



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

LRR



HARVARD LAW SCHOOL
LIBRARY

Digitized by Google

THE
PACIFIC REPORTER,
VOLUME 63.

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING,
UTAH, NEW MEXICO, OKLAHOMA, AND COURTS OF
APPEALS OF COLORADO AND KANSAS.

PERMANENT EDITION.

JANUARY 3—MARCH 28, 1901.

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED, AND TABLE OF
DECISIONS BY THE KANSAS COURT OF APPEALS IN WHICH PETITIONS FOR ORDERS
TO CERTIFY TO THE SUPREME COURT HAVE BEEN REFUSED.

KF
135
P32

ST. PAUL:
WEST PUBLISHING CO.
1901.

COPYRIGHT, 1901,
BY
WEST PUBLISHING COMPANY.
(63 PAC.)

PACIFIC REPORTER, VOLUME 63.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ARIZONA—Supreme Court.

WEBSTER STREET, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

FLETCHER M. DOAN. RICHARD E. SLOAN.
GEORGE R. DAVIS.

CALIFORNIA—Supreme Court.

WILLIAM H. BEATTY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

THOMAS B. McFARLAND. JACKSON TEMPLE
RALPH C. HARRISON. F. W. HENSHAW.
C. H. GAROUTTE. WALTER VAN DYKE.

Supreme Court Commissioners.

JOHN HAYNES. WHEATON A. GRAY.
N. P. CHIPMAN. J. A. COOPER.
GEORGE H. SMITH.

COLORADO—Supreme Court.

JOHN CAMPBELL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

LUTHER M. GODDARD.¹ WILLIAM H. GABBERT.
ROBERT W. STEELE.²

Court of Appeals.

JULIUS B. BISSELL, PRESIDENT.

JUDGES.

ADAIR WILSON. CHARLES I. THOMSON.

IDAHO—Supreme Court.

JOSEPH W. HUSTON, CHIEF JUSTICE.³
RALPH P. QUARLES, CHIEF JUSTICE.⁴

JUSTICES.

RALPH P. QUARLES.⁴ ISAAC N. SULLIVAN.
CHARLES O. STOCKSLAGER.⁵

¹ Term expired January 8, 1901.

² Term began January 8, 1901.

³ Term expired January 7, 1901.

⁴ Became Chief Justice January 7, 1901.

⁵ Term began January 7, 1901.

KANSAS—Supreme Court.

FRANK DOSTER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

W. A. JOHNSTON.	ADRIAN L. GREENE.*
WILLIAM R. SMITH.	ABRAM H. ELLIS.*
EDWIN W. CUNNINGHAM.*	JOHN C. POLLOCK.*

KANSAS—Court of Appeals.[†]*Northern Department.*

JOHN H. MAHAN, PRESIDING JUDGE.

ASSOCIATE JUDGES.

ABIJAH WELLS.	SAMUEL W. McELROY.
---------------	--------------------

Southern Department.

A. W. DENNISON, PRESIDING JUDGE.

ASSOCIATE JUDGES.

B. F. MILTON.	MANFORD SCHOONOVER.
---------------	---------------------

MONTANA—Supreme Court.

THEO. BRANTLY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WM. T. PIGOTT.	R. LEE WORD. [‡]
GEORGE R. MILBURN. [§]	

NEVADA—Supreme Court.M. S. BONNIFIELD, CHIEF JUSTICE.¹⁰W. A. MASSEY, CHIEF JUSTICE.¹¹

ASSOCIATE JUSTICES.

W. A. MASSEY. ¹¹	C. H. BELKNAP.
A. L. FITZGERALD. ¹²	

NEW MEXICO—Supreme Court.

WILLIAM J. MILLS, CHIEF JUSTICE. (4th Dist.)

ASSOCIATE JUSTICES.

JOHN R. McFIE. (1st Dist.)	F. W. PARKER. (3d Dist.)
J. W. CRUMPACKER. (2d Dist.)	CHARLES A. LELAND. ¹³ (5th Dist.)
DANIEL H. McMILLAN. ¹⁴ (5th Dist.)	

OKLAHOMA—Supreme Court.

JOHN H. BURFORD, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN L. MCATEE.	BAYARD T. HAINER.
CLINTON F. IRWIN.	BENJ. F. BURWELL.

* Term began January 14, 1901.

† Expired by limitation of law January 14, 1901.

‡ Term expired January 7, 1901.

§ Term began January 7, 1901.

10 Term expired January 7, 1901.

11 Became Chief Justice January 7, 1901.

12 Term began January 7, 1901.

13 Resigned September 1, 1900.

14 Appointed November, 1900.

JUDGES OF THE COURTS.

OREGON—Supreme Court.

ROBERT S. BEAN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

FRANK A. MOORE

CHARLES E. WOLVERTON.

UTAH—Supreme Court.

GEORGE W. BARTCH, CHIEF JUSTICE.¹²

JAMES A. MINER, CHIEF JUSTICE.¹³

ASSOCIATE JUSTICES.

JAMES A. MINER.¹⁴

ROBERT N. BASKIN.

GEORGE W. BARTCH.

WASHINGTON—Supreme Court.

R. O. DUNBAR, CHIEF JUSTICE.¹⁵

JAMES B. REAVIS, CHIEF JUSTICE.¹⁶

ASSOCIATE JUSTICES.

JAMES B. REAVIS.¹⁷

WILLIAM H. WHITE.¹⁸

T. J. ANDERS.

WALLACE MOUNT.¹⁹

MARK A. FULLERTON.

R. O. DUNBAR.

WYOMING—Supreme Court.

CHARLES N. POTTER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SAMUEL T. CORN.

JESSE KNIGHT.

¹² Ceased to be Chief Justice January 7, 1901.

¹³ Became Chief Justice January 7, 1901.

¹⁴ Term expired January 14, 1901.

¹⁵ Became Chief Justice January 14, 1901.

¹⁶ Term expired January 14, 1901.

¹⁷ Term began January 14, 1901.

CASES REPORTED.

	Page		Page
Abbott, Bryan v. (Cal.).....	363	Blackwell v. First Nat. Bank (N. M.).....	43
Adams v. City of Modesto (Cal.).....	1083	Blake, Canadian & American Mortgage & Trust Co. v. (Wash.).....	1100
Adams, Perkins v. (Colo. App.).....	792	Blanchard v. Hartwell (Cal.).....	349
Adams' Estate, In re (Cal.).....	838	Blizzard, Andrus v. (Utah).....	888
Ahart, Crosby v. (Cal.).....	1125	Blewett v. Miller (Cal.).....	157
A. J. Knollin & Co. v. Jones (Idaho).....	638	Board of Com'rs of Ada County, Andrews v. (Idaho).....	592
Allen v. Reed (Okla.).....	867	Board of Com'rs of Ellis County, Nolan v. (Kan. App.).....	657
Alliance Trust Co. v. Multnomah County (Or.).....	408	Board of Com'rs of Haskell County, Webster v. (Kan. App.).....	450
American Nat. Bank, Patten v. (Colo. App.).....	424	Board of Com'rs of Lane County, Suess v. (Kan. App.).....	451
American Refrigerator Transit Co. v. Thomas (Colo. Sup.).....	410	Board of Com'rs of Sheridan County v. Hanna (Wyo.).....	1054
American Smelting & Refining Co., Marti v. (Utah).....	184	Board of Education of City and County of San Francisco, Greene v. (Cal.).....	161
Anderson v. Canter (Kan. App.).....	285	Board of Education of City and County of San Francisco, Greene v. (Cal.).....	1126
Anderson, People v. (Cal.).....	668	Board of Education of Kansas City v. City of Kansas City (Kan. Sup.).....	600
Anderson, Scoville v. (Cal.).....	1013	Board of State Land Com'rs, State v. (Wash.).....	532
Anderson, Thorn v. (Idaho).....	592	Board of Sup'rs of San Luis Obispo County, Stumpf v. (Cal.).....	663
Andrews v. Board of Com'rs of Ada County (Idaho).....	592	Boggs v. United States (Okla.).....	969
Andrus v. Blazzard (Utah).....	888	Bolander's Estate, In re (Or.).....	689
Argonaut Min. Co. v. Kennedy Min. & Mill. Co. (Cal.).....	148	Borello, Baker v. (Cal.).....	914
Arlington, People v. (Cal.).....	347	Bosqui v. Sutro R. Co. (Cal.).....	682
Arms, State v. (Mont.).....	401	Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (Mont.).....	830
Atchison, T. & S. F. R. Co. v. Conlon (Kan. Sup.).....	432	Boston & M. Consol. Copper & Silver Min. Co., Wetzstein v. (Mont.).....	799
Atchison, T. & S. F. R. Co. v. Moore (Kan. App.).....	458	Boston & M. Consol. Copper & Silver Min. Co., Wetzstein v. (Mont.).....	1043
Auerbach v. Salt Lake County (Utah).....	907	Boulware, Parke v. (Idaho).....	1045
Augir v. Foreman (Wash.).....	201	Bounds v. Bounds (Wash.).....	1134
Austin, Field v. (Cal.).....	692	Bovard v. Dickenson (Cal.).....	162
Baker v. Borello (Cal.).....	914	Bowman, Hunt v. (Kan. Sup.).....	747
Baker, Klumpke v. (Cal.).....	137	Bracka v. Fish (Wash.).....	561
Baker, Klumpke v. (Cal.).....	676	Brandon, Douglass v. (Kan. App.).....	1127
Bancroft-Whitney Co. v. Gowan (Wash.).....	1111	Branner v. Webb (Kan. App.).....	274
Bane v. Guinn (Idaho).....	634	Brentnall v. Marshall (Kan. App.).....	93
Bank of California v. Staacke (Cal.).....	81	Brewster v. Shoemaker (Colo. Sup.).....	309
Bank of California v. Staacke (Cal.).....	608	Brill v. Christy (Ariz.).....	757
Bank of Garnett, Gilmore v. (Kan. App.).....	89	Brooking, Smith v. (Kan. App.).....	19
Bank of Ukiah v. Reed (Cal.).....	68	Brooks, People v. (Cal.).....	464
Bank of Visalia v. Curtis (Cal.).....	921	Brown, P. A. Buell & Co. v. (Cal.).....	167
Barber, Thomas v. (Kan. App.).....	1133	Brown, Scott v. (Kan. App.).....	451
Barker v. Hurley (Cal.).....	1071	Brownlee v. Young (Mont.).....	798
Barnes, Ellison v. (Utah).....	894	Bruce, People v. (Wash.).....	519
Barnum, Fremar v. (Cal.).....	691	Brun v. Supreme Council American Legion of Honor (Colo. App.).....	796
Barnum, McLeod v. (Cal.).....	924	Bryan v. Abbott (Cal.).....	363
Barr, Nelson v. (Kan. App.).....	1131	Bryant, Hoxie v. (Cal.).....	153
Barratt v. Grimes (Kan. App.).....	272	Buckers Irr. Mill & Imp. Co. v. Platte Valley Irr. Co. (Colo. Sup.).....	305
Barrett, State v. (Mont.).....	1030	Buck & Co., Wheeler v. (Wash.).....	561
Barry, Lewin v. (Colo. App.).....	121	Buell & Co. v. Brown (Cal.).....	167
Barton, Hawk v. (Cal.).....	64	Bull, Wheeler v. (Cal.).....	732
Battay v. Eureka Bank (Kan. Sup.).....	437	Bunnell, Van Loben Sels v. (Cal.).....	773
Batz, Miller & Lux v. (Cal.).....	680	Bunting & Co., Bankers, First Nat. Bank v. (Idaho).....	694
Bayard v. Standard Oil Co. (Or.).....	614	Burchinell, Kaufman v. (Colo. App.).....	786
Bayless v. McFarland (Okla.).....	859	Burnett v. Hinshaw (Kan. App.).....	461
Bay View Brewing Co. v. Grubb (Wash.).....	1091	Burr, Green v. (Cal.).....	360
Beaman v. Martha Washington Min. Co. (Utah).....	631	Butte Creek Gold-Mining & Power Co., Carter v. (Cal.).....	667
Beard, Schowalter v. (Okla.).....	687	Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co. (Mont.).....	825
Beddo, State v. (Utah).....	96	Byrne, Mohr v. (Cal.).....	341
Beechler, Sauers v. (Or.).....	193		
Bell, Sellers v. (Kan. App.).....	457		
Benton's Estate, In re (Cal.).....	775		
Bertwell v. Haines (Okla.).....	702		
Beverington, McAlmond v. (Wash.).....	251		
Bigger v. Ryker (Kan. Sup.).....	740		
Biggs v. Consolidated Barb-Wire Co. (Kan. Sup.).....	740		
Billups v. Utah Canal Enlargement & Extension Co. (Ariz.).....	713		

	Page		Page
Cady v. Purser (Cal.).....	844	City of Helena, State v. (Mont.).....	99
California Imp. Co., Stewart v. (Cal.).....	177	City of Kansas City, Board of Education	
California Imp. Co., Stewart v. (Cal.).....	724	of Kansas City v. (Kan. Sup.).....	600
Callow, Doe v. (Kan. App.).....	603	City of Modesto, Adams v. (Cal.).....	1083
Camburn, Missouri, K. & T. R. Co. v.		City of Oakland v. Central Pac. R. Co.	
(Kan. App.).....	605	(Cal.).....	1125
Cameron, Seal v. (Wash.).....	1103	City of Oakland v. Southern Pac. Co. (Cal.).....	371
Camp v. Simon (Utah).....	332	City of Portland v. Gaston (Or.).....	1051
Camp v. Thomas (Cal.).....	736	City of Portland, Gadsby v. (Or.).....	14
Campbell v. West (Colo. Sup.).....	300	City of Portland, King v. (Or.).....	2
Campbell, Dobbs v. (Kan. App.).....	289	City of Pullman, State v. (Wash.).....	265
Campbell, Poncelor v. (Kan. App.).....	606	City of Rosedale v. Cosgrove (Kan. App.).....	287
Camp's Estate, In re (Cal.).....	736	City of San Diego, Higgins v. (Cal.).....	470
Canadian & American Mortgage & Trust		City of Seattle, Jones v. (Wash.).....	553
Co. v. Blake (Wash.).....	1100	City of Spokane, State v. (Wash.).....	1116
Canter, Anderson v. (Kan. App.).....	285	City of Topeka v. Myers (Kan. App.).....	273
Canter, Peuker v. (Kan. Sup.).....	617	Clark, Crosby v. (Cal.).....	1022
Caplice Commercial Co. v. Cassidy (Mont.).....	799	Clark, Morrison v. (Mont.).....	98
Carlow v. Fowler (Kan. Sup.).....	737	Clark, Sether v. (Wash.).....	1106
Carpenter, Patton v. (Cal.).....	1126	Clarke, People v. (Cal.).....	183
Carpy v. Dowdell (Cal.).....	778	Cleveland v. Western Loan & Savings Co.	
Carpy v. Dowdell (Cal.).....	780	(Idaho).....	885
Carr v. Stafford (Kan. Sup.).....	737	Closser, Carr, Ryder & Adams Co. v.	
Carr, Durkee v. (Or.).....	117	(Mont.).....	1043
Carr, Ryder & Adams Co. v. Closser		Clough, People v. (Colo. App.).....	1006
(Mont.).....	1043	Coad v. Cowhick (Wyo.).....	584
Carter v. Butte Creek Gold-Mining & Pow-		Coburn, San Mateo County v. (Cal.).....	78
er Co. (Cal.).....	667	Coburn, San Mateo County v. (Cal.).....	621
Cassidy, Caplice Commercial Co. v. (Mont.).....	799	Cockrell, W. W. Kimball & Co. v. (Wash.).....	228
Catlin v. Christie (Colo. App.).....	328	Coit v. Western Union Tel. Co. (Cal.).....	83
Cavanaugh v. Salisbury (Utah).....	39	Cole, Grant v. (Wash.).....	263
C. Bunting & Co., Bankers, First Nat.		Collett v. Northern Pac. R. Co. (Wash.).....	225
Bank v. (Idaho).....	694	Collins, Dimmick v. (Wash.).....	1101
Cederson v. Oregon R. & Nav. Co. (Or.).....	763	Columbia County, Citizens' Nat. Bank v.	
Center, City and County of San Francisco		(Wash.).....	209
v. (Cal.).....	35	Conklin v. Cullen (Mont.).....	686
Central Pac. R. Co., City of Oakland v.		Conklin v. Lorimer (Kan. App.).....	23
(Cal.).....	1125	Jonlon, Atchison, T. & S. F. R. Co. v.	
Chambers, People v. (Wash.).....	519	(Kan. Sup.).....	432
Chandler, Manley v. (Kan. App.).....	298	Conover, Light v. (Okl.).....	966
Cheetham, State v. (Wash.).....	552	Consolidated Barb-Wire Co., Biggs v.	
Chehalis Boom Co. v. Chehalis County		(Kan. Sup.).....	740
(Wash.).....	1123	Consolidated Mining & Prospecting Co. v.	
Chehalis County, Chehalis Boom Co. v.		Huff (Kan. Sup.).....	442
(Wash.).....	1123	Continental Bldg. Ass'n v. Holt (Cal.).....	189
Chehalis County, Gray's Harbor Co. v.		Continental Bldg. Ass'n v. Hutton (Cal.).....	622
(Wash.).....	233	Contreras v. Merck (Cal.).....	336
Cherry Tp., Weakley v. (Kan. Sup.).....	433	Conway v. Supreme Council Catholic	
Chester, Feeney v. (Idaho).....	192	Knights of America (Cal.).....	727
Chicago Bldg. & Mfg. Co. v. Kirby (Okl.).....	966	Cooper v. Ives (Kan. Sup.).....	434
Chicago Bldg. & Mfg. Co. v. Pethers (Okl.).....	964	Cooper v. People (Colo. Sup.).....	314
Chicago Packing & Provision Co., Richard-		Coos Bay, R. & E. R. & Nav. Co., Nosler v.	
son v. (Cal.).....	74	(Or.).....	1050
Chicago, R. I. & P. R. Co. v. Smith (Kan.		Corbus, Reynolds v. (Idaho).....	884
App.).....	204	Cosgrove, City of Rosedale v. (Kan. App.).....	287
Childers, Gaines v. (Or.).....	487	Costigan, White v. (Cal.).....	1075
Christensen's Estate, In re (Utah).....	896	Coverdale v. Westchester Fire Ins. Co.	
Christenson v. Nelson (Or.).....	648	(Kan. Sup.).....	1128
Christie, Catlin v. (Colo. App.).....	328	Cowell v. South Denver Real-Estate Co.	
Christy, Brill v. (Ariz.).....	757	(Colo. App.).....	991
Church, Maxwell v. (Kan. Sup.).....	738	Cowhick, Coad v. (Wyo.).....	584
Citizens' Bank v. Los Angeles Iron & Steel		Craig, Joost v. (Cal.).....	840
Co. (Cal.).....	462	Crawford, Reiner v. (Wash.).....	516
Citizens' Nat. Bank v. Columbia County		Crawford, Willis v. (Or.).....	985
(Wash.).....	209	Creswell v. Woodside (Colo. App.).....	330
City and County of San Francisco v. Center		Crosby v. Ahart (Cal.).....	1125
(Cal.).....	35	Crosby v. Clark (Cal.).....	1022
City and County of San Francisco v. La		Crosby v. Kier (Cal.).....	1125
Société Française D'Epargnes et de Pre-		Crosby, Stout v. (Kan. App.).....	661
voyance Mutuelle (Cal.).....	1016	Cross v. Cross (Wash.).....	528
City and County of San Francisco, La So-		Cullen, Conklin v. (Mont.).....	686
cietà Italiana di Mutua Beneficenza v.		Cupit v. McLaughlin (Utah).....	589
(Cal.).....	174	Curl v. Curl (Cal.).....	65
City and County of San Francisco, Martin		Curtis, Ex parte (Okl.).....	963
v. (Cal.).....	913	Curtis, Bank of Visalia v. (Cal.).....	344
City and County of San Francisco, Savings			
& Loan Soc. v. (Cal.).....	665	Daisy Gold-Min. Co., Popp v. (Utah).....	185
City and County of San Francisco, Stan-		Dake, Montezuma Catle Co. v. (Colo.	
ford v. (Cal.).....	145	App.).....	1058
City of Boise City v. Union Bank & Trust		Dane v. Daniel (Wash.).....	268
Co. (Idaho).....	107	Daniel, Dane v. (Wash.).....	268
City of Denver v. Hayes (Colo. Sup.).....	311	Dauer, San Diego County v. (Cal.).....	338
City of Denver v. Hyatt (Colo. Sup.).....	403	Davis v. Hofer (Or.).....	56
City of Denver v. Webber (Colo. App.).....	804	Davis v. Richards (Wash.).....	211
City of Eureka, Eureka Hill Min. Co. v.		Davis, Greenebaum v. (Cal.).....	165
(Utah).....	654	Davis, Hardison v. (Cal.).....	1005

	Page		Page
Davis, Stringham v. (Wash.).....	230	Ferguson, Warren v. (Cal.).....	1126
Davis, Van De Vanter v. (Wash.).....	555	Fidelity Nat. Bank v. Henley (Wash.).....	1119
Dean v. First Nat. Bank (Kan. App.).....	1127	Field v. Austin (Cal.).....	692
Dekum v. Multnomah County (Or.).....	496	Fields, Riegel v. (Kan. App.).....	24
Dengel, State v. (Wash.).....	1104	Figoni v. Devincenzi (Cal.).....	723
Dennis v. Kolm (Cal.).....	141	Findlay v. Potts (Cal.).....	694
Denver Consol. Electric Co., National Fire Ins. Co. v. (Colo. App.).....	949	First Ave. R. Co., French v. (Wash.).....	1108
Denver Union Water Co., Venner v. (Colo. App.).....	1061	First Nat. Bank v. C. Bunting & Co., Bankers (Idaho).....	694
De Paoli, State v. (Wash.).....	1102	First Nat. Bank v. Foster (Wyo.).....	1056
Des Moines Life Ass'n of Des Moines, Iowa, v. Owen (Colo. App.).....	781	First Nat. Bank v. Schrenkler (Kan. App.).....	1128
Devincenzi, Figoni v. (Cal.).....	723	First Nat. Bank v. Williams (Kan. Sup.).....	744
Devincenzi's Estate, In re (Cal.).....	723	First Nat. Bank, Blackwell v. (N. M.).....	43
Dickenson, Bovard v. (Cal.).....	162	First Nat. Bank, Dean v. (Kan. App.).....	1127
Dimmick v. Collins (Wash.).....	1101	First Nat. Bank, Estes v. (Colo. App.).....	788
District Court of Eighth Judicial Dist., People v. (Colo. Sup.).....	321	Fish, Bracka v. (Wash.).....	561
District Court of First Judicial Dist., State v. (Mont.).....	393	Fissure Min. Co. v. Old Susan Min. Co. (Utah).....	587
District Court of Second Judicial Dist., State v. (Mont.).....	389	Fler, Schall v. (Kan. App.).....	289
District Court of Second Judicial Dist., State v. (Mont.).....	402	Flinn v. Mowry (Cal.).....	724
Dixon, State v. (Idaho).....	801	Flinn v. Mowry (Cal.).....	1006
Dobbs v. Campbell (Kan. App.).....	289	Flood, Lathrope v. (Cal.).....	1007
Doe v. Callow (Kan. App.).....	603	Foerst v. Kelso (Cal.).....	681
Doland v. Grand Valley Irr. Co. (Colo. Sup.)	300	Fogg v. Town of Hoquiam (Wash.).....	234
Domascio, Master Builders' Ass'n v. (Colo. App.).....	782	Foley, Nolan v. (Kan. App.).....	1131
Donnell, Vincent v. (Kan. App.).....	24	Folsom, Howell v. (Or.).....	116
Doon v. Tesh (Cal.).....	764	Foote, Stanley v. (Wyo.).....	940
Doremus v. Root (Wash.).....	572	Ford, Taylor v. (Cal.).....	770
Douglass v. Brandon (Kan. App.).....	1127	Foresman, Augir v. (Wash.).....	201
Douglass, Southern Development Co. of Ne- vada v. (Nev.).....	38	Foster, First Nat. Bank v. (Wyo.).....	1056
Dow, Mulcahey v. (Cal.).....	158	Fowler, Carlow v. (Kan. Sup.).....	737
Dowdell, Carpy v. (Cal.).....	778	Fowler, Hamilton v. (Colo. App.).....	948
Dowdell, Carpy v. (Cal.).....	780	Franz v. Mendonca (Cal.).....	361
Doyle v. Nichols (Colo. App.).....	123	Frazier v. Jeakins (Kan. App.).....	459
Drinkhouse, Fennell v. (Cal.).....	734	Frazier, Ellis v. (Or.).....	642
Drumm, Gray's Harbor Co. v. (Wash.).....	530	Frazier, Kadderly v. (Or.).....	487
Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co. (Wash.).....	1095	Freman v. Barnum (Cal.).....	691
Durkee v. Carr (Or.).....	117	Fremont County v. Warner (Idaho).....	106
Duvall, Hellings v. (Cal.).....	1017	French v. First Ave. R. Co. (Wash.).....	1108
Eadie, Wilcox v. (Kan. App.).....	1133	Freud, Warner Bros. Co. v. (Cal.).....	1017
Eagle Automatic Can Co., Schaafe v. (Cal.).....	1025	Freud's Estate, In re (Cal.).....	1080
Eastman, State v. (Kan. Sup.).....	597	Freundt v. Hahn (Wash.).....	1107
Easton Packing Co. v. Kennedy (Cal.).....	130	Gadsby v. City of Portland (Or.).....	14
Eaton v. Norris (Cal.).....	856	Gaffney v. Megrath (Wash.).....	520
Eaton v. Spokane County (Wash.).....	1134	Gaines v. Childers (Or.).....	487
Edwards, State v. (Kan. App.).....	1132	Gaston, City of Portland v. (Or.).....	1051
Egan v. Montana Cent. R. Co. (Mont.).....	831	Gay, Sellers v. (Kan. App.).....	1132
Eikenberry, Los Angeles County v. (Cal.)	766	Geiser Mfg. Co., Ragains v. (Okla.).....	687
Eisenbeis, Long v. (Wash.).....	249	George v. Robison (Utah).....	819
Elg v. Hoff (Idaho).....	37	Georges v. Kessler (Cal.).....	466
Elledge v. Superior Court of Lassen County (Cal.).....	360	German Savings & Loan Soc. v. Kern (Or.).....	1052
Ellis v. Frazier (Or.).....	642	Gibbs v. Tally (Cal.).....	168
Ellison v. Barnes (Utah).....	899	Gibson v. Henley (Cal.).....	61
Enos v. Snyder (Cal.).....	170	Gieske, Jones v. (Mont.).....	1042
Ensign, Park v. (Kan. App.).....	280	Gillespie, State v. (Kan. Sup.).....	742
Estes v. First Nat. Bank (Colo. App.).....	788	Gilmer, Guthiel v. (Utah).....	817
Eureka Bank, Battey v. (Kan. Sup.).....	437	Gilmore v. Bank of Garnett (Kan. App.).....	89
Eureka Hill Min. Co. v. City of Eureka (Utah).....	654	Gilmore, Parker v. (Kan. App.).....	20
F. A. Buck & Co., Wheeler v. (Wash.).....	566	Ginther, Zimmerman v. (Kan. App.).....	657
Fairbanks v. Kent (Colo. App.).....	707	Givens v. Keeney (Idaho).....	110
Fairchild, McClaine v. (Wash.).....	517	Goettert, McFadden v. (Cal.).....	477
Falletti v. Marshall (Kan. App.).....	1127	Goggerty, Myers v. (Kan. App.).....	296
Farmers' & Merchants' Bank, Murphy v. (Cal.).....	368	Goodrich v. Williamson (Okla.).....	974
Farmers' & Merchants' Bank, Murphy v. (Cal.).....	731	Goore v. Goore (Wash.).....	1092
Farris v. Wirt (Colo. App.).....	946	Gorringer v. Read (Utah).....	902
Fay v. Reed, two cases (Cal.).....	1125	Gowan, Bancroft-Whitney Co. v. (Wash.).....	1111
Fay v. Rich (Cal.).....	1125	Grand Legion of Select Knights, A. O. U. W., of Kansas v. Korneman (Kan. App.)	292
Fay, Kern County v. (Cal.).....	857	Grand Valley Irr. Co., Doland v. (Colo. Sup.).....	300
Feeney v. Chester (Idaho).....	192	Grant v. Cole (Wash.).....	263
Fenaughty v. Loob (Kan. Sup.).....	427	Grant's Estate, In re (Cal.).....	731
Fennell v. Drinkhouse (Cal.).....	734	Gray v. La Société Française de Bienfa- sance Mutuelle (Cal.).....	848
		Gray, Schuster v. (Kan. App.).....	279
		Graybehl, Howard v. (Colo. App.).....	953
		Gray's Harbor Co. v. Chehalis County (Wash.).....	233
		Gray's Harbor Co. v. Drumm (Wash.).....	530
		Green v. Burr (Cal.).....	360
		Greene v. Board of Education of City and County of San Francisco (Cal.).....	161
		Greene v. Board of Education of City and County of San Francisco (Cal.).....	1126

	Page		Page
Greenebaum v. Davis (Cal.).....	165	Hotchkiss Mountain-Mining & Reduction Co., Hiwassee Gold-Min. Co. v. (Colo. App.).....	708
Greiser, Rehberg v. (Mont.).....	41	Howard v. Graybehl (Colo. App.).....	953
Gridley, Holt v. (Idaho).....	188	Howard, Morissette v. (Kan. Sup.).....	756
Griffin v. Seymour (Colo. App.).....	809	Howell v. Folsom (Or.).....	116
Griffith v. Holman (Wash.).....	239	Hoxie v. Bryant (Cal.).....	153
Griffith v. Rundle (Wash.).....	199	Hoyland, State Bank v. (Kan. App.).....	1132
Grimes, Barratt v. (Kan. App.).....	272	Hoyne, Salina Mill & Elevator Co. v. (Kan. App.).....	660
Grubb, Bay View Brewing Co. v. (Wash.).....	1091	Hubbard, Haughawout v. (Cal.).....	1078
Guinn, Bane v. (Idaho).....	634	Hudson v. Miller (Kan. App.).....	21
Guthiel v. Gilmer (Utah).....	817	Huff, Consolidated Mining & Prospecting Co. v. (Kan. Sup.).....	442
Habighorst, Hoffman v. (Or.).....	610	Huffman, State v. (Or.).....	1
Habishaw v. Standard Quicksilver Co. (Cal.).....	728	Hull v. Johnson (Kan. App.).....	455
Haffamier v. Hund (Kan. App.).....	659	Humphrey's Estate, Jones v. (Kan. App.).....	26
Hahn, Freundt v. (Wash.).....	1107	Hund, Haffamier v. (Kan. App.).....	659
Haines, Bertwell v. (Okla.).....	702	Hunt v. Bowman (Kan. Sup.).....	747
Hale v. McConnell (Kan. App.).....	1128	Hunt, Miller v. (Idaho).....	803
Hale v. Stenger (Wash.).....	554	Hurley, Barker v. (Cal.).....	1071
Hale, Hopkins v. (Wash.).....	1134	Hutchinson & S. R. Co., Williams v. (Kan. Sup.).....	430
Hall v. Union Cent. Life Ins. Co. (Wash.).....	505	Hutton, Continental Bldg. Ass'n v. (Cal.).....	622
Hall, Reclamation Dist. No. 536 v. (Cal.).....	1000	Hutton, McClain v. (Cal.).....	182
Hall, State v. (Or.).....	13	Hutton, McClain v. (Cal.).....	622
Halverson, Harris v. (Wash.).....	549	Hyams, Lewis v. (Nev.).....	126
Hamilton v. Fowler (Colo. App.).....	948	Hyatt v. Lewis (Wash.).....	1104
Hanna, Board of Com'rs of Shetidan County v. (Wyo.).....	1054	Hyatt, City of Denver v. (Colo. Sup.).....	403
Hannum, Neesho Valley Inv. Co. v. (Kan. App.).....	92	Imperial Ins. Co., Schroeder v. (Cal.).....	1074
Hanrahan, Stickney v. (Idaho).....	189	Independent Tel. Messenger Co., Haupt v. (Mont.).....	1033
Harden v. Metz (Kan. Sup.).....	1126	Inman, Poulsen & Co., Wadhams & Co. v. (Or.).....	11
Hardison v. Davis (Cal.).....	1005	Iretou v. Iretou (Kan. Sup.).....	429
Hargadine-McKittrick Dry-Goods Co. v. Swofford Bros. Dry-Goods Co. (Kan. App.).....	281	Isenhardt v. Hazen (Kan. App.).....	451
Harrington v. Smith (Mont.).....	1036	Iverson, Jones v. (Cal.).....	135
Harris v. Halverson (Wash.).....	549	Ives, Cooper v. (Kan. Sup.).....	434
Harrison v. McCabe (Kan. App.).....	277	Jackson v. King (Kan. App.).....	297
Harrison v. Mulvane (Kan. Sup.).....	749	Jeakins, Frazier v. (Kan. App.).....	459
Hartwell, Blanchard v. (Cal.).....	349	Jenkin v. Pacific Mut. Life Ins. Co. of California (Cal.).....	180
Hatcher, May v. (Cal.).....	33	Johnson v. Oregon Short-Line R. Co. (Idaho).....	112
Haughawout v. Hubbard (Cal.).....	1078	Johnson, Hull v. (Kan. App.).....	455
Haupt v. Independent Tel. Messenger Co. (Mont.).....	1033	Johnson, Lawrence v. (Cal.).....	176
Hauser, McIntyre v. (Cal.).....	69	Johnson, People v. (Cal.).....	842
Hawk v. Barton (Cal.).....	64	Johnson, Sharp v. (Or.).....	485
Hawkins, State v. (Wash.).....	258	Johnson, State v. (Wash.).....	1124
Hayes, City of Denver v. (Colo. Sup.).....	311	Johnson, Townsend v. (Kan. App.).....	25
Hays v. Hill (Wash.).....	576	Johnston v. McCart (Wash.).....	1121
Hazen, Isenhardt v. (Kan. App.).....	451	Jones v. City of Seattle (Wash.).....	553
Heagler, Holyoke Envelope Co. v. (Kan. App.).....	450	Jones v. Gieske (Mont.).....	1042
Healey v. Rupp (Colo. Sup.).....	319	Jones v. Humphrey's Estate (Kan. App.).....	26
Hearst, Mize v. (Cal.).....	30	Jones v. Iverson (Cal.).....	135
Heaton, McPike v. (Cal.).....	179	Jones v. Van Horn (Colo. Sup.).....	307
Hedge v. Williams (Cal.).....	721	Jones, A. J. Knollin & Co. v. (Idaho).....	638
Heinze v. Kleinschmidt (Mont.).....	927	Jones, Horgan v. (Cal.).....	835
Heinze, Talbott v. (Mont.).....	624	Joost v. Craig (Cal.).....	840
Heilings v. Duvall (Cal.).....	1017	Jordan, State v. (Kan. Sup.).....	1126
Henley, Fidelity Nat. Bank v. (Wash.).....	1119	Judd, Stout v. (Kan. App.).....	662
Henley, Gibson v. (Cal.).....	61	Kadderly v. Frazier (Or.).....	487
Herman v. Pacific Jute M. Co. (Cal.).....	344	Kansas & C. P. R. Co. v. Lawrence (Kan. App.).....	1130
Hibbard, Schallehn v. (Kan. App.).....	606	Karnes, Wheeler v. (Cal.).....	62
Higgins v. City of San Diego (Cal.).....	470	Kaufman v. Burchinell (Colo. App.).....	786
Hill v. Southern Pac. Co. (Utah).....	814	Keeney, Givens v. (Idaho).....	110
Hill, Hays v. (Wash.).....	576	Kelley v. Rhoads (Wyo.).....	935
Hiltel, People v. (Cal.).....	919	Kelso, Foerst v. (Cal.).....	681
Hinkle, State v. (Kan. App.).....	1132	Kennedy, Easton Packing Co. v. (Cal.).....	130
Hinshaw, Burnett v. (Kan. App.).....	461	Kennedy Min. & Mill. Co., Argonaut Min. Co. v. (Cal.).....	148
Hiwassee Gold-Min. Co. v. Hotchkiss Mountain Mining & Reduction Co. (Colo. App.).....	708	Kent, Fairbanks v. (Colo. App.).....	707
Hofer, Davis v. (Or.).....	56	Kepley v. Sheehan (Kan. App.).....	295
Hoff, Elg v. (Idaho).....	37	Kern, German Savings & Loan Soc. v. (Or.).....	1052
Hoffman v. Habighorst (Or.).....	610	Kern County v. Fay (Cal.).....	857
Hogue, Law Guarantee & Trust Soc. of London v. (Or.).....	690	Kessler, Georges v. (Cal.).....	466
Hoke v. Zent (Kan. App.).....	1128	Kier, Crosby v. (Cal.).....	1125
Holbrook, King v. (Or.).....	651	Kiernan v. Swan (Cal.).....	768
Holman, Griffith v. (Wash.).....	239	Kimball v. School Dist. No. 122 of Spokane County (Wash.).....	213
Holt v. Gridley (Idaho).....	188	Kimball & Co. v. Cockrell (Wash.).....	228
Holt v. Holt (Cal.).....	912		
Holt, Continental Bldg. Ass'n v. (Cal.).....	182		
Holyoke Envelope Co. v. Heagler (Kan. App.).....	450		
Hopkins v. Hale (Wash.).....	1134		
Horgan v. Jones (Cal.).....	835		
Horner v. Simpson (Kan. App.).....	604		
Horst, Taylor v. (Wash.).....	231		

	Page		Page
King v. City of Portland (Or.).....	2	Maas v. Territory (Okl.).....	990
King v. Holbrook (Or.).....	651	McAllister v. People (Colo. Sup.).....	308
King, Jackson v. (Kan. App.).....	297	McAlmond v. Bevington (Wash.).....	251
King, Morgan v. (Colo. Sup.).....	416	McCabe, Harrison v. (Kan. App.).....	277
Kinney, Work v. (Idaho).....	596	McCart, Johnston v. (Wash.).....	1121
Kirby, Chicago Bldg & Mfg. Co. v. (Okl.)..	966	McClain v. Hutton (Cal.).....	182
Kirby, State v. (Kan. Sup.).....	752	McClain v. Hutton (Cal.).....	622
Kleinschmidt, Heinze v. (Mont.).....	927	McClaine v. Fairchild (Wash.).....	517
Klug v. McPhee (Colo. App.).....	709	McConnell, Hale v. (Kan. App.).....	1128
Klumpke v. Baker (Cal.).....	137	McCornick v. Queen of Sheba Gold Min. & Mill. Co. (Utah).....	820
Klumpke v. Baker (Cal.).....	291	McCoy, Watkinson v. (Wash.).....	245
Kneisel, Leverton v. (Kan. App.).....	638	McFadden v. Goetter (Cal.).....	477
Knollin & Co. v. Jones (Idaho).....	317	McFarland, Bayless v. (Okl.).....	859
Knowles v. Lower Clear Creek Ditch Co. (Colo. Sup.).....	90	McGee v. Wineholt (Wash.).....	571
Koenig, Lincoln Tp. v. (Kan. App.).....	141	McGorray v. Stockton Savings & Loan Soc. (Cal.).....	479
Kolm, Dennis v. (Cal.).....	66	Machado, People v. (Cal.).....	69
Korneman, Grand Legion of Select Knights, A. O. U. W. of Kansas, v. (Kan. App.).....	292	McIntyre v. Hauser (Cal.).....	1125
Kreuzberger, Starr v. (Cal.).....	31	Mack, State v. (Nev.).....	822
Kruger's Estate, In re (Cal.).....	1126	McKendrick, Nottingham v. (Or.).....	704
Kruger's Estate, In re (Cal.).....	1133	McKennon v. McKennon (Okl.).....	589
Kufler, Wallace v. (Kan. App.).....	125	McLaughlin v. Park City Bank (Utah).....	589
Kuhn, Matheson v. (Colo. App.).....	216	McLaughlin, Cupit v. (Utah).....	924
Laberee, Palmer v. (Wash.).....	738	McLeod v. Baraum (Cal.).....	670
Lackey, Miles v. (Kan. Sup.).....	54	McNamara v. Oakland Building & Loan Ass'n (Cal.).....	709
La Follett, Mitchell v. (Or.).....	72	McPhee, Klug v. (Colo. App.).....	179
Lake Shore Cattle Co. v. Modoc Land & Live-Stock Co. (Cal.).....	628	McPike v. Heaton (Cal.).....	80
Lambert, Lebcher v. (Utah).....	383	Madden, Murphy v. (Cal.).....	108
Lane, Salisbury v. (Idaho).....	143	Male v. Lefang (Idaho).....	279
Larrabee v. Town of Cloverdale (Cal.).....	174	Manhattan Life Ins. Co. v. Olmsted (Kan. App.).....	298
La Societa Italiana Di Mutua Beneficenza v. City and County of San Francisco (Cal.)	848	Manley v. Chandler (Kan. App.).....	511
La Société Française de Bienfaisance Mu- tuelle, Gray v. (Cal.).....	1016	Marks v. Stephens (Or.).....	824
La Société Française D'Epargnes et de Pre- voyance Mutuelle, City and County of San Francisco v. (Cal.).....	1007	Marks v. Taylor (Utah).....	897
Lathrope v. Flood (Cal.).....	622	Marr v. Rhodes (Cal.).....	364
Lavenson v. Wise (Cal.).....	690	Marshall, Brentnall v. (Kan. App.).....	93
Law Guarantee & Trust Soc. of London v. Hogue (Or.).....	176	Marshall, Falletti v. (Kan. App.).....	1127
Lawrence v. Johnson (Cal.).....	1130	Martha Washington Min. Co., Beaman v. (Utah).....	631
Lawrence, Kansas & C. P. R. Co. v. (Kan. App.).....	628	Marti v. American Smelting & Refining Co. (Utah).....	184
Lebcher v. Lambert (Utah).....	882	Martin v. City and County of San Fran- cisco (Cal.).....	913
Lee, Silver v. (Or.).....	48	Martin v. Steele (Idaho).....	1040
Leeds, Lockhart v. (N. M.).....	108	Master Builders' Ass'n v. Domascio (Colo. App.).....	782
Leflang, Male v. (Idaho).....	1130	Matchett, Minnick v. (Kan. App.).....	276
Lehman-Higginson Grocer Co. v. Staub (Kan. App.).....	580	Matheson v. Kuhn (Colo. App.).....	125
Leighton, Sherlock v. (Wyo.).....	934	Matheson, Mitchell v. (Wash.).....	564
Leighton, Sherlock v. (Wyo.).....	128	Mattern, Security Loan & Trust Co. v. (Cal.).....	482
Lemasters v. Southern Pac. Co. (Cal.).....	599	Maxwell v. Church (Kan. Sup.).....	738
Leroy & C. Val. Air-Line R. Co. v. Sidell (Kan. Sup.).....	202	May v. Hatcher (Cal.).....	33
Levan, State v. (Wash.).....	342	Maydole v. Peterson (Idaho).....	1048
Levee Dist. No. 6 of Sutter County, People v. (Cal.).....	678	Mayer v. Stephens (Or.).....	760
Levee Dist. No. 6 of Sutter County, Peo- ple v. (Cal.).....	291	Megrath, Gaffney v. (Wash.).....	520
Leverson v. Kneisel (Kan. App.).....	335	Meherin v. Saunders (Cal.).....	1084
Levin, In re (Cal.).....	121	Meiss v. Meiss (Colo. App.).....	952
Lewin v. Barry (Colo. App.).....	126	Mendenhall, People v. (Cal.).....	675
Lewis v. Hyams (Nev.).....	1104	Mendenhall, State v. (Wash.).....	1109
Lewis, Hyatt v. (Wash.).....	1104	Mendonca, Franz v. (Cal.).....	361
Lewis, Raught v. (Wash.).....	968	Mente, Pendleton v. (Kan. App.).....	1131
Light v. Conover (Okl.).....	90	Merani, Rauer v. (Cal.).....	31
Lincoln Tp. v. Koenig (Kan. App.).....	715	Merck, Contreras v. (Cal.).....	336
Lindsey, Montana Ore-Purchasing Co. v. (Mont.).....	1130	Merguire, O'Donnell v. (Cal.).....	847
Littlefield v. Littlefield (Kan. App.).....	48	Merrill v. Pacific Transfer Co. (Cal.).....	915
Lockhart v. Leeds (N. M.).....	249	Mesmer, Rose v. (Cal.).....	1010
Long v. Eisenbeis (Wash.).....	280	Metropolitan Nat. Bank v. Republican Val. Bank (Kan. App.).....	911
Long v. Steele (Kan. App.).....	427	Metz, Harden v. (Kan. Sup.).....	1126
Loob, Fenaughty v. (Kan. Sup.).....	23	Miles v. Lackey (Kan. Sup.).....	738
Lorimer, Konklin v. (Kan. App.).....	766	Miller v. Hunt (Idaho).....	803
Los Angeles County v. Eikenberry (Cal.)..	402	Miller, Blewett v. (Cal.).....	157
Los Angeles Iron & Steel Co., Citizens' Bank v. (Cal.).....	317	Miller, Hudson v. (Kan. App.).....	21
Lower Clear Creek Ditch Co., Knowles v. (Colo. Sup.).....	469	Miller & Lux v. Batz (Cal.).....	680
Luffkin's Estate, In re (Cal.).....		Miner, State v. (Kan. App.).....	89
		Mineral Union, Stanley v. (Nev.).....	59
		Minnick v. Matchett (Kan. App.).....	276
		Missouri, K. & T. R. Co. v. Cambern (Kan. App.).....	605
		Missouri Pac. R. Co. v. Preston (Kan. Sup.)	444
		Mitchell v. La Follett (Or.).....	54

	Page		Page
Mitchell v. Matheson (Wash.).....	564	Nosler v. Coos Bay, R. & E. R. & Nav. Co. (Or.).....	1050
Mitchell v. Oregon Women's Flax-Fiber Ass'n (Or.).....	881	Nottingham v. McKendrick (Or.).....	822
Mitchell v. Simpson (Kan. Sup.).....	440	Noyes v. Phipps (Kan. App.).....	659
Mitchell, Price v. (Wash.).....	514	Numbers v. Rocky Mountain Bell Tel. Co. (Idaho).....	381
Mize v. Hearst (Cal.).....	30	Oakland Building & Loan Ass'n, McNamara v. (Cal.).....	670
Modoc Land & Live-Stock Co., Lake Shore Cattle Co. v. (Cal.).....	72	O'Donnell v. Merguire (Cal.).....	847
Mohr v. Byrne (Cal.).....	341	Old Susan Min. Co., Fissure Min. Co. v. (Utah).....	587
Montana Cent. R. Co., Egan v. (Mont.)...	831	Olmsted, Manhattan Life Ins. Co. v. (Kan. App.).....	279
Montana Cent. R. Co., Nolan v. (Mont.)...	926	Oregon R. & Nav. Co., Cederson v. (Or.)...	763
Montana Lumber & Mfg. Co., Murray v. (Mont.).....	719	Oregon Short-Line R. Co., Johnson v. (Idaho).....	112
Montana Ore-Purchasing Co. v. Lindsay (Mont.).....	715	Oregon Women's Flax-Fiber Ass'n, Mitchell v. (Or.).....	881
Montana Ore-Purchasing Co., Boston & M. Consol. Copper & Silver Min. Co. v. (Mont.).....	830	Overend v. Superior Court of City and County of San Francisco (Cal.).....	372
Montana Ore-Purchasing Co., Butte & B. Consol. Min. Co. v. (Mont.).....	825	Owen v. Pomona Land & Water Co. (Cal.)...	850
Montezuma Cattle Co. v. Dake (Colo. App.)...	1058	Owen, Des Moines Life Ass'n of Des Moines, Iowa, v. (Colo. App.).....	781
Mooney, People v. (Cal.).....	1070	Owens, United States Savings & Loan Co. v. (Wash.).....	1134
Moore, Atchison, T. & S. F. R. Co. v. (Kan. App.).....	458	P. A. Buell & Co. v. Brown (Cal.).....	167
Moran, State v. (Mont.).....	390	Pacific Inv. Co. v. Ross (Cal.).....	67
Morford v. Territory (Okl.).....	958	Pacific Jute M. Co., Herman v. (Cal.).....	344
Morgan v. King (Colo. Sup.).....	416	Pacific Mut. Life Ins. Co. of California, Jenkin v. (Cal.).....	180
Morisette v. Howard (Kan. Sup.).....	756	Pacific Nat. Bank v. San Francisco Bridge Co. (Wash.).....	207
Morrell Hardware Co. v. Princess Gold-Min. Co. (Colo. App.).....	807	Pacific Transfer Co., Merrill v. (Cal.).....	915
Morrison v. Clark (Mont.).....	98	Pallett v. Murphy (Cal.).....	366
Morris & Whitehead v. Williams (Wash.)...	236	Palmer v. Laberee (Wash.).....	216
Mowry, Flinn v. (Cal.).....	724	Park v. Ensign (Kan. App.).....	280
Mowry, Flinn v. (Cal.).....	1006	Park City Bank, McLaughlin v. (Utah)...	589
Mulcahey v. Dow (Cal.).....	158	Parke v. Boulware (Idaho).....	1045
Multnomah County, Alliance Trust Co. v. (Or.).....	498	Parker v. Gilmore (Kan. App.).....	20
Multnomah County, Dekum v. (Or.).....	496	Parsons, Tally v. (Cal.).....	833
Mulvane, Harrison v. (Kan. Sup.).....	749	Patten v. American Nat. Bank (Colo. App.)...	424
Murphy, In re (Kan. Sup.).....	428	Patterson, Murphy v. (Mont.).....	375
Murphy v. Farmers' & Merchants' Bank (Cal.).....	368	Patterson, Murphy v. (Mont.).....	380
Murphy v. Farmers' & Merchants' Bank (Cal.).....	731	Patton v. Carpenter (Cal.).....	1126
Murphy v. Madden (Cal.).....	80	Paul v. Rooks (Colo. App.).....	711
Murphy v. Patterson (Mont.).....	375	Payette v. Willis (Wash.).....	254
Murphy v. Patterson (Mont.).....	380	Peachy v. Witter (Cal.).....	468
Murphy, Pallett v. (Cal.).....	366	Pemberton, In re (Mont.).....	1043
Murphy, Portland Cracker Co. v. (Cal.)...	70	Pendleton v. Mente (Kan. App.).....	1131
Murray v. Montana Lumber & Mfg. Co. (Mont.).....	719	People v. Anderson (Cal.).....	668
Myers v. Gogerty (Kan. App.).....	296	People v. Arlington (Cal.).....	347
Myers, City of Topeka v. (Kan. App.).....	273	People v. Brooks (Cal.).....	464
Myrick, Rea-Patterson Mill Co. v. (Kan. App.).....	462	People v. Bruce (Wash.).....	519
Nance, Stuart v. (Colo. Sup.).....	323	People v. Chambers (Wash.).....	519
Naphtaly v. Rovegno (Cal.).....	66	People v. Clarke (Cal.).....	138
Naphtaly v. Rovegno (Cal.).....	621	People v. Clough (Colo. App.).....	1066
National Fire Ins. Co. v. Denver Consol. Electric Co. (Colo. App.).....	949	People v. District Court of Eighth Judicial Dist. (Colo. Sup.).....	321
Nelson v. Barr (Kan. App.).....	1131	People v. Hiltel (Cal.).....	919
Nelson, Christenson v. (Or.).....	648	People v. Johnson (Cal.).....	842
Neosho Valley Inv. Co. v. Hannum (Kan. App.).....	92	People v. Levee Dist. No. 6 of Sutter County (Cal.).....	342
Neufelder v. Third St. & S. Ry. (Wash.)...	197	People v. Levee Dist. No. 6 of Sutter County (Cal.).....	676
Nichols, Doyle v. (Colo. App.).....	123	People v. Machado (Cal.).....	66
Nichols, Snyder v. (Kan. App.).....	1132	People v. Mendenhall (Cal.).....	675
Nicoll v. Weldon (Cal.).....	63	People v. Mooney (Cal.).....	1070
Ninemire, Williams v. (Wash.).....	534	People v. Reclamation Dist. No. 556 (Cal.)...	27
Nolan v. Board of Com'rs of Ellis County (Kan. App.).....	657	People v. Rodley (Cal.).....	351
Nolan v. Foley (Kan. App.).....	1131	People v. Rosenstein-Cohn Cigar Co. (Cal.)...	163
Nolan v. Montana Cent. R. Co. (Mont.)...	926	People v. Tapia (Cal.).....	1001
Nolan Bros. Shoe Co. v. Nolan (Cal.).....	480	People v. Terrill (Cal.).....	141
Nolan, Nolan Bros. Shoe Co. v. (Cal.).....	480	People v. Warren (Cal.).....	86
Norris, Eaton v. (Cal.).....	856	People v. Warren (Cal.).....	87
Norris, Sholes v. (Colo. App.).....	124	People v. Young (Cal.).....	837
Northern Pac. R. Co., Collett v. (Wash.)...	225	People, Cooper v. (Colo. Sup.).....	314
North Pacific Lumber Co., Williamson v. (Or.).....	16	People, McAllister v. (Colo. Sup.).....	308
North Point Consol. Irr. Co. v. Utah & S. L. Canal Co. (Utah).....	812	People, Starr v. (Colo. Sup.).....	299
Northwestern Theatrical Ass'n, Title Guarantee & Trust Co. v. (Wash.).....	212	Perkins v. Adams (Colo. App.).....	792
		Perkins v. Territory (Okl.).....	860
		Perkins, Smith v. (Kan. App.).....	297
		Petaluma Gaslight Co., Sims v. (Cal.)...	1011
		Peterson v. Seattle Traction Co. (Wash.)...	539

	Page		Page
Peterson, Maydole v. (Idaho).....	1048	St. Clair v. Williams (Wash.).....	206
Peuker v. Canter (Kan. Sup.).....	617	Salina Mill & Elevator Co. v. Hoyne (Kan. App.).....	660
Pewthers, Chicago Bldg. & Mfg. Co. v. (Okla.).....	964	Salisbury v. Lane (Idaho).....	383
Phipps, Noyes v. (Kan. App.).....	639	Salisbury, Cavanaugh v. (Utah).....	39
Pillar, Shapter v. (Colo. Sup.).....	302	Salt Lake County, Auerbach v. (Utah).....	907
Platte Valley Irr. Co., Buckers Irr., Mill & Imp. Co. v. (Colo. Sup.).....	305	San Diego County v. Dauer (Cal.).....	338
Pocatello Power & Irrigation Co., Thomas v. (Idaho).....	595	San Francisco Bridge Co., Pacific Nat. Bank v. (Wash.).....	207
Pomeroy v. Woodward (Or.).....	194	San Mateo County v. Coburn (Cal.).....	78
Pomona Land & Water Co., Owen v. (Cal.).....	850	San Mateo County v. Coburn (Cal.).....	621
Poncelor v. Campbell (Kan. App.).....	606	Sauers v. Beechler (Or.).....	195
Popp v. Daisy Gold-Min. Co. (Utah).....	185	Saunders, Meherin v. (Cal.).....	1084
Port Angeles Gas, Water, Electric Light & Power Co., Dunsmuir v. (Wash.).....	1095	Sausalito Land & Ferry Co., Raisch v. (Cal.).....	346
Porter v. Steele (Idaho).....	187	Savings & Loan Soc. v. City and County of San Francisco (Cal.).....	665
Portland Cracker Co. v. Murphy (Cal.).....	70	Scarlett, State v. (Kan. App.).....	1132
Potts, Findlay v. (Cal.).....	694	Schaake v. Eagle Automatic Can Co. (Cal.).....	1025
Poulson, Shell v. (Wash.).....	204	Schall v. Fler (Kan. App.).....	289
Power, State v. (Wash.).....	1112	Schallehn v. Hibbard (Kan. App.).....	606
Preston, Missouri Pac. R. Co. v. (Kan. Sup.).....	444	Schomber, State v. (Wash.).....	221
Price v. Mitchell (Wash.).....	514	School Dist. No. 122 of Spokane County, Kimball v. (Wash.).....	213
Princess Gold-Min. Co., Morrell Hardware Co. v. (Colo. App.).....	807	Schowalter v. Beard (Okla.).....	687
Purser, Cady v. (Cal.).....	844	Schrenkler, First Nat. Bank v. (Kan. App.).....	1128
Quayle, Wyman v. (Wyo.).....	988	Schroeder v. Imperial Ins. Co. (Cal.).....	1074
Queen of Sheba Gold Min. & Mill. Co., McCormick v. (Utah).....	820	Schuster v. Gray (Kan. App.).....	279
Ragains v. Geiser Mfg. Co. (Okla.).....	687	Scott v. Brown (Kan. App.).....	451
Raisch v. Sausalito Land & Ferry Co. (Cal.).....	346	Scoville v. Anderson (Cal.).....	1018
Randolph v. Sprague (Kan. App.).....	446	Seal v. Cameron (Wash.).....	1103
Rauer v. Merani (Cal.).....	31	Seattle Traction Co., Peterson v. (Wash.).....	539
Raught v. Lewis (Wash.).....	1104	Second Judicial Dist. Court, State v. (Mont.).....	686
Read, Gorringer v. (Utah).....	902	Second Judicial Dist. Court, State v. (Mont.).....	717
Rea-Patterson Mill Co. v. Myrick (Kan. App.).....	462	Security Loan & Trust Co. v. Mattern (Cal.).....	482
Reclamation Dist. No. 536 v. Hall (Cal.).....	1000	Sellers v. Bell (Kan. App.).....	457
Reclamation Dist. No. 556 v. Thisby, two cases (Cal.).....	918	Sellers v. Gay (Kan. App.).....	1132
Reclamation Dist. No. 556, People v. (Cal.).....	27	Sether v. Clark (Wash.).....	1106
Reed, Allen v. (Okla.).....	867	Seymour, Griffin v. (Colo. App.).....	809
Reed, Bank of Ukiah v. (Cal.).....	68	Seymour, State v. (Idaho).....	1036
Reed, Bank of Ukiah v. (Cal.).....	921	Shaffer, Starrett v. (Kan. App.).....	1132
Reed, Fay v., two cases (Cal.).....	1125	Shapter v. Pillar (Colo. Sup.).....	302
Rehberg v. Greiser (Mont.).....	41	Sharp v. Johnson (Or.).....	485
Reiner v. Crawford (Wash.).....	516	Shaver's Estate, In re (Cal.).....	340
Republican Val. Bank, Metropolitan Nat. Bank v. (Kan. App.).....	911	Sheehan, Kempley v. (Kan. App.).....	295
Reynolds v. Corbus (Idaho).....	884	Shell v. Poulson (Wash.).....	204
Rhoads, Kelley v. (Wyo.).....	935	Shell's Estate, In re (Colo. Sup.).....	413
Rhodes, Marr v. (Cal.).....	364	Sherlock v. Leighton (Wyo.).....	580
Rice, State v. (Kan. Sup.).....	737	Sherlock v. Leighton (Wyo.).....	934
Rich, Fay v. (Cal.).....	1125	Shoemaker, Brewster v. (Colo. Sup.).....	309
Richards, Davis v. (Wash.).....	211	Sholes v. Norris (Colo. App.).....	124
Richardson v. Chicago Packing & Provision Co. (Cal.).....	74	Sidell, Leroy & C. Val. Air-Line R. Co. v. (Kan. Sup.).....	599
Ridpath v. Spokane County (Wash.).....	261	Silver v. Lee (Or.).....	882
Riegel v. Fields (Kan. App.).....	24	Simon, Camp v. (Utah).....	332
Rio Grande W. R. Co. v. Telluride Power Transmission Co. (Utah).....	935	Simpson, Horner v. (Kan. App.).....	604
Robbins, Wolfe v. (Kan. App.).....	278	Simpson, Mitchell v. (Kan. Sup.).....	440
Roberts v. Spokane St. R. Co. (Wash.).....	506	Sims v. Petaluma Gaslight Co. (Cal.).....	1011
Robinson's First Addition to City of Hutchinson, In re (Kan. Sup.).....	426	Smith v. Brooking (Kan. App.).....	19
Robison, George v. (Utah).....	819	Smith v. Perkins (Kan. App.).....	297
Rocky Mountain Bell Tel. Co., Numbers v. (Idaho).....	381	Smith v. Stubbs (Colo. App.).....	955
Rodley, People v. (Cal.).....	351	Smith, Chicago, R. I. & P. R. Co. v. (Kan. App.).....	294
Rooks, Paul v. (Colo. App.).....	711	Smith, Harrington v. (Mont.).....	1036
Rooney v. Snow (Cal.).....	155	Smith's Estate, In re (Cal.).....	729
Root, Doremus v. (Wash.).....	572	Snow, Rooney v. (Cal.).....	155
Rose v. Mesmer (Cal.).....	1010	Snyder v. Nichols (Kan. App.).....	1132
Rosenstein-Cohn Cigar Co., People v. (Cal.).....	163	Snyder, Enos v. (Cal.).....	170
Ross, Pacific Inv. Co. v. (Cal.).....	67	South Denver Real-Estate Co., Cowell v. (Colo. App.).....	991
Rovegno, Naphtaly v. (Cal.).....	66	Southern Development Co. of Nevada v. Douglass (Nev.).....	38
Rovegno, Naphtaly v. (Cal.).....	621	Southern Pac. Co., City of Oakland v. (Cal.).....	371
Rundle, Griffith v. (Wash.).....	199	Southern Pac. Co., Hill v. (Utah).....	814
Rupp, Healey v. (Colo. Sup.).....	319	Southern Pac. Co., Lemasters v. (Cal.).....	128
Rush v. Spokane Falls & N. R. Co. (Wash.).....	500	Spielberger v. Thompson (Cal.).....	132
Ryker, Bigger v. (Kan. Sup.).....	740	Spielberger v. Thompson (Cal.).....	678
Sadler, State v. (Nev.).....	128	Spokane County, Eaton v. (Wash.).....	1134
		Spokane County, Ridpath v. (Wash.).....	205
		Spokane Falls & N. R. Co., Rush v. (Wash.).....	501
		Spokane St. R. Co., Roberts v. (Wash.).....	506
		Sprague, Randolph v. (Kan. App.).....	446

	Page		Page
Staaacke, Bank of California v. (Cal.).....	81	Stout v. Crosby (Kan. App.).....	661
Staaacke, Bank of California v. (Cal.).....	668	Stout v. Judd (Kan. App.).....	662
Staaacke, Thompson v. (Cal.).....	81	Striaghham v. Davis (Wash.).....	230
Staaacke, Thompson v. (Cal.).....	668	Stuart v. Nance (Colo. Sup.).....	323
Stafford, Carr v. (Kan. Sup.).....	737	Stubbs, Smith v. (Colo. App.).....	955
Stager v. Troy Laundry Co. (Or.).....	645	Stumpf v. Board of Suprs of San Luis	
Standard Oil Co., Bayard v. (Or.).....	614	Obispo County (Cal.).....	663
Standard Quicksilver Co., Habishaw v.		Suess v. Board of Com'rs of Lane County	
(Cal.).....	728	(Kan. App.).....	451
Stanford v. City and County of San Fran-		Superior Court of City and County of San	
cisco (Cal.).....	145	Francisco, Overend v. (Cal.).....	372
Stanley v. Foote (Wyo.).....	940	Superior Court of City and County of San	
Stanley v. Mineral Union (Nev.).....	59	Francisco, Tomsy v. (Cal.).....	1020
Stanley, Washington Nat. Building Loan &		Superior Court of Lassen County, Elledge	
Investment Ass'n v. (Or.).....	489	v. (Cal.).....	360
Starr v. Kreuzberger (Cal.).....	134	Supreme Council American Legion of Hon-	
Starr v. People (Colo. Sup.).....	299	or, Brun v. (Colo. App.).....	796
Starrett v. Shaffer (Kan. App.).....	1132	Supreme Council Catholic Knights of	
Start, State v. (Kan. App.).....	448	America, Conway v. (Cal.).....	727
State v. Arms (Mont.).....	401	Surry, State v. (Wash.).....	557
State v. Barrett (Mont.).....	1030	Sutro R. Co., Bosqui v. (Cal.).....	682
State v. Beddo (Utah).....	96	Swan, Kiernan v. (Cal.).....	768
State v. Board of State Land Com'rs		Swofford Bros. Dry-Goods Co., Hargadine-	
(Wash.).....	532	McKittrick Dry-Goods Co. v. (Kan. App.)	281
State v. Cheetham (Wash.).....	552		
State v. City of Helena (Mont.).....	99	Talbot, Tulare Sav. Bank v. (Cal.).....	172
State v. City of Pullman (Wash.).....	265	Talbot v. Heinze (Mont.).....	624
State v. City of Spokane (Wash.).....	1116	Tally v. Parsons (Cal.).....	833
State v. Dengel (Wash.).....	1104	Tally, Gibbs v. (Cal.).....	168
State v. De Paoli (Wash.).....	1102	Tam, Williams v. (Cal.).....	133
State v. District Court of First Judicial		Tapia, People v. (Cal.).....	1001
Dist. (Mont.).....	395	Taylor v. Ford (Cal.).....	770
State v. District Court of Second Judicial		Taylor v. Horst (Wash.).....	231
Dist. (Mont.).....	389	Taylor, Marks v. (Utah).....	897
State v. District Court of Second Judicial		Taylor's Estate, In re (Cal.).....	345
Dist. (Mont.).....	402	Telluride Power Transmission Co., Rio	
State v. Dixon (Idaho).....	801	Grande W. R. Co. v. (Utah).....	995
State v. Eastman (Kan. Sup.).....	597	Terrill, People v. (Cal.).....	141
State v. Edwards (Kan. App.).....	1132	Territory, Maas v. (Okl.).....	960
State v. Gillespie (Kan. Sup.).....	742	Territory, Morford v. (Okl.).....	958
State v. Hall (Or.).....	13	Territory, Perkins v. (Okl.).....	860
State v. Hawkins (Wash.).....	258	Tesh, Doon v. (Cal.).....	764
State v. Hinkle (Kan. App.).....	1132	Third St. & S. Ry., Neufelder v. (Wash.)...	197
State v. Huffman (Or.).....	1	Thisby, Reclamation Dist. No. 556 v., two	
State v. Johnson (Wash.).....	1124	cases (Cal.).....	918
State v. Jordan (Kan. Sup.).....	1126	Thomas v. Barber (Kan. App.).....	1133
State v. Kirby (Kan. Sup.).....	752	Thomas v. Pocatello Power & Irrigation Co.	
State v. Levan (Wash.).....	202	(Idaho).....	595
State v. Mack (Nev.).....	1125	Thomas, American Refrigerator Transit	
State v. Mendenhall (Wash.).....	1109	Co. v. (Colo. Sup.).....	410
State v. Miner (Kan. App.).....	89	Thomas, Camp v. (Cal.).....	736
State v. Moran (Mont.).....	390	Thompson v. Staaacke (Cal.).....	81
State v. Power (Wash.).....	1112	Thompson v. Staaacke (Cal.).....	668
State v. Rice (Kan. Sup.).....	737	Thompson, Spielberger v. (Cal.).....	132
State v. Sadler (Nev.).....	123	Thompson, Spielberger v. (Cal.).....	678
State v. Scarlett (Kan. App.).....	1132	Thorn v. Anderson (Idaho).....	592
State v. Schomber (Wash.).....	221	Title Guarantee & Trust Co. v. Northwest-	
State v. Second Judicial Dist. Court		ern Theatrical Ass'n (Wash.).....	212
(Mont.).....	686	Tomsy v. Superior Court of City and	
State v. Second Judicial Dist. Court (Mont.)		County of San Francisco (Cal.).....	1020
State v. Seymour (Idaho).....	1036	Town of Cloverdale, Larrabee v. (Cal.)....	143
State v. Start (Kan. App.).....	448	Town of Hoquiam, Fogg v. (Wash.).....	234
State v. Stegman (Kan. Sup.).....	746	Townsend v. Johnson (Kan. App.).....	25
State v. Surry (Wash.).....	557	Troy Laundry Co., Stager v. (Or.).....	645
State v. Whorton (Mont.).....	627	Tuers v. Tuers (Cal.).....	1008
State Bank v. Hoyland (Kan. App.).....	1132	Tulare Sav. Bank v. Talbot (Cal.).....	172
Staub, Lehman-Higginson Grocer Co. v.			
(Kan. App.).....	1130	Union Bank & Trust Co., City of Boise	
Staub, Wellington Nat. Bank v. (Kan.		City v. (Idaho).....	107
App.).....	1133	Union Cent. Life Ins. Co., Hall v. (Wash.)	505
Staub, Wichita Wholesale Grocer Co. v.		Union Pac. R. Co., Wild v. (Utah).....	886
(Kan. App.).....	1133	Union Sav. Bank & Trust Co., Young v.	
Steele, Long v. (Kan. App.).....	280	(Wash.).....	247
Steele, Martin v. (Idaho).....	1040	United States, Boggs v. (Okl.).....	969
Steele, Porter v. (Idaho).....	187	United States Savings & Loan Co. v. Ow-	
Stegman, State v. (Kan. Sup.).....	746	ens (Wash.).....	1134
Stenger, Hale v. (Wash.).....	554	Utah Canal Enlargement & Extension Co.,	
Stephens, Marks v. (Or.).....	824	Billups v. (Ariz.).....	713
Stephens, Mayes v. (Or.).....	760	Utah & S. L. Canal Co., North Point	
Stewart v. California Imp. Co. (Cal.).....	177	Consol. Irr. Co. v. (Utah).....	812
Stewart v. California Imp. Co. (Cal.).....	724		
Stickney v. Hanrahan (Idaho).....	189	Van Alstine v. Van Alstine (Wash.).....	243
Stockman v. Western Union Tel. Co. (Kan.		Van De Vanter v. Davis (Wash.).....	555
App.).....	658	Van Horn, Jones v. (Colo. Sup.).....	307
Stockton Savings & Loan Soc., McGorray		Van Loben Sels v. Bunnell (Cal.).....	773
v. (Cal.).....	479		

	Page		Page
Venner v. Denver Union Water Co. (Colo. App.)	1061	Wheeler v. Karnes (Cal.)	62
Vincent v. Donnell (Kan. App.)	24	White v. Costigan (Cal.)	1075
Vogeli, Werner v. (Kan. App.)	607	Whorton, State v. (Mont.)	627
Vosburg v. Vosburg (Cal.)	1000	Wichita Wholesale Grocer Co. v. Staub (Kan. App.)	1133
Wadhams & Co. v. Inman, Poulsen & Co. (Or.)	11	Wilcox v. Eadie (Kan. App.)	1133
Wallace v. Kuffer (Kan. App.)	1133	Wild v. Union Pac. R. Co. (Utah)	886
Warner, Fremont County v. (Idaho)	106	Williams v. Hutchinson & S. R. Co. (Kan. Sup.)	430
Warner Bros. Co. v. Freud (Cal.)	1017	Williams v. Ninemire (Wash.)	534
Warren v. Ferguson (Cal.)	1126	Williams v. Tam (Cal.)	133
Warren, People v. (Cal.)	86	Williams, First Nat. Bank v. (Kan. Sup.)	744
Warren, People v. (Cal.)	87	Williams, Hedge v. (Cal.)	721
Washington Min. Co., Beaman v. (Utah)	631	Williams, Marble Sav. Bank v. (Wash.)	511
Washington Nat. Building, Loan & Investment Ass'n v. Stanley (Or.)	499	Williams, Morris & Whitehead v. (Wash.)	236
Watkinson v. McCoy (Wash.)	245	Williams, St. Clair v. (Wash.)	206
Weakley v. Cherry Tp. (Kan. Sup.)	433	Williamson v. North Pacific Lumber Co. (Or.)	16
Webb, Branner v. (Kan. App.)	274	Williamson, Goodrich v. (Okla.)	974
Webber, City of Denver v. (Colo. App.)	804	Willis v. Crawford (Or.)	985
Webster v. Board of Comrs of Haskell County (Kan. App.)	450	Willis, Payette v. (Wash.)	254
Weldon, Nicoll v. (Cal.)	63	Wincholt, McGee v. (Wash.)	571
Wellington Nat. Bank v. Staub (Kan. App.)	1133	Wirt, Farris v. (Colo. App.)	946
Werner v. Vogeli (Kan. App.)	607	Wise, Lavenson v. (Cal.)	622
West, Campbell v. (Colo. Sup.)	300	Witter, Peachy v. (Cal.)	468
Westchester Fire Ins. Co., Coverdale v. (Kan. Sup.)	1126	Wolfe v. Robbins (Kan. App.)	278
Western Loan & Savings Co., Cleveland v. (Idaho)	885	Woodside, Creswell v. (Colo. App.)	330
Western Union Tel. Co., Coit v. (Cal.)	83	Woodward, Pomeroy v. (Or.)	194
Western Union Tel. Co., Stockman v. (Kan. App.)	658	Work v. Kinney (Idaho)	596
Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co. (Mont.)	739	W. W. Kimball & Co. v. Cockrell (Wash.)	228
Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co. (Mont.)	1043	Wyman v. Quayle (Wyo.)	968
Wheeler v. Bull (Cal.)	732	Yoell, In re (Cal.)	913
Wheeler v. F. A. Buck & Co. (Wash.)	566	Young v. Union Sav. Bank & Trust Co. (Wash.)	247
		Young, Brownlee v. (Mont.)	708
		Young, People v. (Cal.)	837
		Zent, Hoke v. (Kan. App.)	1128
		Zimmerman v. Ginther (Kan. App.)	657

REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

City of Portland v. Erickson (Or.) 62 P. 753.

Kimmell v. Skelly (Cal.) 62 P. 1067.

Security Savings & Trust Co. v. Loewenberg
(Or.) 62 P. 647.

Wallace v. Farmers' Ditch Co. (Cal.) 62 P.
1078.

White v. White (Cal.) 62 P. 34.

Williams v. Bergin (Cal.) 62 P. 59.

REHEARINGS GRANTED

[California cases in which rehearings have been granted and in which rehearings have been disposed of, with or without written opinions, since the publication of the original opinions in previous volumes of this reporter.]

Adams v. Modesto, 61 P. 957. On rehearing,
63 P. 1083.

Angus v. Craven, Aug. 8, 1900.

Bassett v. Fairchild, 61 P. 791; granted Aug.
1, 1900.

Carpenter v. Cook, 60 P. 475; granted April
2, 1900.

Chapman v. Hughes, 58 P. 298. On rehearing,
58 P. 916; 60 P. 974; 61 P. 76.

City and County of San Francisco v. Center,
63 P. 36; granted Jan. 2, 1901.

Continental Bldg. Ass'n v. Holt, 61 P. 273. On
rehearing, 63 P. 182, 622.

Cortelyou v. Jones, 61 P. 918. On rehearing,
64 P. 119.

Downing v. Rademacher, 62 P. 1055; granted
Jan. 2, 1901.

Fair v. Goodfellow, 60 P. 442; granted March
28, 1900.

Fair's Estate, In re, 60 P. 442; granted March
28, 1900.

Filipini v. Trobock, 62 P. 1066; granted Dec.
29, 1900.

Gibbs v. Tally, 63 P. 168; granted Jan. 21,
1901.

Hallinan v. Hearst, 62 P. 1063; granted Jan.
2, 1901.

Howard v. Bryan, 62 P. 459; granted Oct. 29,
1900.

Iowa & C. Land Co. v. Hoag, 62 P. 189; grant-
ed Sept. 28, 1900.

Levin, In re, 63 P. 335; granted Jan. 1, 1901.

McClain v. Hutton, 61 P. 273. On rehearing,
63 P. 182, 622.

Marti's Estate, In re, 61 P. 964; granted Aug.
18, 1900.

Miller & Lux v. Batz, 61 P. 935. On rehear-
ing, 63 P. 680.

Mulcahey v. Dow, 63 P. 158.

O'Donnell v. Merguire, 60 P. 980. On rehear-
ing, 63 P. 847.

Palmer v. Continental Ins. Co., 61 P. 784. On
rehearing, 64 P. 97.

People v. Mendenhall, 63 P. 675; granted Feb.
15, 1901.

People v. Walker, 61 P. 800. On rehearing, 64
P. 133.

Rauer v. Merani, 61 P. 76. On rehearing, 63
P. 31.

Security Sav. Bank v. San Francisco, Aug. 8,
1900.

Southern Pac. Co. v. Robinson, Aug. 8, 1900.

Stewart v. California Imp. Co., 61 P. 280. On
rehearing, 63 P. 177.

Wills v. Porter, 61 P. 1109; granted Aug. 30,
1900.

Yule v. Bishop, 62 P. 68; granted Sept. 12,
1900.

PETITIONS FOR ORDERS.

[Petitions for orders to certify to the Supreme Court of Kansas for review have been refused in the following cases in the Court of Appeals.]

- | | |
|---|--|
| <p>Anthony v. Atwood, 62 P. 720.
Aultman & Taylor Co. v. Donnell, 60 P. 432.
Chicago, R. I. & P. Ry. Co. v. Smith, 63 P. 291.
City of Kansas City v. Frohwerk, 62 P. 432.
Dobbs v. Campbell, 63 P. 289.
D. M. Ferry & Co. v. Ballinger, 60 P. 824.
D. M. Ferry & Co. v. Biehn, 60 P. 1133.
D. M. Ferry & Co. v. Kemper, 60 P. 1133.
D. M. Ferry & Co. v. Shook, 60 P. 1134.
D. M. Ferry & Co. v. Smith, 60 P. 1134.
German Ins. Co. v. Sweet, 62 P. 1119.
Gregory Grocery v. Beaton, 62 P. 732.
Harrison v. McCabe, 63 P. 277.
Havens v. Pope, 62 P. 540.
Isenhart v. Hazen, 63 P. 451.
63 P.</p> | <p>Kansas City Suburban Belt Ry. Co. v. Herman, 62 P. 543.
Kansas & C. P. Ry. Co. v. Lawrence, 63 P. 1130.
Lincoln Tp. v. Koenig, 63 P. 90.
Neosho Val. Inv. Co. v. Hannum, 63 P. 92.
Newborg v. Sproat, 62 P. 544.
Nolan v. Foley, 63 P. 1131.
Otis v. Carpenter, 62 P. 535.
Pratt v. Cook, 62 P. 438.
Ranft v. Bolles, 62 P. 537.
St. Louis & S. F. R. Co. v. Keller, 62 P. 905.
Salina Mill & Elevator Co. v. Hoyne, 63 P. 660.
Thomas v. Barber, 63 P. 1133.</p> |
|---|--|

(xv)†

THE
PACIFIC REPORTER.
VOLUME 63.

(39 Or. 48)

STATE v. HUFFMAN.

(Supreme Court of Oregon. Dec. 17, 1900.)

CRIMINAL LAW—CONTINUANCE—AGE—EVIDENCE—APPEAL—REVIEW.

1. Refusal of continuance in a rape case, for absent witnesses, who, according to defendant's affidavit, would testify that the prosecuting witness told them that her mother had tried to induce her to tell something about defendant that would get him into great trouble, but that she refused to do because it was not true, cannot be held an abuse of discretion; it not being shown how the evidence was material, or that the statement was not made before the alleged rape.

2. An instruction in a rape case, where it is necessary that the jury be satisfied that defendant is over 16 years old, that the state need produce no evidence, defendant being present and being evidence of his age, of which the jury are judges, cannot be held error; his appearance being evidence of his age, and there being nothing in the record to show that it was not sufficient.

Appeal from circuit court, Harney county; M. D. Clifford, Judge.

W. D. Huffman was convicted of rape, and appeals. Affirmed.

The defendant was convicted of the crime of rape, upon an indictment returned April 19, 1900. The crime is charged to have been committed July 1, 1899, and, among other things, it is alleged that the defendant was "then and there a male person above the age of sixteen years." He was arraigned on the day the indictment was found, and on the day following he entered a plea of not guilty, and filed a motion for a postponement of the trial to the next term of the court, supported by his affidavit, wherein he stated, in substance, that he could not safely go to trial without the testimony of Alexander Castro and John E. Lawrence, who would testify, if present, that on or about July 20, 1899, Alfa Farrens, the prosecuting witness, informed them that her mother had theretofore tried to induce her to tell something about the defendant that would get him into, or cause him, great trouble, but that she refused to do as her mother desired, for the reason that it was not true; that said testimony was material; and that the motion was not made for the purpose of delay, but that justice might be

done. The court refused to grant the continuance, and its action in this regard is assigned as error. The trial of the case was begun on the 26th day of April and concluded on the 27th. The court charged the jury that the averment respecting the age of the defendant at the time of the alleged commission of the crime was material, and that before they could convict him they must be satisfied beyond a reasonable doubt that he was then above the age of 16 years, and concluded with the specific instruction "that it is not necessary for the state to produce any evidence of the age of the defendant in this case, as the defendant himself is present, and is evidence of his age, of which you are the judges." An exception was saved to this instruction, and constitutes the second ground of error. Judgment having been rendered on the verdict, the defendant appeals.

L. R. Webster, for appellant. D. R. N. Blackburn, Atty. Gen., for the State.

WOLVERTON, J. (after stating the facts). We will dispose of the two questions in the order stated.

A motion for a continuance is always addressed to the sound, legal discretion of the court, and the action of the trial court concerning it is not subject to review, except for an abuse of that discretion, or where it has been injudiciously and unwisely exercised, to the prejudice of the moving party. *Vanblaricum v. Ward*, 1 Blackf. 50; *Davis & Rankin Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co.*, 84 Wis. 262, 54 N. W. 506; *State v. O'Neill*, 13 Or. 183, 9 Pac. 284; *State v. Howe*, 27 Or. 138, 146, 44 Pac. 672. The alleged evidence upon which the continuance was sought impresses one as vague and mysterious in character. It is that the prosecuting witness had informed the absent witnesses that her mother tried to induce her to tell something that would get the defendant into great trouble, but that what she wanted her to tell was not true. Whether this evidence was wanted to impeach the prosecuting witness, or to show a conspiracy between the mother and daughter to inculcate the defendant, or in what particular respect it would

become material, is not shown. Without some such further showing, its materiality is not clearly apparent. The bill of exceptions shows that the mother and daughter were both called at the trial; that the former testified merely that she was the mother of the prosecutrix, and the latter that she was the person upon whom the crime was charged to have been committed, and that her name was Alfa Farrens. But this did not aid the showing for a continuance in any particular. Furthermore, the affidavit is indefinite as to the time when the mother tried to induce the prosecuting witness to tell "something" about the defendant. For aught that appears, it may have been long before the alleged commission of the crime with which he is charged, and possibly could have no relevancy to his defense in this action. Upon the whole, we cannot say that the court below abused its legal discretion, and hence there was no error in overruling the motion.

As it concerns the second assignment, touching the court's instruction to the jury, it may be premised that the bill of exceptions shows nothing of the evidence or of the personal appearance of the defendant, as regards his age, tending to elucidate the instruction in any particular. Hence we have the simple question to deal with, whether such an instruction is proper in any case. Error will never be presumed, but must be made to appear before it can be available to induce a reversal upon appeal. Where the appearance of the accused sufficiently indicates his probable age, it may be considered as evidence of the fact. *People v. Justices of Special Sessions of New York Co.*, 10 Hun, 224. Mr. Wharton says that "when age can be ascertained by inspection the jury must decide." 1 Whart. Cr. Law. § 73. And in *State v. Arnold*, 13 Ired. 184, where the question was as to whether the defendant was under the age of 14 years,—a matter incumbent upon him to establish,—it was held that, "as there was no proof on the point, it could only be judged of by inspection, and, so far as that goes, it must be taken to have been decided against the prisoner both by the court and the jury." So, in *State v. McNair*, 93 N. C. 628, where the same defense was interposed, the court said to the jury, "It is for you to say whether he is under fourteen years of age or not, being, as you see him before you, grown to the stature of manhood;" and the ruling was affirmed upon appeal. *Com. v. Emmons*, 98 Mass. 6, is directly to the purpose. The charge was that, as a keeper of a billiard room or table, the defendant did admit certain minors without the consent of their parents or guardians, and the question came up as to whether the parties were minors, as alleged. The trial court ruled that as to one of them the jury might determine, by personal inspection of him, whether or not he was a minor, and no evidence of his age was admitted. The appeal was taken there, as here, without any explanation in the record touching the phys-

ical appearance of the supposed minor. In deciding the case, Mr. Chief Justice Bigelow says: "There is nothing in the bill of exceptions from which it can be inferred that the defendant was aggrieved by the ruling of the court in permitting the jury to judge whether one of the alleged minors was under-age, from his appearance on the stand. There are cases where such an inspection would be satisfactory evidence of the fact. It certainly was not incompetent for the jury to take his appearance into consideration in passing on the question of his age, and, as it does not appear that this may not have afforded plenary evidence of the fact, the defendant fails to show that he was convicted on insufficient evidence, or that he has been prejudiced by the ruling of the court." It is readily supposable that there are cases in which the senses cannot be mistaken. A mere youth could not be mistaken, as regards his age, for a man past the meridian or in the decline of life. As to what were the conditions in the case at bar, we are not advised; and for the very reason that it may have been a case wherein the jury might have determined the fact with inevitable certainty by an inspection of the defendant, who was necessarily present in court, we cannot say there was error in the instruction complained of. We are aware that there are cases holding that evidence must be adduced of the age, because it is not practicable to present the matter of personal appearance by the record. *Stephenson v. State*, 28 Ind. 272; *Ihinger v. State*, 53 Ind. 251. But we are satisfied that, where there can exist any doubt in the premises, enough could be made to appear so that the defendant could make his appeal effective. The judgment of the court below must be affirmed, and it is so ordered.

(38 Or. 402)

KING et al. v. CITY OF PORTLAND et al.
(Supreme Court of Oregon. Dec. 10, 1900.)

CONSTITUTIONAL LAW—TAXATION—PUBLIC IMPROVEMENTS—NOTICE—ASSESSMENT—UNIFORMITY—DUE PROCESS OF LAW.

1. Sess. Laws 1898, p. 156, § 138, requiring the council to assess the cost of improvements or repairs of the half street immediately in front of the abutting lots to such lots, and providing that the cost of street intersections shall be assessed five-ninths to the corner lot, or first 50 feet, and the remainder to the adjacent lot, or next 50 feet, in the quarter block, does not provide a tax so in excess of or out of proportion to the benefits received as to be a taking of property for public use without compensation, in violation of Const. U. S. Amend. 5.

2. Sess. Laws 1898, p. 151, § 128, provides that before street improvements are made the council shall pass a resolution declaring its intention to make the same, which resolution shall be published for 10 consecutive days in a newspaper and posted at certain places, and that the property owners may file their remonstrances with the auditor within 10 days thereafter. *Held*, that the notice required gave the property owners opportunity to raise objections as to the excessiveness of costs over benefits, and as to the proportionment of the ben-

efits, and hence the law is not in violation of Const. U. S. Amend. 14, as being a taking of property without due process of law.

3. Sess. Laws 1898, p. 150, authorizes a common council to make street improvements, and provides that each lot within the limits of the improvement abutting on the street shall be liable for the cost of half the street in front thereof. An elevated roadway, ranging from 10 to 15 feet in height, was built on a certain street, and the costs thereof taxed to the abutting lot owners, in accordance with the law; the tax varying according to the height of the roadway in front of each lot. *Held*, that the assessment against the lots was as nearly proportional according to the benefits as could be devised, and was therefore valid.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Application for an injunction by A. N. King and others against the city of Portland and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

This is a suit to enjoin the enforcement of a local assessment for a street improvement, consisting of an elevated roadway extending along East Yamhill street, between East Water street and Union avenue, in the city of Portland. The charter provisions bearing upon the present controversy (Sess. Laws 1898, p. 150) are, in substance, as follows: Sections 126 and 127 authorize the improvement. Section 128 requires that, before any improvement is made, the common council shall pass a resolution declaring its intention to make it, and describing the same, which resolution shall be posted in the office of the auditor and published for 10 consecutive days in a daily newspaper of the city, and that the city engineer shall cause to be posted a notice at each end of the line of the contemplated improvement, which shall state the fact of the adoption of the resolution, its date, the character of the improvement proposed, and the time within which written objection or remonstrance may be made thereto. Section 129 provides that within 10 days after the official publication of notice the owners of more than one-half of the abutting property may file with the auditor written objection or remonstrance, which shall be a bar to further proceedings unless the owners of one-half or more of such property shall subsequently petition therefor. Section 130: That, if no such objection or remonstrance be filed, the council shall be deemed to have acquired jurisdiction to order the improvement to be made, and shall, within four months from the date of the final publication of the resolution of intention, declare by ordinance the time and manner of said improvement. Section 131: That the auditor shall immediately transmit a copy thereof to the board of public works and the city engineer, and said board shall include, as a part of the costs of such improvement, the cost of advertisement, etc. Section 132: That said board shall without delay cause the engineer to prepare and file estimates and specifications of the amount of such work or improvement, and thereupon

give five days' notice, and invite proposals for doing the work. Section 133: That said board shall, at the time set, examine the proposals and let the work. Section 136: That the auditor shall make the assessment and apportionment of the expenses of said improvement, in the mode and manner provided by section 138. Section 137: That whenever any improvement, the expense of which is to be assessed against the property benefited thereby, has been completed in whole or in such proportion as shall enable the said board to determine the cost of the whole thereof, the city engineer shall file a written acceptance of the work so completed. Thereupon the board shall publish a notice of such completion and acceptance for six consecutive insertions in the official newspaper, stating the time and place where written objections to the acceptance of the improvement may be heard. At the time fixed, any owner or agent may appear and file objections to such improvement, which shall be heard and determined by the board; and, if it appear that the said improvement has not been completed in accordance with the specifications and contract, it shall not be approved until so completed. When approved, the board shall indorse the same upon the acceptance of the engineer, and file a copy with the auditor, together with the contract and the estimated expenses of advertising, etc. Section 138: That the auditor shall thereupon prepare an assessment to cover the entire cost of such work or improvement, and apportion the same to the property affected thereby within the limits of such work or improvement, as declared by the ordinance authorizing the same, in the manner following: "Each lot or part thereof within the limits of a proposed street improvement abutting upon the street shall be liable for the full cost of making the same upon half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersections of two of the streets bounding the block in which such lot or part thereof is situated. * * * The cost of improving the intersection of streets, unless otherwise ordered by the council, shall be assessed upon the lots or parts thereof situated in the quarters of the four regular blocks adjoining such intersections, but only upon the lots or parts thereof within the quarter blocks nearest thereto and in the following proportion: Five ninths of the cost to the corner or first fifty feet; and four ninths of the cost to the lot next inside or the next fifty feet as laid out on the recorded plats." Section 139: That when the probable cost of the improvement has been ascertained, and the proportionate share assessed to each lot, the common council must declare the same by ordinance, and direct the auditor to enter a statement in the docket of city liens. Sections 140, 141, and 142 provide for a docket of city liens and the entry of the assessment therein, but that the same shall

not be collected until by order of the common council; that 10 days' notice shall be given of the entry; and that if, within 30 days from the first publication of such notice the sum assessed is not wholly paid, the council shall thereafter order the issuance of a warrant to enforce the collection of the same. Section 158: That "the proceedings authorized by this chapter for the establishment or alteration of a grade or the improvement of a street or any part thereof may be taken or had without giving notice prescribed in section 128, whenever the owner or owners of two thirds of the adjacent property shall, in writing, petition the council therefor. And whenever any street or part thereof shall be in such condition as to become impassable, unsafe or dangerous to persons or teams passing on, along or over the same the council may declare the same by resolution, and may thereupon cause the improvement of such street to be made, upon giving ten days' notice by publication in any paper of said city, and no remonstrance shall be heard thereto." The decree of the court below being in favor of the defendants, the plaintiffs appeal.

M. L. Pipes, for appellants. J. M. Long, for respondents.

WOLVERTON, J. (after stating the facts). Several objections are interposed, directed against the legality of the assessment. The first is that the charter provisions under which it was made do not provide for an apportionment of the burden under a uniform rule, such as is required by the constitution. There is much discussion in the books as to whether an assessment for local improvements is a tax or not, but, whatever may be the true doctrine, it must be conceded that the authority to make such an assessment is necessarily lodged in the taxing power. This has been held so often that the controversy must be regarded as closed. *Irrigation Dist. v. Bradley*, 164 U. S. 112, 176, 17 Sup. Ct. 56, 41 L. Ed. 369. Apportionment of the burden is, however, essential, though it need not be made upon property in proportion to its value. Mr. Cooley says: "But, whatever may be the basis of the taxation, the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established." Cooley, *Const. Lim.* (6th Ed.) 615. Mr. Justice Earl, in *Stuart v. Palmer*, 74 N. Y. 183, states the proposition as follows: "It is not disputed that the legislature has unlimited power, except as restrained by the federal constitution to impose taxes and assessments for public purposes. It may impose taxes upon all property within the state, and in such cases the owners are supposed to receive a compensation for the burdens thus imposed, in the protection and benefits of the government under which they live. It may

impose taxes upon the local divisions of the state for the purposes of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made, and authorize the expense thereof to be assessed upon the land benefited thereby. But in all cases there must be apportionment of the burdens, either among all the property owners of the state, or of the local division of the state, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property, arbitrarily imposed, without reference to some system of just apportionment, could not be upheld."

This brings us to the rule of apportionment, and in this connection may be considered the second objection, which is that the mode and manner of assessment for street improvements adopted and prescribed by the legislature through the city charter do not take into consideration the benefits, or limit or apportion the assessment by and in accordance with the benefits received, and therefore that the charter is in violation of the fifth and fourteenth amendments to the national constitution, which inhibit the taking of private property for public use, and without due process of law. Our state constitution has similar provisions (article 1, §§ 10, 18), so that, if the rule is in violation of one, it is also in conflict with the other. The case has been presented, however, by the allegations of the complaint and at the argument, with special reference to the federal question; and we will treat it more particularly in that light, for, if the legislative act prescribing the manner and mode of assessment is void under the national constitution, within the doctrine of the supreme judicial court of the United States, then we are precluded, as it is, the final arbiter in the premises. It is asserted with substantial unanimity and great clearness by the courts in this country, as well as by text writers of erudition and learning, that, unless the nature of the case precludes it, the power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact, which the legislature is always presumed to have considered and settled by the enactment. Mr. Justice Finch, in *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682,—a case involving the validity of an act whereby certain real property, situated in a prescribed district, which had not theretofore paid an assessment for a local improvement under an act declared to be void, was required to pay a sum of money then ascertained,—says: "The act of 1881 [the one in question] determines absolutely

and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. * * * The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review." This case went to the supreme court of the United States (s. c., 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763), and the doctrine thus promulgated was there directly approved and affirmed, in the following language (Mr. Justice Gray speaking for the court): "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of the commissioners." So, in *Irrigation Dist. v. Bradley*, supra, the court say: "The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question." In further support of the doctrine, see *Cooley, Tax'n* (2d Ed.) 640; *King v. City of Portland*, 2 Or. 146; *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419; *Litchfield v. Vernon*, 41 N. Y. 123. As has been indicated by some of the foregoing references to the authorities, the legislature may, instead of fixing and prescribing the taxing district itself, refer the matter to commissioners or local boards or bodies for their ascertainment and determination; and in such case the substituted bodies possess and exercise legislative functions, and their action must be deemed as conclusive upon the subject as if the legislature had exercised the authority directly. *Cooley, Tax'n* (2d Ed.) 640. The doctrine is laid down in *Williams v. Eggleston*, supra, as follows: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what

property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." See, also, *Spencer v. Merchant*, supra; *Dickson v. City of Racine*, 61 Wis. 545, 21 N. W. 620. The question of apportionment between the owners when the authority is delegated is quite a different thing. In such case the commissioners or body to which the duty is intrusted act quasi judicially, and there must be notice and an opportunity to be heard before the owner can be finally precluded and his property subjected to the payment of the assessment. *Sears v. Commissioners*, 173 Mass. 350, 355, 53 N. E. 876, and authorities there cited. See, also, 2 Dill. Mun. Corp. (4th Ed.) § 802a.

The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property, or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see *Towns v. Klamath Co.*, 33 Or. 225, 53 Pac. 604; *Weed v. City of Boston*, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642), or the assessment is to be enforced by a suit to which he is to be made a party (*Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined (*McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335). In such case he cannot be heard to complain that his property is being taken without due process of law. The case of *Paulsen v. City of Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637, covers the question of the right to notice and a hearing quite fully; and it is significant that special reference is made to the 10-days notice required to be given under section 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens, and before collection can be proceeded with, which is almost the exact provision now contained in section 141. While the court at the time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court, in conformity with the prevailing rule, that, if provision is made for notice to and hearing of each proprietor at some stage of the proceeding upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due

process of law. *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691.

The principle upon which is based the authority to take money as a tax for public use is that the taxpayer receives, or is supposed to receive, a just remuneration, in the protection which the government affords to life, liberty, and property, and in the increase in the value of possessions which comes from the use to which the money raised by the tax is applied. *Cooley, Const. Lim.* (6th Ed.) 613. Local or special assessments for local improvements stand upon a different basis. They are made and sustained upon the assumption that a prescribed portion of the community is to be especially benefited, in the enhancement of the value of the property peculiarly situated, as regards the proposed expenditure of the funds to be raised by the assessment. It is but a demand of simple justice that special contributions in consideration of special benefits should be made by those receiving the benefits, but such contributions ought not, by the same demand of justice, to be enforced in any case beyond the benefits received. *Cooley, Tax'n* (2d Ed.) 606. Such an assessment is not in conflict with the provision of our state constitution requiring that "all taxation shall be equal and uniform." Article 1, § 32; *King v. City of Portland*, supra. It must be conceded, therefore, as was said by Mr. Justice Harlan in *Norwood v. Baker*, 172 U. S. 269, 279, 19 Sup. Ct. 187, 43 L. Ed. 443, that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use, without compensation." The eminent jurist used the words "substantial excess" advisedly, because, as he explains, "exact equality in taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Judicial authority, were it necessary, is not lacking elsewhere in support of the doctrine. "The whole theory of local taxation or assessment," say the supreme court of Missouri in *McCormack v. Patchin*, 53 Mo. 33, "is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person or given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." So, in *State v. Mayor, etc., of Hoboken*, 36 N. J. Law, 291, it was held that, to the extent of the excess of an assessment above benefits accruing by reason thereof, it was a taking of private property for public use without compensation, be-

cause that received by the owner was not equal to that taken from him. And again, in *Dexter v. City of Boston* (Mass.) 57 N. E. 379 (a recent case), the court say: "It is now settled law in this court, as it is in the supreme court of the United States and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits,"—citing the *Norwood Case*, and, among others, *Sears v. Commissioners*, supra, wherein the court say that "it is well established that taxation of this kind is permissible under the constitution of this commonwealth and under the constitution of the United States only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits." This marks the boundary, beyond which it is not within the power of the legislature to go, even in the determination of benefits as applied to a prescribed district. When, however, it is plainly and palpably manifest from the surroundings (that is, from the physical condition of the property involved, its locality, the character of the work or improvement, the assessment, and from the very nature of things) that such an assessment is not adapted to the purpose, and is requiring of the owner a contribution to which he should not be subjected in that capacity, the court will interfere to prevent a consummation of the injustice.

But we are more concerned with the manner of apportionment as between owners within the assessment district. In this, as in prescribing the district, the legislature has a discretion commensurate with the broad domain of legislative power. 2 Dill. Mun. Corp. (4th Ed.) § 761, subd. 4. The mode which the legislature has prescribed is, in substance, that the cost of the half street in front shall be assessed upon the abutting lot or part of lot, and that the cost of street intersections shall be assessed five-ninths upon the corner lot, and the remainder upon the adjacent lot in the quarter block. The rule is invariable, and, when the cost of the improvement in front or at an intersection is ascertained, it must be assessed upon the property; and no discretion, legislative or judicial, abides with the municipal authorities to modify or abate it in the slightest measure. The method is perhaps the least justifiable, as a general rule, of any that has been devised, but that does not signify that it is not proper in any case. The *Norwood Case* would seem, at first thought, to forbid the application under all conditions of the front-foot rule, but it was probably not intended that it should be so far-reaching in its significance. As applied to that case, and all similar cases, it must be

accepted as controlling. The rule has been many times upheld, and it is believed it yet may be, where the conditions are such that it may reasonably be supposed that the method adopted will secure a proportional distribution of the burden according to the benefits. Thus, in *Sears v. Board*, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834, an assessment for sprinkling a street was sustained by the rule, because it did not appear that, as applied to the property assessed, it was not an approximately accurate method of determining benefits. In the opinion the proposition is stated that, "while these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to the benefits. Accordingly the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside." This case was decided March 3, 1899, since the announcement of the *Norwood Case*. In the September prior, the same court decided the case of *Weed v. City of Boston*, supra, wherein it was held that assessments according to frontage of lots on a strip of private land taken for a sewer may be so grossly disproportionate to the benefits received by the land from the sewer that a statute authorizing them is unconstitutional. The court say: "The weight of authority is that an assessment according to the frontage of lots abutting upon a street or a public way in a city sometimes may be a reasonable mode of making an assessment for the cost of constructing a sewer in such street or way, because of the similarity of the lots, but that such an assessment when the sewer is not constructed in a street or way, or is constructed in the country, where the lots abutting are not laid out as building lots, often would be unreasonable." In the May following the announcement of the case of *Sears v. Board*, supra, another case was decided, entitled *Sears v. Commissioners*, 173 Mass. 350, 53 N. E. 876, whereby it was held that an act purporting to give the street commissioners power to levy a local assessment for a burden that was clearly general in its character, and that ought to be borne by the state at large, was invalid. And a year later the decision of *Dexter v. City of Boston* (Mass.) 57 N. E. 380, was handed down, which holds that the rule is vicious as applied to the construction of a sewer which, by reason of its turning at right angles upon plaintiff's lot, imposed a double burden (being assessed upon the two sides) as compared with other lots. The rule was applied by the common council and upheld in

Wilson v. City of Salem, supra, upon the ground that the legislative judgment of the council had settled the matter as being an appropriate measure of benefits in that case.

The only basis upon which any devised method can be sustained is that it is reasonably calculated to the promotion of a substantial proportional distribution of the burden according to benefits. Mr. Dillon says: "The legislature has, within legislative limits, a discretion in providing the mode of ascertaining the benefits; but, even in the absence of express constitutional restriction, its power is not unlimited. This ascertainment may be made, and usually is, by a separate and actual estimate of special benefits. But where the lots in a town or city are small, of the same depth, and similarly situated, an ascertainment, under the conditions mentioned in a previous section, may be authorized on the basis of frontage, which is a convenient substitute for an actual estimate; but this mode cannot be authorized where it must inevitably operate with manifest inequality, as will often be the case with rural or suburban property, or where, from the circumstances, it is clear that it is legally impossible that an apportionment of the cost on this basis can be just or equal, or approximately so, and where injustice must certainly result from its adoption. The same general principle applies to an assessment upon the basis of superficial area; and therefore where an assessment in this mode was authorized to be made, and was made equally upon lands remote from the sewer and only slightly benefited, with no provision securing the right to connect with it, and upon lots fronting on the sewer and greatly benefited, the court considered the mode so arbitrary, so certain to work injustice, so flagrantly opposed to the principle of contribution in proportion to benefits, as to be unconstitutional." 2 Dill. Mun. Corp. (4th Ed.) § 989. So it was held upon like principle by this court that an assessment for a local improvement upon property not at all benefited, although within the taxing district, would be annulled, as it would amount to a taking without due process of law. *Oregon & C. R. Co. v. City of Portland*, 25 Or. 229, 35 Pac. 452, 22 L. R. A. 713. The same idea pervades the judicial utterances of the supreme court of the United States. *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, is a case wherein congress by legislative enactment provided for a comprehensive system of water supply in the District of Columbia, through street mains, and that the assessment for such purpose should be levied upon abutting lots or property at the rate of \$1.25 per foot front. It was objected that the system adopted did not afford the owner an opportunity to be heard upon the question of costs, benefits, or apportionment, and that the assessment was not made upon the basis of benefits to

the property assessed. But the court held (Mr. Justice Shiras announcing the opinion) that none of the objections were well taken. "Our conclusion," it was said, "is that it was competent for congress to create a general system to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection, and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system, or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their bona fide exercise of such a power cannot be reviewed by the courts." The opinion quotes from 2 Dill. Mun. Corp. (4th Ed.) § 752, as follows: "Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property, or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." The Norwood Case distinguishes this by the significant observation that "there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." In *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270 (decided in 1896), it was said: "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners." See, also, *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098. *Walston v. Nevin*, supra, is very similar, as respects the matters in controversy, to the case at bar. The statute prescribing the manner of making assessments is as follows: "When the improvement is the original construction of any street," etc., "such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of the square feet owned by them respectively, except that corner lots * * * shall pay twenty-five per cent. more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square." An assessment made in pursuance of the statute

was attacked as in conflict with the fourteenth amendment of the national constitution, but it was upheld, the court saying: "The statute has been repeatedly before the Kentucky court of appeals, which has sustained it as constitutional and proper legislation; the powers vested thereby in the local government being subjected to the supervision of the courts, where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation,"—citing *Preston v. Roberts*, 12 Bush, 570; *Beck v. Obst*, 12 Bush, 268; *Baptist Church v. McAtee*, 8 Bush, 508. Further on in the opinion the court cites *Davidson v. City of New Orleans*, 96 U. S. 97, 24 L. Ed. 616. After quoting from the opinion of Mr. Justice Miller, it draws the conclusion therefrom "that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. * * * And, whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." The same principle is maintained in the case of *In re Washington Avenue*, 69 Pa. St. 352, where it was held (Mr. Justice Agnew rendering the opinion) that it was incompetent for the legislature to create a district mainly in rural domain for the construction of an artificial road seven miles long, the expense to be paid by assessments upon lands within the district. It was apparent from the very nature of things that the road was a general public benefit, for which a local assessment could not be maintained, and in this respect was like the case of *Sears v. Commissioners*, supra. In the course of the opinion it was said: "Taxation, according to the benefits received, is neither unequal nor unjust, and cannot, therefore, come into conflict with those clauses in the bill of rights which regard as sacred the right of private property. So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that assessment according to the frontage of property on a public street to pay for its opening, grading, and paving is to be justified. As a practical result, in cities and large

towns, the per foot front mode of assessment reaches a just and equal apportionment in most cases. Hence this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute (which it really is) for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. Hence the fairness of the rule of charging benefits by frontage was a conceded point in *Hammitt v. City of Philadelphia*, 65 Pa. St. 155. But this rule, as a practical adjustment of proportional benefits, can apply only to cities and large towns, when the density of population along the street, and the small size of lots, make it a reasonably certain mode of arriving at a true result." See, also, *Cleveland v. Tripp*, 13 R. I. 50; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *Allen v. City of Davenport (Iowa)* 77 N. W. 532.

Since the decision of the *Norwood Case*, assessments by the front-foot rule have been sustained in several of the states of the Union. In the case of *Cass Farm Co. v. City of Detroit (Mich.)* 83 N. W. 108, which involved a street pavement, in the course of the opinion the court quotes from Mr. Justice Cooley in *Sheley v. City of Detroit*, 45 Mich. 431, 8 N. W. 52, as follows: "We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments, and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, municipal law, and on the law of taxation have collected the cases, and have recognized the principle as settled; and, if the question were new in this state, we might think it important to refer to what they say. But the question is not new. It was settled for us thirty years ago." But the court distinguished the case from that of *Norwood v. Baker* on the ground that it was for paving a street, while that was for street-opening purposes, and refused to disturb the rule that had been so long followed in the state. In *Indiana* it was sustained in *Adams v. City of Shelbyville (Ind. Sup.)* 57 N. E. 114. The case involved a stone curbing, where what is known as the "Barrett Law" was upheld. The rule was also sustained in *North Dakota*, in *Webster v. City*

of *Fargo*, 82 N. W. 732 (an assessment for street paving); in *Minnesota*, in *State v. District Court*, 83 N. W. 183, 7 L. R. A. 121 (also for street paving); in *Missouri*, in *Heman v. Allen (Mo. Sup.)* 57 S. W. 559, and *Paving Co. v. French (Mo. Sup.)* 58 S. W. 934 (the former of which involved a sewer assessment, and the latter the pavement of a street); in *New York*, by the court of appeals, in *Conde v. City of Schenectady*, 58 N. E. 130 (a street-paving case); and in *California*, in *Hadley v. Dague*, 62 Pac. 500 (for street improvement). *Texas* has condemned the rule unqualifiedly (*Hutcheson v. Storrie [Tex. Sup.]* 51 S. W. 848, 45 L. R. A. 289), and the federal circuit courts are uniform in their holding to the same purpose (*Fay v. City of Springfield*, 94 Fed. 409; *Loeb v. Trustees*, 91 Fed. 37; *Charles v. City of Marion*, 98 Fed. 166; *Cowley v. City of Spokane*, 99 Fed. 840; *Charles v. City of Marion*, 100 Fed. 538).

But we are inclined to believe that the better doctrine deducible from adjudged cases, including those of the supreme court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners. This must be so, logically and necessarily, in view of the broad latitude accorded the legislature, in its discretion, to prescribe the taxing district, and the manner and method of making the assessment within the district, as it concerns individual owners and proprietors. As the writers say, the authority of the legislature in these respects is almost without limit; yet that there is a limit beyond which it cannot go, all will concede. When, however, it has exercised its legislative discretion, and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority, before the court should undertake to set at naught its declared will. Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury to enforce it. If such an exception arises, as was the case in *Oregon & C. R. Co. v. City of Portland*, supra, the court will not enforce it, but it will hesitate long to condemn the rule because of the exception. The rule upon which the assessment is made in the present case has been upheld in several jurisdictions. *Warren v. Henly*, 31 Iowa, 31; *Gatch v. City of Des Moines*, 63 Iowa, 718, 18 N. W. 310; *Sands v. City of Richmond*, 31 Grat. 571; *White v. People*, 94 Ill. 604. Upon this subject Mr. Dillon observes: "It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in

front of his own property than if the cost were assessed on the basis of frontage or of supposed benefits received. Still it seems to the author difficult to find satisfactory and solid ground on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature, and the other is not." 2 Dill. Mun. Corp. (4th Ed.) § 753.

Now, let us look at the law, and ascertain, if we can, whether it is legally sustainable upon principle. The common council is empowered by the legislature to fix and determine the taxing district. This it did by adopting the resolution of intention to make the improvement. Its action in this regard is legislative in character, and it was not requisite that the legislature should have provided for notice before the council was authorized to act. In prescribing the district, it must be presumed, as would have been the case if the legislature had itself acted directly, that it took into consideration the exceptional benefits that would accrue to the property which it was intended should be charged with the burden, because it could inaugurate or make such an assessment upon no other basis. A notice in the present instance was required by the charter, and given, however, and, while it was for the purpose of acquiring jurisdiction, it gave the property holders an opportunity to appear and file objections to the improvement; and it was perfectly competent for them to raise both the objection that as a district the costs would be in excess of the exceptional benefits to the property involved, and that as it respects individual holders, and between themselves, the assessment would not be proportional to the relative benefits to be derived from the improvement. This is what, in fact, was done by the plaintiffs, as shown by the record, and upon this issue they were accorded a hearing. It was also possible for the common council to determine the matter with reasonable accuracy, as the probable cost and distributive share thereof among the holders was known to them, as was also the locality and situation of the property to be assessed. The manner adopted for the assessment of the costs and expenses against the respective lots is wholly legislative in its nature. The common council is accorded no discretion, but is to make the assessment as directed by the charter. Its function in that respect is clerical, merely, as no choice is lodged with it to vary the rule adopted. Such being the nature of the assessment, no notice or hearing would seem to be requisite under *Parsons v. District of Columbia*, supra. But the charter afforded an opportunity to be heard sufficient under other authorities to support the assessment. There are four several notices required along the way: First, of the proposed improvement; second, inviting proposals for doing the work; third, touching the acceptance of the work; fourth, 10 days' notice of the entry of the assess-

ment in the docket of city liens. Ample opportunity was thus afforded the owners to appear and interpose the constitutional objections, which is all that is sought to be done in this proceeding. The improvement consists of an elevated roadway, ranging from 10 to 15 feet in height throughout, except at one intersection, which was a fill; and it is apparent that the cost of the work was practically uniform throughout, and the assessment against the lots was therefore as nearly proportional according to benefits as could be devised. At least, it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the court in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter fulfills the condition as applied to the present controversy. There is no doubt that the property was benefited in excess of the costs and expenses. These considerations affirm the decree of the court below, and sustain as valid the assessment involved by the proceeding. We have arrived at this conclusion not without some misgivings. But, in view of the fact that the manner of the assessment, as here found to exist, has been followed substantially in its present form since 1864 (see published charter of the city of Portland of 1872); that many miles of street improvements, in various forms, have been made and constructed in pursuance of it; that hundreds of thousands of dollars have been expended under the rule; that numerous titles are depending upon it, and to that extent it has become a rule of property; that tax bills issued in pursuance of it are bought and sold in the market upon the faith of it; that many bonds are outstanding, depending for their validity upon its legality; and that it has time and time again been before the courts of the state and sustained, although not upon the exact point here involved (which was never mooted until after the decision in the *Norwood Case*).—we deem it unwise at this late date to disturb it and set the whole matter at large, as if there had never been a law upon the subject, thus unsettling the financial autonomy of the city government, and perhaps many titles within its domain. It would be far better that the legislature should change the procedure, than that we should nullify it ab initio, with a long train of evils certain to follow in its wake; and to that source of power resort should be had, if an evil exists, for its reparation. Where a law is clearly without the pale of the constitution, state or national, the courts will not hesitate to declare it void. But unless it so appears, or where a reasonable doubt exists, it should be resolved in favor of uphold-

ing the will of the legislature, which department of the government is as much bound by the letter of the constitution as the judiciary, and is always presumed to have acted within its authority.

(33 Or. 143)

WADHAMS & CO. v. INMAN, POULSEN & CO.

(Supreme Court of Oregon. Dec. 17, 1900.)

EQUITABLE ASSIGNMENTS—EVIDENCE—SUFFICIENCY—INSTRUCTIONS.

1. A logging company contracted to sell 500,000 feet of logs to defendant, who agreed to pay the market price therefor, and to make advances amounting to \$700. Shortly after making the contract, the company notified defendant that it intended to draw orders on defendant in favor of certain creditors, to which defendant assented. The company then drew an order in favor of plaintiff for \$420. When the order was given no logs had been delivered, and defendant had advanced \$150 on the contract. Subsequently the logs were delivered, the market value thereof being \$2,000. *Held* sufficient to sustain a finding that at the time the order was given there was a debt to become due in futuro, on which it would operate as an equitable assignment.

2. In determining whether an objection to an instruction is well taken, the substance and effect of the instruction must be considered, and not merely detached portions thereof.

3. That advances were made by a vendee to his vendor after the vendee's acceptance of an order drawn by the vendor in favor of a third person is no defense to an action on the order, unless such advances were made in pursuance of the contract of sale, before such acceptance, or unless the payee knew of such advances, and assented thereto.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Judge.

Action by Wadhams & Co. against Inman, Poulsen & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

This action is brought on the following order, given by the Washougal Land & Logging Company, for a valuable consideration, to the plaintiff: "Order No. 2. September 12, 1894. Messrs. Inman, Poulsen & Co.: Please pay to Wadhams & Co. the sum of \$420 out of the proceeds of logs, when the same is due the Washougal Land & Logging Company. J. A. Buckley, President." Immediately upon the delivery of this order to the plaintiff, it was presented for acceptance, and the defendant thereupon promised to pay it if the logs contracted for should be delivered by the drawer, and made a record thereof in its books. The complaint, in addition to alleging the making and delivery of the order and its subsequent presentment to, and acceptance by, the defendant, avers that, prior to its date, the Washougal Land & Logging Company agreed to sell and deliver, and the defendant to purchase, the logs then in the boom in the Washougal river, in the state of Washington, sufficient for the manufacture of about 500,000 feet of lumber, and all other logs that might be put into such river by the logging

company during the season of 1894-95; that the logging company should give orders for money on the defendant, to be numbered consecutively, and to be paid by such defendant, as numbered, out of the proceeds of the logs, and deducted from the purchase price thereof; that, in compliance with its agreement, the logging company did deliver to the defendant, and the defendant received, logs available for the manufacture of about 550,000 feet of lumber, of the market value of about \$2,000; that the only order drawn by the logging company on the defendant in pursuance of the contract prior in date to the one in favor of the plaintiff was for \$140, in favor of the Columbia River Lumber & Fuel Company; that, after the logs had been delivered to and received by the defendant, the plaintiff demanded payment of the order held by it, but defendant has not paid the same or any part thereof. The answer denies the contract between defendant and the logging company, as set out in the complaint, and alleges that defendant purchased of such company 469,000 feet of logs, which were delivered in the spring of 1895, but that they were not purchased in accordance with such contract, or any other contract, and were fully paid for by the defendant in advances made from time to time to the logging company. Upon the issues thus presented, the cause was tried before a jury, resulting in a verdict in favor of the plaintiff for the face of the order, with interest from the 18th day of May, 1896, and from the judgment thereon the defendant appeals.

H. M. Cake, for appellant. J. N. Teal, for respondent.

BEAN, C. J. (after stating the facts). The brief of the defendant is directed principally to a discussion of the question as to whether its alleged promise to pay the order given by the logging company to the plaintiff is within the statute of frauds, and therefore void. But upon the argument here it was substantially conceded that the order and promise by defendant to pay it if the logs should be delivered are sufficient to operate as an equitable assignment, if at the time of its presentation and such promise there was a debt actually existing, or to become so in futuro, upon which it could operate. This position presents simply a question of fact. The only evidence in the transcript bearing upon the question is the testimony of Mr. Buckley, the president of the logging company, which is to the effect that on or about the 19th of July, 1894, as the president and manager of the logging company, he entered into a contract on behalf of his principal with the defendant to sell and deliver to it about 500,000 feet of logs belonging to the company, and then in the boom, and also such logs as the company might thereafter get out during the year 1894; that under such contract defendant was to

pay the market price for the logs, and to furnish and advance supplies to the logging company, amounting in the aggregate to about \$700, but there was no contract or agreement that it should advance or furnish supplies sufficient to enable the company to conduct its business during the entire season; that shortly after making the contract some of the creditors of the logging company were urging payment of their claims, and he told them as soon as there was any money due on the contract with the defendant he would pay their accounts; that he informed Mr. Poulsen, of the defendant company, that he intended to draw orders upon him in favor of such creditors, and that Mr. Poulsen replied, "Fix them up so we will know which comes first;" that, in accordance with this arrangement, he gave an order on the defendant in favor of Kelly, Dunn & Co., No. 1, for \$150, and one in favor of the plaintiff, No. 2, for \$420, and that he had also given an order in favor of the Columbia River Lumber & Fuel Company for \$140, which was prior in time to either of the two orders referred to; that at the time these orders were given no logs had been delivered, and the defendant had advanced only about \$150 to the logging company; that, in pursuance of this contract, 469,000 feet of logs were delivered to the defendant, and the market value thereof was \$2,030.39. It thus appears that there was evidence from which the jury could properly find that at the time of the presentation of the order to the defendant there was a debt to become due in the future, upon which it could operate as an assignment.

It is next insisted that the court erred in permitting the witness Fried, the representative of the plaintiff, to answer the question, "When Mr. Poulsen told you, Mr. Fried, that he would pay that out of the proceeds of the logs, if they were delivered, did you rely upon that promise of Inman, Poulsen & Co.?" The objection made to this question is that it is an attempt to prove by parol a consideration for the defendant's promise to pay the order, and is void under the statute of frauds. In support of this contention, *Gump v. Halberstadt*, 15 Or. 356, 15 Pac. 467, is cited. But, as we have already said, the question of the statute of frauds was abandoned at the hearing, and so this objection falls to the ground. Besides, it is not apparent how the answer to the question could in any way prejudice or affect the defendant's case.

It is also contended that the court erred in giving the following instruction: "There are various aspects in which this matter can be presented. The defendant, among other things, claims that a bill of sale was made of these logs for a certain sum of money, and that advances were made which left not only no indebtedness from the defendant to

the Washougal Land & Logging Company, but that the indebtedness was upon the other side. In that case, of course, plaintiff could not recover, unless, after the time when this agreement was made, these advances were made, and were not made in pursuance of a binding agreement entered into between the parties before that; that is, if the defendant agreed to pay this account, and there was sufficient money to meet the account, then it would not be any answer to proceed and make advances which would not only wipe out the indebtedness, but leave a balance on the other side, unless it was in pursuance of a contract which had previously been entered into between the parties, and as to which plaintiff had knowledge." The objection to this instruction is particularly directed to the latter clause, and it is argued that by it the court charged the jury that advances made by the defendant, in pursuance of a valid contract entered into between it and the logging company previous to the presentation of the order in favor of the plaintiff, would be no defense unless the plaintiff had knowledge of such contract. In determining whether the objection is well taken, the substance and effect of the instructions taken as a whole must be considered, and not merely some detached portion thereof (*Wellman v. Railway Co.*, 21 Or. 539, 28 Pac. 625); and, when so considered and construed, we think it quite clear that the court did not instruct, or intend to instruct, the jury as contended by the defendant. In the instruction complained of it is said that the defendant, among other things, claims that advances were made to the logging company which left no indebtedness from the defendant to it, and in that case plaintiff could not recover unless such advances were made after the acceptance of the order, and not in pursuance of a binding agreement entered into between the parties prior thereto. Immediately following such instruction the court said: "The defendant could not enter into an agreement to pay this sum of money, then proceed and make advances not foreseen at the time, not contemplated, not within the view of the parties, and say that they should be considered as offsetting the claim of the plaintiff, unless the plaintiff had knowledge and assented to such a proposition." The effect of the instructions, when taken as a whole, is that advances by defendant after the presentation and acceptance of the order would be no defense, unless made (1) in pursuance of an agreement entered into between the original parties before the acceptance of the order, or (2) unless plaintiff knew of such advances and assented thereto. No objection can be made to the law as thus announced. It follows that the judgment of the court below must be affirmed; and it is so ordered.

(37 Or. 479)

STATE ex rel. HERREN v. HALL, County Clerk, et al.¹

(Supreme Court of Oregon. Dec. 17, 1900.)

COUNTY COURT—CONTRACT—COLLECTION OF TAXES.

The county court, made the general financial or business agent of the county, and charged with "the care and management" of its business and funds (Hill's Ann. Laws, § 896, subd. 9), can employ one to assist in collecting delinquent taxes which cannot otherwise be collected, there being no interference with the duties of the sheriff, the tax collector.

Appeal from circuit court, Marion county; R. P. Boise, Judge.

Suit by the state, on the relation of Levi Herren, against W. W. Hall, county clerk of Marion county, and another, for injunction. Decree for relator. Defendants appeal. Reversed.

This is a suit brought by the state, upon the relation of a private individual, to enjoin the delivery by the clerk and payment by the treasurer of Marion county of a warrant ordered to be issued by the county court to George G. Bingham on a claim presented by him for services in the collection of delinquent taxes. The facts are that in September, 1898, the county court employed Mr. Bingham to collect, or assist in the collection of, delinquent taxes for the years 1892, 1893, 1894, 1895, and 1896, and to take charge of the property theretofore bid in by the county judge on delinquent tax sales, and collect the amounts due thereon, or, when advisable, to recover the possession of the property by action or otherwise. At the time of making this contract the delinquent tax rolls for the years named were in the hands of the sheriff, but all collections thereon which could be enforced had been made, and there were no means of collecting any further or additional taxes by legal process. It was Mr. Bingham's duty, under his contract, to ascertain from the tax rolls the names of delinquent taxpayers, to learn their whereabouts, and to notify them personally or by letter of the amount of their taxes, and request them to call at the sheriff's office and pay the same, but he was not in any way authorized to interfere with the duties of that officer. For his services he was to receive 15 per cent. on all taxes collected from the rolls of 1895 and 1896, and 20 per cent. on the amount collected from the other rolls. On January 6, 1899, he was allowed \$180.51 by the county court for the percentage due him on collections made in pursuance of his contract, and a warrant was ordered issued in his favor for the amount thereof. Before its delivery this suit was commenced, and a decree rendered in favor of the plaintiff, and the defendants appeal.

W. M. Ramsey and F. T. Wrightman, for appellants. R. J. Fleming, for respondent.

BEAN, C. J. (after stating the facts). The plaintiff bases its right to relief on the ground that the county court had no power or authority to enter into a contract with Mr. Bingham to collect, or to assist in the collection of, delinquent taxes. The argument is that by law the sheriff is made the tax collector of the county, and the county court cannot interfere with his duties. But, conceding this position, the contract in question does not attempt to interfere with the duties of the sheriff or any other officer. The county court by statute is made the general financial or business agent of the county, charged with "the care and management" of its business and funds (Hill's Ann. Laws, § 896, subd. 9), and to that end it may, unless prohibited by law, adopt such means as in its judgment may be proper or expedient to assist a county officer in the discharge of his duties. Taylor v. Umatilla Co., 6 Or. 394; Burnett v. Markley, 23 Or. 436, 31 Pac. 1050; Martin v. Whitman Co., 1 Wash. St. 533, 20 Pac. 599. And we can see no reason why it may not, if in its judgment necessary, employ some one to collect, or assist in collecting, taxes from delinquent taxpayers from whom payment could not be otherwise enforced. It was so held by the supreme court of Iowa, under a statute conferring upon the boards of county supervisors substantially the same powers as conferred upon the county courts of this state. Wilhelm v. Cedar Co., 50 Iowa, 254. In that case it is said: "Now, because the statute does not expressly authorize the board of supervisors to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty, it does not follow that they may not have the implied power to do so. They have the power 'to represent their respective counties, and to have the care and the management of the property and business of the county in all cases where no other provision is made.' * * * It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question." The decision in Burness v. Multnomah Co., 60 Pac. 1006, 37 Or. —, is in no way in conflict with this conclusion. In that case the contract between the county and Noble was held void because it undertook to interfere with the duties of the county clerk by stipulating how and from what data he should make delinquent tax rolls. But, as already said, in this case there was no attempt to interfere with the duties of the sheriff, but, rather, to give him assistance, in order that something might be realized on delinquent taxes which could not be collected by legal process. It follows that the decree of the court below must be reversed, and the complaint dismissed.

¹ Rehearing denied January 7, 1901.

(38 Or. 135)

GADSBY et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. Dec. 17, 1900.)

LICENSES—VEHICLE TAX—MUNICIPAL CORPORATIONS—TAXATION—ORDINANCE—POLICE POWER.

1. Portland City Charter (Sess. Laws 1898, p. 109, § 1) authorizes taxation not to exceed eight mills on the dollar. Subdivision 1, § 32, requires the council to set apart certain portions of the amount realized by taxation for specified municipal purposes,—among them, for the repair of streets, one-quarter of a mill,—and that no other sum shall be appropriated for the purpose. Section 217 limits the council's expenditures for all purposes annually to the amount of revenues estimated by the auditor at the first meeting of the council in January of each year. Section 159 requires the council to declare whether the cost of a street improvement shall be assessed on adjacent property or paid out of the general fund, and that temporary repairs shall be paid from the sum for street repairs. Section 160 provides that, if the council declares that an improvement shall be paid from the general fund, it shall be deemed a temporary repair, and paid for accordingly. *Held*, that as section 217 and section 32, subd. 1, indicated that the various municipal improvements should be paid for from particular funds, limited in amount, with which construction sections 159 and 160 were not in conflict, since a reading together of such sections showed that the term "general fund," as used in such sections, was merely to distinguish between the cost to be paid by the city and that to be paid by adjacent property. Ordinance No. 11,736, imposing a license tax on vehicles, and providing that the sum so raised should be devoted to the repair of streets, was invalid, as an attempt to collect revenue in excess of the amount authorized; the full eight mills on the city's taxable property having been collected.

2. The ordinance could not be sustained on the ground that it was an exercise of the police power of the city, rather than a measure of taxation.

3. The ordinance was not valid on the ground that the full eight mills on the dollar authorized to be collected had not been collected, by reason of the fact that the assessors had improperly rated the city's taxable property, since his valuations were conclusive.

4. Portland City Ordinance No. 11,733, imposing a tax on vehicles, and providing that the sum so raised should be used for the repair of streets, being invalid, as an attempt to raise revenue for the streets additional to that authorized by the city charter, could not be sustained on the ground that, though invalid in such regard, the revenue might be collected and placed in the general fund; the title of the ordinance declaring its purpose to be to raise revenue for the repair of streets.

Appeal from circuit court, Multnomah county: John B. Cleland, Judge.

Suit by William Gadsby and others against the city of Portland and others. From a judgment in favor of plaintiffs, defendants appeal. *Affirmed*.

J. M. Long, for appellants. W. D. Fen-ton, for respondents.

WOLVERTON, J. This suit was instituted by nearly 200 merchants, firms, and corporations engaged in business of various kinds in the city of Portland, who refused to pay the license fees or taxes required by Ordinance No. 11,736, upon wagons, hacks,

and other vehicles used by them in connection with their business enterprises, and its purpose is to enjoin the collection thereof. The ordinance in question is entitled "An ordinance licensing, taxing and regulating, for the purpose of city revenue, all vehicles of any description whatsoever, in use in, upon or through any of the streets within the limits of the city of Portland." Section 8 thereof provides that "all moneys derived from license taxes under the provisions of this ordinance shall be placed to the credit of the fund for the repair of streets and bridges, and the auditor and treasurer are hereby authorized and directed to make the entries upon the books of both departments in accordance with this section." It is alleged, among other things, and conceded, that the common council of the city of Portland has for the current year caused to be levied the full eight-mill tax, or maximum amount authorized by the city charter, upon all the taxable property, both real and personal, within the city; that this tax has been paid in full by the plaintiffs; and that the common council will be compelled to make a like levy for the ensuing year. The validity of the ordinance is challenged upon the ground that it is an attempt to provide revenue for a specific purpose in excess of the amount authorized by the charter to be expended for such purpose, and constitutes the only question which we deem it necessary to consider at this time, as it is decisive of the case.

The city charter provides (Sess. Laws 1898, p. 109): "The council has power and authority within the city of Portland: (1) To assess, levy and collect taxes for general municipal purposes not to exceed eight mills upon the dollar upon all property, both real and personal, which is taxable by law for city and county purposes. And when the council shall have made their estimate and declared the necessary amount of money to be raised by general taxation, as provided in section 51 of this act, they shall by said ordinance set apart not to exceed one and one half mills for lighting the streets of the city; not to exceed two mills for the fire department of said city and not to exceed one and three-fourth mills for the maintenance of the police department; and shall appropriate and set apart one fourth of one mill on the dollar on the assessed valuation of all property liable to assessment and taxation, which shall constitute funds, respectively, for the fire department, police department, lighting department and the repair of streets and shall not be used for any other purposes whatsoever. And that no part of the said funds so specially appropriated shall be used for any other purpose, nor shall said funds so appropriated be a part of the general fund of the said city, against which fund warrants may be drawn for any other than the maintenance of the specific departments for which the fund is appropriated. And no other or greater sum shall be appropriated for the purpose

above set forth, and the remaining two and one half mills hereby authorized to be levied shall be set apart and used exclusively to pay the interest on the bonded indebtedness of the city of Portland." Section 32, subd.

1. Section 51, alluded to, provides that on or before December 31st of each year the several officers, commissions, or departments of the city shall prepare and file an estimate of the expense for the ensuing year for their respective departments, and that thereupon the council shall, by ordinance, estimate and declare the necessary amount of money to be raised by general taxation, and levy the necessary tax therefor. The charter elsewhere provides (section 71) that the police commissioners shall on the 1st day of January of each year report to the common council the estimated amount of salaries and other necessary expenses of the police department for the ensuing year, and the council shall make an appropriation not to exceed $1\frac{3}{4}$ mills on the dollar upon all taxable property within the city, to meet the expenses of the department, and pay the same monthly as other accounts are paid out of the city treasury. Section 94, that the board of fire commissioners shall, on the 1st day of January of each year, or as soon thereafter as practicable, report to the common council the estimated amount of salaries and other necessary expenses for the fire department for the ensuing year, and that the council shall make an appropriation not exceeding 2 mills on the dollar upon all the taxable property within said city to meet the same, and, to the extent that the tax levied on said property is collected, the sum so raised shall be used to meet the expenses of said department. Section 175, subd. 1, that the amount expended in any one year for lighting the streets of the city shall not exceed $1\frac{1}{2}$ mills upon the dollar of all the taxable property within the city. Section 159, that the common council may repair any street, or any part of a street, and declare by ordinance whether the cost thereof shall be assessed upon the adjacent property or paid out of the general fund of the city. Temporary repairs may be made under the direction of the board of public works whenever the said board deems the same necessary, and the expense thereof shall be paid out of the fund raised for the repair of streets. Section 160, that, if the council declares that a proposed repair shall be made at the cost of the adjacent property, the repair shall be deemed an improvement, and made accordingly; but if it declares that the cost of the same shall be paid out of the general fund, it shall be deemed a temporary repair, be made as the ordinance may provide, and be paid for accordingly. And section 217, that at the first meeting of the common council in the month of January, annually, the auditor shall submit a statement, prepared by him, of the estimated amount of revenues for the current year, to be derived from taxes, licenses, and

all other sources, and the common council shall be limited to its expenditures to be made for all purposes during the year to the aggregate amount of such estimated revenues. At the first meeting in each month the common council shall provide for the payment of all liabilities of the city incurred during the preceding month or at any time prior thereto, excepting that the payment of interest and other fixed charges shall be made as the same matures, in accordance with the terms of the contract under which such payments are to be made. From the estimated revenues hereinbefore mentioned there shall be deducted the annual interest charge against the city, the appropriations made for the police and fire departments, and all other fixed charges, so that no greater proportion of the estimated revenues of the year shall be expended in the payment of the liabilities and obligations of said city in any one month than one-twelfth part of the remainder thereof. No money shall be expended or payment made by the city except in pursuance of a specific appropriation made by ordinance for that purpose, and an ordinance making an appropriation of money must not contain a provision on any other subject. No liability shall be incurred, debt created, or contract made, involving the expenditure of money, approved by the council, during any year, which exceeds the amount of revenues received for that year.

These comprehend about all the sections and clauses of the charter that have any particular bearing upon the present controversy. When construed in *pari materia*, as it was, no doubt, intended they should be, they indicate a legislative purpose of providing four several, separate, and distinct funds, to be set apart and used as thereby directed, which funds are all limited by the charter with a view to keeping the expenditures of the several departments within the bounds thereby prescribed. The remaining $2\frac{1}{2}$ mills constitute the fifth fund, but it does not appear to have been limited and restricted in amount, or otherwise, except that it shall be used exclusively to pay the interest on the bonded indebtedness of the city. As we have seen, subdivision 1, § 32, requires that the common council shall set apart by ordinance not to exceed $1\frac{1}{2}$ mills for lighting streets, 2 mills for the fire department, $1\frac{3}{4}$ mills for the police department, and appropriate and set apart one-fourth of 1 mill on the dollar, which shall constitute a fund for the repair of streets, and that no other or greater sum shall be appropriated for the purposes named. This latter limitation, however, does not apply to the interest fund. Section 71 also requires that an appropriation not exceeding $1\frac{3}{4}$ mills on the dollar shall be made to meet the expenses of the police department, and section 94 contains almost the identical provision with reference to the fire department. Section 175, subd. 1, expressly circumscribes the authority of the common council to the ex-

penditure of $1\frac{1}{4}$ mills on the dollar of the taxable property in any one year for street-lighting purposes; and sections 159 and 160, while not so explicit, are just as effective to confine the expenditure for the repair of streets to one-fourth of 1 mill on the dollar of the taxable property of the city. Section 159 authorizes the council, whenever it deems it expedient, to declare by ordinance whether the cost of a repair shall be paid out of the general fund; but this must be read in the light of the subsequent clause and section 160. By the subsequent clause the expense of temporary repairs shall be paid out of the fund raised for the repair of streets; and, by section 160, if the common council declares that the cost shall be paid out of the general fund, such repair (that is, such as is provided for in section 159) shall be deemed a temporary repair, and be paid for accordingly, which necessarily must be out of the street-repair fund, as the latter clause of section 159 requires the cost of a temporary repair to be paid out of that particular fund. The legislature used the term "general fund," no doubt, to distinguish between the cost to be paid by the adjacent property and that to be paid by the city. If, however, it was determined that it should be paid by the city, then it was the purpose to confine the city to payment out of the fund for repairing streets. Section 217 indicates a purpose, also, to limit the city in the amount of its expenditures to the estimated annual revenues; and it is provided that from such revenues shall be deducted the interest charge, the appropriations for the fire and police departments, and other fixed charges, which evidently includes the funds for lighting and repairing streets. What remains constitutes the general fund of the city, and of this no greater sum than one-twelfth thereof shall be expended in any month. The general scheme, therefore, devised by the legislature for conducting and managing the finances of the city, includes the setting apart, among others, of a specific fund, consisting of one-fourth of one mill on the dollar on all taxable property of the city, for the purpose of repairing streets, which cannot be augmented or increased during the year by the city authorities. In other words, the common council is limited in its expenditures for that purpose to the maximum amount thus prescribed, and any expenditures therefor in excess of the prescribed fund are unauthorized and unwarranted. An appropriation must be made for the specific purpose, and when made the fund becomes available, and not otherwise. Such an appropriation has been made for the current year. Now, the declared purpose of Ordinance No. 11,736 is to raise revenue; and section 8 appropriates the whole of it to the fund for the repair of streets and bridges, thus signifying a clear intention on the part of the common council to supplement or augment the fund for repairing streets beyond the amount as limited by the charter. This,

we have seen, it is not authorized to do, and the ordinance is therefore void and inoperative. It is immaterial whether a license fee imposed under subdivision 3, § 32, of the charter, is referable to the taxing or to the police power of the city. The ordinance in the present case obviously denotes that its specific purpose is to raise revenue, and not only this, but to appropriate the whole of it to a use for which there is a circumscribed fund, which is not permitted to be augmented in any manner when its full quota of the city revenues has been set apart. We only know of the amount of the taxable property of the city by the assessment roll as returned by the officer intrusted with the duty of making the assessment. His valuations are conclusive, and whether he has rated the property at 60 or 100 per cent. of its cash value we cannot inquire, but must presume that he has performed his duty and rated it at its true value.

It is argued that if section 8 of the ordinance be invalid, as making an appropriation, yet that the ordinance in all other respects may be adjudged to be valid, and that the revenue accruing under it would go into the general fund, and be otherwise disposed of as the city may direct. But the very purpose of the ordinance is to raise revenue for the particular fund named in section 8 thereof, and to so hold would be to subvert the specific intention of the common council, which we cannot do, under any rules of interpretation known to the law. In support of this construction of the charter and the ordinance in question, see *Chamberlain v. City of Tampa*, 40 Fla. 74, 23 South. 572; *Black v. Common Council*, 119 Mich. 571, 78 N. W. 660. It follows that there must be an affirmation of the decree of the court below, and it is so ordered.

(38 Or. 560)

WILLIAMSON et al. v. NORTH PACIFIC LUMBER CO.

(Supreme Court of Oregon. Dec. 17, 1900.)

AGENCY—CONSTRUCTION—QUESTION FOR COURT.

1. Where the conversation between the parties, so far as it related to the authority of plaintiffs to act for defendant in settling a controversy, was merged in a letter from defendant to plaintiffs, so that the authority must be determined therefrom, its construction is for the court, though it is to be construed in connection not only with a prior letter, but with defendant's testimony as to how a clause happened to be added to the letter, and with the surrounding circumstances.

2. Where defendant sold lumber to plaintiffs in California to be shipped to customers in Chile, where all plaintiffs' business was done, to defendant's knowledge, through an allied firm there located, and defendant's contract of sale provided that, in the event of any dispute arising at the port of discharge in regard to quality, it should appoint a representative on the spot to settle it, but it refused to do so on a dispute arising, the statement to plaintiffs, "We will be satisfied with any settlement you may make for us in adjusting the matter at

point of destination," is authority to settle the matter through the allied firm in Chile.

Appeal from circuit court, Multnomah county; Arthur L. Frazer, Judge.

Action by Stephen Williamson and others, partners as Balfour, Guthrie & Co., against the North Pacific Lumber Company, a corporation. Judgment for defendant. Plaintiffs appeal. Reversed.

This is an action for reclamation on two cargoes of lumber purchased by the plaintiffs from the defendant, and shipped to ports on the west coast of South America. The defendant is a corporation engaged in the manufacture and sale of lumber at Portland. Plaintiffs are merchants doing business there and at other Pacific Coast points, and are associated in business with the firm of Williamson, Balfour & Co. at Valparaiso, Chile. The Valparaiso firm receives orders in Chile for Oregon and Washington lumber, and sends them to the plaintiffs to be filled. The latter purchase the lumber from local manufacturers and ship it to Chile, where it is delivered to the buyer, and the profit and loss of the venture shared by the two companies. In February and March, 1896, the plaintiffs, to fill orders thus received, contracted with the defendant for two cargoes of lumber, in accordance with certain specifications, to be shipped on the ships *Airlie* and *Ballochmyle* to ports on the coast of Chile. Each of the contracts contains the stipulation that, "in event of any dispute arising at port of discharge in regard to quality, sellers to appoint a representative on the spot to attend to and settle the same." After the *Airlie* had been loaded, it was discovered that by mistake some 40,000 feet of 4x12 lumber in excess of the amount called for by the specifications was included in her cargo. The defendant's attention was called to the matter, and it agreed that, if plaintiffs would take the excess, it "would stand good for anything that might crop up regarding it," or do "whatever was right in the matter." The cargo was thereupon accepted and paid for by the plaintiffs, but without inspection at Portland. The *Airlie* sailed in April, and reached her first port of discharge some time in June. On August 4th plaintiffs received from the Chillan firm information in regard to some difficulty about the stowage of her cargo, and immediately transmitted the same to defendant, with the following letter: "Portland, Or., August 4, 1896. North Pacific Lumber Co., City—Dear Sirs: We inclose herewith some correspondence from Valparaiso in regard to difficulty with the *Airlie* cargo, and will be glad to hear what you have to say on the subject. Yours, truly, Balfour, Guthrie & Co." The *Airlie*, having discharged a part of her cargo at Coquimbo, arrived at Iquique, her final port of discharge, the latter part of July. When the 4x12 lumber was tendered to the parties who had ordered it, they declined to take the 40,000 feet of excess, because it was

inferior in quality and not ordered. The *Ballochmyle* was loaded and left Portland about the 23d of May, and discharged the upper assortment of her cargo at Antofagasta in August, but the buyers refused to accept it because it did not conform in quality to that ordered. When the Valparaiso firm was informed of the controversy at the port of discharge concerning the quality of the two cargoes, it immediately cabled the plaintiffs to that effect and asked for instructions. The cablegram was received at Portland on August 20th, and Mr. Burns, the manager for the plaintiffs, immediately sent for the defendant's manager, Mr. Williams, but he was out of town at the time. Upon his return, on the 22d of August, he called at plaintiffs' office. Mr. Burns informed him of the intelligence plaintiffs had received from Chile as to the rejection of the lumber because of its inferior quality, and suggested that defendant send an agent down to settle the matter, or that the American consul or some other local person be appointed by it for that purpose. Mr. Williams declined to do this, saying it was impracticable, and, as plaintiffs contend, authorized them to adjust the matter. After Williams left the office, Burns telephoned to him, saying that he would like to have plaintiffs' authority in writing, and thereupon Williams sent to the plaintiffs the following letter: "Portland, Or., August 22, 1896. Messrs. Balfour, Guthrie & Co., City—Gentlemen: In reply to yours of the 4th inst., with correspondence relating to the *Airlie* cargo, referring to the manner in which it was loaded, will say that the specifications, as we received them, stated that the cargo was to be loaded in two lots, one underneath and one on top, and the lumber was furnished to the captain of the vessel in that way. In the portion to go underneath was some 140 M. feet, 12x12, with other lumber, some considerable of which was 40 feet long. He was not able to conveniently load such timber in the bottom of the vessel, and therefore loaded it between decks and on top. The writer on one occasion went aboard the vessel to see how the cargo was being loaded, but was informed that we had nothing whatever to do with the stowage of the vessel, that they knew nothing about there being two divisions of cargo, and that they did their business through Balfour, Guthrie & Company. However, we are satisfied that the vessel could have been unloaded properly at point of destination, as the lumber he had on deck was mostly 12x12, which could have remained in the vessel until the first division was discharged. Will say further that the cargoes of the *Airlie* and *Ballochmyle* were tallied by our regular tally man, a man of long experience, who says the lumber was all of first-class quality in every particular. However, we will be satisfied with any settlement you may make for us in adjusting the matter at point of destination. Yours, truly, North Pacific Lumber Co., E. T. Williams, Vice-

Pres't." The plaintiffs cabled the Chillan firm to settle the dispute about the lumber as best they could, and on the 24th of November received the reports of the adjustment of the controversy, together with the original reports of the surveyors of the cargoes and of an expert called in to assist them, and immediately forwarded copies thereof to the defendant, with a demand for a reclamation of \$325.73 on the shipment of the Airlie and \$3,087.15 by the Ballochmyle. The defendant refused to pay the amount demanded, putting its refusal on the ground that the lumber purchased from it by the plaintiffs was "as good as any lumber that your firm has ever purchased from us, and equal to any grade of merchantable lumber on the Pacific Coast," and hence this action. It was originally brought in the name of the plaintiffs, but afterwards the complaint was amended by making the Chillan firm a joint plaintiff, and inserting an allegation that it was a partner in the venture. These amendments were subsequently stricken out on motion of the defendant, and the cause went to trial on an answer consisting of general denials only, resulting in a mistrial. Defendant was afterwards permitted to file an amended answer, which purports to set up fraud in the settlement made by the Chillan house. The new matter in the amended answer was put in issue by a reply, and on the second trial a verdict and judgment were rendered in favor of the defendant, from which the plaintiffs prosecute this appeal, assigning as error the giving and refusal of certain instructions by the trial court.

W. D. Fenton and F. D. Chamberlain, for appellants. Thos. N. Strong, for respondent.

BEAN, C. J. (after stating the facts). Although the complaint alleges and the answer denies that the lumber rejected by plaintiffs' buyers in Chile was inferior in quality and did not conform to the contract between plaintiffs and defendant, no evidence was offered by the plaintiffs and none admitted on behalf of the defendant in relation to the matter. The plaintiffs relied entirely upon the fact that their buyers had objected to the quality of the lumber at the port of discharge, and that defendant had authorized them to appoint the Chillan firm to settle and adjust such dispute. In other words, the position of the plaintiffs is that the agreement between them and the defendant in reference to the settlement of the dispute, and the subsequent action had thereon, was in fact a submission to arbitration and an award, and should be so treated. This was the view of the trial court; hence it excluded the testimony offered by the defendant showing or tending to show that the lumber was in fact of the quality specified in its contract with the plaintiffs. With this general view of the position of the parties, and the theory upon which the cause was tried in

the court below, we proceed to notice such of the assignments of error as we deem material.

The first and most important one is the action of the court in giving the following instruction to the jury: "In construing the letter written August 4th by Balfour, Guthrie & Co., and its answer upon August 22d, they must be construed together, and in the light of all the surrounding circumstances." The principal objection to this instruction is that it left the construction of the letter of August 22d to the jury, when it should have been construed by the court as a matter of law. The question as to whether the defendant authorized and empowered the plaintiffs to settle for it the dispute in regard to the lumber at the port of discharge is an important point in the case, and plaintiffs' authority in the premises is contained in the letter of August 22d. The previous oral conversation between Burns and Williams was merged in the writing, so far as it related to the power or authority of the plaintiffs to act for the defendant in settling the controversy. It is admitted by Williams, and he so testifies, that, after he returned to his office, at Burns' request and for the purpose of putting plaintiffs' authority in writing, he added the clause to the letter of August 22d in reference to the quality of the cargoes of the Airlie and the Ballochmyle, and the statement that "we will be satisfied with any settlement you may make for us in adjusting the matter at point of destination." So that the question of plaintiffs' authority must be determined from the letter, and its construction, like that of any other writing, was a question for the court, and not for the jury: 11 Enc. Pl. & Prac. 78 et seq.; Long Creek Bldg. Ass'n v. State Ins. Co., 29 Or. 569, 46 Pac. 366; Goddard v. Foster, 17 Wall. 123, 21 L. Ed. 589; Battershall v. Stephens, 34 Mich. 68. By the charge of the court, however, that question was submitted to the jury, and they were left to construe the letter, and to determine, as a matter of fact, whether by it the defendant authorized the plaintiffs to settle the controversy about the cargoes of the two vessels. The letter of August 22d should, of course, be construed in connection with that of August 4th, Williams' testimony as to how the latter clause came to be added, and the surrounding circumstances; and, when so construed, it seems to us clearly to authorize the plaintiffs, through the Chillan firm, to settle or adjust the matter, and, if necessary, to appoint agents at the port of discharge to act for them in the premises. It is argued that the letter authorized the plaintiffs only to settle the matter, and that they could not delegate their authority to some one in Chile, although they might employ persons there to ascertain the facts and report to them. But it must be remembered that the controversy as to the quality of the lumber, to which the letter refers, was at

the port of discharge, and not in Portland, and that under defendant's contract it was bound to appoint a representative on the spot to attend to and settle the same. It was this contract that Burns was insisting that Williams should comply with by sending an agent or representative to Chile, or by appointing some person there to act for defendant. Williams declined to do so, and agreed to be satisfied with any settlement that plaintiffs might make "at point of destination." He knew at the time that plaintiffs had an allied house in Chile, and that all of their business on that coast was done through such house. He must therefore necessarily have intended that the settlement should be effected in the same way.

It is next insisted that the court erred in refusing to withdraw from the jury the question of fraud. It is urged in support of this position that the allegations of the answer are insufficient to constitute the defense of fraud, and that there is no proof if the allegations had been sufficient. As the case must be reversed and remanded for a new trial, defects in the answer, if any, may be cured by amendment; and, as the evidence may be different on another trial from that contained in the record, we shall pass this question without deciding.

There are several other questions made in the briefs and argued by counsel, but as they are closely allied to the principal one discussed, and may not arise on another trial, we shall refrain from discussing them at this time.

(10 Kan. App. 523)

SMITH v. BROOKING et al.

(Court of Appeals of Kansas, Southern Department, C. D. Dec. 15, 1900.)

ATTACHMENT—INDEMNIFYING BOND—CONSTRUCTION.

The facts stated in the opinion, and which were alleged in the petition, are *held* to present a case where the language of the bond sued upon should be interpreted in the light of all the surrounding facts as they existed at the time of its execution and delivery.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. W. Shinn, Judge.

Action by J. A. Smith against S. L. Brooking and others. A demurrer to the complaint by Edwin Tucker was sustained. Judgment entered for him, and plaintiff brings error. Reversed.

A. L. Redden and James Shultz, for plaintiff in error. W. S. Marlin, for defendant in error Edwin Tucker.

MILTON, J. This action was brought by the plaintiff in error to recover upon an indemnifying bond given by the defendants to the plaintiff in an attachment action brought in the district court of Greenwood county, Kan., by the Missouri, Kansas & Texas Live-Stock Commission Company against William

Freeman, M. J. Herrick, and D. H. Herrick. The defendant Tucker filed a demurrer, alleging failure of the petition to state a cause of action, and the demurrer was sustained, and a judgment for costs in favor of Tucker was entered. The petition alleged that the sheriff required an indemnifying bond for the reason that the property about to be levied upon was claimed by one W. H. Freeman and by the firm of Willis & Erickson, and that the levy was made upon the promise of the attaching creditor to execute and deliver the required bond; that the levy was made on July 11, 1895, and that on October 2d or 3d thereafter the plaintiff herein demanded the bond of indemnity which the commission company had theretofore agreed to deliver to him, and that thereupon the bond sued upon was given; that a few days before the execution and delivery of the bond the defendant S. L. Brooking, as president of the commission company, without the knowledge or consent of plaintiff, dispossessed the plaintiff of the attached property, to wit, 288 head of cattle, and appropriated the same to the use of that company; and that Brooking in fact sold the cattle, making it impossible for the plaintiff to repossess himself thereof, which he sought to do by demanding the same from Brooking. It was also alleged that after the bond was given the commission company dismissed the attachment suit. The petition further alleged that on the 20th day of February, 1896, William Freeman, the principal defendant in the attachment action, sued this plaintiff in the district court of Greenwood county to recover the value of 188 head of the attached cattle, and thereafter obtained a judgment against this plaintiff, which, with costs, amounted to \$778.62, and which judgment this plaintiff was compelled to pay. It was also alleged that the plaintiff notified the defendants herein of the pendency of the said action against him; that they employed counsel to defend therein for him. The petition contains an allegation to the effect that it was the understanding and intention of the obligors on the bond to secure the plaintiff "against any loss or damage that he might sustain or suffer in case the attachment should be discharged or become void for any reason, and he be unable to return said attached property to the persons lawfully entitled to the same, on account of the acts or proceedings concerning said property, by the plaintiff in the action in which said order of attachment issued, to wit, the Missouri, Kansas & Texas Live-Stock Commission Company, or any other persons." The bond, with the caption omitted, reads: "We, the undersigned principal and sureties, bind ourselves hereby to pay to J. A. Smith, as sheriff, all damages and costs that he may sustain as such sheriff by the reason of the detention or sale of the property levied on in this suit by virtue of a certain writ of attachment herein, and now claimed as the property of W. H. Freeman, in an ac-

tion against said sheriff by said W. H. Freeman, in said court, for conversion, and indemnifying said sheriff for release of said levy against all persons whomsoever. S. L. Brooking, President M., K. & T. L. S. Com. Co. S. L. Brooking. Edwin Tucker." It is contended by counsel for plaintiff in error that the bond must be interpreted in the light of the surrounding facts existing at the time of its execution and delivery, and the following cases are cited in support of the contention: *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Bank v. Brigham*, 61 Kan. 727, 60 Pac. 754. In the latter case the first paragraph of the syllabus reads: "The real nature and object of an instrument of writing, which, on its face, appears doubtful or ambiguous in meaning, may be shown by evidence of the inducing causes to the making of it, and of the facts and circumstances surrounding the transaction and involving the parties in their execution of the paper." Under the allegations of the petition the only language of the bond requiring consideration reads, "and indemnifying said sheriff for release of said levy against all persons whomsoever." It is, in effect, alleged that the bond was given at a time when the parties to it were well aware that by the act of Brooking the attached property had passed entirely from the control of the sheriff, and the language of the bond respecting the release of the levy might have been employed in contemplation of the early dismissal of the action by the plaintiff therein on account of such fact. In the state of facts set forth in the petition, the defendant, William Freeman, had a right to demand from the sheriff a return of the attached property upon the dismissal of the action, and a right to recover damages if the same should not be delivered. The fact that the defendants employed counsel to defend for the plaintiff herein when he was sued by William Freeman for the recovery of the value of part of the attached cattle indicates a recognition at that time of their responsibility under the bond. Whether or not the light of all "the facts and circumstances surrounding the transaction and involving the parties in their execution of the paper" would disclose a right of recovery on the part of the plaintiff is a question which ought to be determined by a trial of the action. We think the demurrer to the petition should have been overruled. The judgment of the district court will be reversed, and the cause remanded, with instructions to overrule the demurrer to the petition.

(10 Kan. App. 527)

PARKER v. GILMORE et al.

(Court of Appeals of Kansas, Southern Department, C. D. Dec. 15, 1900.)

APPEAL—EVIDENCE—ACTION ON NOTE.

1. Where special findings, necessary to the support of the general verdict, are contrary to the evidence, the verdict cannot be upheld.

2. The mere possession of a negotiable instrument, produced in evidence by the indorsee, imports prima facie that he acquired it bona fide, for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity, and that he is the owner thereof, and entitled to recover the full amount against all prior parties.

(Syllabus by the Court.)

Error from district court, Sedgwick county; D. M. Dale, Judge.

Action by Walter Parker against Sheridan Gilmore and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. V. Daugherty, for plaintiff in error. Amidon & Conly, for defendants in error.

MILTON, J. The plaintiff in error, as plaintiff below, sought by replevin to recover the possession of a pacing stallion, called "Wichita Tom," which he claimed under a chattel mortgage, and which had been seized by Rufus Cone, as sheriff of Sedgwick county, Kan., under an order of attachment issued in an action brought in that county by Sheridan Gilmore against Robert Reed. The mortgage was executed on June 18, 1895, in Wichita county, Tex., by A. W. Reed, a resident of that county, and was delivered by him to the City National Bank of Wichita Falls, Tex., to secure the payment of a promissory note given that day by Reed to the bank for the sum of \$238.48, and payable 12 months after its date. The mortgage stated that the note was given as a renewal of a note executed by Reed to the plaintiff in error on July 17, 1891, and that the last-named note was secured by a chattel mortgage upon the said stallion. The mortgage in the present action was duly filed for record on the next day after its execution, and the note secured thereby was subsequently duly indorsed and delivered to the plaintiff. The mortgage was in the form of a trust deed, one Frank Dorsey being the trustee, and the Bank of Wichita Falls the beneficiary. The mortgage provided that, if for any reason the trustee should be unwilling or unable to perform the duties therein conferred upon him, then the holder of the note might appoint a substitute. Dorsey died before the commencement of this action, and no substitute was appointed by the plaintiff, the holder of the note. The claim of the defendant Gilmore, upon which his attachment action was based, was for money advanced for entrance fees at various races where the mortgaged horse was entered, and for the expenses of transporting the horse from place to place. At the time the horse was mortgaged it was in Hill county, Tex., in charge of Robert Reed, a brother of the mortgagor, and the arrangement whereby Gilmore furnished the money was made between him and Robert Reed, and probably two or three months after the filing of the mortgage. It was agreed between Robert Reed and Gilmore that the lat-

ter was to be reimbursed from the winnings made by the horse, if any, and that Gilmore was to retain possession and control of the horse until he should be repaid. It does not appear that either the plaintiff or the mortgagor was aware of, or participated in any way in, the said arrangement between Robert Reed and Gilmore. The latter in December, 1895, shipped the horse to Wichita, Kan., and shortly afterwards instituted his attachment suit. Several verdicts were returned in favor of the defendants Chandler and Maulsby, and jointly in favor of the defendants Gilmore and Cone; the latter verdict being in the alternative, and fixing the amount of Gilmore's recovery at \$418.40, in case of the return of the property, which had been delivered to the plaintiff at the commencement of the action, could not be had. There was a verdict also for the plaintiff as against the defendant A. W. Reed. The judgment of the trial court followed the verdict in favor of Gilmore and Cone, and adjudged the costs of the action against the plaintiff. No judgment was rendered upon the other verdicts. The court instructed the jury to find in favor of the plaintiff as against A. W. Reed, since the latter's answer admitted all of the allegations of the petition.

The defendant A. W. Reed has not been served with a summons in error. A motion to dismiss the proceedings in error has been filed, one of the grounds being that Reed is a necessary party to such proceedings. As already stated, he is not named as a party to the judgment rendered in the action. The judgment may be somewhat irregular in this respect, but is not complained of by the defendants in error. We have examined the other grounds of the motion to dismiss, and think it must be overruled.

Counsel for plaintiff in error contend that the jury made two material special findings, which are entirely contrary to the evidence. The findings complained of are that A. W. Reed was not the owner of the horse at the time of the execution of the note and mortgage upon which the plaintiff's action rests, and that there was nothing due on the said note at the time of the trial. The record shows that under the law of Texas and under the terms of the mortgage the note became immediately due upon the removal of the mortgaged property from that state. There was positive testimony that A. W. Reed owned the horse at the time he gave the mortgage, and that the horse had been in his possession as its owner for several years prior thereto. The chattel mortgage states that the same horse was mortgaged by A. W. Reed in 1891, to secure the promissory note held by the plaintiff in error, and that such mortgage was duly recorded. The defendant Gilmore did not obtain possession of the horse until October 21, 1895, about four months after the chattel mortgage was duly recorded. It is true that there is testimony

showing that, some weeks or months after the mortgage was recorded, Robert Reed, who was in possession of the horse, claimed to own it. This evidence does not tend to negative the testimony that A. W. Reed was the owner of the horse at the time the mortgage was given. The finding of the jury is clearly contrary to the evidence.

The finding that nothing was due on the note held by the plaintiff is complained of. The answer of A. W. Reed admitted the allegation of the petition, which alleged that the note given by him, and owned by the plaintiff, was entirely unpaid, and the court instructed the jury to find for the plaintiff under such admission, which was accordingly done. The note, by its terms, was not due for several months after this action was commenced, and it was not claimed by the plaintiff that it was due except by reason of the terms of the mortgage, which, as already stated, provided that the note should become due if the property were removed from the state of Texas. There was no positive testimony to the effect that the note was still unpaid, or that it was paid. It was alleged and proven that before its maturity the note was indorsed and delivered to the plaintiff by the proper officer of the City National Bank of Wichita Falls. "The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie that he acquired it bona fide for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity, and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument, and proof that it is genuine (where, indeed, such proof is necessary), prima facie establishes his case, and he may there rest it." Daniel, Neg. Inst. (4th Ed.) § 812. We hold that this special finding was not warranted by the law or the facts. Since the two special findings under consideration were clearly improper, the court should have set aside the general verdict, and granted a new trial upon the motion therefor filed by the plaintiff. *Railway Co. v. Fray*, 31 Kan. 739, 3 Pac. 550; *Railway Co. v. Duncan*, 40 Kan. 503, 20 Pac. 195; *Railroad Co. v. Long*, 46 Kan. 260, 26 Pac. 682. The judgment of the district court will be reversed, and the cause remanded for a new trial.

(10 Kan. App. 532)

HUDSON v. MILLER et al.

(Court of Appeals of Kansas, Southern Department, C. D. Dec. 15, 1900.)

TAXATION—INJUNCTION—EXEMPTIONS.

1. "An injunction cannot be maintained to prevent the collection of a tax which the plaintiff justly ought to pay, for mere irregularities in the proceedings of the assessor or other taxing officer. *Dutton v. Bank*, 36 Pac. 719, 53 Kan. 440.

2. "Where property is otherwise legally taxa-

ble under the revenue laws of the state, it will not be exempt from such taxation, in the absence of a statute, because it has been returned for assessment and taxation in the same year in another state."

3. A nonresident's cattle, kept in this state from February 10th until the latter part of July, 1896, held taxable in the county where kept.

(Syllabus by the Court.)

Error from district court, Barber county; G. W. McKay, Judge.

Action by N. S. Hudson against J. A. Miller and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Geo. E. McMahon, for plaintiff in error.
A. L. Herr, for defendants in error.

MILTON, J. This action was brought by the plaintiff in error to enjoin the execution of a tax warrant issued by J. C. Jones, as treasurer of Barber county, to J. A. Miller, as sheriff of that county, and levied by the latter on cattle belonging to the plaintiff and A. H. Tandy, partners as Hudson & Tandy. The assessment on which the tax was levied was made by the assessor of Sun City township, in Barber county, in 1896. The temporary injunction granted at the commencement of the action was, on a trial by the court, dissolved, and a judgment for costs was entered in favor of the defendants. The plaintiff claimed to have listed the property for taxation on February 2, 1896, in Oklahoma territory, that the same was taxed on such assessment, and that the tax was paid prior to the commencement of this action. The cattle, numbering about 600 head, were brought into Barber county on February 10, 1896, to be fed with grain preparatory to marketing them, and were all shipped out by the last day of the following July. It is claimed that the cattle were not taxable in Kansas, because they were brought in to be held only temporarily, and that in no event were they taxable in Sun City township. They were in fact listed in Lake City township, in Barber county, by an employé of the plaintiff. The county commissioners afterwards held this assessment to be erroneous, for the reason that the property was temporarily located in Barber county on March 1, 1896, and was assessed and taxed in Oklahoma territory for that year. Whether the cattle were usually kept in Sun City township or in Lake City township is a question upon which the evidence is conflicting. The general finding, therefore, of the court in favor of the defendants, includes a finding that the property was usually kept in the former township.

The statute provides that all personal property shall be listed and taxed each year in the township, school district, or city in which the property was located on the 1st day of March, and that, where the owner of taxable live stock lives outside the limits of a city, such property shall be taxed in the township where the owner resides. It was held in the case of McCandless v. Carlisle, 32 Kan. 367, 4

Pac. 623, that, where a nonresident has taxable live stock in this state, the same is taxable where it is kept. While it appears that neither of the two men who had the principal charge of the plaintiff's cattle in the spring of 1896 was requested or required by the assessor of Sun City township to list the same for taxation, it is possible that another person, apparently in charge, may have been called upon by the assessor of that township to list the cattle, and that he refused, or at least neglected, to do so. The presumption that the assessor performed his duty does not appear to be overthrown by the evidence before us.

At most, however, the assessment was merely irregular. In the case of Association v. Hill, 51 Kan. 644, 33 Pac. 300, the secretary of a corporation on March 11th made and delivered to the assessor a sworn statement of the personal property belonging to the corporation subject to taxation. The assessor on April 30th thereafter, without notice to any of the officers or agents of the corporation, made another and different statement, and returned the same to the county clerk, and the tax sought to be enjoined was based on the latter assessment. The court said: "It may be conceded, for the purposes of this case, that the proceedings of the assessor were irregular and unauthorized, but this is an equitable action, and must be covered by equitable rules. * * * It is well settled in this state that injunction cannot be maintained to restrain the collection of taxes, which the plaintiff justly ought to pay, because of errors or irregularities in the proceedings of the taxing officer." See, also, Dutton v. Bank, 53 Kan. 440, 452, 36 Pac. 719; Ryan v. Commissioners, 30 Kan. 185, 2 Pac. 156.

We think the property was taxable in Barber county, Kan., notwithstanding it was assessed for taxation in the territory of Oklahoma. As the case stood at the time of the trial, the assessment made in Lake City township had been set aside. The tax based on the assessment made in Sun City township was not affected by the action of the county commissioners of Barber county respecting the assessment made in Lake City township. In the case of Washburn College v. Commissioners of Shawnee County, 8 Kan. 344, it is said: "The obligation to pay taxes is co-extensive with the protection received from the state." The claim of counsel that the present tax cannot be sustained, since thereby the plaintiff's property was twice subjected to taxation for the year 1896, is untenable. In the case of Kelley v. Rhoads (Wyo.) 51 Pac. 593, 39 L. R. A. 594, a paragraph of the syllabus reads: "Where property is otherwise legally taxable under the revenue laws of the state, it will not be exempt from such taxation, in the absence of a statute, because it has been returned for assessment and taxation for the same year in another state." Among the numerous cases declar-

ing the same doctrine are the following: *C. N. Nelson Lumber Co. v. Town of Lorraine* (O. C.) 22 Fed. 54; *Cattle Co. v. Williamson* (Ok.) 49 Pac. 937; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715. In view of the foregoing, the judgment of the district court upholding the tax in question will be affirmed.

(10 Kan. App. 550)

CONKLIN v. LORIMER et al.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 12, 1900.)

LIMITATIONS—EXTENSION OF TIME OF PAYMENT—CONSIDERATION.

L., the mortgagee, entered into an agreement with M. and B., grantees of the mortgagor, to extend the time of payment of a past-due note and mortgage for five years. It does not appear that M. and B. agreed to pay a greater rate of interest than was provided for by the terms of the original agreement, or that any advance payment of interest was made, or any act done which would constitute a sufficient consideration, or that M. and B., or either of them, paid any interest on the debt after the making of the extension agreement. More than six years after the note and mortgage became due, by their terms, this action was brought. *Held*, that the extension agreement, being without consideration, was ineffectual to prevent the running of the statute of limitations, and that the cause was barred.

(Syllabus by the Court.)

Error from district court, Reno county; M. R. Simpson, Judge.

Action by J. C. Lorimer, trustee, and others, against J. E. Conklin. Judgment for plaintiffs. Defendant brings error. Reversed.

W. G. Fairchild, for plaintiff in error. F. W. Casner, for defendants in error.

SCHOONOVER, J. This action was brought in the district court of Reno county to foreclose a mortgage given by William Stout on certain real estate, to secure his note of \$600. Prior to the maturity of the note, Stout sold the mortgaged property to Frank McKee and C. Bloom, who assumed and agreed to pay the mortgage indebtedness as part of the purchase price. After the note became due, McKee and Bloom entered into an agreement by which the then owner and holder of the note agreed to extend the time of payment five years; McKee and Bloom agreeing to pay interest according to the terms of certain extension coupon notes. A short time after the execution of the extension agreement McKee and Bloom sold the property in question to the National Bank of Commerce. The bank held the property for over five years, and then sold and conveyed it to J. E. Conklin, plaintiff in error. This sale and conveyance occurred more than 11 years after the execution of the note and mortgage, and more than 6 years after it became due by its terms. Nothing appears in the record showing that any interest payment was made on the mortgage after the sale by McKee and Bloom. A short time after plaintiff in error purchased the property this action was brought. Plain-

tiff in error appeared and answered, pleading the statute of limitations. The case was tried to the court, who found, among other things, that the mortgage was a valid, subsisting lien upon the property as to the owner, J. E. Conklin; that McKee and Bloom were liable upon their contract of assumption; and that the action was barred as to Stout, the mortgagor. Judgment was entered upon the findings, and Conklin brings the case here. McKee and Bloom have also filed a cross petition in error, complaining of the judgment, and asking that the cause be reversed as to them.

As we view the case, the only question to be determined is, was the extension agreement, executed at the request of McKee and Bloom, sufficient to prevent the running of the statute of limitations? "If the time of payment of a mortgage be extended, the right to foreclose is, of course, suspended until the expiration of the extended term." 2 Jones, *Mortg.* § 1190. The statute would therefore not begin to run until the expiration of the extended term. But, in order to prevent the statute from running, the agreement must be founded on a good consideration, and be otherwise valid. Jones, *Mortg.* supra. By the terms of the extension agreement, McKee and Bloom were to "keep the loan for a term of five years, and to pay interest upon the principal of said debt according to the tenor and effect of certain extension coupon notes." In the case of *Holmes v. Boyd*, 90 Ind. 332, the court held that "neither the payment of interest already accrued, nor a promise to pay such interest as may thereafter lawfully accrue upon a note, will afford a sufficient consideration for an agreement to extend the time of payment of the note." There is nothing in the record to show what rate of interest was to be paid upon the note during the extended term. Reference is made in the extension agreement to certain extension coupon notes, but these notes do not appear in the record. We concede that, if McKee and Bloom had agreed to pay a higher rate of interest during the extended term than that named in the note, the amount of interest in excess of the amount named in the note would constitute a sufficient consideration, but there is nothing to show that an increased rate was agreed upon. Plaintiff alleges in his petition that by its terms the note sued upon was to bear 6 per cent. interest, payable semi-annually until maturity, after which it should bear interest at the rate of 12 per cent. per annum. The note itself does not state the rate of interest, but reference is made in the note to certain interest coupons thereto attached. These coupons do not appear in the record, but we suppose that they were made for the amount of interest that would be due semi-annually at 6 per cent., accepting as true the allegation of the petition that 6 per cent. was the rate agreed upon. Plaintiff alleged that coupon No. 10, the last of the coupons claimed to have been executed under the ex-

tension agreement, had not been paid. Judgment was asked for for the amount of the principal, with interest at the rate of 12 per cent. from date of maturity to date of judgment, and for the further sum of \$18 interest from January 1, 1896, to July 1, 1896, being the last six months of the extended term. The interest on \$600 for six months at 6 per cent. amounts to \$18. It therefore appears that the rate of interest for the extended term was 6 per cent., the same rate provided for in the original agreement. Thus, from plaintiff's own allegations, it appears that McKee and Bloom did not agree to pay a greater rate of interest than was provided for in the original agreement. There is no evidence to show that they assumed any new obligation, made advance payments of interest, or did any other acts that would constitute a sufficient consideration for the agreement to extend the time of payment. McKee and Bloom were bound already to pay the note, with a rate of interest at least as high as 6 per cent., and this promise to do what they were already bound for was invalid as a new promise. *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163. One of the leading cases cited by counsel for defendants in error is *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747; but as this case turned upon the payment of interest by a grantee of the mortgagor as an acknowledgment of the existence of a mortgage lien, and as there was no evidence in this case that any interest payments were made after the extension agreement was executed, the case cited is not applicable. We think that the extension agreement was without consideration, and, this being true, it was ineffectual in preventing the running of the statute of limitations. The judgment of the district court is reversed.

RIEDEL et al. v. FIELDS.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 12, 1900.)

On rehearing. For former opinion, see 59 Pac. 1088.

PER CURIAM. A further careful consideration of the briefs of counsel, and a re-reading of the record, lead us to adhere fully to the views expressed in the original opinion delivered in this case. See *Riegel v. Fields* (Kan. App.) 59 Pac. 1088. The judgment of the district court is reversed, and the cause remanded for a new trial. Reversed.

(10 Kan. App. 554)

VINCENT v. DONNELL et al.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 12, 1900.)

JUSTICES OF THE PEACE—JURISDICTION.

A justice of the peace has jurisdiction of an action brought under the provisions of section 529 of the Civil Code by the surety on a

matured and unpaid note against the principal to compel payment of the obligation, where the amount involved is less than \$300. (Syllabus by the Court.)

Error from district court, Reno county; P. M. Simpson, Judge.

Action by W. H. Donnell and G. W. Van Buren against I. B. Vincent. Judgment for plaintiffs on appeal from a justice, and defendant brings error. Affirmed.

H. Whiteside, for plaintiff in error. Martin & Roberts, for defendants in error.

MILTON, J. On December 24, 1896, the plaintiff in error, as principal, and the defendants in error, as sureties, executed and delivered to the State Bank of Haven, a Kansas banking corporation, their promissory note for \$200, due in 30 days from that date; and on the 30th day of the following month, the note being due and unpaid, the sureties brought a suit thereon against Vincent before a justice of the peace of Reno county, a copy of the note being filed as the bill of particulars. The plaintiffs caused garnishment process to be issued and served on several parties. The justice entered judgment in favor of the sureties for the amount of the note and costs. Vincent carried the case to the district court, where the plaintiffs filed a petition which purported to set up two causes of action. The defendant attacked the petition by motion, and as a result the second cause of action, wherein the plaintiffs alleged they were the owners of the note, was stricken out, and the first cause of action amended. The first cause of action, as amended, set forth a copy of the note, alleged its execution and delivery by the defendant as principal and the plaintiffs as sureties; that at the maturity of the note the defendant had wholly failed and refused to pay the same or any part thereof; and that the action was brought for the purpose of compelling the defendant to pay the note to the State Bank of Haven, the owner and holder thereof. Thereupon the defendant demurred to the petition for failure to state a cause of action, and for the reason that the court had no jurisdiction. The demurrer was overruled. The defendant then filed an answer in which the material averment is, substantially, that the court had no jurisdiction over the subject-matter of the cause of action for the reason that such cause of action was not within the jurisdiction of the justice of the peace. The other averments of the answer do not require special mention. On the trial before the court the following admissions were made and entered of record: "Plaintiffs admit that at the commencement of this suit the holder and owner of the note in the suit, the Bank of Haven, was willing to extend the time of payment on said note, and the Bank of Haven was not pressing the makers or sureties for payment. Defendant admits that the plaintiffs were sureties on

the said note for the defendant." The court rendered judgment in favor of the plaintiffs, the journal entry thereof reciting: "It is therefore considered, ordered, and adjudged and decreed by the court that the plaintiffs, W. H. Donnell and G. W. Van Buren, Sr., do have and recover of and from the said defendant, I. B. Vincent, the sum of two hundred twenty-three and $\frac{60}{100}$ dollars (\$223.60), and that the said sum bear interest at the rate of ten per cent. per annum from date thereof; to which ruling of the court the defendant, I. B. Vincent, duly excepted. It is further ordered and decreed by the court that execution issue upon said judgment in favor of the plaintiff as against the defendant, I. B. Vincent, but the plaintiffs, C. W. Van Buren and W. H. Donnell, shall not be entitled to receive any moneys collected upon said execution until the original promissory note, a copy of which is set forth in the plaintiffs' petition, is duly filed for cancellation with the clerk of this court." The only question requiring decision is, whether a justice of the peace has jurisdiction of an action brought by the surety on a note which has matured and is unpaid against the principal to compel payment of the obligation. Section 529 of the Civil Code reads: "A surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after the same has become due." Section 2 of the act regulating the jurisdiction and procedure before justices of the peace reads: "Under the limitations and restrictions herein provided, justices of the peace shall have original jurisdiction of civil actions for the recovery of money only, and to try and determine the same where the amount claimed does not exceed three hundred dollars." Section 185 of the same act reads: "The provisions of an act entitled 'An act to establish a Code of Civil Procedure,' which are in their nature, applicable to the jurisdiction and proceedings before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace." Counsel state their inability to aid the court by the citation of authorities bearing on the question before us. Under section 529, *supra*, a right of action in favor of the sureties arose when the principal failed to pay the note at its maturity. There is another statute which authorizes an action by the surety against the principal before the obligation matures. It is not necessary in either case that the surety should first pay the note, nor does it appear to be necessary that the owner of the note should be made a party to the action. The law in such cases favors sureties. Neither the procedure by which the surety is to obtain the relief to which he is entitled nor the form of judgment to be entered in his favor is stated in the statute. The judgment entered in his action granted the re-

lief to which the sureties were entitled, and at the same time protected both the holder of the note and the principal maker thereof. It is a judgment "for the recovery of money only" in favor of the sureties. It involves nothing in its nature different from an ordinary money judgment except the provision made for the protection of the principal debtor and the holder of the note. It is our conclusion that a justice of the peace has jurisdiction to try such an action and to render such a judgment where the amount involved is less than \$300. The judgment of the district court is affirmed.

(10 Kan. App. 547)

TOWNSEND v. JOHNSON et ux.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 12, 1900.)

APPEAL—REVIEW—VACATING FORECLOSURE SALE.

1. The trial court is invested with considerable discretion in affirming or vacating a sale, and unless that discretion has been abused the appellate court will not disturb the ruling made. *Howler v. Krutz*, 38 Pac. 808, 54 Kan. 623.

2. The trial court set aside a sale of property under a decree of foreclosure, and ordered a resale, for the reason that the order of sale did not recite a payment upon the judgment of \$500, admitted by plaintiff to have been made by the judgment debtor prior to the issuance of the order. *Held* not to be an abuse of discretion.

(Syllabus by the Court.)

Error from district court, Reno county.

Action by James P. Townsend against James H. Johnson and wife. Judgment for plaintiff. From an order setting aside the sale on execution, he brings error. Affirmed.

John W. Roberts and Beardsley & Gregory, for plaintiff in error. Prigg & Williams, for defendants in error.

SCHOONOVER, J. Plaintiff in error, Townsend, brought an action in the district court of Reno county to foreclose a mortgage. Judgment was rendered in his favor for \$921.41 and costs of suit, and it was also decreed that after six months the lands described in the mortgage should be sold to satisfy such judgment. At the expiration of six months an order of sale was issued. The order recited the full judgment of \$921.41, and under it the land was sold to Townsend for \$600. A short time afterwards defendants in error (defendants below) filed a motion to set aside the sale for the reason that the order of sale recited the full judgment for \$921.41, when in fact there was only due upon the judgment the sum of \$421.41. Other grounds were set out in the motion, but it will be unnecessary to notice them further. The court sustained the motion and ordered a resale of the land, and it is of this ruling that the plaintiff in error complains.

From the journal entry of the court's order it appears that "it was admitted, and the court found, that on December 2, 1896, and

prior to the issuance of the order of sale, there was paid and credited on the judgment in the case the sum of \$500; said sum being paid by the defendant James H. Johnson." It is urged by counsel for plaintiff in error: First, that the order of sale was issued in strict accordance with the provisions of the statutes; and, second, that there is no showing in the record that the credit of \$500 was a matter of record in the clerk's office, and that therefore the clerk, whose duty it was to issue the order of sale, could do nothing but issue it as he did.

The inference to be drawn from the plaintiff's first proposition is that, to conform to the provisions of the statute, the order of sale must have been for \$921.41, the amount for which judgment was rendered. We cannot, however, concede such to be the case. The gist—the vital part—of the judgment is that the prevailing party recover. This remains alive until the judgment is fully discharged. The amount for which judgment is rendered is incidental. When a portion of the amount for which judgment is rendered is paid, the judgment still lives, but under it the balance only can be collected. Under this view of the case, we think that the order of sale could issue for the balance due, and be in conformity with the provisions of the statute.

As to the second proposition, we will merely remark that in an equitable proceeding it can have but little force. Plaintiff should have seen that the amount paid was credited upon the records of the court before the order was issued, and if he failed so to do it would be inequitable to permit him to benefit by his own neglect in any way.

The trial court is invested with considerable discretion in affirming or vacating a sale, and unless that discretion has been unwisely exercised and abused the appellate court will not disturb the ruling made. *Fowler v. Krutz*, 54 Kan. 623, 38 Pac. 808. See, also, 9 Am. & Eng. Enc. Law, 257, 258; *Wiltzie, Mortg. Forec.* §§ 529, 534, 566; *Nugent v. Nugent* (Mich.) 20 N. W. 584. We cannot say that the trial court abused its discretion by setting aside the sale and ordering a re-sale of the property. Indeed, we think that justice and equity were promoted by such a course. The judgment of the district court is affirmed.

(10 Kan. App. 545)

JONES v. HUMPHREY'S ESTATE et al.

(Court of Appeals of Kansas, Southern Department, W. D. Dec. 12, 1900.)

APPEAL—RECORD—CLAIMS AGAINST DECEDENT.

1. Error cannot be predicated upon a ruling excluding testimony, where the testimony desired is not shown in the record, nor any statement made as to what the full testimony would be.

2. Where a son maintained his aged mother in his own home, as a member of his family,

the law will not imply a promise on her part to pay for her maintenance.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by John C. Jones against the estate of Jeannette Humphrey and Dennis Madden. Judgment for defendants, and plaintiff brings error. Affirmed.

L. B. & J. M. Kellogg, for plaintiff in error. Madden Brothers, for defendants in error.

MILTON, J. The plaintiff in error was duly appointed general administrator of the estate of his mother, Jeannette Humphreys, deceased, and afterwards filed in the probate court of Lyon county a claim against the said estate for the care and board of the deceased during the two years preceding her death, and also a claim for caring for her property, consisting of three dwelling houses in the city of Emporia, during her lifetime. The defendant Dennis Madden was appointed special administrator, and a hearing had in the probate court. The claim was rejected, and the plaintiff appealed to the district court. It appears that the plaintiff, believing his mother's bodily and mental powers so much impaired that it was no longer safe for her to live alone, had her removed to his home and she was maintained and cared for there the last two years of her life. Her mental faculties were in a falling condition, and she would often wander away. Caring for her properly required constant vigilance and attention on the part of the plaintiff and his family. On the trial he produced a witness, who stated that she once had a conversation with the deceased, in which the latter told what disposition she expected to make of her property, and the witness was then asked if in this conversation the deceased stated she was going to will her property to the plaintiff to repay him for his services to her, and that it had been so agreed between them at the time she came to live with him. An objection to the question for incompetency was sustained. The plaintiff did not state what the witness would actually testify. The verdict and judgment were in favor of the defendants.

The exclusion of the testimony just referred to is complained of by the plaintiff in error. We think the court did not err. In the case of *State v. Barker*, 43 Kan. 262, 23 Pac. 575, one paragraph of the syllabus reads: "Error cannot be predicated upon a ruling excluding testimony, where the testimony desired is not shown in the record, nor any statement made as to what the full testimony would be." The court instructed the jury that, if they should find there was no express contract between the plaintiff and his mother to pay for the services to be rendered by the plaintiff and his family to her, then he could not recover for such services upon an implied contract. The instruction

was warranted by the facts, and correctly stated the law. In the case of *Shane v. Smith*, 37 Kan. 55, 58, 14 Pac. 477, 479, it was said: "We believe that, where a relative is taken into the family and treated as a member thereof, there is a strong presumption created that no payment or compensation was intended to be made for services by one to the other, beyond that received during the time they were rendered." See, also, *Wright v. Senn's Estate*, 85 Mich. 191, 48 N. W. 545. The instructions asked for by the plaintiff, and refused, were contrary to the doctrine just stated.

It is claimed by counsel for defendant in error that the proceedings in error should be dismissed for the reason that the controversy herein has been tried and determined in another action since the petition in error was filed. We have examined this claim, and have concluded that it is not fully sustained by the transcript of the record of the other case. Discovering no error requiring a reversal of the judgment, it will be affirmed.

(130 Cal. 607)

PEOPLE ex rel. THISBY v. RECLAMATION DIST. NO. 556. (Sac. 606.)

(Supreme Court of California. Dec. 7, 1900.)

RECLAMATION DISTRICT—PRIOR ORGANIZATION—DISSOLUTION—DE FACTO EXISTENCE—COLLATERAL ATTACK—APPEAL—JURISDICTIONAL DEFECT.

1. Swamp-land district No. 8 was set apart by the state board of swamp-land commissioners in 1861. Thereafter Act April 2, 1866 (St. 1865-66, p. 799), was passed, providing that swamp lands should be turned over to the respective counties for reclamation purposes, and that the county supervisors should assume the duties of the swamp-land commissioners. Act March 28, 1868 (St. 1867-68, p. 507), substituted new methods of reclamation; and section 32 prescribed that, after any swamp-land district then formed had organized under the act, the county supervisors should turn over all matter relating to the district, provided that until such organization said districts now formed should proceed under the laws then in force. Section 71 repealed the act of 1866 and other acts. District No. 8 took no steps to reorganize. Thereafter the reclamation district, defendant herein, was formed under Pol. Code, § 3446, and included a portion of district No. 8. *Held*, in quo warranto proceedings to test validity of defendant's organization alleged to be void on the ground that district No. 8 still existed by virtue of section 32 of the act of 1868, that the proviso in the latter section did not apply to districts taking no steps to reorganize, and hence district No. 8 had no existence thereunder, and did not prevent defendant's organization.

2. The objection that the board of supervisors had no jurisdiction to grant a petition to form a reclamation district, because the description of the land therein was insufficient under Pol. Code, § 3446, could be first taken on appeal; it not appearing that the defect could have been cured by evidence in the lower court.

3. Plaintiff instituted quo warranto proceedings against a reclamation district, claiming that it included land within an earlier district, but failed to show that the latter had a de jure existence. Plaintiff then relied on a de facto organization. *Held* that defendant was not precluded from controverting the de facto organ-

ization by the rule prohibiting collateral attacks.

4. An insufficient petition for the formation of a reclamation district was approved by the board of supervisors. No business was transacted by the district for 15 years. Thereafter the supervisors were requested to call an election for trustees, and trustees were chosen. They employed an engineer to make plans, and his report was approved. The supervisors later appointed persons to assess the land. No further business was transacted. The trustees joined with other persons, and formed the defendant district, embracing the same lands, and commenced reclamation. *Held*, on quo warranto proceedings setting up the prior district as a bar to defendant's organization, that a finding against the former's de facto existence was supported by the evidence.

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Quo warranto by the people, on the complaint of Rebecca Thisby, against reclamation district No. 556. From a judgment for defendant, plaintiff appeals. Affirmed.

W. F. Fitzgerald, Ex Atty. Gen., Johnson & Johnson, and Grove L. Johnson (Devlin & Devlin, of counsel), for appellant. A. L. Shinn, W. A. Gett, and Catlin, Shinn & Catlin, for respondent.

PER CURIAM. Quo warranto. The complaint alleges that defendant is illegally claiming to be and acting as a reclamation district, and that the organization of defendant was unlawful, and that it never became a reclamation district. A general demurrer was overruled, and defendant answered, alleging the regular formation of defendant as a reclamation district on the 8th day of September, 1893, under the provisions of the Political Code. Defendant had judgment that it "was a public corporation, to wit, a reclamation district, legally organized and existing under the laws of the state of California, and legally entitled to exercise corporate functions and powers." A motion for a new trial was denied, and plaintiff appeals from the order and from the judgment.

The court found that defendant was organized under section 3446 of the Political Code. Appellant does not dispute that on the face of the proceedings defendant was regularly organized. It is claimed by plaintiff that on July 13, 1861, the state board of swamp-land commissioners, pursuant to law, formed the entire body of land known as "Andrus Island," in Sacramento county, comprising about 7,624 acres, into a swamp-land district, designated as "Swamp-Land District No. 8," a portion of which was included within the boundaries of defendant district; that under the act of March 28, 1868 (St. 1867-68, p. 507), known as the "Green Act," the board of supervisors of said county, on April 7, 1869, organized reclamation district No. 75 out of part of the land included in district No. 8; that said board, on December 9, 1874, organized another reclamation district from the lands in said Andrus island, including part of the land in district No. 75, and known as "Rec-

lamation District No. 213"; that each of these districts includes lands embraced within the boundaries of defendant district; that if any one of them has a legal existence the defendant district cannot stand, since it was not organized under section 3481 of the Political Code relating to the formation of a district from lands already embraced within the boundaries of an organized district, but was formed under section 3446 of said Code, upon the assumption that no organized district stood in its way. The court found that neither district No. 8, nor district No. 75, nor district No. 213, has now, or ever has had, any legal existence as a swamp-land or reclamation district.

1. Appellant interposes the organization of swamp-land district No. 8 as an insuperable barrier to the valid organization of defendant district. District No. 8 was set apart as a swamp-land district under the act of 1861, *supra*. The scope, purpose, and effect of this act were concisely, yet comprehensively, set forth in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 43 Pac. 1016, which was a case similar to the one now presented. All the points made in support of district No. 8 in this case were made in the case cited, except that it is now claimed that section 32 of the act of March 28, 1868, was overlooked, and that the effect of this section was to leave district No. 8 in the control of the board of supervisors under the act of April 2, 1866. St. 1865-66, p. 799. The act of 1868 substituted a new scheme for the reclamation and sale of swamp and overflowed lands to take the place of the various schemes developed in preceding statutes. At the close of section 32 is found the following provision: " * * * After any district now formed shall organize under the provisions of this act, the supervisors of the county shall turn over to the trustees all the books and papers in their possession relating solely to that district: provided, that until such organization said districts now formed shall proceed under the laws now in force." Appellant calls attention to the plain language in this proviso, and claims that to give it effect, as must be done, there is no escape from his position, and therefore district No. 8 is still operating under the act of 1866. Section 71 of the act of 1868 expressly repeals the act of 1866, together with a number of other acts on the same subject, and we have no doubt that the later act was intended to take the place of the act of 1866, and not to leave the latter act in force as to all districts theretofore organized. It certainly was not intended that the two acts were to remain in force, else the act of 1866 would not have been in terms repealed, and some more explicit provision would have been placed in the act showing such intention. The later act contemplated a reorganization of the districts previously formed, but it very properly provided that such districts as intended to continue in existence should, during the period of transition, proceed under the

laws theretofore in force. The proviso applied to reorganized districts, but did not, and was not, in our opinion, intended to, apply to a district, like No. 8, that took no steps to reorganize, and, so far as the record shows, transacted no business after May 5, 1869. At this last meeting the board of supervisors passed a resolution annulling all contracts for works of reclamation in the district, and directed the clerk to notify the controller of the state that all contractors have been fully paid for work contracted prior to March 28, 1868 (the date of the passage of the act of 1868), and requesting him to transfer to the supervisors of Sacramento county all books and papers in his possession relating to said district, and to draw his warrants for the cash balances, if any, standing to the credit of said district. This action was apparently in compliance with section 47 of the act of 1868, and is consistent with an intention to reorganize under the act, and we find nothing in any of the minutes offered in evidence to show that the district attempted or desired to continue its existence under the repealed act of 1866 or any other act. Respondent presents sundry requirements of the act of 1861 with which the district failed to comply, and which it is claimed were essential to the forming of a district, but we do not deem it necessary to go over this ground. We are satisfied that the court correctly held, in *People v. Reclamation Dist. No. 551*, that districts formed under the act of 1861 went out of existence when by the later acts the legislature changed its policy for their government and control; and, as appellant claims to be a district under the act of 1861, we must hold that it no longer exists.

2. Appellant makes a feeble claim that district No. 75 was legal, and stood in the way of forming the defendant district. All that is said in support of the claim is that the petition was in due form, properly published, and duly approved by the board of supervisors. It does not appear that it ever after assumed to act, or that any business was transacted in its name. The court, however, found that none of the lands included within the boundaries of this district fell within the boundaries of defendant district, and this finding is not attacked. There is, then, no conflict here.

3. But appellant contends, if there be doubt as to the existence of district No. 75, because formed under the act of 1868, there can be no doubt that district No. 213 was legally organized under the Political Code as it stood when it was organized December 9, 1874. Section 3446 of that Code required the petition, among other things, to set forth "a description of the lands by legal subdivisions or other boundaries." The petition described the various bodies of land as "tract all of swamp land survey Nos. 329 and 330," and similarly as to all the tracts of the several petitioners. The same method of description was held jurisdictional and insuf-

ficient in *Ralston v. Board*, 51 Cal. 592, and also in *Ferran v. Board*, Id. 307. *Ralston v. Board* has never been overruled or questioned, so far as we are advised, and we see no reason why it should be. Appellant does not dispute the correctness of these decisions, but meets them by claiming (1) that the decision of the board of supervisors on the question is final; (2) that their decision cannot be collaterally attacked; (3) that a corporation cannot be attacked collaterally; and (4) that at the trial defendant did not make the objection, and it is too late to raise the question now. Defendant did not at the trial make the specific objection that the land was not described in the petition. The objection upon the offer of the petition was that it was irrelevant, immaterial, and incompetent, and some specific objections were stated, but none directly reaching the point in question. Appellant cites numerous cases to show that an objection cannot be first raised in the supreme court, especially one which could have been cured in the lower court, and two cases are cited, to wit, *Howard v. Harman*, 5 Cal. 78, and *Shay v. Superior Court*, 57 Cal. 541, to the point "that an objection as to jurisdiction must be raised first in the court below." In the first of these cases the objection was that no appeal bond had been filed in the justice's court when the appeal was taken to the county court. The objection was not made in the court below, and it was held too late to make it here, because if it had been made in the county court, it would have been its duty to hear the excuse for the failure, and if sufficient to allow the bond then to be filed. In the other case there were some defects in the proceedings to appeal the case from the justice's court to the superior court as to which no objection was raised until the case came here, where it was urged that the superior court had no jurisdiction to try the case. It was held that, as no objection was made to the regularity of the proceedings in the court below, it was too late to take advantage of the insufficiency of the notice of appeal or of the undertaking. The many cases cited by appellant relate to questions of incompetent evidence, admitted without objection, to the regularity of proceedings, or to objections which, if presented in time, might have been obviated. In the case now here there is no dispute but that the petition as shown in the record is the petition as presented to the board of supervisors. It is not suggested that any evidence would have cured the defect in the description, or that it could have been cured. The objection here goes to the jurisdiction of the board to act upon the petition. It does not depend upon their adjudicating certain facts upon the existence of which their jurisdiction depended. Their jurisdiction depended upon the presentation of a petition setting forth the jurisdictional facts, falling in which the petition conferred no juris-

diction, and the objection could have been taken at any stage of the proceedings, and can be taken for the first time here. In *re Grove Street*, 61 Cal. 438.

Appellant contends, conceding that the steps taken were not legally sufficient to form district 213, that it was a de facto corporation, and cannot be attacked collaterally nor otherwise, except in a suit by the state; citing *Dean v. Davis*, 51 Cal. 406, and *People v. La Rue*, 67 Cal. 526, 8 Pac. 84, and some other cases. In the present instance it does not appear to be necessary to consider whether and to what extent defendant is attacking district No. 213 collaterally. Defendant answered the challenge of the state by showing a charter grounded upon strict compliance with the law. The form and regularity of the proceedings by which it was called into existence are not questioned. But plaintiff interposes what it claims is a legally organized district, which embraces all of the land included in defendant district, and therefore it is claimed that defendant was not legally formed. Plaintiff, as we have seen, failed to show compliance with the law, and proof of its de jure existence failed. Plaintiff then relied on a de facto organization, and certain evidence was submitted in support thereof. Its de facto existence became an issuable fact, as much as did the fact of its de jure existence. The rule invoked by plaintiff does not preclude defendant from controverting the de facto existence of the district asserting it. *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354; *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368. What are the facts? An insufficient petition was filed December 9, 1874, with the board of supervisors, and was on that day approved. Nothing further was done until July 8, 1890, when one of the original petitioners filed a petition asking an order of the board to call an election for trustees, which was done by the board; it appearing that by-laws had been previously adopted, although at what date does not appear. On October 8, 1890, the result of the election was reported to the supervisors, showing the election of Sol. Runyon, G. A. Knott, and P. Crew as the trustees chosen. On February 6, 1891, the trustees reported to the board of supervisors that they had "employed an engineer to survey, plan, locate, and estimate the cost of the works necessary for such reclamation," etc.; that he had made a report in writing which they had approved January 14, 1891, and inclosed with their report to the board a copy of the engineer's report. The trustees requested the board of supervisors to appoint three disinterested persons to view and assess upon the lands a charge proportionate to the whole expense of \$40,000 (the estimated cost of the work), etc., and on February 6, 1891, the board appointed three persons as prayed for by the trustees. No further action has been taken by the district. On August 7, 1893, 2¼ years

after the last action of district 213, petition for the organization of defendant was filed, and was signed by Runyon, Knott, and Crew, who were trustees of district 213, and by the owners of more than half of the land included in district 213, and defendant district included all the lands within the boundaries of district 213. The court found that the prior districts never had any legal existence, and the finding rests upon the lack of any legal organization such as made them corporations de jure, and upon the evidence tending to show that they were not claiming in good faith to be districts, nor doing business as such, and were not corporations de facto. Just how much business must be done by a corporation assuming de facto powers, or what facts showing good faith are necessary to constitute the corporation a de facto organization, can be determined by no fixed rule. In this case it appears that nothing was attempted to be done after the petition was filed for over 15 years. The supervisors were then asked to call an election for trustees of the district, and this was done, and trustees were chosen. They employed an engineer to make a plan, and he reported and the report was approved. The supervisors were asked to appoint persons to assess the lands, and this the board did in 1891, since which time nothing further has been done. The trustees appointed for district 213 united with other of the original petitioners, and formed a new organization, embracing all the lands included within district 213, and were going forward with the work of reclamation, when this action was begun. None of the petitioners for district 213 are complaining, and there is no evidence that any person interested desires that the district should be kept upon its feet. It has no legal existence, and its right to continue because a de facto concern is interposed now rather to defeat what appears to be an effort, after many years of inaction, to do something towards keeping faith with the general government, and for the benefit of the landowners, than to enable it to go forward itself to do the work contemplated in its creation. It would seem to be an effort to prevent reclamation rather than to promote it, and we cannot, therefore, say that the finding of the court is unsupported by the evidence. The judgment and order are affirmed.

BEATTY, C. J. I concur in the judgment, but I dissent from so much of the opinion as rests upon the proposition decided in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016, that swamp-land districts formed under the act of 1861 ceased to exist after the passage of the Green act in 1868. I think all districts which had been "formed" in the sense of section 32 of the latter act (St. 1867-68, p. 515) were by that section kept in existence, and that for the purposes of such districts, until reorganized under

the new law, the original act of 1861 and the amendatory act of 1866 remained in force notwithstanding their repeal for all other purposes. If, therefore, district No. 8 was ever "formed," within the meaning of the Green act, I should be forced to conclude that it was still in existence when the proceedings were had for the organization of the defendant, and that those proceedings, under section 3446 of the Political Code, were ineffectual.

But the superior court has found, upon evidence which I think sustains the finding, that district No. 8 never had a legal existence. It seems to have acquired the designation of "Swamp-Land District No. 8" solely by reason of the petition for its formation and the order of the commissioners for a preliminary survey. From that time forward, it was called "Swamp-Land District No. 8" in reports of engineers and state officers and acts of the legislature. But it clearly was not constituted a swamp-land district by a mere order of the commissioners for a preliminary survey, the only result of which might be to demonstrate the fact that no reclamation could be effected. And yet, for the purpose of that order, and for the purpose of designating the fund out of which the expenses of the preliminary survey were to be paid, it might be, as in fact it was, conveniently designated as "Swamp-Land District No. 8." The result of the preliminary survey, made under the order of the commissioners, was to show the reclamation could not be effected with the funds available, and no plan of reclamation seems to have been adopted, no contract was let, and all proceedings ended with the payment of the expenses of the survey. This was not, in my opinion, a formation of the district in the sense of section 32 of the act of 1868. It was not within the reason of that proviso. Such, indeed, seems to have been the view of the matter upon which the board of supervisors, and all others concerned, have acted during a period of nearly 40 years prior to the proceedings for the formation of the defendant. Upon the grounds thus briefly indicated, I hold that swamp-land district No. 8 was no obstacle to the formation of defendant, and as to the other districts I concur in the principal opinion.

(130 Cal. 630)

MIZE v. HEARST. (S. F. 1,595.)

(Supreme Court of California. Dec. 11, 1900.)

APPEAL—VERDICT—AMOUNT—WHEN SET ASIDE.

Where the verdict in an action for libel was not so large as to show passion, prejudice, or corruption, it will not be set aside on appeal as excessive.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by E. J. Mize against W. R. Hearst.

From a judgment in favor of plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

W. H. L. Barnes, for appellant. J. C. Bates, for respondent.

PER CURIAM. Action to recover damages for the publication of a libel by defendant in his newspaper the Examiner. The jury returned a verdict for plaintiff in the sum of \$2,650, for which amount judgment was rendered. Defendant appeals from the judgment and from an order denying his motion for a new trial.

No exception is taken to any ruling of the court below at the trial, nor is any alleged error of law presented; and the sole point made here for the reversal is that the amount of the damages found by the jury is excessive. But, on well-settled principles, an appellate court is not warranted in setting aside the verdict of a jury on this ground unless the amount of damages assessed is so unreasonably large and extravagant as to show that the jury were actuated by passion, prejudice, or corruption; and it is sufficient to say that the record here does not show such a case. The judgment and order appealed from are affirmed.

(130 Cal. 616)

RAUER v MERANI et al. (S. F. 1,383.)

(Supreme Court of California. Dec. 10, 1900.)

ASSUMPSIT—GOODS SOLD—TIME OF PAYMENT—EVIDENCE—CONSTRUCTION.

In an action for the price of goods, plaintiff's evidence tended to show a sale in August, on Saturday, payment to be part on Monday following, part the following week, and the balance the following week. Defendant's evidence was that the terms of payment were 30, 60, and 90 days, in accordance with notes payable September 15th, October 15th, and November 15th. The action was commenced August 28th, and there was judgment for the whole price in favor of plaintiff. *Held*, that the judgment was not supported by the evidence, since, in the absence of other proof as to the date in August on which the sale was made, it was inferable from defendant's 30-day note that it was on August 15th; and as, under plaintiff's evidence, there was a credit of 14 and 21 days for the second and third payments, the whole purchase price was not due on August 28th, when suit was begun.

In bank. On rehearing. Reversed.

For opinion in department, see 61 Pac. 76.

BEATTY, C. J. This is a suit to recover the price of goods sold. Plaintiff had judgment, and defendants appeal from the judgment and from an order denying a new trial. The claim on the part of appellants is that the action was commenced before payment was due, and their evidence is to the effect that the goods were sold on 30, 60, and 90 days' time, as evidenced by three promissory notes executed and delivered by them, payable September 15th, October 15th, and November 15th. The complaint was filed August 28th. The assignors of plaintiff, who

sold the goods, testified that, although the notes referred to were executed and tendered by defendants, they were not accepted, and that the sale was not upon the time specified therein. As to the real terms of the sale the testimony of one of the vendors was quite indefinite, but not inconsistent, with that of his co-partner, who stated that the goods were sold on Saturday, and were to be paid for \$100 on the following Monday, \$100 the following week, and the balance the week following. As the whole of the second and third weeks, respectively, were allowed for the second and third payments, there was a credit of 14 and 21 days given according to the only evidence introduced by the plaintiff. The goods were sold in August, but the evidence does not show at what date, and, consequently, it does not appear that more than \$100 was due at the time the action was commenced. If the sale took place on the 15th, as may be inferred from the evidence of defendants that their first (or 30-day) note was made payable on September 15th, the final payment, even according to plaintiff's evidence, was not due on August 28th, when the complaint was filed. This being so, the judgment, which was for the whole price of the goods, is unsupported by the evidence. The judgment and order appealed from are reversed, and cause remanded.

We concur: **TEMPLE, J.; VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.**

(130 Cal. 621)

In re KRUGER'S ESTATE. (Sac. 757.)

(Supreme Court of California. Dec. 11, 1900.)

ATTORNEY AND CLIENT—NEGLIGENCE—COMPENSATION.

1. A finding by a probate court that services rendered by an attorney for an estate in an action against it were rendered in connection with the administration of the estate cannot be questioned by the executors or attorney on appeal by heirs from an order fixing the compensation of the attorney for services rendered the estate.

2. The fact that an attorney for an estate did not ask for compensation for services rendered in an action against it will not prevent the consideration of the question of the attorney's negligence in that action in fixing his compensation as attorney for the estate.

3. Where an attorney for an estate, in an action against it, failed to explain his delay in having a statement and amendments, on a motion for a new trial, presented for settlement, embodied in the statement, and evidence of such fact was given in fixing his compensation for services to the estate, an argument thereon may be made for the first time on appeal from the order fixing the compensation.

4. Where an attorney for an estate in an action against it appointed a day too late for presentation for settlement of a statement and amendments on a motion for a new trial, and failed to explain the delay, so that an appeal based thereon was dismissed, and judgment rendered against the estate, such facts constituted negligence, and should be considered in fixing the attorney's compensation for services to the estate.

Department 2. Appeal from superior court, Nevada county; **F. T. Nillon, Judge.**

On the settlement of the account of the executors of the estate of W. H. Kruger, deceased, a fee was allowed the attorney for the estate, and from the decree fixing the amount certain heirs and legatees appeal. Reversed.

Fred T. Searls and Geo. T. Wright, for appellants. P. F. Simonds, for respondent.

TEMPLE, J. This is an appeal from a decree settling the sixth account of the executors, and the appellants seek to reverse the order or decree as to the allowance of the sum of \$6,000 for legal services rendered the executors. The attorney was employed in 1891, with the understanding that he should render such services as the executors might require, and that he should receive such compensation for his services as the court should deem reasonable,—meaning, no doubt, such sum as the court would allow to the executors. Upon the settlement of the fifth annual account, one of the executors asked the court to fix the value of the legal services rendered, which the court then did. From that order the present appellants appealed to this court, and the order was reversed on the ground that the claim for an allowance of an attorney's fee was not contained in the account as filed, and those interested in the estate had no notice that such allowance would be made. 123 Cal. 391, 55 Pac. 1056. After filing the remittitur from this court on that appeal, the sixth account was filed, in which the statement was contained that the attorney was entitled to be paid a reasonable fee for valuable services rendered by him, such fee to be fixed by the court on that settlement. Upon the day for such settlement the appellants, who claim to be the heirs and legatees of the decedent, objected to the allowance of any attorney's fee, on the ground, substantially, that the estate had been injured by the negligent performance of duty by the attorney in a sum far exceeding the claim made on behalf of the attorney. The court allowed as an attorney's fee \$6,000, which ruling the appellants claim is not sustained by the evidence.

There was testimony to the effect that the services were worth \$10,000, and this testimony was not directly controverted. Indeed, it may be said the contestants admit that the fee allowed would be reasonable but for the fact that through the negligence of the attorney in a certain law suit brought against the estate it incurred a loss of a large amount of property, and was compelled to pay \$17,000, besides costs, which would have been saved to the estate if the attorney had properly discharged his duty. It was contended on behalf of the attorney that his employment and the service he rendered in the action alluded to was separate and distinct from his employment as attorney for the executors in the administration of the estate, but the court found against him on this point,

and neither he nor the executor can question the ruling. We are bound to regard the service rendered in the suit as part of the service rendered in pursuance of his employment to aid the executors generally, and the fact that he did not ask for any compensation for service rendered in that case will not prevent the question of such alleged negligence from being considered in fixing his compensation as attorney for the executors.

The suit in question was brought by one P. Henry against the executors of W. H. Kruger, deceased, and also against the executors of E. J. Brickell, deceased, said Brickell having been a partner in business with Kruger, deceased, to obtain an account in regard to certain property alleged to have been held in trust by Kruger and Brickell, for judgment in the sum of \$62,000, and to compel the conveyance of certain property. The defendants answered, denying the alleged rights and equities, and all indebtedness; the said attorney representing the estate of Kruger in pursuance of said employment. Judgment went against said executors for a reconveyance of the property, and for \$28,000 found to be due said plaintiff on the accounting, and for costs. The executors, by their said attorney, in due time took the proper steps to move for a new trial, and said attorney duly prepared and served a statement on said motion November 21, 1893. The plaintiff in that action served his proposed amendments to said statement, November 28, 1893. On the 2d day of December, 1893, said attorney notified plaintiff's attorney in that action that the proposed amendments would not be accepted, and that the statement and proposed amendments would be presented to the judge for settlement, December 11, 1893, which was three days too late. At the time of settlement the plaintiff in that case objected to the settlement on that ground, and, when his objection was overruled, caused his objection to be certified in the statement, and, although there was an apparent failure to present the statement for settlement in time, the moving party did not cause to be inserted any saving explanation. Afterwards the supreme court, on motion of the respondent in that case, dismissed the appeal, solely for this defect. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599. The reasoning upon this point is tersely stated in the syllabus: "Where the record shows that the proposed statement on motion for a new trial, and the proposed amendments thereto, were presented to the judge upon notice after the expiration of the ten days prescribed by law, and that the settlement was objected to by the other party, and no excuse appears in the record for the delay, the delay is fatal," etc. The court said: "Here no excuse for the delay is shown, and it can make no difference whether it was for three days, or fourteen days, or seven months." It will be seen that the charge of negligence is, first, in failing to present the proposed statement and proposed amendments to the judge

for settlement within the period provided, to wit, within 10 days after receiving the proposed amendments; or, in case there was a valid excuse for the delay, in failing to have the facts constituting such excuse incorporated into the statement.

Confessedly, the statement and proposed amendments were not presented to the judge within 10 days; and confessedly, also, when they were so presented the settlement was objected to on the ground that the court had lost jurisdiction of the case, and could not then settle the statement because of such delay, and, the objection being overruled, were incorporated into the statement, which did not disclose any excuse for the delay. And it must be admitted that for one of these reasons the order for a new trial which was made, based upon such statement, was reversed.

The respondent here contends that such excuse did exist; that he handed the proposed statement and amendments to the judge in the presence of Mr. Ford, who represented the plaintiff in the action of *Henry v. Mergulre et al.*, and the judge then appointed the day for settlement, and notice was given of such appointment. This, it is contended, is equivalent to the method provided in section 650, Code Civ. Proc., which authorized him to hand the papers to the clerk for the judge, who then must appoint a day for settlement, of which the clerk must give notice. It is also contended that since the opposing attorney was present notice to him was not necessary, and this was itself a presentation to the judge for settlement. The notice actually given of the day when it would be presented for settlement is inconsistent with each contention, and when the documents were handed to the judge admittedly no notice had been served on Mr. Ford, and the attorney then testified that Mr. Ford then made objection to the proceeding, though he did not remember what specific objection it was. Certainly, then, the law was not complied with, and Mr. Ford did not consent to the day appointed.

But, if these facts constituted an excuse, they should have been stated in the statement when it was settled. The objection was made that the court had no power to settle and certify the statement because of the lapse of time, and without explanation no one could have doubted that the objection was good. The court overruled the objection, and Mr. Ford had his exceptions duly certified. Then it was plainly incumbent upon the moving party to cause the justification for the delay to be certified in the statement. This construction of the statute had been declared by this court. *Higgins v. Mahoney*, 50 Cal. 444; *Tregambo v. Mining Co.*, 57 Cal. 504; *Connor v. Road Co.*, 101 Cal. 429, 35 Pac. 431.

Counsel for appellant say the point that the excuse was not incorporated in the statement was not made in the probate court. The fact was proven, and when the attorney for the

executors was testifying his attention was called to it. He said: "These facts were not incorporated in the statement on motion for a new trial. Counsel did not then believe * * * that seven days was invalid when five should be required." Of course, no such objection that seven days' notice was given was ever made, but the remark shows that the point was made. But there is no such rule that points not made at the trial cannot be made here, but that certain objections to evidence or the procedure cannot be made for the first time in the appellate court. This is not an objection in this case, but an argument from the evidence that counsel was negligent. It was not necessary to show that the same argument was made below, and surely the bill of exceptions would not show this, and it may be added that appellants now assert that it was presented and fully argued in the lower court.

The degree of learning and skill, as also the degree of diligence, for which an attorney is responsible was discussed in *Gambert v. Hart*, 44 Cal. 552. It is said: "The true rule of liability undoubtedly is that an attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise." The facts in that case have a close analogy in essential matters to the facts of this case, and upon the principles there declared it cannot be doubted that actionable negligence was shown here.

But even if the negligence was not of such a nature as to be actionable, as stated on the last appeal, it should still have been considered in determining the value of the services. If because of the unskillful or negligent manner in which the service was performed it was a detriment, and not an advantage, no compensation should have been allowed. The order or decree settling the account of the executors is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.

(120 Cal. 627)

MAY v. HATCHER. (S. F. 1,579.)

(Supreme Court of California. Dec. 11, 1900.)

MORTGAGES—FINDINGS—NECESSITY—AMENDED COMPLAINT—SERVICE—JUDGMENT—VALIDITY—COMMISSIONS—AFFIDAVIT—FILING—NECESSITY—NOTICE—PUBLICATION—INADEQUACY OF PRICE—SETTING ASIDE SALE.

1. Where the record did not show that findings were not waived, the fact that sufficient findings were irregularly put in the judgment, instead of in a separate document called "Findings," did not entitle a purchaser of the mortgagor's interest after foreclosure sale, and who was not a party to the record, to vacate the judgment on motion, since it was not void, and the error could be reviewed only on appeal.

2. The fact that a default judgment was entered one day too soon in foreclosure proceedings did not entitle a purchaser of a mortgagor's interest after foreclosure sale, and who was not a party to the record, to vacate the judgment on motion, since it was not void, but simply erroneous.

3. Under Code Civ. Proc. § 729, providing that a commissioner in foreclosure proceedings must be sworn to faithfully perform his duties, the fact that no written affidavit of the commissioner was on file in the clerk's office, and that the clerk's register of actions did not show that such an affidavit had been filed, was not conclusive evidence that the commissioner was not sworn, and hence did not exclude other evidence that he was sworn, since there is no provision that the affidavit must be filed, or that it should be in writing.

4. The fact that a commissioner in foreclosure proceedings made a sale which was set aside for insufficiency of notice did not invalidate a subsequent sale of which due notice was given.

5. The fact that one publication of a sale by a commissioner under foreclosure had the date June 16th, instead of June 7th, did not vitiate the sale, where sufficient publications were made after the date was changed to June 7th.

6. Inadequacy of price alone is not sufficient to justify setting aside a sale under foreclosure on motion of the purchaser of the mortgagor's interest, after the foreclosure sale, and who was not a party to the record.

Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by Sophia May against Michael Ryan and others. Judgment for plaintiff. From an order denying a motion to vacate the judgment and sale, Sewell Hatcher appeals. Affirmed.

N. E. Wretman and Nicholas Bowden, for appellant. J. C. Black, for respondent.

McFARLAND, J. This is an action to foreclose a mortgage executed to plaintiff by the defendant Michael Ryan. Other persons were made defendants, as claiming some interest in the property. Judgment of foreclosure was entered March 1, 1897, and the mortgaged premises were sold by a commissioner appointed for that purpose on June 7, 1897, to plaintiff. On December 4, 1897, —nine months after the entry of the judgment, and three days less than six months after the sale,—Sewell Hatcher, claiming to have purchased the interest of the mortgagor and his wife about five months after the sale, moved the court to vacate the judgment, and also to vacate the sale. The court denied the motions, and from the order denying them Hatcher appeals.

We really observe nothing in the record which would entitle the appellant to have the judgment vacated, even if the motion had been made in time; but the motion was too late, for a judgment, unless void on its face, cannot be vacated on a mere motion unless it be made at least within six months after the entry of the judgment. In the case at bar the judgment was clearly not void on its face. The main contentions of appellant on this point are: First, that the judgment is void because there were no findings; and, second, because after a certain amendment to the complaint had been served on the defendant J. H. Lyndon, who is alleged to have been the assignee in the insolvency of the defendant Michael Kane, and on the defendant Mary Kane, who is alleged to

have been a subsequent judgment creditor of Michael Kane, default was entered against them by the clerk one day too soon. Lyndon and Kane had been brought into court by service of the summons and original complaint. As to the first contention, as a matter of fact there are sufficient findings, although they are irregularly put in the judgment itself, instead of being in a separate document called "Findings." But, if they cannot be considered as findings, it is sufficient to say—First, that the judgment record does not show that findings were not waived, and therefore, under any view, the judgment would not be void on its face for the reason assigned; and, second, the absence of findings would not make the judgment void, but at most would only be error reviewable on appeal.

2. Appellant is not concerned with the supposed rights of Lyndon and Kane. They did not ask to have the default set aside, nor did they make any effort to be allowed to answer the amendment; and, even as to them, what happened after the service of the summons and the original complaint, at most, "rendered the judgment erroneous, simply, not void." In *re Newman's Estate*, 75 Cal. 220, 16 Pac. 887.

The court did not err in denying the motion to vacate the sale. The point mostly argued by appellant for the reversal of this order is that the commissioner was not sworn to perform his duties. We need not discuss the question here whether his failure to be sworn, if such failure had been shown, would have vitiated the sale, for there was ample proof that he was sworn. Appellant's position is that the facts that no written affidavit of the commissioner was on file in the clerk's office, and that the clerk's register of actions did not show that such affidavit had been filed, are conclusive proof that no oath was taken, and that no other evidence was admissible on the subject. But this position is not tenable. The statutory provision touching the matter is merely that "the commissioner, before entering upon his duties, must be sworn to perform them faithfully." Code Civ. Proc. § 729. There is no provision that he must make a written affidavit, or that an affidavit must be filed anywhere; and there is abundant evidence in the record not only that he was sworn, but that he made a written affidavit. The fact that the commissioner made an invalid sale on May 10, 1897, which the court on plaintiff's motion set aside for insufficiency of notice, etc., did not invalidate the sale afterwards on June 7th. Nor was the latter sale vitiated by the fact that there was one publication of a notice of sale having the date June 16th, instead of June 7th, there being a sufficient publication after it was amended. Something is said in the appellant's brief about inadequacy of price, but that is not one of the grounds of the motion. The evidence introduced on the subject is

exceedingly meager, and simple inadequacy of price, even if shown, is not itself sufficient ground to sustain a motion like the one here in question. There are no other points in appellant's briefs which call for special notice.

The notice of appeal from the orders contains also a notice of appeal from the judgment, but the transcript does not contain the record of that appeal, and, as we understand counsel, that appeal is not before us. Therefore this decision will not be construed as in any way affecting the appeal from the judgment. The orders appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

¹⁶ Cal. Unrep. 596)

CITY AND COUNTY OF SAN FRANCISCO
v. CENTER et al. (S. F. 1,512.)

(Supreme Court of California. Dec. 10, 1900.)

FORMER ACTION—DECREE—REFERENCE TO
OPINION—CONSTRUCTION.

In a former action brought by defendants against plaintiff to quiet title, the judgment quieted title in defendants, with a proviso that nothing in the decree should impair the rights reserved in the Van Ness ordinance to the plaintiff, over lands that had "then been occupied or set apart" for public use. The opinion of the supreme court deciding that case held that all the rights which the plaintiff had, and which could be conveyed by said ordinance, had passed to defendant's grantor at a time shortly after the passage of such ordinance. *Held*, that the expression "then occupied or set apart," as used in the judgment, had reference to the date of the passage of the ordinance, and not to the date of the commencement of the action to quiet title, or the decree therein.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the city and county of San Francisco against John Center and others. From a judgment in favor of plaintiff, and an order denying a new trial, defendants Leroy appeal.

Platt & Bayne and E. S. Pillsbury, for appellants. James L. Gallagher, for respondent.

CHIPMAN, C. Ejectment. Plaintiff filed its complaint in this action November 29, 1896, to recover possession of a strip of land extending from Ninth to Eighteenth street, in the city and county of San Francisco, and which was formerly Mission creek. Among the defendants, of whom there is a large number, were Eugene and Georges Leroy, who claimed ownership in and possession of a portion of the land in question, to wit, the northerly and westerly half of Mission creek, extending from Eleventh street (known as "Wood Street" on the Van Ness map) westerly and southerly to a point distant about 26 feet $3\frac{1}{2}$ inches southerly from the southerly line of Alameda street extended westerly through this land. The Leroy land embraces quite a

large tract, but only the part within the creek is in question. Judgment was given in favor of plaintiff against the Leroy, except as to a small, four-sided tract of land, about 25 feet square, situate at the southwest corner of Alameda and Columbia streets, as to which the Leroy had judgment. From that portion of the judgment in favor of plaintiff the Leroy have appealed, and bring the record here by bill of exceptions. No other defendants appeal.

Plaintiff claimed to be seised in fee in trust for the use of the state and for the people of the city and county of San Francisco, and it based its claim of title upon a patent issued by the United States government June 20, 1884, to plaintiff for its pueblo lands; the decree of the United States circuit court in the case of *City of San Francisco v. U. S.*, entered May 18, 1865, confirming the claim of the city to its pueblo lands; and the act of congress approved March 8, 1866, also confirming said claim. The decree and the act of congress are printed in full in 138 U. S. 663, and *Municipal Reports San Francisco*, 1886-87, Append. 155. The Leroy claimed under decree of the circuit court of the United States, quieting their title against the city and county, and adjudging that they were on, and have been since, October 26, 1883, the owners in fee of the land now claimed by them. On appeal to the supreme court of the United States this decree was affirmed (*City and County of San Francisco v. Leroy*, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096), with the following modification, as shown by the certified copy of the decree: " * * * By adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco, or to its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares, and public buildings of the city, and as thus modified be affirmed." This decree is dated March 2, 1891, and was filed in the United States circuit court at San Francisco December 1, 1891.

Appellants first devote much attention to the proposition that the burden of proof was upon plaintiff to show that there were rights reserved to it under the Van Ness ordinance that would be impaired by the decree pleaded by appellants; they claim, second, that, if the burden was upon defendants, then they, with the assistance of plaintiff, made the proof; and, third and lastly, if any rights in the land covered by Channel street and Mission creek were reserved to the city under the Van Ness ordinance, these rights ceased to exist, because this street and the creek were abandoned by the city.

It becomes necessary to determine at the outset to what period of time the modification of the Leroy decree by the United States supreme court related. Plaintiff contends that it had reference to the date of the decree as entered in the United States circuit court, which

was June 14, 1887. Defendants claim that the modification had reference to the situation as it existed when the Van Ness map was made, showing the reservations then made by the city for streets, etc., under the Van Ness ordinance. The importance of the question lies in the fact that there were other maps made and adopted by the city, subsequent to the Van Ness map, which show that reservations additional to those indicated by that map were made before the decree was entered in favor of the Leroy, and which changed the relation of certain streets to Mission creek, and changed somewhat, apparently, the course and width of Channel street. The opinion of the supreme court was written by Mr. Justice Field, and to this opinion we may look to aid us in arriving at the meaning of the formal decree as subsequently entered by the clerk of the court. It appears from the opinion that in the action brought by the Leroy, they deraigned title through William J. Shaw, who derived title through Kissling, Thorne, and Center, and one Stewart, whose several titles the court held had been fully established under the Van Ness ordinance, running back to a date contemporaneous with that ordinance; that "the title to the lands thus claimed by Kissling and by Thorne and Center, and by Stewart as a purchaser from them of four and a half acres, became, by operation of that ordinance and the confirmatory legislation mentioned, vested in those parties, and by their conveyance passed to William J. Shaw, and was by him conveyed to Eugene L. Sullivan, and thence to the plaintiffs [Leroy] in this suit." The opinion further reads: "All the right, title, and interest which the city held, and which could be conveyed under the Van Ness ordinance, had, therefore, passed to Shaw when the suit to quiet his title was commenced and carried to judgment in the district court of the Twelfth judicial district of the state, and whatever benefit Shaw had acquired by that decree in his favor inured to the benefit of his grantees; the public rights reserved by the Van Ness ordinance being necessarily excepted." The suit here referred to was begun by Shaw on March 28, 1861, and a decree was entered in his favor February 5, 1862, from which no appeal was ever taken. The opinion proceeds: "One of these [i. e. "public rights"] was a reservation, notwithstanding its grant, of lands then occupied or set apart for public squares, streets, and sites for school houses, city hall, and other buildings belonging to the corporation; and the decree in this case should have excepted from its operation lands thus reserved." After discussing the claim of Shaw in the suit above referred to, arising from a deed to him of the tide-land commissioners, the opinion continues: "There was therefore nothing in the deed of the tide-land commissioners which could by any possibility impair the right of the city to exercise the power reserved in the Van Ness ordinance over such portions of the

lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares, and public buildings of the city. Such a reservation should have been embodied in the decree in this case." The opinion concludes as follows: "The decree should therefore be modified by adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco or its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares, and public buildings of the city, and as thus modified be affirmed; and it is so ordered." We have quoted in an earlier part of this opinion the language of the decree as modified, which modification is identical with that in the concluding paragraph of the opinion of Judge Field. Having in view the facts stated by Judge Field relative to the Shaw title, which is the origin of the Leroy title, it seems quite clear to us that the modification of the Leroy decree relating to the reserved rights of the city had reference to those rights as they existed at a date certainly no later than the Van Ness map, which set forth the reservations then claimed by the city under the Van Ness ordinance. In making subsequent maps and passing subsequent ordinances the city could not destroy any rights that had attached in favor of settlers or occupants of land confirmed to them by the Van Ness ordinance and by the acts of the legislature ratifying the action taken by the city under that ordinance.

The Leroy brought their action to quiet their title October 26, 1883, and it was still pending on appeal to the supreme court and undecided when, on November 29, 1886, the city brought this present action. If the Leroy decree had not been modified it would have been conclusively determinative of the rights of the Leroy to at least some portion of the disputed land; and being modified in the particular already noticed, and being in all other respects affirmed, the only question is as to what, if any, reservations of the land in controversy did the city make by the Van Ness map. The other maps introduced in evidence—the engineer's map, so called (adopted 1866), and the Humphreys map (adopted 1870)—are of dates subsequent to the Van Ness map, and subsequent to the inception of Shaw's title, as we understand the facts in the Leroy suit against the city. The Van Ness map must therefore govern in determining what reservations were made by the city that in any way conflict with the Leroy lands. The subsequent maps and ordinances may possibly throw some light on the Van Ness map, and aid in arriving at its meaning; but they cannot take the place of that map in the sense that by them, and not by the Van Ness map, are the rights of the present parties to be determined. The trial court evidently took into consideration not only the Van Ness map, but also the

engineer's map and the Humphreys map (which latter, it is agreed, is identical with the engineer's map so far as the land in controversy is concerned), and also other facts, such as that the city had fenced the lands it now claims; that Mission creek had been filled by the city; and other facts occurring since the Van Ness ordinance was passed, and that appeared in evidence. It is also manifest that the trial court regarded the modification of the Leroy decree as relating to its date or to the beginning of their action, and that the findings of the court were more or less influenced by these later maps, and by evidence as to reservations made by the city in some degree, at least, different from those indicated by the Van Ness map. The location of Mission creek with reference to Channel, Alameda, and Columbia streets is different on the Van Ness map from its location on the Humphreys map. On the Van Ness map Mission creek is shown to run west of Columbia street, while on the Humphreys map the creek and that street are nearly coincident at and north of Alameda street for some distance. Channel street on the Humphreys map seems to occupy a different relation to the other streets named and to Mission creek from the Channel street delineated on the Van Ness map. Whether or not the city should be concluded by the Van Ness map as to the exact location thereon given of Mission creek, we at this time express no opinion. Under the view we have taken, however, as to the modification of the Leroy decree, we do not think this court should, in the present state of the evidence in this case, undertake to point out the respective rights of the plaintiff and appellants to any particular lands in controversy, or to pass upon any other questions now before the court. The judgment and order should be reversed, and a new trial ordered as to appellants, to be had upon the evidence already taken and such other evidence as plaintiff or appellants, or either of them, may wish to offer, and as to all other defendants the judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed and a new trial ordered as to appellants, to be had upon the evidence already taken and such other evidence as plaintiff or appellants, or either of them, may wish to offer, and as to all other defendants the judgment is affirmed.

(7 Idaho, 330)

ELG v. HOFF et al.

(Supreme Court of Idaho. Nov. 28, 1900.)

ACTION ON NOTE—COMPLAINT—INDORSEMENT
BY MISTAKE.

Where it is alleged in the complaint that M. is indebted on his promissory note to E.

in the sum of \$525, and that E. thereafter becomes indebted to M. in the sum of \$242.97, and E. pays his indebtedness to M. by indorsing the same on said promissory note, and thereafter transfers such note to L. for the balance due on said note after deducting said indorsement, E., the assignor, retains no such interest in said note as would entitle him to sustain an action thereon, although it be alleged that said indorsement was made by mistake, when no fact is alleged showing of what such alleged mistake consisted.

(Syllabus by the Court.)

Appeal from district court, Bingham county; J. O. Rich, Judge.

Action by Louis Elg against Rasmus Hoff and others. Judgment for plaintiff. Defendants appeal. Reversed.

Dietrich, Chalmers & Stevens, for appellants. Clark & Holden, for respondent.

SULLIVAN, J. This is an action to foreclose a real-estate mortgage. The facts necessary to an understanding of the case are substantially as follows: On the 15th day of May, 1895, the appellant Morrison made and delivered to the respondent his promissory note for \$525, and his real-estate mortgage to secure the payment of the same. On May 25, 1895, said respondent, Elg, assigned said note and mortgage to the Bank of Idaho Falls as collateral security for a loan of \$300. On the 22d day of October, 1896, the appellant Morrison conveyed by warranty deed to appellants Rasmus Hoff, Nicolay Hoff, and Peter Hoff the land described in said mortgage. On the 5th day of March, 1897, the said Hoffs and wives conveyed said land by warranty deed to appellant Lindahl. It is alleged in the complaint that Rasmus Hoff did, on the 6th day of September, 1898, for the purpose of preventing said Bank of Idaho Falls, as assignee, from foreclosing said mortgage, and for the purpose of postponing final settlement, propose and agree to and with said plaintiff, Elg, that the said Hoff, acting for said Hoff brothers, would advance sufficient money, to wit, \$380.97, with which to redeem said promissory note and mortgage from said bank, providing, however, that said Elg would assign said note and mortgage to the appellant Lindahl,—which proposition was then and there accepted by said Elg; that said \$380.97 was advanced as agreed, and said bank did on the last-mentioned date duly assign said note and mortgage to Elg, and he thereupon, in pursuance of said agreement, duly assigned them to the said P. J. Lindahl. It is alleged in the complaint that the plaintiff did not accept said payment of \$380.97 on said assignment in full payment for said note and mortgage, but made such assignment for that sum believing that an indorsement made on the back of said promissory note for \$242.34 was a good and valid indorsement, and that plaintiff had received full value therefor, and it is alleged that all of said facts were well known to all of the defendants. In explaining how the credit of \$242.34 was mistakenly made by the plaintiff, Elg, he alleges in his

complaint as follows: "That prior to the date of said assignment made by said plaintiff to said defendant P. J. Lindahl, and on the aforesaid date, to wit, January 25, 1897, said plaintiff was owing and indebted to said defendant A. D. Morrison in the sum of \$242.34, which amount was then due; that said plaintiff, by mistake, and laboring under a misapprehension of the facts, credited said amount of \$242.34, then due said A. D. Morrison by said plaintiff, on the back of said promissory note, on said 25th day of January, 1897, which said amount still remains credited on said promissory note; that said plaintiff has not received the said \$242.34, nor any part thereof, the amount so credited on the back of said promissory note as aforesaid; that said amount of \$242.34 was erroneously credited on said promissory note." The foregoing is the only explanation offered of how, or why, or in what respect the respondent, Elg, was mistaken, or misapprehended the facts, or how he came to make the credit of \$242.34 erroneously. Elg was owing Morrison \$242.34. Morrison was owing Elg the amount due on the note of \$525, and gave him credit for the \$242.34 on said \$525 note, and assigned said note, with said indorsement thereon, and the mortgage, to Lindahl, the owner of the land described in the mortgage, for the sum of \$380.97. The defendant Morrison defaulted. The defendant Lindahl demurred specially, which demurrer was overruled. Thereupon the defendants Hoff brothers and Lindahl answered, putting in issue the material allegations of the complaint, and averred ownership of said note and mortgage in defendant Lindahl. The court submitted certain questions to a jury, which were answered by the jury, and the court adopted the special findings of the jury, and made additional findings of facts from which conclusions of law were drawn, and judgment and decree entered in favor of the plaintiff, who is respondent here. Numerous errors are assigned, and counsel for respondent suggests that the vital question to be determined on this appeal is, did the respondent, Elg, retain sufficient interest in said promissory note and mortgage, when he assigned the same to Lindahl, as to permit him to sustain an action to foreclose said mortgage? In the light of the record before us, we are of the opinion that Elg intended to and did transfer his entire interest in and to said promissory note and mortgage to said Lindahl for the sum of \$380.97, and that at the time he brought this action he had no interest whatever in either the note or mortgage, and therefore had no cause of action in the subject-matter of this suit. From the quotation above made from the complaint in this action it is made to appear that the promissory note and mortgage referred to in this suit was executed on May 15, 1895, and was owned by the respondent up to September 6, 1898, when he sold and assigned the same to appellant Lindahl for \$380.97; that on January 25, 1897, respondent, Elg, was in-

debted to Morrison, the maker of said note and mortgage, in the sum of \$242.34; that said Elg paid said Morrison said sum by indorsing it on said promissory note; that said indorsement was on the back of said note at the time the assignment was made to Lindahl. After Elg had paid Morrison the \$242.34 by indorsement on said promissory note, the amount due on said note was reduced by \$242.34. The balance due was sold and transferred to Lindahl for the sum of \$380.97. Elg retained no interest whatever in said note after said assignment, and had no right of action thereon. The demurrers to the complaint ought to have been sustained. For that reason the judgment of the court below must be reversed, and it is so ordered. As the record shows that the complaint cannot be amended so as to state a cause of action in favor of respondent, the court below is directed to enter judgment dismissing said action. Costs are awarded to appellants.

HUSTON, C. J., and QUARLES, J., concur.

(26 Nev. 50)

SOUTHERN DEVELOPMENT CO. OF NEVADA v. DOUGLASS et al. (No. 1,595.)

(Supreme Court of Nevada. Dec. 17, 1900.)

COUNTY COMMISSIONERS—LEASE OF TOLL ROAD—CERTIORARI.

1. County commissioners made an order granting a lease to the proprietors of a toll road, in accordance with Comp. Laws, § 459, authorizing such a lease when the franchise expired; but the proprietors did not then accept its conditions, or agree to perform them, and the board subsequently refused to execute a lease submitted for that purpose, and later made an order rescinding its original order therefor. *Held*, that in making the later order the board did not exercise judicial functions, and hence certiorari would not lie to set the same aside.

2. If the proprietors obtained any right under the original order, and the subsequent order infringed the same, certiorari is not a remedy therefor.

Certiorari by the Southern Development Company of Nevada, a corporation, against W. J. Douglass and others, constituting the board of county commissioners of Esmeralda county. Writ dismissed.

M. A. Murphy, for petitioner. G. S. Green, Dist. Atty., for respondent.

BONNIFIELD, C. J. In the year 1881 or 1882 the petitioner constructed the Walker Lake and Bodle toll road, situated in Esmeralda county, and continued from that date up to a recent period to operate the same, and collect tolls thereon. The petitioner's franchise expired in 1891 or 1892 by limitation. Section 454, Comp. Laws. Upon the expiration of the franchise, the ownership of said road, with all the rights and privileges theretofore belonging to the same, vested in Esmeralda county (section 459, Comp. Laws); and the county commissioners were authorized by said last section to declare said road a free highway, "provided,

that in all cases falling within this section, the county commissioners of the proper county may give a lease at a nominal rental of any such road whereon tolls are now collected * * * to the proprietors * * * for a term not to exceed five years, giving to such lessees the right to collect tolls on such road. * * * Section 459. On December 4, 1899, the petitioner made application to said board for a lease of said toll road for the period of five years, with the privilege of collecting tolls thereon. On the next day, December 5th, the board "ordered that a lease be, and the same is hereby, granted to the Southern Development Co. for a period of five years, commencing January 1, 1900, * * * upon the following conditions: * * *." The conditions were to be performed by the petitioner. On the 3d day of February, 1900, the petitioner presented to the board for execution a written lease of said road for the above-named term. Subsequently the board rejected and refused to execute the lease, and notified the petitioner thereof. At a later date, on the 1st day of October, 1900, the board ordered that the action of the board of December 5, 1899, granting the Southern Development Company a lease of the Walker Lake and Bodie toll road for the period of five years, commencing January 1, 1900, "be, and the same is hereby, rescinded."

The contention of the petitioner is that the action of the board in making and entering the order of December 5, 1899, was in its nature judicial, and that the board exceeded its authority in rescinding said order by the order made on the 1st day of October, 1900, and we are asked to set aside the latter order. Unless the board in making the order complained of was exercising judicial functions, the writ of certiorari will not lie. Section 3531, Comp Laws. This rule is conceded by petitioner.

The order of December 5, 1899, was not a lease in contemplation of the parties, but a promise or agreement on the part of the board to lease the road on certain conditions. The petitioner did not then accept the conditions, or agree to perform them, so far as the record shows. It was so understood evidently by the petitioner that it was not a lease, or it would not have subsequently prepared and submitted to the board the written lease for execution. After said promise or agreement to lease was made, the board refused to execute the lease, and, as stated above, made the order vacating or rescinding the said former order made December 5, 1899. We are of opinion that even if the board had no authority to make the order of said date, October 1, 1900, the order cannot be set aside in this proceeding, as in making the order the board did not exercise judicial functions; neither was the order which was vacated a judicial act. If the petitioner acquired any legal right under the order of December 5, 1899, it cannot enforce it by

writ of certiorari. If the order made October 1, 1900, infringed any such right of petitioner, its remedy is not by writ of certiorari. The writ will not lie to compel the performance of the promise or agreement made by the board, or to set aside its order revoking said promise or agreement. The writ is dismissed.

MASSEY and BELKNAP, JJ., concur.

(22 Utah, 465)

CAVANAUGH v. SALISBURY.

(Supreme Court of Utah. Dec. 6, 1900.)

EQUITABLE ACTION — EVIDENCE — FINDINGS — WHEN NOT DISTURBED — AUTHORITY OF PARTNER TO BIND FIRM — NONTRADING PARTNERSHIP — BURDEN OF PROOF — LIABILITY OF PARTNERS.

1. Where, upon a careful examination and consideration of all the evidence in an equity case, the conclusion is irresistible that the proof is ample to warrant the findings of the trial court, they will not be disturbed.

2. A partner without special authority can bind the firm only within the scope of the business, and the firm, in the absence of ratification, is not bound by any transaction of a partner outside the real or apparent scope.

3. Where a partnership is engaged in the stage business, or the carrying of mails, passengers, and express, a partner has prima facie no authority to bind the firm or another partner in a transaction relating to the business of mining; and he who would seek to hold the firm liable by virtue of such transaction has the burden to show that the contracting partner had the authority to enter therein. No such power is implied in a partner in a nontrading partnership.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Sarah Effle Cavanaugh against O. J. Salisbury and others. Case settled and dismissed as to all except O. J. and Monroe Salisbury. Judgment entered in favor of O. J. Salisbury, and plaintiff appeals. Affirmed.

Frank Hoffman, for appellant. W. C. Hall and Dickson, Ellis & Ellis, for respondent.

BARTON, C. J. This is an equitable action founded upon contract. Originally the suit was brought against O. J. Salisbury, Monroe Salisbury, and Katherine C. Belcher, administratrix of the estate of John T. Gilmer, deceased, defendants. Afterwards Mary E. Gilmer, Wells, Fargo & Co., and John E. Dooly were also made defendants, and a trial was had; but before the entry of final judgment the case was settled and dismissed by stipulation as to all the defendants except O. J. Salisbury and Monroe Salisbury, the plaintiff reserving the right to prosecute the action against them to final determination. Thereupon the suit was prosecuted against the defendant O. J. Salisbury, and judgment entered in his favor. From that judgment this appeal is taken by the plaintiff.

The contract out of which the controversy arose reads as follows: "The undersigned

have this day sold to Michael Cavanaugh one thousand (1,000) shares of the capital stock of the Highland Mining Company of Deadwood, Dakota, for the sum of nine thousand dollars (\$9,000), and have received payment in full therefor. It is understood that said stock is free from assessments to this date. The said one thousand shares is to be held in pool subject to the same terms as the bulk of the stock, and, in case of the sale of the whole or any part of the pooled stock, said Cavanaugh is to receive his pro rata of the proceeds of stock sold; and in case the stock is issued to owners from the pool, without a sale, the one thousand shares are to be issued to Cavanaugh in the same way and at the same time as to other owners of stock. Dated March 4, 1880. Gilmer, Salisbury & Co." The plaintiff, who is the sole heir of Michael Cavanaugh, deceased, seeks to recover the 1,000 shares of stock mentioned in this contract, and to compel an accounting for all the dividends paid thereon.

It will be noticed that the contract was executed in the name of Gilmer, Salisbury & Co. That company at the time of the execution of the instrument was a partnership, and its individual members were John T. Gilmer, O. J. Salisbury, the defendant, and Monroe Salisbury. The firm was engaged in the stage business,—carrying mails, passengers, and express. The contract, as shown by the evidence, was made and executed by John T. Gilmer, he signing the firm name to it; and the main issues at the trial were whether or not the firm, and the individual members thereof, were bound by the terms of the agreement, and whether or not the firm, or the individual members thereof, have received any benefits from the shares of stock alleged in the contract to be held in trust for Michael Cavanaugh. Respecting these issues the court, in substance, found that the firm of Gilmer, Salisbury & Co. did not, for a valuable consideration or otherwise, execute the contract or declaration of trust, or deliver the same to Michael Cavanaugh; that the firm did not, for value or otherwise, agree to deliver to Cavanaugh the 1,000 shares of stock of the Highland Mining Company, or any number of shares, or receipt for the stock or any part thereof; that the firm did not agree to hold the stock in trust for Cavanaugh under the pool agreement, or, when the pool should be dissolved or distribution of stock made, that Cavanaugh should receive the 1,000 shares, or the dividends paid thereon; and "that said John T. Gilmer, in his lifetime, signed the name of Gilmer, Salisbury & Co. to said agreement of March 4, 1880, without the knowledge or consent of the defendant Orange J. Salisbury, and that the said firm or partnership of Gilmer, Salisbury & Co. did not receive any of the shares of stock mentioned in said contract of March 4, 1880, nor any of the dividends or profits accruing or paid thereon, nor did the said defendant Orange J. Salisbury receive any por-

tion of said shares of stock, or any part of the dividends or profits growing or accruing or paid thereon, but that the said John T. Gilmer did receive said shares of stock mentioned in said contract of March 4, 1880, and received from said Michael Cavanaugh at the date of said contract of March 4, 1880, the nine thousand dollars (\$9,000) mentioned therein, and at that date used and appropriated the same to his own private and personal uses, and without the knowledge or consent of said Orange J. Salisbury, and that said contract or trust agreement of March 4, 1880, was not made by said John T. Gilmer for and in behalf of said Gilmer, Salisbury & Co., or said Orange J. Salisbury."

The appellant insists that the findings are not supported by the proof. Upon careful examination and consideration of all the evidence, however, the conclusion is irresistible that the proof is ample to warrant the court in making the findings of fact referred to and quoted. So, without reference to the evidence in detail, it is clear that the court was warranted in deciding the issues mentioned in favor of the defendant. It is true, the testimony shows that the members of the firm of Gilmer, Salisbury & Co. (first Gilmer and Monroe Salisbury, and afterwards O. J. Salisbury) were individually interested, and each had a large amount of stock in his own right in, the Highland Mining Company. They were likewise interested in other mining concerns; but the evidence fails to show that Gilmer, Salisbury & Co. was so interested, as a firm, in the Highland Mining Company, or any other mining corporation, or that the firm, as such, did any mining business whatever. Nor does the proof show that the contract in question was executed or delivered by authority of the firm or of defendant O. J. Salisbury, or with his knowledge or consent, or that the instrument sued upon was within the scope of the business of the partnership, or that the firm or the defendant Salisbury ever received the stock or the money or dividends, or any part thereof, mentioned in the writing. On the contrary, it appears from the testimony that John T. Gilmer made and entered into the contract as an individual affair of his own, and signed the firm name to it without any authority of the firm, and that the defendant Salisbury was not aware of the execution of such an instrument until a long time thereafter he was informed of its existence by the witness McCornick, when he promptly repudiated the transaction. The witness McCornick, who was guardian of the plaintiff before she became of age, on this point, in part, testified: "I remember talking with John T. Gilmer, during my guardianship, about this paper in this city. I don't think that I showed him the paper. I think I called his attention to the contents. He simply stated that it was a matter of his own. Prior to that time I had taken this paper and showed it to Mr. O. J. Salisbury. I think I told him that O. J. Salisbury told me that he knew

nothing whatever of the existence of the paper." On cross-examination the witness, among other things, said: "Mr. Gilmer said that it was a deal that he had with Cavanaugh personally. At the time I had the conversation with Mr. Gilmer, it was in my official capacity as guardian of the minor. I don't remember his making any objection to the claim at that time, simply answering that it was a deal that he had with Cavanaugh,—a personal matter of his own." From this and other evidence in the record, it is clear that neither the firm, nor any member thereof, except Gilmer, had anything to do with the writing in question, or received any benefit because thereof. It is further apparent from the proof that the firm of Gilmer, Salisbury & Co. was a nontrading partnership, and that the contract, because of which this controversy arose, was not within the scope of its ordinary business. A partner without special authority can bind the firm only within the scope of the business, and the firm, in the absence of ratification, is not bound by any transaction of a partner outside the real or apparent scope. Where, therefore, as in this case, a partnership is engaged in the stage business, or the carrying of mails, passengers, and express, a partner has prima facie no authority to bind the firm or another partner in a transaction relating to the business of mining; and he who would seek to hold the firm liable by virtue of such transaction has the burden to show that the contracting partner had the authority to enter therein. The law in the case of a nontrading partnership implies no such power in a partner. *Bates, Partn.* §§ 317, 327; *Skillman v. Lachman*, 23 Cal. 199; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225. Nor has the appellant shown by the evidence or otherwise that Gilmer, in the present instance, was authorized to bind the firm or the individual members thereof.

We are of the opinion that the proof in this case shows no right of recovery against the respondent, and that the findings of fact are sufficiently supported by the testimony. We do not, therefore, consider it necessary to discuss the remaining questions presented. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(24 Mont. 487)

REIBERG v. GREISER.

(Supreme Court of Montana. Dec. 17, 1900.)

APPEAL — BRIEF — STATEMENT — REFERENCE TO TRANSCRIPT — SPECIFICATION OF ERRORS.

1. Under Sup. Ct. Rule 5, § 3 (44 Pac. vii.), requiring appellant's statement to present succinctly the questions involved, and refer to the pages of the transcript, so that the pleadings, evidence, etc., may be easily found, a statement that the court reserved its decision as to the findings of the jury, and thereafter set aside certain findings and substituted findings of its own (referring to the pages of the transcript

where this was shown), was insufficient, in so far as the question whether the evidence justified the findings was concerned, in not referring to the pages of the transcript where the evidence to support the findings was to be found.

2. Failure of a brief to set out a specification of errors, stating separately and particularly each error asserted, as required by Sup. Ct. Rule 5, § 3 (44 Pac. vii.), though not jurisdictional on appeal, will be cause for affirming the judgment.

3. Whether a decision is "against law," in that the findings do not sustain the judgment, is an error of law, and not of fact, required to be set out in specifications of error.

4. Whether evidence is sufficient to sustain a finding is an error of law required to be set out in the brief in specifications of error.

5. That the supreme court has occasionally overlooked infractions of the rule requiring briefs to contain a specification of errors does not require it to abrogate the rule, or overlook such infractions in other instances.

6. That Sup. Ct. Rule 5, § 5 (44 Pac. vii.), prescribes that a brief not conforming therewith shall be returned to the clerk without filing, does not prevent the court from dismissing the appeal for such defect; the court having inherent power to affirm or dismiss judgments appealed from when not presented in substantial compliance with its rules.

Motion for rehearing denied.

For former opinion, see 62 Pac. 820.

PIGOTT, J. Since the opinion in this case was handed down the death of the appellant has been suggested, and the executrix of his will has been substituted as the appellant. The executrix appears, and moves for a rehearing upon the ground that in the opinion (62 Pac. 820, 24 Mont. —) we applied to the brief of the appellant a rule which was not published until long after the brief was deposited in the office of the clerk. The copies of the brief before us bore no filing marks, and we assumed that it had been filed after the adoption of the present rules. It is true that the rule quoted in the former opinion differs somewhat from the rule in existence at the time the brief was filed. Section 3, rule 5 (44 Pac. vii.), which went into effect January 1, 1896, provides that the brief shall contain "in the order here stated: (1) A concise abstract or statement of the case, presenting succinctly, the questions involved, and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and judgment may be easily found. (2) A specification of errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. * * * In the motion for a rehearing counsel for the appellant say that a reversal of the judgment and order denying a new trial was asked for because of the insufficiency of the evidence to sustain the findings of the court and because the decision is against law. The abstract or statement of the case contained in the brief recites that the action is for a permanent injunction against the defendant, enjoining him from diverting waters of the Prickly Pear creek, to which the plaintiff

and defendant claim to be entitled, from a certain ditch tapping the creek, jointly constructed and owned by the parties. After reciting the contents of the pleadings, it proceeds: "A jury trial was had, and nineteen special findings were returned. The court reserved its decision on said findings, and thereafter set aside certain of the findings returned by the jury, substituted in their places findings of its own, and rendered a judgment and decree in favor of plaintiff and respondent. Thereafter defendant, Greiser, moved for a new trial. The motion was by the court overruled. The defendant appeals from said judgment and decree and the order of the court overruling defendant's motion for a new trial."

This statement or abstract of the case, at least in so far as the question whether the evidence justified the findings is involved, does not conform to the requirements of the rule. It does not appear from the statement, or from any reference therein made, what the evidence was, or what it proved or tended to prove. There is not a suggestion with respect to evidence, nor that any was received. Immediately following the so-called "Statement of the Case" is the argument. Neither in its proper place nor elsewhere in the brief is there set out, in accordance with the command of the rule, a specification of errors relied upon. Here and there in the argument may be gleaned the reasons urged for reversal; but the rule requires that the errors specified must be grouped together, and must constitute a division of the brief separate and distinct from the abstract and from the argument. In the respect just mentioned, the brief violates the rule as seriously as did the one condemned in *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081. In that case it was said that the specification of errors required by the rule is designed to serve the purpose which an assignment of errors accomplished at the common law. This was perhaps not entirely accurate. The assignment is the pleading filed by the plaintiff in error in the court to which the cause has been transferred by the writ of error, and is jurisdictional. Its function in the higher court may be likened to the function of the declaration in the lower court, and the joinder in error, which makes the issue, is akin to a plea in general denial. The assignment performs the further office of calling attention to the errors relied on. The specification required by the rule of this court may not be indispensable to jurisdiction. It is, however, essential for the purpose of pointing out with particularity the errors relied upon for reversal, and hence it performs the second office, at least, of the common-law assignment. For convenience, and as an aid to the court in the consideration and determination of appeals, the rule requires that the errors relied upon shall be specified and grouped together after the statement of the case.

Counsel assert that the rule requires only a specification of the errors in law relied upon, and does not require a specification of the insufficiency of the evidence to justify a finding or other decision of the court, nor that the decision is against law. Their position is that when the only points relied upon for reversal are that the evidence was insufficient, and the decision was against law, the rule does not contemplate a specification of errors. To support the position, they instance section 1171 of the Code of Civil Procedure, which, among other grounds for a new trial, enumerates the following: (1) Insufficiency of the evidence to justify the verdict or other decision; (2) that the decision is against law; (3) errors in law occurring at the trial and excepted to. They invoke also section 1173 of the same Code, which provides that, when the notice of motion for a new trial "designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law, occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely." They cite, also, *Bardwell v. Anderson*, 18 Mont. 528, 46 Pac. 443, where it was held that specifications of error in law in a new-trial statement are not to be confounded with specifications therein of the insufficiency of the evidence, and that insufficiency of the evidence to justify a particular finding of fact may not be presented by means of a specification of errors in law. These distinctions which the statutes draw and the cases recognize pertain to the procedure in the district courts upon motions for new trials, and in nowise affect the rule of the supreme court requiring the errors relied upon in the latter court to be specified in the briefs. This court, when exercising its appellate jurisdiction, is a court for the correction of errors committed in or by the court or judge a quo. Whether a "decision against law" includes anything but a verdict or special finding of a jury returned contrary to the law, as declared in the charge of the court, we do not pause to inquire, for the appellant uses the term as meaning that the findings do not sustain the judgment, and that the judgment is therefore erroneous. Such supposed error, to be considered here, must be specified in the brief. It is plainly an error of law. The denial of a proper motion to vacate a finding, verdict, or decision which was not supported by any evidence is also manifestly an error of law. What the evidence tends to prove is question of law, and hence a finding by a court of a fact which is not supported by any evidence whatever is equivalent to a decision or ruling that there was some evidence tending to prove what is found when in truth there

was none; and this also presents a question of law which, when the finding is excepted to, becomes a proper subject for review on writ of error at the common law and on appeal under the Code of Civil Procedure of Montana. *The Francis Wright*, 105 U. S. 381, 26 L. Ed. 1100; *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453; *Alexandre v. Machan*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; *Bedlow v. Dry-Dock Co.*, 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629; *Fernald v. Bush*, 131 Mass. 591; and see *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165. The three errors referred to are unquestionably errors of law, and must be specified, and so must any other error relied upon. What evidence in substantial conflict proves—that is to say, what inference of ultimate fact is to be deduced from disputed evidentiary or probative facts—is a question of fact the final determination of which is confided to the trial court or jury, whose decision cannot be overturned by this court upon the ground that the evidence preponderated against the finding or verdict; but, in cases where the decision is so clearly against the weight of the evidence as to require the inference that it was made under the influence of passion, prejudice, bias, or corruption, this court will set aside the decision as error, and remand the cause for a new trial; and whether such decision be deemed an error in law or an erroneous inference of fact is immaterial in respect of the necessity for specifying the error in the brief as a condition precedent to its consideration by this court. Each error asserted and intended to be urged must be particularized as the rule requires. If an error in matter of fact can be reviewed by this court, it must be specified; if it cannot be reviewed by this court, then it is not the subject of a specification. The rule demands that the error intended to be urged must be particularly specified, and, without the proper specification, the appellant is in no position to demand that any supposed error be considered.

It is also said by counsel that this court has hitherto decided some cases on the merits where the briefs were in the condition of the one filed by the appellant. If this be true, it certainly does not follow that the supreme court must or should abrogate the rule for the benefit of the appellant in this case. That a failure to comply with the requirements of the rule has been occasionally overlooked or disregarded furnishes no reason why the practice should be continued. The appellant's brief has been on file for more than two years, and during that period this court has affirmed many judgments and orders, for the reason that the briefs did not meet the demands of the rule, and an ample opportunity has been afforded him to apply for leave to file a new brief or for leave to amend; indeed, at the time the cause was argued and submitted the defects were adverted to, but no effort was made to supply

them. We are told that the only penalty prescribed by section 5, rule 5 (44 Pac. vii.), of the rules of 1896, is that, if the brief does not conform therewith, it shall be returned by the clerk without filing. Such penalty is not the only one; for inherent power to affirm or dismiss orders and judgments appealed from, when not presented in substantial compliance with its rules, resides in this court. The motion for a rehearing is denied. Denied.

BRANTLY, C. J., and WORD, J., concur.

(10 N. M. 555)

BLACKWELL v. FIRST NAT. BANK OF ALBUQUERQUE et al.

(Supreme Court of New Mexico. Aug. 24, 1900.)

DELINQUENT TAXES—SALE—NOTICE—LIEN—STATUTES.

1. In the sale of real estate for taxes which are delinquent the notice required by statute must be strictly complied with, and the time prescribed by statute for the publication and posting of the notice is essential to the validity of any sale made under it, and the notice, if given for less than the statutory time, makes void all subsequent proceedings, no matter how regular they may themselves be.

2. If, at the time the sale for delinquent taxes was made, there was no statute in force giving the purchaser at an irregular or void tax sale a lien upon the property sold, or for money paid by the purchaser for any subsequent taxes, an act passed after such sale does not give a lien. Such lien exists only by virtue of the provisions of a statute.

3. The territory can, by statute, give a lien to purchasers at void tax sales for the money paid by them upon the property attempted to be sold, but such a lien cannot be created by retroactive legislation. Only the lien which the territory has can pass by such legislation.

4. Laws enacted at the same session of the legislature relating to the same subject-matter are in *pari materia*, and are to be considered and construed together, as if they were different sections of one act, and as if enacted at the same time.

(Syllabus by the Court.)

Appeal from district court, Bernalillo county; before Justice J. W. Crumpacker.

Action by Arthur M. Blackwell against the First National Bank of Albuquerque and others. Judgment for plaintiff, and defendants appeal. Affirmed.

On September 1, 1898, A. M. Blackwell filed suit in the district court of Bernalillo county against the above-named defendants, appellants herein. The complaint, answers, and amended answers show that on March 1, 1892, Joseph E. Saint and wife gave to Blackwell a mortgage on certain lots situated in the city of Albuquerque to secure the payment of the sum of \$3,000, and that said debt at the date of the filing of this suit was still unpaid; that on September 6, 1895, the collector of the county of Bernalillo sold said property for taxes due for the year 1894, which taxes amounted to \$118.92, and that said property was struck off to the defendant R. W. D. Bryan, who sold the tax

certificate to the defendant the First National Bank; that on July 4, 1896, the bank paid the taxes assessed against the property for the first half of the year 1895, amounting to \$49.42, and on January 22, 1897, paid the taxes assessed against the property for the second half of the year 1895, amounting to \$49.42, and likewise on January 26, 1897, paid the taxes assessed against the property for the first half of the year 1896, amounting to the sum of \$50.03. On April 6, 1896, March 7, 1897, and March 9, 1898, the property was again sold by the collector of Bernalillo county for taxes due upon the same for 1893, for the second half of 1896, and the second half of 1897, and was purchased at each of said sales by the defendant J. A. Henry for the sums of \$76.82, \$63.22, and \$64.53, respectively. The complaint also alleges that the first sale of said property was advertised to take place on September 2, 1895, and that no adjournment of said sale from September 2, 1895, to some other day, was entered on the books of the collector, or posted at the court-house door, as required by section 4087 of the Compiled Laws of 1897; that the first notice of adjournment entered on the records of the collector's office was on September 9, 1895, and that the statute does not authorize the advertisement for sale of property for taxes in September, but only on or before the first Monday in March in each year (section 4074, Comp. Laws 1897); that the other sales of the property, when the same was bought in by Henry, were also adjourned from time to time, but that no notice of such adjournments are made upon the books of the collector, as required by law. The complaint also sets out several other alleged defects in the proceedings taken by the collector prior to the making of the sale; that he did not give notice of tax sales by causing the same to be published once a week for four consecutive weeks, the last publication being at least one week prior to the date of sale, in some newspaper published in the county, and also by causing a copy of such notice to be posted on the door of the county court house at least five weeks before the date of sale; that said property was sold for taxes assessed upon personal property of defendant Saint, as well as the taxes assessed upon his real estate; that a sale of the personal property was condition precedent to a resort to the real estate; that the property was not advertised to be sold, and sold to the person who offered to pay the amount of the taxes due on the same for the smallest portion thereof, but was advertised to be sold to the highest bidder for cash; that the notice of sale did not state the amount of the taxes assessed against the property; that the figures were given without dollar marks, and were meaningless, etc. These alleged defects in the manner of advertising the notice of the sale and the manner of conducting it are not denied by the

answers. The defendant Bryan filed a disclaimer on the ground that he had no interest in the property. The answers of the bank and Henry alleged that the taxes were regularly assessed, and were liens upon the property, and that by virtue of the sales and the proceedings set forth in the complaint they became subrogated to all the right, title, and interest of the territory of New Mexico and Bernalillo county in and to the taxes for the several years aforesaid; and that, if such tax sale should prove irregular, they should recover the taxes so paid by them, and interest at the rate of 25 per cent. per annum upon the several amounts so paid. They further virtually consent to the granting of the relief prayed for in the complaint, and repayment to them of the several sums that they had paid out, with interest as aforesaid. Defendant Sandoval in his answer admitted that he was the collector of Bernalillo county, and that he would issue deeds to the property to the several holders of tax certificates if they applied to him for the same after the statutory period of three years. To the answers of the First National Bank and Henry the plaintiff demurred. This demurrer was never passed upon, as, while the case was in this condition, a session of the territorial legislature was held, and a new law was passed, which granted to purchasers at tax sales heretofore made the lien of the county and territory for such taxes, and thereupon the defendant bank and Henry filed amended and supplemental answers, and, in addition to the allegations in their previous answers, set up the act of the legislature, and claimed thereunder the right to recover the taxes which were due at the time the sale took place, together with all penalties thereon and subsequent taxes paid, with interest at the rate of 25 per cent. per annum. To these amended and supplemental answers plaintiff demurred, which demurrer, in substance, set out: "That the matters and things set up therein constitute no defense as against the relief prayed for by the plaintiff; that the act of the legislature did not purport to subrogate the defendants to any tax lien which the said county and territory may have had in said property described in said complaint for the taxes mentioned therein; and because, if said act did so pretend to give the defendants a lien for said taxes, it would be the creation of a new lien, the old lien having ceased to exist, and would be unconstitutional and void; and because that at the time the said act was passed neither the territory nor the county had any lien on said property for said taxes; and because the legislature at the same session passed an act providing that all penalties and interest upon all delinquent taxes which might be paid prior to the 1st day of July, 1899, should be remitted." The case was heard upon this demurrer to the amended and supplemental answer, and the demurrer was sustained, and,

the defendants declining to plead further, the court entered a decree ordering payment into court for the benefit of the defendants of the amount of taxes and costs which had been paid by said defendants, with interest thereon at the rate of 6 per cent. per annum, from the date of the respective payments by the defendants, and cancelling the tax certificates and granting other relief. From this decree the defendants appealed to this court, assigning as error that the court erred in granting plaintiff the relief prayed for on his paying to the defendants the various amounts of taxes paid by them, with 6 per cent. interest, when such relief should not have been granted without first compelling plaintiff to pay defendants the several amounts paid by them, with interest at the rate of 25 per cent. per annum. The validity of the assessments is nowhere attacked in the complaint.

A. B. McMillen and Johnston & Finecal, for appellants. Childers & Dobson, for appellee.

MILLS, C. J. (after stating the facts). The appellants rely on section 4066 of the Compiled Laws of 1897, which provides that delinquent taxes shall bear interest at the rate of 25 per cent. per annum, and chapter 27 of the laws of 1899, which provides: "That under all tax sales made heretofore by the various county collectors of this territory, by virtue of the revenue laws in force prior to the 1st day of January, 1899, the certificates of sale issued by said collectors, as provided for by section 4092 of the Compiled Laws of 1897, shall, and hereby do, vest in the purchasers to whom said certificates may have been issued, their heirs and assigns, all the right, title, interest and lien of the county and territory, in and to the real estate sold for the taxes for which the same may have been sold, or subsequently paid as provided for by section 4094 of said laws; and under any sale made heretofore, under the provisions of said revenue laws for the non-payment of taxes which may hereafter prove to be invalid, and ineffectual to convey the title for any cause, except in case of land exempt from taxation, or upon which the taxes may have been paid prior to such sale therefor, the lien which the county and territory had on such land for all taxes, territorial, county and municipal, for which said lands may have been sold, or subsequently paid by the purchaser at tax sale as provided for by section 4094, shall remain in full force and effect and is hereby declared to be transferred by said certificates of sale to the grantees, their heirs, and assigns, who shall be entitled to foreclose said lien as mortgages and other liens are foreclosed, the owner of said lands being allowed to redeem the same as now provided by law upon the payment to said county collectors of the amounts for which said property was sold for taxes, together with interest thereon at the rate heretofore

provided by law and costs. Provided, that the holder of said certificate will pay or cause to be paid the full amount of taxes due upon said property, to the proper officer authorized to receive the same." That the several irregularities set out in the complaint existed in the manner of advertising and conducting the sales of the lots are admitted, as they are not denied by the answers; and it is for us first to determine whether or not any such irregularity was sufficient to make the sales invalid and of no binding force and effect. One of the alleged irregularities set out in the complaint was that the notice of sale required by law was not published for the length of time required before the sale was made. Section 4074, Comp. Laws 1897, provides that on or before the first Monday in March in each year the collector is required to offer at public sale at the court-house door all delinquent real estate, and sell the same. Section 4075 provides that notice of such sale shall be given, stating the time and place of such sale, and containing a description of the parcels of real estate to be sold, what taxes, interest, and costs are charged against each tract, and the name of their owner, when known; and section 4076 requires that the collector shall give such notice by causing the same to be published in some newspaper once a week for four consecutive weeks, the last publication to be at least one week prior to the day of sale, and by causing a copy of such notice to be posted on the door of the county court house for at least five weeks before the day of sale. The publishing and posting of the notice of sale is such an important step in tax proceedings, and is so vital to the validity of the further acts of the officer making the sale, that it must closely follow all the statutory directions and requirements. All of the provisions of law in this regard must be strictly complied with. The time prescribed by statute for the publishing and posting of the notice is essential to the validity of any sale made under it, and the notice, if given for less than the statutory time, makes void all subsequent proceedings, no matter how regular they may themselves be. There was no legal notice of the sale of this property. Thirty-five days should have elapsed between the date of the first publication and the day of sale, and the notice should also have been posted at the door of the court house 35 days before such sale. The failure to give legal notice of sale makes the sale illegal, and conveys no title to the property. *Early v. Doe*, 16 How. 610, 14 L. Ed. 1079; *Blackw. Tax Titles*, § 398; and cases cited in note 1. In view of the foregoing, it is unnecessary for us to consider the other irregularities alleged by the complaint to exist.

At the time that the sales for taxes were made, there was no statute in force expressly giving the purchaser at an irregular or void sale any lien upon the property sold for the taxes paid at the sale, or for any subse-

quent taxes paid thereunder, as provided by the statute. Section 4070 of the Compiled Laws of 1897 provides: "In all cases where any person shall pay any tax, interests or costs, or any portion thereof that shall thereafter be found to be erroneous or illegal, whether the same be due to erroneous or improper assessment, or improper or irregular levying of the tax, to clerical or other irregularities, the board of county commissioners shall order the same refunded to the tax payer without discount." It will be observed that under this section the county commissioners are required to refund the amount of the money paid "without discount." It does not authorize the payment by the county commissioners of any interest or penalty upon the amount paid, and it also expressly applies only where the tax itself shall be found to be "erroneous or illegal." This section does not apply to the facts in this case. It is nowhere alleged that the taxes for which the property was sold, or the subsequent taxes which it is alleged were paid by the purchasers at the tax sales, were "erroneous or illegal." Section 4072 of the Compiled Laws of 1897 provides: "When by mistake or wrongful act of the collector, clerk, assessor, or from double assessment, real estate has been sold on which no tax was due at the time, the county shall refund to the purchaser the amount paid by him, with interest thereon at the rate of twenty-five per cent. per annum; and the collector, clerk or assessor, as the case may be, shall be liable on his official bond to the county for all losses sustained by the county from sales made through his mistake or misconduct." It will be observed that this section applies only where property has been sold by "mistake or wrongful act of the collector, clerk, assessor, or from double assessment; * * * on which no tax was due at the time." It is not alleged anywhere in the pleadings in this case that the taxes for which the property was sold, or which were subsequently paid by the respondents or their assigns, were not due at the time that the property was sold for taxes. This section, it will also be observed, only applies to money paid at the time of the sale in payment for the property sold. It does not apply to taxes subsequently paid by the purchaser at the void tax sale. It therefore does not appear that the respondents could recover from the county under either of these provisions any part of the money alleged to have been paid on account of these void tax sales, as the validity of the taxes assessed is nowhere questioned. The territory and county therefore had no lien on account of any liability to refund to the purchaser the sums thus paid.

The only other section, having any application to tax sales, in existence at the time that these sales were made, is section 4101 of the Compiled Laws of 1897, which provides that the deed given to the purchaser three years after the tax sale "shall

vest in the purchaser all the right, title, interest and estate of the former owner in and to the lands conveyed, and also all the right, title, interest and claim of the territory and county thereto, and shall be prima facie evidence in all courts in the territory in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the lands thereby conveyed," of nine different facts set out in this section of the statute, all of which were necessary to have made a valid sale of taxes and authorized the purchaser to receive a valid deed therefor. No deed was ever executed and delivered to the purchasers or their assigns in this case. It would seem to be plain that the purchaser is not entitled to receive a deed where the tax sale is void for failure to give notice, or any of the other causes alleged in the pleadings in this case, which would render the sale void. If the purchaser is not entitled to the deed, and has not received any, it cannot be very well contended that he acquires any lien by virtue of the section of the statute providing for the execution and delivery to him of a deed. He could not show himself entitled to a lien, which arises out of the deed when executed and delivered, unless he also shows himself entitled to receive a deed. It appears in this case, taking the allegations in the complaint to be true,—as they are so taken upon demurrer,—that the respondents were not entitled to receive a deed, and therefore could not claim any lien under this section of the statute. The act of 1899, above quoted, provides: "That under all tax sales made heretofore by the various county collectors of this territory, by virtue of the revenue laws in force prior to the first day of January, 1899, the certificates of sale issued by said collectors, as provided for by section 4092 of the Compiled Laws of 1897, shall and hereby do, vest in the purchasers to whom said certificates may have been issued, their heirs and assigns, all the right, title, interest and lien of the county and territory, in and to the real estate sold for the taxes for which the same may have been sold, or subsequently paid as provided for by section 4094 of said laws," etc.; and "under any sale made heretofore, under the provisions of said revenue laws for the non-payment of taxes, which may hereafter prove to be invalid, and ineffectual to convey the title for any cause," etc., the "lien which the county and territory had on such lands for all taxes, territorial, county and municipal, for which said lands may have been sold, or subsequently paid by the purchaser at tax sale as provided for by section 4094, shall remain in full force and effect, and is hereby declared to be transferred by said certificates of sale to the grantees, their heirs and assigns," etc. We do not deem it necessary in this case to discuss how far the legislature may attempt to enact retrospective legislation for the purpose of creating liens in favor

of a purchaser at a void tax sale which he did not have by virtue of a statutory enactment at the time of such sale. All the authorities hold that no such lien exists in favor of the purchaser, except by virtue of the provisions of a statute. *Croskery v. Busch* (Mich.) 74 N. W. 464, and authorities there cited; *Nester v. Busch*, 64 Mich. 657, 31 N. W. 572; *Adams v. Osgood* (Neb.) 60 N. W. 869; *Conway v. Cable*, 37 Ill. 82. We think it plain that no such lien existed, prior to the enactment of the statute of 1899, in favor of the purchaser at a void tax sale; and certainly none such existed prior to the execution and delivery of a deed. The language used in section 4101 of the Compiled Laws is also used in the Iowa statute, and it has been there held that the legal title and the right to the possession of the land continue in the original owner of the land until the tax deed has been regularly executed and delivered to the purchaser at the tax sale. *Williams v. Heath*, 22 Iowa, 519. The right to collect 25 per cent. upon the amount paid at the time of the sale, or for subsequent taxes, in this case must be based upon the act of 1899, as no previous statute expressly gave any such right. The general principles of equity would not require, as a condition for equitable relief, the payment of any such rate of interest, even if it be held that by such payment alone the purchaser at a tax sale is subrogated to the rights of the territory and county. We deem it, however, unnecessary to discuss this proposition for the determination of this case. Let us assume that the payment of the taxes by the purchaser and the subsequent payment of taxes did not have the effect of extinguishing the lien of the territory upon the property, and that such lien was in force and effect at the date of the passage of the act of 1899. It seems to us clear that the act of 1899 could convey, and did convey, only such lien as the territory and county had at the session of the legislature when the act of 1899 was passed. In fact, we think it plain that the respondents could recover only to the extent of such lien as the territory or county could enforce at the date of the decree rendered in this case. In *Hentig v. Thomas* (Kan. App.) 53 Pac. 80, the supreme court of Kansas held that it was improper to allow 20 per cent. interest on the sum due at the date of the tax deed and on taxes subsequently paid, because the statute as it existed at the time of the sale allowed such rate, the statute having been subsequently changed, thereby reducing the rate to 12 per cent. The court held that the latter rate—which was that provided by the statute at the time of the rendition of the decree—was the correct rate. At the same session of the legislature of 1899, however, an act was passed which provides “that all accrued penalties and interest upon taxes now or heretofore in this year delinquent shall be remitted upon such taxes which have been or shall be paid on or before the first

day of July, A. D. 1899.” Acts 1899, c. 52, p. 106. This act was approved March 16, 1899. The act transferring the lien of the territory, already discussed, was approved March 4, 1899. It is a well-settled principle that all laws enacted at the same session of the legislature, relating to the same subject or in *pari materia*, are to be considered and construed together, as if they were different sections of one act, and as if enacted upon the same day. “Acts of the same session are, according to the British rule of construction of statutes, and the rule which prevails in Virginia, parts of the same act, and have effect from the same day, and are to be taken together as parts of the same act.” *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638. In another case the supreme court of the United States says: “The correct rule of interpretation is that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule that all acts in *pari materia* are to be taken together as if they were one law.” *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724. In fact, we understand that this is the common-law rule of construction of the acts of parliament and in this country of legislatures. See, also, *Perkins v. Perkins*, 62 Barb. 531; *Suth. St. Const.* § 283; *Town of Highgate v. State* (Vt.) 7 Atl. 898, and authorities cited; *Sedg. St. Const. Law*, § 209, and note; *Cain v. State*, 20 Tex. 355; *People v. Jackson*, 30 Cal. 427; *St. Martin v. New Orleans*, 14 La. Ann. 113; *Powers v. Shepard*, 48 N. Y. 543; *Board v. Cutler*, 6 Ind. 354. We do not doubt but that it is competent for the legislature by statute to give a lien to purchasers at void tax sales for the money paid by them upon the property attempted to be sold, but we do not believe that such a lien can be created by retroactive legislation. Only such lien as the territory already has may pass by such legislative transfer. *Railroad Co. v. Comstock*, 71 Wis. 88, 36 N. W. 843; *Pier v. Prouty*, 67 Wis. 218, 30 N. W. 232, and cases cited *supra*. Construing these two statutes together as one law, the only lien which the territory had at the time that the decree was rendered in this case was for the payment of the taxes due. The person who owed the taxes had a right to pay them without any interest prior to the 1st day of July, 1899, by virtue of chapter 52, quoted *supra*. We do not believe, therefore, that it can be contended that a person whose property the collector had attempted to sell at a sale which was void can be required to pay more taxes by the act of the legislature between the dates of the passage of these two acts and the 1st day of July, 1899, than any delinquent taxpayer whose property the collector had not attempted to sell at a void tax sale; nor would it be competent for the legislature to make any such discrimination. By applying the well-settled rule of construction above quoted, and construing these two

acts together, no such unjust and anomalous result follows. We therefore think the court below correctly construed these two statutes. If there was any error at all, it was in requiring the plaintiff to pay 6 per cent. interest upon the taxes actually paid by the defendants. But that question, however, is not before us. The plaintiff not having taken any cross appeal, we express no opinion upon it. For the foregoing reasons, the decree and judgment of the court below are affirmed.

PARKER and McFIE, JJ., concur. CRUMPACKER, J., having heard the case below, and LELAND, J., being absent, did not participate in this decision.

(10 N. M. 568)

LOCKHART v. LEEDS et al.

(Supreme Court of New Mexico. Aug. 24, 1900.)

MINES AND MINERALS — CLAIMS — LOCATION — TITLE — CONFLICTING CLAIMS — INJUNCTION — ADEQUATE REMEDY AT LAW — PLEADING — DEMURRER.

1. A bill alleged a partnership agreement to prospect for minerals between complainant and P.; that P. located a claim, posted notice, but did not have the same recorded within 90 days by reason of a fraudulent agreement into which he entered with defendants; that thereafter complainant secured and filed a copy of the notice, but that defendants posted a notice, and took possession of the claim. Complainant prayed that such location be decreed void, that complainant be declared the equitable owner of the mine, and for general equitable relief. *Held* that, since a demurrer only admits facts well pleaded, the bill could not be held to allege either the time when complainant secured a copy of the notice or that he relied on P. to record the same, which defects were fatal to the bill.

2. There being no averment that defendants took possession after the expiration of 90 days from complainant's location, such fact could not be regarded as established by an allegation in the demurrer that the bill did not allege that defendants entered on the claim within 3 months after location.

3. Complainant, under the allegations of the bill, had a complete and adequate remedy at law to establish his title by ejectment, since, if P. surrendered his possession within the 90 days, complainant would be excused from perfecting his location, defendants not being able to initiate any rights which would defeat those of prior discoverers; and hence the bill, not being filed in aid of a suit at law, did not justify the granting of an injunction restraining defendants from interfering with the claim.

4. A bill for injunction to restrain defendants from interfering with real estate cannot be maintained merely as a substitute for an action of ejectment.

5. Allegations of a bill to restrain defendants from operating a mine, that defendants induced complainant's partner to refrain from filing a claim under a fraudulent scheme which amounted to a colorable fraud and breach of trust, were mere legal conclusions, and were, therefore, not admitted by a demurrer to the bill.

6. Where a bill alleged that complainant's partner located a mining claim, but failed to file a location, and surrendered possession to defendants under a fraudulent agreement with them, but did not allege that defendants' possession was not taken until after 90 days allowed for filing had expired, complainant was not entitled to have defendants declared construct-

ive trustees of the same for plaintiff under their prayer for general relief in the bill, since, if defendants took possession before the expiration of such period, they could acquire no rights in the location as against complainant.

7. Where a bill alleged that complainant's partner failed to file location notice of a mining claim by reason of a fraudulent contract with defendants, but failed to show when complainant's location was made, the alleged agreement between defendants and complainant's partner, not being of record, was not such a cloud on complainant's title to the mine as would prevent him from recovering possession at law.

8. Comp. Laws, § 4010, declaring that an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession, did not authorize the maintenance of a bill to quiet title to a mining location which was part of an unconfirmed grant from the Spanish government, where the bill failed to allege why complainant had not an adequate remedy at law.

Appeal from district court, Bernalillo county; before Justice J. W. Crumpacker.

Suit by Henry Lockhart against H. C. Leeds and others. From a decree in favor of defendants, complainant appeals. Affirmed.

The appellant filed a bill in equity in this case on the 26th day of May, 1894, to which the defendants demurred, and the demurrer was sustained. Thereafter he filed an amended bill, to which a demurrer was also filed and sustained, and on January 6, 1896, the appellant filed a "second" amended bill, to which a demurrer was also filed, and was sustained by the court on the 16th day of August, 1899, and the case dismissed. From the action of the court in sustaining the demurrer to the second amended bill this appeal was taken. The second amended bill, in substance, alleges: That on May 7, 1893, the appellant entered into an agreement in writing with one Ben Johnson and Charles Pilkey, whereby the said Pilkey agreed with the appellant and Johnson to enter into a co-partnership for the purpose of discovering, locating, and operating mining claims. That Pilkey should prospect and locate such veins, lodes, and places as he may discover or know the existence of, containing valuable ores or minerals, in the name of and for the joint benefit of the parties thereto. The appellant and Johnson were to furnish certain articles, therein mentioned,—25 pounds of powder, 100 feet of fuse, 1 box caps, 1 hammer, — lbs. of drill steel, 1 pick,— and when he should have sunk or driven a shaft or tunnel 4 feet by 6 feet in the vein of mineral-bearing quartz to a depth of 20 feet from the lowest level of the surface at its mouth, such vein and locality to be designated by the appellant and Johnson, he was to receive, in addition, the sum of \$30, less any moneys or provisions or other articles, except as above mentioned. That said work should begin within 20 days from the date of the agreement, and be prosecuted with due diligence to a completion, and to the satisfaction of the said appellant and

Johnson. Pilkey was to furnish the said appellant and Johnson, from time to time, at their request, samples of all ores or minerals discovered or taken out of any workings. It also provided that it should be at the option of said appellant and Johnson to continue the work or abandon any claims located at any time they might deem proper. The agreement was to continue in force for one year from its date, and all discoveries or locations made during that time by said Pilkey were to be covered by the agreement. "Any concealment of a discovery or failure to locate a valuable mineral claim for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest, direct or indirect, that such first party might have or afterwards obtain to and for the benefit" of said appellant and Johnson. This agreement was dated May 7, 1893. The bill alleges that the plaintiff and Johnson delivered the articles and provisions mentioned in the contract, and paid the money, and divers other sums of money, to and for the said Pilkey, and in all respects kept and performed the said agreement upon their part. It further alleges that under this agreement Pilkey located a claim in the name of himself, the appellant, and Johnson on July 10, 1893, called it the "Sampson," and that a copy of the location notice is filed as Exhibit B to the bill; that he posted that location notice on the said claim, marked the boundaries on the ground, transmitted, at the request of appellant and Johnson, samples of the ore, and sunk a shaft or cut on said claim to the depth of 10 feet, showing mineral in place, within less than 90 days from the time of taking possession of said lode. It further alleges that the discoverers and locators of said claim, not then knowing whether the said mineral was situated upon the public domain of the United States, and so free and open to location under the mining laws of the United States, performed the required acts of location under the said laws and the laws of the territory, and were ready, able, and willing in all things to comply therewith, and would have done so except for the fraudulent and unlawful acts of the defendants therein mentioned. The bill alleged the performance of every necessary act to constitute a valid location, except the recording in the proper recorder's office of the location notice. It further alleges that "on or about October 1, 1893, the defendant Pilkey, while so in possession of the said lode, ledge, or lead, under and in pursuance of said agreement, wrongfully and fraudulently conspired with the defendants Leeds, J. A. Johnson, Fagaley, and Walker to defraud the appellant and the said Johnson of their interest in and title to the said mines and minerals discovered and possessed by them as aforesaid, of which the said Pilkey, as the partner and co-owner

with your orator, was then, in pursuance of said conspiracy and confederation, in possession, and on, to wit, October 1, 1893,—the precise date whereof being unknown to your orator,—an agreement was made and entered into by the defendants Fagaley, J. A. Johnson, Walker, and Leeds and the defendant Pilkey, by which it was agreed that the said Pilkey, in violation and fraud of the rights of your orator in and to the said mine, of which he was then in possession as aforesaid, by him discovered, and held under said agreement, should transfer, convey, and deliver possession of said mine to the last-named defendant without the knowledge or consent of your orator and one Ben Johnson, and that they should do and perform all other acts deemed necessary for that purpose." And the bill further states "that the said complainant (meaning Pilkey), by an instrument in writing, the precise terms of which are unknown to complainant, the same being in possession of defendants, or some of them, sold, transferred, and conveyed to the defendants Fagaley, J. A. Johnson, Leeds, and Walker an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument, and by him held in secret trust for said Pilkey; and in pursuance of said fraudulent combination and conspiracy the defendants Frank Fagaley, J. A. Johnson, Lee Walker, and H. C. Leeds, together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement, and to fail and neglect to record the said location notice so by him posted thereon as aforesaid; and the said defendants, or some of them, wrongfully removed the said location notice from said claim, and said defendants covered up or concealed the said workings thereon theretofore done and performed by defendant Pilkey; and without the knowledge or consent of your orator and the said Johnson entered into and upon the said lead, lode, ledge, and deposit bearing gold and silver, and upon the said parcel or surface ground, including the same mentioned and described in said location notice, and known as the 'Sampson Mine,' and denied and still deny that your orator had or has any interest therein; and thereafter, having so procured possession of the same, the said defendants, in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county," etc., a copy of which is filed, and made a part of the bill, etc.; and "thereby said defendants claimed to have located the said lode for the benefit of themselves as locators * * * under the mining laws of the United States, and called and designated the same as the 'Washington Lode.'" The bill then alleges that the said defendants agreed among them-

selves as to the respective interest each of them should have in said location, and that the said Pilkey should be entitled to a one-fifth interest therein, but that the said last-named interest should be claimed and held by said Walker in trust for him. The bill then alleges that the ground upon which these locations were made is situated within the exterior boundaries of a tract of land claimed to have been granted in 1728, by the then Spanish authorities, to one Antonio Lucero, and that the same was, at the time of the making of said locations, claimed by certain persons under said alleged grant, and that claims were then and at the time of the filing of said amended bill pending in the United States court of private land claims, and undetermined; and further alleges that neither the said Antonio Lucero nor his heirs or successors had become entitled in law or equity to the minerals contained therein; and that by virtue of the location of the said Sampson claim by the said Pilkey, under the said agreement with the appellant, the appellant became and now is equitably entitled to the minerals contained therein, and had a paramount right and title in and to the same as against the said defendants, or any or either of them. It also alleges that the other defendants named in the bill claim some right or interest in and to said mining claim known as the Washington, derived through their co-defendants. It alleges that the mineral deposit so discovered by said Pilkey was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States, because the same is situate within the said alleged private land grant; and that by virtue of the said prior discovery, possession, and working of the said mining claim by the said Pilkey under said agreement the appellant became and was and is equitably entitled to the minerals contained in said location, as against the said defendants, or any other persons except the government of the United States. The bill also alleges that the appellant, by virtue of conveyances, had acquired an undivided title and interest as tenant in common in said private land claim, superior to any title or right thereto on the part of the defendants, or either of them, and is lawfully entitled to enter upon and work the said mine. The bill also alleges that, after the removal by the said defendants of the said location notice posted as aforesaid by Pilkey, a copy thereof was procured by the appellant, and filed and recorded in the office of the recorder of the county of Bernalillo, in which the same was situate. The bill further alleges that the appellant, by virtue of the facts alleged in the said bill, became the equitable owner of the mineral in said claim, and had a preferential right to acquire the legal title to the same from the United States, and that the location thereof under the name of the Washington

by the defendants was wholly inoperative and void; and that the said Pilkey, by reason of his participation in the said fraudulent conspiracy and combination, by virtue of the said agreement with the appellant and Ben Johnson, had forfeited all right or interest, direct or indirect, in and to the said Sampson mine; and that the said defendants claimed that the said Washington location was a valid location, and denied the appellant had any interest therein, and excluded him from the possession thereof. The bill also alleged the insolvency of some of the defendants, and that the appellant would suffer irreparable injury unless the defendants were enjoined from working the same. The bill then prays for the appointment of a receiver to take possession of the said Sampson mine, and that the said transfer and conveyance executed by said Pilkey to said Pagaley, Leeds, J. A. Johnson, and Walker be declared fraudulent and void as against him, and that it be canceled and annulled; and that the location notice of the Washington lode be decreed to be void, and of no effect, as against the appellant; and that the defendants be enjoined from mining, working, or removing from the said Washington lode any ore; and that he be decreed the equitable owner of the said ore and mineral contained therein; and also for general relief. To this bill the defendants filed a demurrer, among others, upon the following grounds: That the bill did not allege that the defendants entered upon the mining claim within three months after the said mining claim is alleged to have been located under the name of the "Sampson"; that it appeared that no valid location notice was ever posted upon the surface of said claim, or recorded in the recorder's office, as required by law; and because the agreement, alleged to have been between plaintiff and Ben Johnson and defendant Pilkey, was subject to revocation by either party thereto at any time; and that the facts alleged in the amended bill amounted to an abandonment of said alleged Sampson claim under the terms of his alleged agreement; and because it did not appear from the allegations in the bill that at the time of the alleged entry of the defendants on this exact mining claim the complainant or his co-locators under the alleged Sampson location were in possession of the said mining claim, or any part thereof, or had any lawful right to the possession thereof; and because the complainant's remedy was at law, and that the amended bill did not state a case for a court of equity. The assignments of error by the appellant are that the court erred in sustaining the demurrer of the defendants to the plaintiff's "second" amended complaint, and ordering the dismissal of the said case.

Warren & Chaves and Fergusson & Gillett, for appellant. Childers & Dobson, for appellees.

PARKER, J. (after stating the facts). 1. The question to be determined is whether the appellant has by his bill stated a case which entitles him to any relief in a court of equity. A suit in ejectment involving the same mining claim which is the subject of the litigation was before this court, and the opinion deciding it will be found reported under the title of *Lockhart v. Wills* (N. M.) 54 Pac. 336. The appellees contend that upon the allegations of the bill the remedy of the appellant is at law, and not in equity. We think this contention is well founded, and that the action of the court in sustaining the demurrer was correct. In the case of *Lockhart v. Wills*, supra, we held that the ground in controversy was subject to location under the mining laws of the United States. In that case it was stipulated by the parties that the decree of the court of private land claims within which it was alleged the ground in controversy was located eliminated the mine from the grant. We held, however, that, although that decree had not been rendered at the time the attempted locations of the Sampson and Washington mines were made, nevertheless the ground was subject to exploration, location, and entry under the mining laws of the United States. After fully discussing the contention of the parties and the law applicable to the facts, we said: "We conclude that they [lands within unconfirmed Mexican or Spanish grants] are not reserved lands, and are 'lands belonging to the United States,' within the meaning of section 2319 of the Revised Statutes of the United States." We deem it unnecessary to again discuss this question, and refer to our opinion in that case.

The demurrer admits the truth of all the allegations in the bill which are well pleaded. If any of the allegations in the bill, however, are ambiguous, they are to be construed more strongly against the appellant. "A demurrer only admits facts well pleaded. It does not admit matters of inference and argument, however clearly stated." *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673. There must be sufficient equity on the facts of the bill to warrant the relief prayed for, and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue. *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429. "The rule is familiar that the court will refuse to decree unless the substantial groundwork of the case on which the relief is sought is distinctly alleged in the bill." *Pelham v. Edelmeier* (C. Q.) 15 Fed. 262. "It may be affirmed as an elementary rule of the most extensive influence that the bill should state the right, title, or claim of the plaintiff with accuracy and clearness, and that it should in like manner state the injury or grievance of which he complains, and the relief which he asks of the court." Story, Eq. Pl. § 241. Applying these principles to the allegations of the bill, we find that the bill alleges that the

defendant Pilkey, under the contract between him and the appellant and Ben Johnson, located the Sampson mine, and performed all the acts necessary to complete a valid location, except the filing of the location notice in the county recorder's office within 90 days after the making of the location on July 10, 1893. It alleges that the defendants caused and procured the defendant Pilkey "to fail and neglect to record the said location notice so by him posted thereon as aforesaid, and the said defendants, or some of them, wrongfully removed the said location notice from said claim; and after the removal of the said location notice, * * * a copy thereof was procured by your orators, * * * and the same was filed in the office of the recorder on December 9, 1893." It falls to allege when the posted copy was removed, or when the copy filed for record was procured by the appellant. So far as the allegations of the bill are concerned, the copy may have been in possession of the appellant long before the expiration of the 90 days within which the law required it to be filed. It was certainly within the power of the defendant to have definitely alleged when he procured this copy, and thereby show, if such was the fact, that he did not file it sooner because he could not obtain it. He does not allege how or from whom he obtained it. The failure to file a location notice for record works a forfeiture of a mining location, and leaves the claim open to relocation. *Lockhart v. Wills*, supra. There is no allegation in the bill showing that the appellant could not himself have filed this location notice for record within the 90 days. It contains no allegation that appellant relied upon the defendant Pilkey to file it. It is true that there is an allegation that the defendants caused and procured the defendant Pilkey to fail and neglect to record it, but this, in the absence of an allegation that the appellant was relying upon the defendant to file it, does not account for the delay in doing so until December 9th following. The bill alleges "that on or about the 1st of October, 1893,—the precise date thereof being unknown" to appellant,—an agreement was made and entered into by some of the defendants with Pilkey, who was then in possession of the mine, that he should transfer and deliver possession of the said mine to the last-named defendant, without the knowledge or consent of the complainant and Ben Johnson, and by an instrument in writing—the precise terms of which he cannot set up, because it is in possession of the defendants—Pilkey conveyed an undivided four-fifths interest in said Sampson mine to the defendants, retaining one-fourth conveyed to defendant Walker, to be held in secret trust by Walker for said Pilkey; and that in pursuance of said agreement they procured the defendant Pilkey to withhold said location notice from record. This allegation does not, however, excuse the absence of the allegations in the

bill as to delay in filing the notice already pointed out. The bill alleges that the defendants entered into the possession of the mine under this agreement, but it does not allege when the defendants so entered into possession of said mine. This is an important allegation. Appellant's counsel insists that possession was so taken after the expiration of the 10th day of October, within 90 days from the location of the Sampson. There is no allegation in the bill upon which to base this contention. Counsel appeals to the first ground stated in defendant's demurrer as establishing this fact. We do not know of any principle of pleading by which defective allegations in a bill can be aided by a demurrer filed to it.

2. Under the allegations of the bill, if the defendants, by collusion with Pilkey or otherwise, intruded upon the possession of the appellant, which the bill alleges was actually held by Pilkey, under the terms of the contract, up to the time of the actual entry and exclusion of the appellant and his co-tenant, Johnson, by the defendants, the appellant could recover possession in an action at law. This action could be sustained both against Pilkey and the defendants entering under him. If Pilkey made the agreement alleged in the bill, the defendants became co-tenants with the appellant. Pilkey could, by the conveyance alleged in the bill, only convey his undivided third interest, and ejectment lies against a co-tenant or a grantee of a co-tenant attempting to hold adversely to his co-tenants. Prior possession, under such circumstances, is sufficient to maintain ejectment. *Freem. Co-Ten. § 290; Cristy v. Scott*, 14 How. 282, 14 L. Ed. 422; *Burt v. Panjaud*, 99 U. S. 180, 25 L. Ed. 451; *Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435. In a similar case it is said: "Claiming, as both parties did, under Payne and Cook, the regularity of the location of the mining claims is not in question; and when, in 1862, the plaintiff purchased from one of the owners of the claim an undivided interest therein, and went into possession with his grantor, and with others, deriving title from the original locators, * * * he became a tenant in common with those who were then the owners. He was such when the Union Gold & Silver Mining Company purchased the interest of other owners. By that purchase that company succeeded to a tenancy in common with him, and so did the defendant, when it became the purchaser. * * * The possession of his co-tenants was his possession. They held it for him until he was ousted. That this is a settled rule of law is not denied." *Mining Co. v. Taylor*, 100 U. S. 40, 25 L. Ed. 541. The only acts alleged in the bill as having been done by Pilkey which deprived the appellant of his rights are the surrender of the possession and the failure to record the location notice.

3. If Pilkey surrendered the possession

prior to the 10th day of October, 1893, the appellant would, in an action of ejectment, be excused from perfecting his location. In such a case the supreme court of the United States has said: "They could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers." *Erhardt v. Boaro*, 113 U. S. 534, 5 Sup. Ct. 564, 28 L. Ed. 1115. "A location can only be made where the law allows it to be done. An attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done." *Belk v. Meagher*, 104 U. S. 284, 26 L. Ed. 737. "The record shows actual possession in the appellees, which is prima facie evidence of title; and, as we said in *Lebanon Min. Co. v. Consolidated Republican Min. Co.*, 6 Colo. 380, 'entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession amounts only to a trespass, and cannot form the basis for the acquisition of a title.'" *Weese v. Barker*, 7 Colo. 178, 2 Pac. 921. We think it clear that under the allegations of the bill the appellant could obtain the relief actually prayed for in an action at law. Neither the alleged contract of Pilkey with the defendants nor any other fact alleged would prevent him from obtaining a plain, speedy, and adequate remedy by a suit in ejectment.

4. The allegations do not show such a state of facts as would justify the granting of an injunction or the appointment of a receiver. This relief could only be had provided the bill contained proper allegations, and was filed in aid of a suit at law. *Fussell v. Gregg*, 113 U. S. 554, 555, 5 Sup. Ct. 631, 28 L. Ed. 993; *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633; *Parker v. Manufacturing Co.*, 2 Black, 545, 17 L. Ed. 833; *Town of Grand Chute v. Winger*, 15 Wall. 373, 21 L. Ed. 174; *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246. A bill for injunction cannot be maintained simply as a substitute for an action of ejectment.

5. The bill prays that the Washington location be declared void, and for possession. The appellant now asks, under the prayer for general relief, that the Washington location be held valid, and the holders thereof be held as constructive trustees. The allegations in the bill do not justify any such relief. It is essential that the facts and circumstances which constitute the fraud complained of should be set out clearly, concisely, and with sufficient precision to apprise the opposite party of what he is called upon to answer. 9 Enc. Pl. & Prac. 687, and many authorities there cited. Charging generally that what

was done was "colorable fraud," "a breach of trust," and a "scheme," themselves are allegations of legal conclusion, which a demurrer does not admit. *Fogg v. Blair*, 139 U. S. 127, 11 Sup. Ct. 478, 35 L. Ed. 107; *Van Weel v. Winston*, 115 U. S. 237, 6 Sup. Ct. 22, 29 L. Ed. 384; *Brooks v. O'Hara* (C. C.) 8 Fed. 532; *Phelps v. Elliott* (C. C.) 35 Fed. 455; *Lafayette Co. v. Neely* (C. C.) 21 Fed. 744. For the purpose of sustaining this contention, the appellant now insists that the intrusion of the defendants upon the possession of appellant took place after the 10th day of October. As already shown, if it took place before that date, it would be tortious, and the rights of the appellant would not be thereby affected. The bill is fatally defective for not alleging conclusively whether it took place before or after that date. In the prayer for general relief only such relief as is agreeable to the case made by the bill can be granted. *English v. Foxall*, 2 Pet. 612, 7 L. Ed. 531; *Hobson v. McArthur's Heirs*, 16 Pet. 182, 10 L. Ed. 980; *Boon v. Chiles*, 10 Pet. 177, 9 L. Ed. 388. "Now, it is perfectly clear, according to the practice of the court, where a specific relief is prayed for, even though there be a prayer for general relief, the court cannot grant relief which is inconsistent with, or entirely different from, that which is asked for." *Wilson v. Graham*, 4 Wash. C. C. 53, 30 Fed. Cas. 125 (No. 17,804). "It is true that there was a prayer for general relief, but relief given under the general prayer must be agreeable to the cases made by the bill." *Allen v. Car Co.*, 139 U. S. 662, 11 Sup. Ct. 683, 35 L. Ed. 305; *Hayward v. Bank*, 96 U. S. 614, 24 L. Ed. 855, and authorities cited; *Georgia v. Stanton*, 6 Wall. 77, 18 L. Ed. 721. "In order to entitle a plaintiff to a decree, under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim for relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise the court would take the defendant by surprise, which is contrary to its principles." 1 Daniel, Ch. Prac. 386; *Curry v. Lloyd* (D. C.) 22 Fed. 264. "But, even when a prayer for general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby." Story, Eq. Pl. § 42; 3 Enc. Pl. & Prac. 350 et seq., and notes. The allegations contained in the bill are not adapted to the relief now urged by counsel for appellant in

his brief. The bill was not framed to secure the holding of Pilkey or any other defendant as a trustee under the Washington location.

6. The bill prays that the instrument of writing alleged to have been executed by the defendant Pilkey, conveying to his co-defendants interests in the Sampson location, be declared fraudulent and void as against the plaintiff, and that it be canceled and annulled. This agreement was not upon record, and is not a cloud upon the title of the plaintiff. It in no way prevents him from recovering possession in an action at law. It could convey, as against the appellant, only the interest which the defendant Pilkey had in the Sampson. *Ore Co. v. Miller*, 3 Morr. Min. R. 353. "The facts set forth in the bill of the plaintiff clearly show that he has a plain, adequate, and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: that the defendants are in the possession and enjoyment of the property claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If he is the owner in fee of the premises, he can establish that fact in an action at law; and, if the evidences of the defendant's asserted title are fraudulent and void, that he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof." *Whitehead v. Shattuck*, 138 U. S. 150, 11 Sup. Ct. 276, 34 L. Ed. 874.

7. It is also contended that this bill can be sustained under section 4010 of the Compiled Laws of New Mexico, relating to suits to quiet title. We do not think that the allegations contained in the bill bring appellant's case within the provisions of this statute. They do not show why he cannot recover in a suit at law. Neither does the allegation of ownership of an interest in an unconfirmed grant entitle the appellant to such relief. *Pinkerton v. Ledoux*, 129 U. S. 351, 9 Sup. Ct. 399, 32 L. Ed. 706; *Astiazaran v. Land Co.*, 148 U. S. 80, 13 Sup. Ct. 457, 37 L. Ed. 376. These cases hold that, until the question of title to an unconfirmed grant has been settled by congress or the tribunal established by it for that purpose, it cannot be contested in the ordinary courts of justice.

For the reasons above stated, we are led to the conclusion that the ruling of the court below in sustaining the demurrer to the second amended bill of complaint and dismissing the suit was correct, and the decree of the court is therefore affirmed.

MILLS, C. J., and McFIE, J., concur. CRUMPACKER, J., having heard the case below, and LELAND, J., being absent, did not participate in this decision.

(38 Or. 178)

MITCHELL v. LA FOLLETT.

(Supreme Court of Oregon. Dec. 24, 1900.)

SALES—CONTRACT—BREACH—EVIDENCE—INSTRUCTIONS—APPEAL—HARMLESS ERROR.

1. Defendant contracted to deliver certain potatoes in sacks furnished by defendant f. o. b. on boat by June 1st, if possible. In an action by plaintiff for an alleged breach of contract, in refusing to deliver the potatoes, defendant denied the breach, and alleged that on May 27th plaintiff proposed to take the potatoes at defendant's farm, where they were situated, to which he agreed, provided the balance of the purchase money was paid before removal, which plaintiff refused to do, and repudiated the contract, performance of which defendant tendered several times. *Held*, that it was not error to permit defendant to testify that after the 27th of May he continued sacking the potatoes, and, not having sufficient sacks, was obliged to go to plaintiff's agent, and get more; it not being admitted to show a breach of contract by plaintiff in failing to furnish sacks, but that defendant was proceeding to comply with the contract by preparing the potatoes for delivery.

2. Error, if any, in admitting in evidence a written offer or tender of the potatoes specified in the contract, on June 8th, was harmless, since plaintiff did not claim a breach by failing to deliver on time, and defendant did not claim that it was impossible to do so.

3. It was not error for the court to refuse to give an instruction that plaintiff was not obliged to pay for the potatoes until they were delivered f. o. b. the boat, and, if defendant demanded payment at any time before they were so delivered, he violated the contract, and plaintiff was entitled to damages therefrom, since such a charge disregarded defendant's theory of the case and the evidence supporting it.

4. It was not error to give an instruction that if defendant notified plaintiff that he would not, under any consideration, fulfill his contract before the date fixed for the delivery, it would be such a breach as would entitle plaintiff to sue without an offer to perform on his part; but a mere refusal to deliver at the farm, unless the potatoes were paid for, would not be such a breach, and plaintiff must show a refusal to deliver at the river. Since defendant was under no obligation to deliver at the farm, it was not a breach of contract to demand payment before delivery there.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by McKinley Mitchell against J. W. La Follett. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This action was brought on July 9, 1898, by the plaintiff, Mitchell, against the defendant, La Follett, to recover damages for a breach of the following contract: "Gervais, Oregon, May 17, 1898. This is to certify that I have this day sold to McKinley Mitchell, of Gervais, Oregon, all my potatoes supposed to be 700 to 900 sacks, outside of the seed stock, on the following conditions, as follows, to wit: All stock put up as strictly choice fancy potatoes, to be 25 cts. per bushel, net cash, on delivery on the river, sacks furnished; all put up as No. 1 merchantable potatoes, to be 22 cents per bushel, net cash, delivered on the river, sacks furnished; and all the seed potatoes put up as No. 1 (all to be well sacked, and put up in No. 1 shape, and put on the boat f. o. b.); 12½ cents per bushel,—all to be delivered, if

possible, by June 1, 1898. And I hereby acknowledge receipt of \$20.00 on sale of same. [Signed] J. W. La Follett." The complaint alleges that, in pursuance of the contract, the plaintiff paid the \$20 therein mentioned, and furnished defendant 725 sacks, of the value of \$36.25; that on or about the 27th of May, 1898, the defendant repudiated the contract, and informed him that he would not deliver the potatoes as stipulated or at all, and "ever since has and still does refuse to deliver the said potatoes to this plaintiff or any part thereof"; that, upon such refusal, the plaintiff demanded a return of the \$20, and payment for the sacks furnished, but defendant refused to pay the same or any part thereof; that the potatoes were purchased for resale, and defendant was so informed at the time; that, by reason of the breach of the contract by the defendant, plaintiff has been damaged in the sum of \$100 as loss of profits, in addition to the money paid thereon and the value of the sacks furnished. The answer denies the breach of the contract as alleged in the complaint, and for an affirmative defense avers that, on or about the 27th of May, the plaintiff proposed to take the potatoes at the defendant's farm, where they were situated, and the defendant agreed to so deliver them, provided the plaintiff would pay the balance due before their removal, which he refused to do, and then and there notified the defendant that he would not accept the potatoes at any time or place; that he has ever since refused, and does now refuse, to accept or receive the potatoes, or any part thereof, although the defendant was then, is now, and ever since has been, ready and willing to deliver them, and at divers times thereafter, and before the commencement of this action, offered and tendered to him the whole of the potatoes, sacks, and twine; that defendant has duly and fully performed, and offered to perform, all the conditions and provisions of the contract on his part. The reply puts in issue the new matter alleged in the answer. A trial was had, resulting in a verdict for the defendant, from which the plaintiff appeals, assigning error in the admission of testimony, giving certain instructions to the jury, and refusing others requested by the plaintiff.

John A. Carson, for appellant. W. M. Kaiser, for respondent.

BEAN, C. J. (after stating the facts). Upon the trial, the defendant, as a witness in his own behalf, gave evidence tending to show that on May 27th the plaintiff requested that the potatoes be delivered at Brooks' Station, instead of the river, as stipulated in the contract, and that when he declined to do so the plaintiff unequivocally refused to accept the potatoes, and so notified the defendant. He was thereupon asked the following questions: "Well, then, what did

you do with the potatoes after he went away? A. I kept on sacking them. Q. Did you have all your sacks there at that time, and, if not, where did you get the balance?" Objection was made to the last question on the ground that the pleadings admit that defendant received 725 sacks from the plaintiff, and there is no allegation in the answer that the plaintiff had refused to provide sacks as stipulated in his contract. The court overruled the objection, and the witness answered: "No; I had only 525. The next Monday— That was on Friday, the 27th. The next Monday I went over to Brooks, and saw Mr. Dorcas [plaintiff's agent] about sacks. He said for me to drive over to the depot and get them, and I got them, and filled them." It is argued that this evidence is incompetent, because the answer does not set up as a defense a breach of the contract by the plaintiff in failing to furnish sacks. But we do not understand it to have been offered or admitted for the purpose of showing a breach of the contract by the plaintiff, but that defendant was proceeding to comply with the contract on his part subsequent to the transaction of the 27th of May, by procuring sacks from the plaintiff's agent, and preparing the potatoes for delivery, in accordance therewith; thus refuting the allegation that defendant repudiated the contract at that time. The entire theory of the defense, as we understand the record, is that defendant was at all times ready and willing to perform his contract, and the evidence objected to, as well as the other evidence given by him, was in support of such theory.

It is next insisted that the court erred in permitting the defendant to give in evidence a written offer or tender made on the 8th of June to the plaintiff of the potatoes specified in the contract. The ground of the objection to the admission of this testimony is that under the contract the potatoes should have been delivered at the river by June 1st if possible, and, since the answer does not allege that it was not possible to make the delivery within the time stipulated, evidence of an offer or tender after that date is incompetent. But the plaintiff is not seeking to recover because the defendant did not deliver the potatoes within the time stipulated, nor is the defense based on the theory that it was impossible for the defendant to comply with his contract in that respect. The action is grounded on an alleged repudiation of the contract by defendant before the time for delivery, and the complaint seems to have been drafted upon the hypothesis that plaintiff was ready at all times, up to the commencement of the action, to receive the property, but that defendant refused to deliver it to him. It is alleged that on the 27th of May the defendant informed plaintiff that he would not deliver the potatoes, and that he has ever since refused, and still refuses, to comply with his contract. The answer denies the breach alleged in the

complaint, and avers that the defendant was ready and willing at all times to perform, and offered and tendered performance to the plaintiff, both prior and subsequent to the 1st of June, but plaintiff refused to accept such tender. The reply denies that any tender was ever made by the defendant, so that, as the pleadings stand, the question of time is immaterial, and the admission of the offer to deliver on the 8th of June was therefore harmless, if error at all.

It is also insisted that the court erred in refusing to give the following instruction requested by the plaintiff: "I further charge you that the plaintiff was not obliged to pay for the potatoes until the same were delivered f. o. b. the boat on the river, and, if the defendant demanded payment at any time before the potatoes were delivered on the boat on the river, he thereby violated the contract, and plaintiff is entitled to recover damages from him. Under the contract in this case, it was the duty of the defendant to deliver the potatoes to the plaintiff f. o. b. the boat on the river,—It is so stated in the contract,—and by the expression 'free on board the boat' you will understand that the defendant was bound to take the potatoes and place them on the boat on the river at his own expense." As we have already said, the defendant gave evidence tending to show that the plaintiff required the potatoes delivered at Brooks' Station, but defendant refused to so deliver them unless they were paid for at his farm, and hence the court could not properly have charged the jury that a demand of payment before the potatoes were delivered on the boat would have been a breach of the contract entitling plaintiff to recover damages, without disregarding the defendant's theory of the case and the evidence given in support of it.

It is also insisted that the court erred in charging the jury as follows: "But the mere refusal of Mr. La Follett to deliver the potatoes at the farm, unless paid therefor, would not, of itself, entitle Mr. Mitchell to sue and recover damages." This is but an excerpt from the general charge, and, when read in connection with its context, is not objectionable. The defendant was under no obligation to deliver the potatoes at the farm, and, if the plaintiff desired delivery there, it would be no breach of the contract for the defendant to refuse to make such delivery, unless upon payment of the purchase price. The charge of the court is to the effect that if the defendant, before the date fixed for the delivery, notified the plaintiff that he would not, under any consideration, fulfill his contract, it would be such a breach as would entitle the plaintiff to bring an action for damages without an offer to perform on his part, but a mere refusal to deliver at the farm, unless the potatoes were paid for, would not be such a breach. In this connection, the court said: "The question for you to determine now is whether Mr. La Follett before the 1st of June

unequivocally refused to perform the contract. He may have refused to enter into a new contract, and he may have refused to deliver at the farm without pay in advance, but that, in itself, would not prove that he refused to deliver at the river, and Mr. Mitchell must show that he refused to deliver at the river before the 1st of June; otherwise, he could not base any action on what occurred on the 27th of May. * * * In other words, the obligation is mutual. If, without having a right to do so, Mr. La Follett, before the day prescribed in the contract, unequivocally refused to perform the contract, that would excuse Mr. Mitchell, and Mr. Mitchell could turn right around and sue for damages. Mr. La Follett having refused to perform the contract, Mr. Mitchell would not be obliged to wait until the expiration of the time. On the other hand, if Mr. Mitchell did refuse to take the potatoes on the river, and tell Mr. La Follett he would not take the potatoes, that would excuse Mr. La Follett from performing it. So the question is whether Mr. La Follett refused to perform that contract and deliver the potatoes at the river, and Mr. Mitchell must make a better case." We think there was no error in giving the instruction complained of, and, as this disposes of all the questions presented by the argument, the judgment of the court below must be affirmed; and it is so ordered.

(38 Or. 150)

DAVIS et al. v. HOFER et al.

(Supreme Court of Oregon. Dec. 17, 1900.)

ACCOUNTING—BY DIRECTORS—JURISDICTION—REFERENCE—BILL OF PARTICULARS.

1. Equity has jurisdiction of a suit by stockholders against directors of a corporation for an account, there being a fiduciary relation between the parties requiring the defendants to account.

2. Conditions giving the court equitable jurisdiction of a suit by stockholders against directors for an account is established where defendants, by their answer, admit that they secured all moneys collected on account of the corporation, and do not deny that they received the amount alleged in the complaint, and do not plead a stated account in bar, nor tender the issues of nothing in arrear.

3. The court need not refer a cause to a master to take and state an account, but may do it itself.

4. Where defendants in a suit by stockholders against directors for an accounting do not allege an accounting with the corporation, and no demand is made on them for a copy of their account, plaintiffs cannot insist, as a matter of right, on the filing of a bill of particulars.

Appeal from circuit court, Marion county; R. P. Boise, Judge.

Suit by George W. Davis and others against Ernst Hofer and others. Decree for defendants. Plaintiffs appeal. Affirmed.

The purpose of this suit is to have a judgment and a sale thereunder set aside, and to require the defendants to account for money received in conducting the business of a corporation in which the parties to such suit

are stockholders. It appears that the Capital Journal Publishing Company, a corporation organized for the purpose of publishing a newspaper at Salem, entered into a contract with the defendants Ernst Hofer, A. F. Hofer, Jr., and F. X. Hofer, partners as Hofer Bros., whereby supplemental articles of incorporation were filed increasing the capital stock to the sum of \$10,000, divided into 100 shares of \$100 each, and one-half thereof was transferred to the defendants in consideration of their agreement to publish said newspaper at a reasonable compensation for their service for the term of two years from December 4, 1889. The by-laws of the corporation provide for the election of a president, a secretary, and three directors, who together constitute the board of directors. At a called meeting of the board held July 2, 1898, whereat were present M. L. Chamberlain, president, A. F. Hofer, Jr., secretary, and Ernst Hofer, a director, the secretary, A. F. Hofer, Jr., made a report, showing that the only indebtedness of the corporation was on account of salaries due E. Hofer as editor and himself as business manager of said newspaper in the sums of \$649.64 and \$1,295.75, respectively, which report was, upon motion, duly approved. A. F. Hofer, Jr., having thereafter secured an assignment of Ernst Hofer's claim, commenced an action in the circuit court for Marion county against the corporation, and recovered a judgment for the sum of \$1,945.39, and, an execution having been issued thereon, all the property of the said corporation was sold to him in payment thereof. It is substantially alleged in the complaint that the defendants, who constitute a majority of the board of directors, fraudulently conspired to wreck the corporation, and to acquire its property, to the injury of the plaintiffs, who own 33 shares of the capital stock; and that said corporation was not indebted to said defendants as claimed, or at all, nor was any accounting ever had by them with it; that they collected from various sources moneys belonging to the corporation exceeding the sum of \$30,000, which they have fraudulently appropriated to their own use, and refuse to account therefor. The answer admits that since the defendants assumed control of said newspaper they have collected all moneys paid to the corporation, but deny that the sum so received is not known to the plaintiffs, or that the latter believe it exceeds \$30,000; and for a separate defense alleges that, after taking charge of the business, an agreement was entered into with the corporation whereby it was stipulated that Ernst Hofer should receive as editor, and A. F. Hofer, Jr., as the business manager, of said newspaper, the sum of \$25 per week each, and that, a judgment having been rendered for the salaries due them, the property of the corporation had been sold on an execution issued thereon. The material allegations of

the answer having been denied in the reply, a trial was had before the court, at which the plaintiffs introduced testimony showing their ownership of the stock of the corporation; that they had requested M. L. Chamberlain, president, and C. March, a director, to defend said action, or permit them to do so, on behalf of the corporation, and the refusal of the latter to comply therewith; the value of the property so sold on execution; and that from \$15 to \$20 per week was a reasonable compensation for the service of an editor, and a like compensation for a business manager of said newspaper; and thereupon moved the court, upon such testimony and the pleadings, for an order directing the defendants to render an account. The court having overruled said motion, the defendants introduced testimony tending to show that the property sold on execution brought a fair price, and that the corporation agreed to pay them the salary so claimed, and, the cause having been submitted, the court found that the allegations of the complaint had not been sustained, and dismissed the suit, whereupon the plaintiffs appeal.

Ramsey & Bingham, for appellants. W. H. Holmes and Condit & Park, for respondents.

MOORE, J. (after stating the facts). If the overruling of the motion to require the defendants to render an account be regarded as a denial of equitable jurisdiction of the subject-matter, the court necessarily erred; for, while an action of account was originally cognizable at law, it was soon ascertained that only a court of equity, by reason of its power to compel a discovery, was competent; in many cases, to afford adequate relief; and out of this discovery has been evolved the principle of concurrent jurisdiction of courts of equity in such cases. 3 Bl. Comm. *437; 1 Story, Eq. Jur. (13th Ed.) § 452. The inadequacy of a legal remedy which gives rise to equitable jurisdiction to settle an account is apparent in the following instances: (1) Where the accounts are mutual; (2) when they are all on one side, but intricate; (3) where a fiduciary relation exists between the parties, thereby imposing upon the defendant the duty to render an account. 3 Pom. Eq. Jur. (2d Ed.) § 1421. The rule is of universal application that a court of equity has jurisdiction to settle an account wherever a fiduciary relation exists between the parties upon whom the duty of keeping accounts rests. 1 Enc. Pl. & Prac. 96; Warren v. Holbrook (Mich.) 54 N. W. 712, 35 Am. St. Rep. 554; Nashua & L. R. Corp. v. Boston & L. R. Corp. (C. C.) 19 Fed. 804; Pacific R. Co. v. Atlantic & P. R. Co. (C. C.) 20 Fed. 277; Bischoffsheim v. Baltzer (C. C.) 20 Fed. 890; Thornton v. Thornton, 31 Grat. 212; Clarke v. Pierce, 52 Mich. 157, 17 N. W. 780; Marvin v. Brooks, 94 N. Y. 71; Fowle v. Lawrason, 5 Pet. *495, 8 L. Ed. 204; Halsted v. Rabb,

8 Port. 63; Vilwig v. Railroad Co., 79 Va. 449. To cite authorities illustrative of the principle that the directors of a corporation are the agents of and trustees for the stockholders, who have a quasi reversionary interest in the corporate property after the payment of the corporate debts, seems unnecessary, and, the fiduciary relation existing between the parties having been clearly stated in the complaint, jurisdiction of the subject-matter attached in equity. A suit in equity is maintainable only where there is not a plain, adequate, and complete remedy at law. Hill's Ann. Laws Or. § 380. "A plea of stated account," says Mr. Pomeroy in his work on Equitable Jurisprudence (volume 3 [2d Ed.] § 1421), "obviously constitutes a bar to a suit in equity for an accounting, since in that case the remedy at law is entirely adequate." Thus, in Wann v. Coe (C. C.) 31 Fed. 369, which was a suit to redeem certain property that had been conveyed and transferred as security for a loan of money and for an accounting, the defendants contended that all the matters in controversy existing between the parties had been settled by an agreement, in pursuance of which the plaintiff promised to pay them the sum of \$26,500 as the amount due, and to accept a reconveyance and transfer of all property received by them, and not sold or disposed of. But it was held that, inasmuch as the account rendered by the defendants was not itemized, and many of the charges contained therein were evidently excessive, it did not constitute a plea in bar, so as to defeat the interposition of a court of equity, and thereupon decreed an accounting. So, too, in Morton v. Lea, 73 N. C. 21, it is held in a suit for an accounting that an answer alleging a former account and settlement did not constitute a plea in bar unless it alleged that an account had been stated between the parties, and, as settled, was just and true. In Lee v. Abrams, 12 Ill. 111, Mr. Justice Trumbull, in speaking of the distinction between a plea in bar and a denial of any indebtedness, and the evidence necessary to establish each, says: "By filing the plea of plene computavit before the court, the defendant would, if the issue was found in his favor, be entitled to a judgment against the plaintiff for costs, and the plaintiff would be driven to seek redress in another form of action, although the proof should show that a large sum had been admitted to be due him upon such accounting. The difference between the proof necessary to sustain the plea of plene computavit on the part of the defendant and that which is requisite to sustain the issue of nothing in arrear is this: In the former case the defendant must show an actual settlement or accounting between the parties, and a balance struck, it matters not in favor of which party; while in the latter case he must show by an exhibition of the accounts that nothing is due the plaintiff." In the case at bar the defendants admit in their answer that they secured all moneys collect-

ed on account of the corporation, and do not deny that they received the sum of \$30,000; but they do not plead a stated account in bar, or tender the issue of nothing in arrear; thereby conclusively establishing the existence of conditions giving the court equitable jurisdiction of the subject-matter. Under the rules of former practice it was customary in a suit for an accounting to render an interlocutory decree known as "quod computet" (*Morton v. Lea*, supra; *Closson v. Means*, 40 Me. 337); but such decree was not necessarily a condition precedent to referring the cause to a master, auditor, or referee to take and state the account (*Spalding v. Day*, 37 Conn. 427). The decree in such cases, "that the defendant do account," was equivalent to an adjudication upon the pleadings that a court of equity had jurisdiction of the subject-matter (*McPherson v. McPherson* [N. C.] 53 Am. Dec. 416); and the fact that defendants herein introduced testimony after the motion was overruled tends to show that the court did not hold that it was without jurisdiction. The question, then, presented by this appeal, as we view it, is whether the court, after considering that it had jurisdiction, was obliged to refer the cause to a master to take and state the account, or whether it could do so itself. In *Taylor v. Trust Co.*, 1 App. D. C. 209, which was a suit to foreclose a deed of trust, it was held that it was the duty of the court to ascertain the amount due, and that in discharging such duty it might call to its assistance the services of an auditor, but that this was a matter entirely within its discretion. In *Bryan v. Morgan*, 35 Ark. 113, which was a suit by one partner against another for an accounting, the court, upon motion therefor, refused to refer the cause to a master, and it was held that no error was thereby committed, the court saying: "The chancellor may himself take an account, announce the result, and decree accordingly." In *Hidden v. Jordan*, 28 Cal. 301, it is held that it is in the discretion of the court to take the account or to refer the cause to a commissioner or referee for that purpose. In *Emery v. Mason*, 75 Cal. 222, 16 Pac. 894, it was held that in a suit for an accounting the court may itself take or state the account, and, when it does so, a refusal to order a reference for such purpose is not erroneous. In *Montanye v. Hatch*, 34 Ill. 394, it is held that a court of equity has power to discharge the duties ordinarily performed by its master in stating an account between parties, and that no injustice was done in refusing to refer the matter to a master, because either party had the same rights before the court in regard to the production of books and examination upon interrogatories that he would have enjoyed before a master. In *Jewett v. Cunnard*, 13 Fed. Cas. 594 (No. 7,310), it is held that, where the court has the means to take an account satisfactorily, and is disposed to do so, the cause will not be referred to a master unless both sides desire it and acquiesce

in the further delay and expense incident thereto. To the same effect, see *Wheeler v. Billings*, 18 C. C. A. 573, 72 Fed. 301; *Martin v. Foley*, 82 Ga. 552, 9 S. E. 532; *Carter v. Lewis*, 29 Ill. 500; *City of Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Shipp v. Jameson*, 1 Litt. Sel. Cas. 190; *Goodrich v. Parker*, 1 Minn. 195 (Gil. 169); *Pierce v. Thompson*, 6 Pick. *193; *Bailey v. Westcott*, 6 Phila. 525.

The motion to require the defendants to render an account was evidently treated by the court and parties as a request to refer the cause to a master to take and state the account, and, when this motion was overruled, the plaintiffs had every opportunity to ascertain the condition of the account before the court that they could have enjoyed before a master. *Montanye v. Hatch*, supra. The transcript, relating to the filing of the motion, is as follows: "Mr. Carson, attorney for the plaintiffs, asked permission of the court to file a motion asking that an interlocutory decree be issued compelling the defendants to render an accounting. The Court: 'You can file a motion, and I will pass upon it.'" In pursuance of this permission the following motion (omitting the title and subscription) was filed: "Now, on this 11th day of November, 1898, at the close of the evidence offered by plaintiffs at the trial of this cause, the plaintiffs move the court for an order or decree directing the defendants Hofer to render an account. This motion is based upon the pleadings and evidence offered by plaintiffs and received upon the trial of this suit." If this motion be regarded as an application to the court for an order requiring the defendants to prepare and file a bill of particulars containing an itemized account of moneys collected and paid out on behalf of the corporation, and it be admitted that it is within the power of the court to grant the motion, it is at most discretionary (*Hill's Ann. Laws*, § 521), and no error can be predicated upon a refusal to comply with the request, unless it is manifest that such discretion has been abused, which, in our judgment, is not apparent. If a party allege an account, and do not set forth in his pleading the items, nor file therewith a copy thereof, he must, within five days after a demand therefor in writing, deliver to the adverse party a copy of the account; and, if the one filed or delivered be defective, the court may order a further account, and, if the party refuse to comply therewith, he shall be precluded from giving evidence thereof. *Id.* § 83. It will be remembered that the defendants do not allege an accounting with the corporation, nor does it appear that any demand was made upon them for a copy of their account; and hence plaintiffs could not insist, as a matter of right, upon the filing of a bill of particulars.

At the argument our attention was called by plaintiffs' counsel to the case of *Miller v.*

Kent, 60 How. Prac. 388, where it was held that a broker, who is the agent of his client, ought to be required to show fully and specifically each item of the account which he charges against his client, and the defendants were thereupon ordered to serve a bill of particulars; but this was done, however, in pursuance of a statute of New York which provided that "the court may in any case direct a bill of particulars of the claim of either party to be delivered to the adverse party," thus making the order evidently a matter of discretion. To the same effect is *Morgan v. Morgan*, 48 N. J. Eq. 399, 22 Atl. 545, in which it was held that when a party claims by his bill that he has been acting as trustee or agent, and as such is entitled to an account with his cestui que trust or principal, it is his duty to present his account with his bill, and, if he fails to do so, it is proper for the court, when a reference to a master is asked for, after taking the testimony, to suspend the hearing, and require the plaintiff to make and present such account. The latter decision would seem to have been made under a statute like ours. In *Campbell v. Knowles*, 13 Phila. 163, it is held that an order for the production of books and papers will not be made unless the bill prays for a discovery of facts material to the issue. See, also, 6 Enc. Pl. & Prac. 781. In the case at bar no discovery is prayed for in the complaint, and, this being so, the plaintiffs cannot insist upon the production of a bill of particulars as a matter of strict legal right, thus exceeding the court's discretion. Besides, the defendants were evidently ready to submit their books to the inspection of the court and parties in order that the account might be determined therefrom; for A. F. Hofer, Jr., in answer to an interrogatory propounded to him on cross-examination, read from his ledger the credits respecting his salary, though the books were not offered in evidence. Whether the judgment rendered against the corporation is vulnerable to a collateral attack because the claims upon which it was predicated were audited by the defendants, who constitute a majority of the board of directors making the allowance, becomes important only in case of an accounting between the parties; but the failure of the plaintiffs to avail themselves of the opportunity afforded them to try the cause before the court on the merits precludes the necessity of considering the question. The errors insisted upon not appearing to have been prejudicial, the decree is affirmed.

(23 Nev. 55)

STANLEY v. MINERAL UNION, Limited, et al. (No. 1,596.)

(Supreme Court of Nevada. Dec. 24, 1900.)

MINES—STATE LANDS—RIGHTS OF PATENTEE.

Act Cong. June 16, 1880 (21 Stat. 287), granting certain lands to the state of Nevada,

authorized the state to dispose of them under such regulations as the legislature should prescribe. Act March 5, 1887, after providing for the sale of such lands, provided that nothing in the act should be construed to prevent any person entering on the lands to prospect for minerals, or to prevent the economical working of any mine which might be discovered therein. St. 1887, p. 102, provided that any citizen might enter on any mineral lands in the state, notwithstanding the state's selection of it under grants, and explore for minerals, and, on the discovery thereof, mine the same, except that improvements made by persons purchasing the land from the state should not be taken or injured without compensation, and that thereafter all patents made by the state should reserve all mines that might exist on the land. *Held*, that one taking a patent to such lands, with such reservation, acquired no interest in a mine located after his application was filed, but before the patent issued, notwithstanding that the selection by the state under the grant from the government determined that the lands were agricultural and nonmineral, within the meaning of the grant.

Appeal from district court, Lincoln county; G. F. Talbot, Judge.

Action by William B. Stanley against the Mineral Union, Limited (a corporation), and H. Hirsching and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry Rives, for appellant. Louis Gottschalk and F. R. McNamee, for respondents.

MASSEY, J. This is a proceeding in ejectment and for damages. The verdict of the jury was for the respondents. From the judgment rendered thereon, and the order denying the motion for a new trial, this appeal was taken.

Briefly, that part of the answer of the respondents pertinent to the question presented on the appeal sets up as a defense that the respondents were in possession of the premises in controversy under and by virtue of a valid mining location made on the 14th day of January, 1899, by the respondent Henry Hirsching, known as the "Hirsching Lode-Mining Claim," record of which had been duly made upon the records of the Yellow Pine mining district, and upon the records of the recorder's office of Lincoln county, wherein said mining claim and mining district are situated; that said claim contains large deposits of gold, silver, and copper ore, and is valuable only for the precious metals therein contained; that after making the location the respondents had done a large amount of development work thereon, and had erected thereon certain buildings and a plant for the reduction of ores, at a cost of about \$40,000. The appellant showed title to the lands from the state by purchase under patents issued on the 23d day of May, 1899. It was further shown, and is not disputed, that in the year 1893 the appellant made application to purchase the lands in controversy from the state of Nevada, as agricultural lands, under the grant made by the act of congress of June 16, 1880 (21 Stat. 287), of 2,000,000 acres, in lieu of the sixteenth and thirty-sixth sections,

before that time granted for the support of the common schools. It is also conceded that all necessary and proper steps were taken for the selection of the land by the state, and its approval by the proper officers of the government. It was also shown that on the 7th day of February, 1896, and after the act of selection had been made, the state entered into a contract for the sale of the lands to the appellant, and thereafter patents were issued to the appellant under said contract of purchase. The evidence offered by the respondents supports the defense made by that part of the answer above set out, and the jury by its verdict so found.

Appellant contends that these averments of the answer, and the facts shown thereunder, conceded to be true for the purpose of the argument, are no defense as against his rights under the patents from the state, and are not sufficient to authorize either the verdict of the jury or the judgment of the court. It is ably argued in support of this contention that the selection of the lands by the state under the grant, and the approval of such selection by the proper officers of the government, were a conclusive determination by the tribunal having authority for that purpose that the lands were agricultural and nonmineral, within the meaning of the act making the grant; that the act of selection by the state, and its patents to him, gave him the right to the exclusive possession of the lands embraced therein from the time he made his application, or at least from the date of the contract of purchase; that the subsequent discovery of valuable mineral lodes by the respondents gave them no rights as against the selection by the state, and his rights under the state's patents; that any attempt to defeat his rights in this proceeding under the patents is a collateral attack upon the findings of the authorized tribunal that the lands were agricultural and nonmineral in character, and excepted by the act from the grant; that an attack involving the character of the lands could only be made in a direct proceeding instituted for that purpose, and that the entry of the respondents upon the lands after selection by the state, and after appellant's contract of purchase had been executed, was a trespass, and such entry, even though the mining rules, laws, and regulations had been strictly complied with, did not initiate any right in the respondents as against the appellant.

A large number of authorities are cited by the appellant to support this contention, and, in a proper case, would control; but as the cases cited do not, as we believe, apply to the case at bar, we do not deem it necessary to discuss or review them. The question must be determined, as we view it, by the application of certain statutory rules, the enactment of our legislature. While it is probably true that under the act of June 16, 1880, supra, making the grant, and excepting there-

from mineral lands, the selection by the state, and the approval of such selection by the authorized officers of the government, is such a determination of the agricultural and non-mineral character of the land, within the meaning of the grant, as to preclude any investigation involving that question in proceedings of this character, based upon the subsequent discovery of valuable mineral deposits, it does not necessarily follow that the state must, under its laws regulating the sale of the lands thus acquired, by its conveyance vest in its grantee the same title and right acquired from the government under the grant. By section 3 of the act of June 16, 1880, supra, the state is, in direct terms, authorized to dispose of the lands under such laws, rules, and regulations as may be prescribed by the legislature. The only restriction or limitation found in the act relates to the use of the funds arising from the sale of the lands granted. The language used is clear and explicit. The laws, rules, and regulations for the disposal of the lands should be such as were prescribed by the legislature of the state of Nevada. In this matter power was delegated by congress to the legislature. The disposal of the land was left to its judgment and wisdom, and long before any steps were taken by the appellant to acquire or even initiate any right to the lands in controversy the legislature of this state, by law, defined his rights, as an applicant and contractor, to purchase the lands under the grant, and made provision for the maintenance of actions to sustain and protect the same. By the act of March 5, 1887, the legislature, in the exercise of this delegated authority, prescribed by law to the effect that every person who has applied or may thereafter apply to or contract with the state to purchase land under the grant, in good faith, and who has paid or may thereafter pay to the proper officers of the state the required amount of money under such application or contract, shall be deemed and held to have the right to the exclusive possession of such land, provided that no actual adverse possession thereof existed in another at the date of the application. It was further provided that every person who has contracted with the state in good faith to purchase such land shall be entitled to maintain or defend any action at law or in equity concerning the same or its possession which may now be maintained or defended by persons who own land in fee, and that every person who has applied or shall thereafter apply to purchase, in good faith, such land, and has paid or shall thereafter pay the required amount of money under the application to the proper officer, shall be deemed and held to have the right to the exclusive possession of such land, and shall be entitled to maintain and defend any action at law or in equity concerning the same or its possession which may be maintained or defended by persons who own land in fee,

provided no actual adverse possession of such land existed in another at the date of the application. If the legislature had gone no further, then, under this statute, should the contention of the appellant be sustained, but it did not stop with these provisions. By section 3 of the act it provided in direct terms that nothing in the act contained should be so construed as to prevent any person or persons from entering upon such lands for the purpose of prospecting for any of the precious metals, or to prevent the free and economical working of any mine which may be discovered therein. Comp. Laws 1900, §§ 325-327. At the time the respondent Hirsching entered the lands in controversy and made the mining location, the appellant claimed them under his application and contract to purchase; and, by the provisions of section 3 of the act, Hirsching had a right to enter for that purpose. He was not trespassing at the time he entered, and by making his mining location he initiated the right by which he was enabled to work in a free and economical manner the mine which he discovered. The strength and infirmity of this act entered into and became a part of appellant's contract. He took possession of his land with his rights of action and right to exclusive possession limited by the provisions of said section 3. By its terms he could neither hold possession as against respondents, nor could he maintain an action to recover possession as against them, under the showing of the record. It cannot be successfully claimed that the issuance of the patents of the state at the date subsequent to the entry of the respondents in any manner terminated or concluded their rights. The legislature at the same session, and only a few days prior to the passage of the act, and in harmony therewith, declared, among other things, in an act to encourage mining, that any citizen of the United States, or person having declared his intention to become such, might enter upon any mineral lands in the state, notwithstanding the state's selection of it under the grants, and explore for gold, silver, copper, lead, cinnibar, or other valuable mineral, and, upon the discovery of any such mineral, might work and mine the same in pursuance of the local rules and regulations of the miners and the laws of the United States, provided that, after a person who has purchased lands from the state has made valuable improvements thereon, such improvements shall not be taken or injured without full compensation, but such improvements should be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use. It further declared mining to be of paramount interest and a public use. It still further declared that every contract, patent, or deed thereafter made by the state or its authorized agents should contain a provision expressly reserving all mines of gold, silver,

copper, lead, cinnibar, or other valuable mineral that may exist in such land, and disclaimed for the state and its grantees any interest in mineral lands selected by the state on account of any grant from the United States. St. 1887, p. 102 (Comp. Laws 1900, §§ 281, 282). The patent issued to the appellant contains the reservation provided for in the act last cited; and without entering upon a discussion as to what, if any, limitation should be placed upon the construction of the clause of the statute providing for the reservation, it is sufficient to say that under the showing of the record the Hirsching lode was located, worked, and improved, and known to exist, before the patent of the state was issued, and, if this clause of the statute is to be applied to any case, it seems especially appropriate that it should be made to apply to the case at bar. In other words, the state did not by its patent convey or attempt to convey the Hirsching lode. It did not terminate any rights of the respondents to the possession of the claim. It did not, under the facts of the case, divest or attempt to divest the respondents of any rights initiated by their location, work, and improvements made upon the claim; and it was proper in this action to set up and have determined their rights under these statutes. By the terms of the statutes the respondents were lawfully in the possession of the mine, and lawfully entitled to the possession thereof. This right was not violative of any of the terms of the appellant's contract to purchase. It does not conflict with any of his rights under his patent, as defined by the statutes. If these statutes cannot be applied to the facts of this case, then they are nugatory. If they render unstable and have a tendency to unsettle titles, the remedy must be, if it can be, found in the legislative department. We do not make the laws. It is our duty to construe and apply them.

Error based upon the giving and refusal to give certain instructions is not properly before us. The instructions are not in the statement. No objection was made or exception taken to the action of the court in this matter. *McGurn v. McInnis*, 24 Nev. 370, 55 Pac. 304, 56 Pac. 94.

The other questions not valued are without merit. The judgment and order appealed from are, for the reasons given, affirmed.

BONNIFIELD, C. J., and BELKNAP, J., concur.

(131 Cal. 6)

GIBSON v. HENLEY. (S. F. 1,707.)

(Supreme Court of California. Dec. 18, 1900.)

STATUTE OF LIMITATIONS—MONEY HAD AND RECEIVED—PARTNERSHIP.

A member of a law partnership embezzled money belonging to a client in February, 1893, the partner not knowing of or participating in the fraud; and the client brought action

against the partner to recover the sum so embezzled in February, 1896. *Held*, that the action came within Code Civ. Proc. § 339, as being for money had and received, and, since it was not brought within two years from the time the right of action accrued, recovery was barred.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. R. Dainingerfield, Judge.

Action by Thomas Gibson against Barclay Henley. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

Henley & Costello (Crittenden Thornton, of counsel), for appellant. Samuel Knight, for respondent.

SMITH, C. The appellant, Henley, was sued as a member of the law firm of Henley & McSherry, doing business in San Francisco during the years 1892-93, and judgment recovered against him for \$602.50 and costs. McSherry was made party to the complaint, but was not served. The suit was commenced February 4, 1896,—within three years, but not within two years, of the accrual of the cause of action. The defendant pleaded the two-years statute (Code Civ. Proc. § 339). The sole question involved in this appeal is as to the bar of the statute pleaded, and this again turns upon the question whether the action is to be regarded as an action for relief on the ground of fraud, or merely as an action on contract, or for money had and received. If the latter, the action is barred; otherwise not. The facts on which the question turns are as follows: Henley & McSherry and one Hart of New York were attorneys for the plaintiff in the matter of an estate in process of settlement in Brooklyn, N. Y., in which plaintiff was interested. Hart, on or about February 8, 1893, having collected the money coming to the plaintiff, transmitted to Henley & McSherry, by mail, a check for \$145, payable to the order of the plaintiff. This check was received by McSherry, who, it is found, obtained and embezzled the money. The plaintiff did not learn the fact of the embezzlement of the money until June 2, 1893,—within three years, but not within two years, of the commencement of the suit, which occurred February 4, 1896. There is no allegation that the defendant, Henley, participated in or knew of, or received the benefit of, the money embezzled; indeed, it is expressly found that he did not know of it until on or about November 25, 1893. On this state of facts it is very clear that there is no cause of action for fraud against the defendant, Henley. The complaint shows a fraud committed by his partner, McSherry, but it is not pretended that Henley was in any way connected with it, otherwise than by the existence of the partnership relation. By force of this relation he became responsible for the money received by McSherry, and also for the damages caused by the fraud, if any; but he did not become guilty of the fraud, nor could he be sued di-

rectly for it. There are certain cases where all the members of a firm become participants criminals in a tort, and may be jointly sued. But this is not the case where the only liability for the tort arises out of the partnership relation. In such cases they are responsible only on the principle of agency. 1 Lindl. Partn. 147, 149, 150, et seq.; 1 Bates, Partn. §§ 467, 468, 474-478; Civ. Code, §§ 2330, 2431, 2443. Thus, e. g., where a trespass has been committed by one of the partners in the conduct of the firm business, the offending partner may be sued in trespass, or all the partners jointly in case, but not in trespass. *Moreton v. Hardern*, 4 Barn. & C. 223. So, in the present case, the plaintiff might have sued McSherry for the fraud, but could not have joined Henley; or he might sue both on the firm obligation,—as he has in fact done. It follows that the action was barred by the statute, and, as this appears from the specific facts found, a new trial will be unnecessary. I advise that the judgment be reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the defendant.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the defendant.

(130 Cal. 618)

WHEELER v. KARNES. (S. F. 1,649.)

(Supreme Court of California. Dec. 11, 1900.)

MORTGAGES—FORECLOSURE—APPEAL—BOND—SURETIES—SUFFICIENCY—EXCEPTIONS—STAY OF SALE.

1. Code Civ. Proc. § 948, authorizes the appellee, on appeal from a judgment directing the sale of real estate, to except to the sufficiency of the sureties on the bond required by section 945 to be given by the appellant in order to stay proceedings, at any time within 30 days after the filing of the bond, and declares that, unless within 20 days after the appellant has been served with notice of such exceptions the sureties justify, the judgment appealed from shall be no longer stayed. *Held*, that where a decree of foreclosure of a real-estate mortgage was appealed from, and on June 2d appellant filed a sufficient stay bond, but a mortgage sale was had June 3d, and 13 days after the sale appellee excepted to the sureties, who failed to justify, the sale should have been vacated, as the bond operated as a stay until the expiration of the period allowed for justification.

2. That some of the sureties on a bond given under Code Civ. Proc. § 945, requiring that, in order to stay proceedings on appeal from a decree foreclosing a real-estate mortgage, appellant must give an undertaking as therein prescribed, were on the bond twice, for different sums, did not vitiate it.

3. Code Civ. Proc. § 945, requires that, on appeal from a decree foreclosing a real-estate mortgage, proceedings cannot be stayed unless appellant execute a bond conditioned that during the possession of the property by him he will not commit waste; that, if the decree be affirmed and the appeal dismissed, he will pay

the value of the occupation of the premises until delivery thereof, and pay any deficiency arising on mortgage sale. *Held*, that it was not necessary that the court's order for the bond to stay proceedings on appeal from a decree of foreclosure should name the separate amounts for waste, occupation, and deficiency.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Suit by C. O. Wheeler against Mary Ellen Karnes and others to foreclose a mortgage. From an order refusing to set aside a sale of mortgaged premises under the decree of foreclosure, defendant Karnes appeals. Reversed.

W. P. Thompson and C. C. Merriam (Lloyd & Wood, of counsel), for appellant. Horace Hawes and H. H. Welch, for respondent.

McFARLAND, J. Judgment in the foreclosure action was entered November 19, 1896, against the appellant, Karnes, and others. On April 8, 1897, the appellant took an appeal to this court from the judgment, by giving and serving notice of appeal and filing a \$300 undertaking, which appeal is still pending. 57 Pac. 893. Afterwards the commissioner appointed to sell the mortgaged premises gave notice of a sale thereof to take place June 3, 1897. On May 29, 1897, the judge of the court below made an order fixing the amount of a bond to stay proceedings, under the provisions of section 945 of the Code of Civil Procedure, at \$3,050; and on June 2d appellant filed a stay bond in that amount, and notified the attorneys for plaintiff that such bond had been filed; and on June 3, 1897, before any attempted sale, she notified the commissioner of the filing of such bond, and that no exception to the sureties thereon had been made, and objected to and protested against any sale being made. Nevertheless the commissioner proceeded on said June 3d and made the sale. On June 16th, 13 days after the sale, plaintiff excepted to the sureties, and they failed to justify. Afterwards, in May, 1898, appellant, on due notice, moved the court to vacate the sale as void because made under the circumstances above stated, and on May 27, 1898, the motion was regularly heard and denied. From the order denying the motion this present appeal is taken.

We think that it was error to refuse to set aside the sale. The fact that after the sale there was an exception to the sureties, and they failed to justify, did not make the bond inoperative at the time the sale was made. The whole matter is one of statutory regulation, and the statute governs irrespective of equitable considerations. The provision of the statute on the subject (section 948, Code Civ. Proc.) is that the adverse party may except to the sureties at any time within 30 days after the filing of the undertaking, and that unless the sureties, or other sureties, justify within 20 days thereafter, "execution of the judgment, order or decree appealed from is no longer stayed." But the

execution is stayed until the expiration of the time allowed for the justification, and therefore in the case at bar, as the stay was operative when the sale was made, the latter was unauthorized and invalid. Of course, some injustice might be done a judgment creditor by the filing of a stay bond with sureties not having sufficient pecuniary ability, but the legislature has not made provision for such contingency. See *Duncan v. Times-Mirror Co.*, 109 Cal. 605, 42 Pac. 147. At the worst the judgment creditor would only suffer some delay through the necessity of postponing the sale until the time had arrived for the justification of the sureties.

The stay bond was sufficient in form and amount. The fact that some of the sureties are on it twice, for different sums, does not vitiate it, and the affidavits accompanying the undertaking were clearly sufficient.

The order of the judge fixing the amount of the stay bond was proper and sufficient in form. *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977. It was not necessary for the judge to name in the order separate amounts for waste, occupation, and deficiency. It was sufficient to name the whole amount which in his judgment would be necessary to meet the requirements of section 495, although the undertaking itself must contain covenants for each of the matters covered by that section. The order appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

(130 Cal. 666)

NICOLL v. WELDON et al. (L. A. 779.)

(Supreme Court of California. Dec. 15, 1900.)

JUDGMENT BY DEFAULT—SETTING ASIDE DEFAULT—TERMS OF DEFAULT—INJUNCTION.

1. An order setting aside a default for excusable negligence and inadvertence, as authorized by Code Civ. Proc. § 473, will not be reversed on appeal unless the trial court is clearly shown to have abused its discretion.

2. The delay of a party in making application to have a default set aside for inadvertence and excusable neglect is to be considered by the trial court in determining whether the default shall be set aside.

3. Where the sum which the court requires the defendant to pay to the plaintiff, as terms on which a default will be set aside, is not shown to be inadequate, it will be sustained on appeal.

4. Where an interlocutory injunction granted in a suit to obtain a perpetual injunction is made perpetual by a decree entered by default, the interlocutory injunction will remain in full force on the default being set aside.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Suit by one Nicoll against one Weldon and others. From an order setting aside a judgment by default, plaintiff appeals. Affirmed.

B. Brundage, for appellant. Alvin Fay, for respondents.

HARRISON, J. After judgment had been entered against the respondents in this ac-

tion upon their default, they made application to the court to have the judgment set aside and leave granted them to answer, upon the ground that their default and the judgment entered thereon was taken against them through inadvertence and excusable neglect, and in support of their motion presented affidavits setting forth the facts upon which they relied. At the hearing of the motion no counter affidavits were filed, and the court granted their motion upon the condition that they pay into court for the use of the plaintiff the sum of \$25. From this order the plaintiff has appealed.

The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any prejudice thereby. This discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. Section 473, Code Civ. Proc., is a remedial provision, and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Harbaugh v. Water Co.*, 109 Cal. 70, 41 Pac. 792; *Melde v. Reynolds* (Cal.) 52 Pac. 491. It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but, if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court will impose as the condition of granting the motion.

In the present case the court was satisfied from the evidence presented to it that the neglect of the defendants was excusable, and we see no reason for questioning its conclusion in that respect. When this fact had been determined by the court, it was its duty to grant the motion upon such terms as it should deem to be just. The delay in making the application after the judgment had been rendered was a matter to be considered by that court in determining whether to grant the relief, and the terms which it imposed as a condition of granting the motion must, in the absence of any contrary showing, be held to be ample compensation to the plaintiff. It does not appear in the present case

that the plaintiff will be materially, if at all, injured by the delay. He seeks by the action an injunction against the defendants for doing certain acts, and at the commencement of the action obtained a preliminary injunction against them. The judgment obtained by him, and the writ of injunction issued thereon, had the effect merely to make permanent the previous restraining order; and the preliminary injunction is not impaired, nor are the defendants released from its effect, by setting aside the final judgment. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(130 Cal. 654)

HAWK v. BARTON. (Sac. 736.)

(Supreme Court of California. Dec. 14, 1900.)

LIMITATIONS OF ACTIONS—ACTION ON AGREEMENT TO PAY JUDGMENT.

1. An action in 1896, on an agreement in 1893 to pay a certain judgment recovered in 1890, is not barred by the five-years limitations prescribed by Code Civ. Proc. § 336, providing that action on a judgment must be commenced within five years, since such action rests on the agreement, and not on the judgment.

2. Where a third person has agreed with a judgment debtor to pay the judgment, and the creditor holds both the judgment and the agreement, he is not bound to proceed first against the judgment debtor, but may sue on the agreement, as the latter is not merely a contract of indemnity.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by E. L. Hawk against O. L. Barton. From a judgment for defendant, plaintiff appeals. Reversed.

White & Seymour, for appellant. A. J. Bruner, for respondent.

CHIPMAN, C. Action on a contract. Defendant demurred to the complaint for insufficiency of facts, and also for the reason that the action is barred by section 336, Code Civ. Proc. Defendant had judgment, from which plaintiff appeals. The complaint alleges that on May 12, 1890, one Matthew Lennox obtained a deficiency judgment for the sum of \$628.66, arising out of a foreclosure suit, against one W. P. Harlow, and that the said judgment is unsatisfied, unpaid, and unreleased; that on May 16, 1893, defendant herein entered into a written contract with Harlow, which recites that defendant on December 12, 1892, had agreed to purchase a certain mine known as the "Harlow Mine," situated in Placer county, for the consideration of \$15,000, and that since said contract of purchase, to wit, on said May 16, 1893, Harlow had delivered to defendant a deed to said mine, duly executed and acknowledged. The contract then reads: "Now, as part of the consideration for said deed, the undersigned

agrees and binds himself as follows to the said W. P. Harlow: First, to pay and satisfy a certain judgment in favor of Matthew Lennox against W. P. Harlow for the sum of six hundred and twenty-eight dollars and sixty-six cents, said judgment in superior court of El Dorado county, dated May 12, 1890." The contract then sets forth certain other payments agreed to be made by defendant, not necessary to be stated here. The contract is signed, "O. L. Barton." Harlow assigned this contract to plaintiff, December 12, 1895. The complaint also avers that Lennox assigned his interest in the judgment to plaintiff on July 7, 1896, and it is alleged that no part of the judgment has been paid, but the whole thereof is due and unpaid; that defendant was notified by plaintiff of said assignments before this action was commenced and demand made upon him to pay and satisfy said judgment, but that defendant refused, and still refuses, to pay the same or any part thereof. There is no brief for respondent, and we are not advised as to the grounds on which the demurrer was sustained. The complaint was filed October 12, 1896, less than four years from the date of the agreement of defendant to pay the judgment. The five-years statute (section 336) relates to judgments, and we suppose defendant's notion was that the action rested on the judgment, and not on the contract. In this we think he erred. The action was founded on a written contract, and was not barred. Code Civ. Proc. § 337. We can only surmise the remaining ground upon which the demurrer was sustained, namely, that the contract was merely one of indemnity. But by its terms it was plainly an agreement to pay and satisfy a certain judgment for a certain sum of money, the full consideration for which defendant had received. Plaintiff is the owner and holder of both the judgment against Harlow and the agreement of Barton to pay it. Plaintiff may look to defendant, whose performance would have the effect to discharge the judgment. He is not bound to look first or at all to Harlow, the judgment debtor; for he holds Barton's written agreement, executed for a good and valuable consideration, to pay this judgment. Whether Barton can by proper plea show that he is discharged from liability on his contract for the reason that the judgment against Harlow was barred when assigned to plaintiff is a question not raised by the demurrer, since the action is on Barton's contract, and not on the Lennox-Harlow judgment, and the only statute pleaded is that relating to judgments. We advise that the judgment be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

63 P.—5

(130 Cal. 638)

CURL v. CURL. (L. A. 803.)¹

(Supreme Court of California. Dec. 14, 1900.)

DIVORCE—CRUELTY—MENTAL SUFFERING—
APPEAL—PRESUMPTIONS.

1. Whether conduct alleged in the complaint causes such grievous mental anguish as to constitute a ground for divorce is a question of fact to be determined by the trial court from the testimony.

2. Where the evidence before the court below is not in the record, and there are no findings of fact, it must be assumed, in support of a judgment for divorce, that the evidence was sufficient to support the allegations of the complaint.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Bill for divorce by W. T. Curl against Ellen J. Curl. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Walter Bordwell, for appellant. Diehl & Chambers, for respondent.

HARRISON, J. The plaintiff brought this action against the defendant for a divorce, and set forth in his complaint certain conduct by her which he alleged had caused him great suffering and grievous mental anguish. The conduct with which the defendant was thus charged was that she had at a certain date clandestinely visited the house and home of another man during the absence of his family, and had secretly remained there with him for more than one hour, and had at divers other times secretly and clandestinely met him, and in company with him gone to places unknown to the plaintiff, and had remained away for several hours, and that he had at divers times visited the home of the plaintiff and defendant during the absence of the plaintiff, and while the defendant was alone, and upon each of said occasions had remained in said house in company with the defendant alone for several hours. The defendant made no answer to the complaint, but suffered default, and, after hearing proofs of the matters alleged, the court granted the divorce. The present appeal is taken from this judgment, without any bill of exceptions.

Whether the conduct of the defendant, as above set forth in the complaint, caused the plaintiff grievous mental anguish, was a question of fact to be determined by the court from the testimony before it at the hearing. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298. The evidence before the trial court is not before us, and, as there are no findings of fact, it must be assumed in support of the judgment that the evidence was sufficient to support the allegations of the complaint, and that the court found therefrom that the conduct of the defendant had caused the plaintiff grievous mental anguish. If so, she was guilty

¹ Rehearing denied January 10, 1901.

of extreme cruelty, and the judgment was correct. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(130 Cal. 639)

NAPHTALY et al. v. ROVEGNO et al. (S. F. 1,654.)¹

(Supreme Court of California. Dec. 14, 1900.)

JURY—COURT RULES—COMPLIANCE.

Where a party fails to comply with a rule of the trial court requiring a party demanding a jury to deposit the fees necessary therefor before the commencement of the trial, the denial of a jury trial is not error.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by Joseph Naphaly and another against Stefano Rovegno and others. Judgment for plaintiffs, and from an order denying a motion for a new trial certain defendants appeal. Affirmed.

James A. Devoto, for appellants. Naphaly, Freidenrich & Ackerman, for respondents.

McFARLAND, J. This is an action for a partition of certain described land. The defendants Rosa Rovegno and Giacomo Rovegno appeal from an order denying their motions for a new trial. The only point which they insist on for a reversal of the order is that the court below erred in denying their demand for a jury. Whether or not certain issues in the case were of such a character as to give to appellants the general right to have them tried before a jury is a question not necessary to be here determined; for we think that the court, for specific reasons hereinafter mentioned, did not err in refusing the demand. The case was tried on the 20th of October, 1896, but it had been on the trial calendar several weeks prior to that time, marked as a "court" case, as distinguished from a "jury" case, in accordance with the custom of the court. This fact was well known to the parties, and appellants never asked to have it changed from "court" to "jury," and had not demanded a jury until the said 30th of October. On the latter day, when the case came on regularly to be tried, one of the defendants (Stefano Rovegno) moved for a continuance, and, the motion having been denied, demanded a jury, and the demand was denied. Then these appellants, who had not joined in the motion for a continuance, also demanded a jury, and their demand was refused. On September 20th the case had been called for trial, and appellants had answered "Ready" without any intimation that they desired a jury; but, owing to the number of cases before it on the calendar, it was not reached until October 20th, at which time there was no jury in attendance. The record at this stage merely shows the naked

facts that appellants made a demand for a jury, and that the court denied it. Nothing further appears. But in another part of the record it is shown that there was a rule of court providing that "a party demanding a jury shall before the commencement of the trial deposit with the clerk of the court the fees necessary therefor,"—specifying the amount; and appellants did not make nor offer to make such deposit. In *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488, it was held that such a rule is reasonable, and must be complied with. Under these circumstances it does not appear that the court erred in denying the demand for a jury, and such denial does not, therefore, warrant a new trial. The order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(6 Cal. Unrep. 600)

PEOPLE v. MACHADO. (Cr. 639.)

(Supreme Court of California. Dec. 18, 1900.)

LARCENY—INDICTMENT—EVIDENCE—HEARSAY—IMPEACHMENT—INSTRUCTION.

1. An indictment sufficiently describes the stolen property as "one cow, the same being the property then and there of H."

2. In a criminal case, refusal to charge that the jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence whether there is reasonable doubt as to his guilt, is proper.

3. In a prosecution for larceny of a cow a witness had testified to finding on the premises of accused a "stunk" calf,—that is, one that had been taken from its mother,—and that it had been taken from the stolen cow, to which no objection nor motion to strike out was made. *Held*, that a question asking for the appearance of the calf as to when it had been taken from its mother, and his answer giving the facts on which his conclusion was based, were not objectionable as assuming that the calf had been taken from "a" cow; not "the" cow,—that is, from the stolen cow.

4. Where a witness, in a prosecution for the larceny of a cow, had testified in reference to a hide found on the premises of accused, but had not testified that any part of a brand on it was indistinguishable, a question, on cross-examination, asking what part of the brand was indistinguishable, was properly excluded.

5. A question to a witness, "Now, when you went to the butcher shop or slaughter house for the first time, you didn't go in?" was properly excluded for uncertainty, as it could not be understood whether it referred to the butcher shop or the slaughter house.

6. Where, in a prosecution for the larceny of a cow, a witness testified, without objection, to the finding of the carcasses of two calves in a certain locality, a question calling for their condition, and the answer to the effect that they were very much decomposed, which was favorable to accused as showing that they could not have come from the stolen cow, were properly admitted.

7. Admission of testimony as to statements of a third person to one accused of a crime, though not accompanied with proof of the conduct of accused, was not error, where accused did not move to strike it out.

8. In a larceny prosecution, a witness testifying that the stolen property belonged to one person cannot be impeached by showing that in another case he had testified that it belonged to another.

¹ For opinion on rehearing, see 63 Pac. 631.

9. In a criminal case, a question of one witness as to declarations of another, who was not himself questioned in relation thereto, was properly stricken out.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

John Machado was convicted of grand larceny, and he appeals. Affirmed.

Grave & Graves, for appellant. Atty. Gen. Ford, for respondent.

SMITH, C. The defendant was indicted with another for the crime of grand larceny. The property stolen is described as "one cow, the same being the property then and there of Hathaway and Branch," etc. The indictment was demurred to on the ground of the insufficiency of this description. The description, I think, was sufficiently certain. 12 Enc. Pl. & Prac. pp. 977, 983, et seq.; People v. Littlefield, 5 Cal. 355, affirmed in People v. Ah Woo, 28 Cal. 211; People v. Stanford, 64 Cal. 27, 28 Cal. 106.

It is claimed the court erred in refusing to give the following instruction: "The jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence to determine whether there is reasonable doubt as to defendant's guilt." The instruction is substantially similar to an instruction refused in People v. Durrant, 116 Cal. 185, 222. 48 Pac. 75, and comes within the ruling in that case.

Objections are made to numerous rulings of the court on the evidence, but none of them are well taken. The witness Avila had testified, without objection, as to finding on the premises of defendant what he called "a 'slunk' calf,—that is, a calf that had been taken from the cow,"—and was asked, "What was the appearance of the calf, when you saw it, as to when it had been taken from the cow?" The question, and also the answer, which simply gave the facts on which the witness' conclusion was based, were proper. It may be added that the objection was that the question assumed that the calf "had been taken from 'a' cow"; not "taken from 'the' cow,"—i. e. from "the stolen cow," as stated in the brief. The witness had testified some time before that the calf was taken from the stolen cow, giving his reasons; but no objection was made, nor was there any motion to strike out. The question to Avila, referring to the brand on the hide found on defendant's premises, and asking, in effect, which part of it was indistinguishable, was properly excluded. The witness had not testified that any part of it was indistinguishable. So, also, the question, "Now, when you went to the butcher shop or slaughter house for the first time, you didn't go in?" was properly excluded for uncertainty; i. e. because it could not be understood whether it referred to the butcher shop or the slaughter house. The rulings of the court with reference to the testimony of

the witness Cook were also unobjectionable. There was no objection to his testimony that he had found the carcasses of two calves in the creek south of the slaughter house. That evidence had been given without objection. The objection was to the question, "What was the condition of those two carcasses?" and the answer, which was that "they were very much decomposed," was favorable to the defendant as showing that they could not have come from the stolen cow. Nor was it error to allow the question as to what was said by Martinez to the defendant on the occasion referred to in the question. The rule is that such evidence is proper, but must be accompanied with proof of the conduct of the accused, in default of which it may be stricken out. People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; People v. Mallon, 103 Cal. 513, 37 Pac. 512. The prosecution did not offer the additional proof, but there was no motion to strike out. Indeed, the answer could not have had any influence on the minds of the jury, and, if erroneous, would have been harmless. The questions asked this witness with a view of impeaching him were inadmissible. Most of them seem to have been designed to bring out the fact that in a criminal complaint made by the witness against one Espinoza he had sworn that the cow in question was the property of Avila. But the witness had not testified otherwise in this case. The evidence was clearly inadmissible. The court did not err in striking out the testimony of Silvers as to declarations of Avila. Avila had not been questioned as to such declaration. The same statement was afterwards repeated by the witness without objection on the part of the prosecution. The question of the prosecution to the same witness, objected to by defendant, was not improper in cross-examination, and the answer could not possibly have affected the result one way or the other. I advise that the judgment be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 8)

PACIFIC INV. CO. v. ROSS. (S. F. 1,538.)
(Supreme Court of California. Dec. 19, 1900.)

HARMLESS ERROR—SUSTAINING DEMURRER TO CROSS COMPLAINT—CHATTEL MORTGAGES—FORECLOSURE—DECREE—SALE—ORDER FOR IMMEDIATE POSSESSION.

1. As by Code Civ. Proc. § 462, new matter contained in the answer is deemed controverted by plaintiff, it presents an issue substantially the same as would be presented by an answer to a cross complaint alleging the same matter; and in such a case, where findings were waived in a trial to the court, the presumption being that it found on all matters of fact in issue necessary to support the judgment for plaintiff, and hence found against defendant as to the new matter alleged in the answer, error, if any, in sustaining a demurrer to the cross

complaint alleging such new matter, was harmless.

2. A decree on foreclosure of a chattel mortgage properly ordered the commissioner appointed by consent of counsel to execute the same to take immediate possession of the incumbered property for the purpose of the sale, since that is made necessary by Code Civ. Proc. § 698, providing that, "the officer making the sale must deliver the property to the purchaser."

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by the Pacific Investment Company, a corporation, against Anna Ross. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank Shay, for appellant. J. H. Long, for respondent.

VAN DYKE, J. The action is one to foreclose a chattel mortgage. Judgment went for the plaintiff, from which the defendant appeals upon the judgment roll. The complaint is in the usual form. The answer admits the execution of the note and mortgage, but avers that at the time of its execution it was agreed and understood that the plaintiff would not seek to foreclose so long as defendant paid the interest; that defendant had tendered the interest to plaintiff, who had refused to receive it. By way of cross complaint the defendant set up the same matter of the parol agreement made at the time of giving the note and mortgage, as stated in the answer, and asks that said note and mortgage be reformed according to said parol agreement. The demurrer to the cross complaint was sustained, and this is urged as one of the errors on appeal. The new matter contained in the answer in reference to the parol agreement between the parties at the time of the execution of the note and mortgage is deemed in law controverted by the opposite party. Code Civ. Proc. § 462. An issue was therefore presented substantially the same as would have been presented by an answer to the cross complaint, had the same been allowed to stand. At the trial findings were waived, but it will be presumed that the court found upon all the matters of fact in issue necessary to support the judgment, and therefore found against the defendant as to the alleged parol agreement. *Blanc v. Mining Co.*, 95 Cal. 524, 30 Pac. 765; *Bank v. Kowalsky*, 105 Cal. 42, 38 Pac. 517. Assuming, therefore, that the court erred in sustaining the demurrer to the cross complaint,—which, however, it is not necessary to decide,—the error would be altogether harmless, and hence no ground for reversal. *Blakely v. Blakely*, 89 Cal. 325, 26 Pac. 1072; *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443.

In the decree of foreclosure one Kerrigan, by consent of counsel, was appointed a commissioner for the purpose of carrying out and executing said decree. And it was further ordered that said commissioner take imme-

diately possession of the incumbered property, and proceed to sell the same, or so much thereof as may be necessary, to satisfy the judgment and costs. The appellant attacks this portion of the decree directing the commissioner to take possession of the property as being without authority of law. There is nothing in this contention. The commissioner is simply a substitute for the sheriff, and was appointed by the consent of the appellant; and he must make the sale in like manner as the sheriff would be required to do. The property here must be taken into possession, for, being capable of manual delivery, "the officer making the sale must deliver to the purchaser the property." Code Civ. Proc. § 698. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(6 Cal. Unrep. 604)

BANK OF UKIAH v. REED et al. (S. F. 1,542).¹

(Supreme Court of California. Dec. 14, 1900.)
APPEAL AND ERROR—CONFLICT OF EVIDENCE
—BURDEN OF PROOF.

1. Where there is a conflict of evidence submitted on a motion to set aside a default, the determination of the court denying the motion will not be reviewed on appeal.

2. Where a written memorandum of an agreement between the parties to a suit is executed, in which is expressed the consent of defendants that their defaults be entered, and an agreement on the part of plaintiff not to take judgment until a certain time, the burden of proof is on defendants to show that they were entitled to a further notice, and to additional time beyond the date expressed in the memorandum, before judgment could properly be entered against them by default.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the Bank of Ukiah against John S. Reed and others. From an order denying a motion to vacate and set aside their default and the judgment thereon, defendants appeal. Affirmed.

Heller & Powers, for appellants. J. A. Cooper, for respondent.

HARRISON, J. After judgment had been entered against the appellants upon their default, they moved the court to vacate and set aside their default and the judgment thereon, and from the order refusing their motion the present appeal has been taken. The complaint was filed January 21, 1896, and, service of the summons issued thereon having been had upon the defendant, John S. Reed, a demurrer to the complaint was filed on his behalf February 1, 1896. Service was made upon the defendant Anna M. Reed March 11, 1896. On that day, at the request of the defendants, an interview was had between them and the directors of the plaintiff, at the banking house of the latter, at which it was agreed on the part of the

¹ Rehearing denied January 12, 1901.

defendants that the demurrer of the defendant John S. Reed should be withdrawn, and that Mrs. Reed should make default in the suit, and that upon payment by the defendants of \$600, on or before July 15, 1896, the plaintiff would not take judgment until January 2, 1897. Mrs. Reed thereupon appeared in the action, and filed her consent that default be taken against her. A stipulation was also filed by John S. Reed consenting that his demurrer be withdrawn and his default entered. April 27, 1896, the plaintiff caused the defaults of the defendants to be entered. The defendants did not pay the \$600, and on September 18, 1897, judgment was entered in the action for the foreclosure and sale of the mortgaged property. September 29, 1897, the defendants moved to set aside and vacate the default and judgment, upon the ground that they were entered through mistake and inadvertence on their part, and presented evidence in support of their motion. The court, after hearing the same, denied the motion, and the present appeal is taken from that order.

In the affidavits presented by the defendants in support of their motion they set forth, as the grounds upon which they claim the relief, that at the time they agreed to withdraw the demurrer, and consented that default might be entered against them, the attorney for the plaintiff agreed with them that no further action should be taken in the case without giving them previous notice thereof; and, further, that after said agreement had been made the president of the plaintiff agreed with them, in substance, that no judgment should be taken against them until after the year 1897, and that they might have the whole of that year in which to pay their indebtedness, and that their failure to appear or take any steps in the suit had been by reason of their reliance upon these agreements. At the hearing upon the motion there was presented on behalf of the plaintiff a written memorandum, in which was expressed the consent of the defendants that their defaults be entered, and the agreement on the part of the plaintiff not to take judgment until January 2, 1897. It was also shown that at the interview between the defendants and the directors, at which the agreement was made, its terms were openly stated and discussed, and that, after the memorandum had been prepared, it was read to the defendants, and its terms assented to by them, and that a copy of it was taken by Mrs. Reed. Affidavits by directors who were present at the meeting were also presented, in which they stated that no agreement was made of any extensions of time, except as stated in said memorandum, and that nothing was said at the meeting about giving further notice of any steps to take judgment. The attorney for the plaintiff was also present at that interview, and testified at the hearing of this motion that neither at that time, nor

at any other time, did he agree to any extension of time beyond the 2d day of January, 1897, or to give to the defendants any notice of any further steps to be taken in the suit. The president of the bank testified that he never told the defendants, or either of them, that they could have all of the year 1897 in which to pay their indebtedness, or agreed with them, or either of them, to give to them any time beyond that expressed in the memorandum. Upon the conflict of evidence thus presented, it must be assumed that in denying the defendants' motion the superior court determined in favor of the plaintiff. In the face of the evidence contained in the written memorandum the burden was upon the defendants to show that they were entitled to any further notice before the entry of judgment, as well as to additional time beyond the 2d day of January, 1897, before judgment should be entered against them. We cannot say, from an examination of the evidence presented to the superior court, that its determination was erroneous, or that it abused its discretion in denying the motion of the defendants. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 11)

McINTYRE v. HAUSER. (L. A. 757.)

(Supreme Court of California. Dec. 19, 1900.)

CHATTEL MORTGAGES — SALE — ASSENT OF MORTGAGEE — ASSIGNMENT OF PRICE — PLEADING — AMBIGUITY — CONSTRUCTION — DEBT — EQUITABLE ASSIGNMENT — ESSENTIALS — GARNISHMENT.

1. In an action by a judgment creditor of B. to recover the amount of his debt, for which defendant had been garnished, the complaint alleged that B., by written instrument, had sold defendant certain cattle on which there was a chattel mortgage to others; that the mortgagees, by written statement attached to the contract of sale, consented thereto on condition that the proceeds of the sale be paid to them; and that defendant, in spite of plaintiff's garnishment, paid the money to the mortgagees. *Held*, that a demurrer to the complaint was properly sustained, since the complaint must be construed to allege a contract requiring the money arising from the sale to be paid to the mortgagees by defendant, in which case it was not subject to garnishment by a creditor of B.

2. Where the owner of cattle subject to a chattel mortgage sold them by written contract, and the mortgagees, by written instrument attached thereto, consented to the sale on condition that the purchaser pay the money arising from the sale to them, though the purchaser knew nothing of the conditional assent, the transaction was an equitable assignment to the mortgagees of the vendor's claim to the purchase money.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Allen McIntyre against Julius Hauser to recover the amount of a debt owed to plaintiff by James Brown, for which defendant had been garnished. From a judg-

ment for defendant on demurrer to the complaint, plaintiff appeals. Affirmed.

Leonard & Morris (H. Goodcell, of counsel), for appellant. Isidore B. Dockweiler, for respondent.

GAROUTTE, J. In this action a general and special demurrer was sustained to the complaint, and, the plaintiff declining to amend, judgment went against him, and this appeal is taken therefrom. The sufficiency of the complaint is the question before the court. In passing upon this question all ambiguities and uncertainties found in the pleading will be construed against the pleader. The facts are these: James Brown owned a herd of cattle upon which third parties held a chattel mortgage. Brown sold these cattle to the defendant, the sale being evidenced by a contract in writing. To this contract was appended a written statement to the effect that the cattle were mortgaged to these third parties (naming them) to secure the payment of an indebtedness owing to them by Brown, and it was further stated by the complaint that "they approved and consented to such sale to said defendant, provided the money derived therefrom was paid to them; which said statement was signed by them." In view of what has been said relating to the construction which should be given ambiguities appearing upon the face of the complaint, the last allegation of the pleading quoted will be construed to the effect that the mortgagees consented to the sale provided the money derived therefrom was paid to them by Hauser, the purchaser of the cattle. Especially must this construction of the pleading be maintained when we find that a special demurrer was directly pointed to this ambiguity. The further facts, as disclosed by the complaint, are these: Before the purchase price was paid, this plaintiff, a judgment creditor of Brown, garnished the money in the hands of Hauser. Hauser, regardless of the garnishment, paid the money to the mortgagees, and he is now sued by the judgment creditor for the amount. Upon the foregoing state of facts the question is presented, to whom did Hauser owe the money at the date of the garnishment? If he owed it to Brown, then he is liable in this action. If he owed it to the mortgagees, he is not liable. There can be but one answer to this question. If the contract of sale, taken in connection with the consent to the sale by the mortgagees, be construed as a tripartite agreement,—which construction the allegation of the pleading would fairly justify,—then it is manifest the money was owing to the mortgagees; and a direct promise upon the part of Hauser to pay it to them formed a part of the contract. This character of transaction would constitute a novation pure and simple. But, even eliminating from the agreement any question of Hauser's promise to pay to the mortgagees the proceeds derived from the sale of the cat-

tle, still by every fair construction of the pleading the fact remains that the understanding between Brown and the mortgagees was that the money should be paid by Hauser to them. Certainly there was ample consideration for such an agreement, and that agreement constituted an equitable assignment by Brown to them of the money due from Hauser. The fact that this plaintiff knew nothing of the transaction is immaterial, and likewise it is immaterial if Hauser knew nothing of it. If the mortgagees could have sued Hauser for the money, and recovered, then he owed Brown nothing, and this plaintiff secured no rights by his garnishment. The moment the sale was made of the cattle, the amount due from Hauser became a chose in action, and, of course, was assignable by Brown. It is elementary that an assignment of a chose in action takes precedence over a subsequent garnishment (*Walling v. Miller*, 15 Cal. 38), and as to the particular facts which constitute an equitable assignment it is only necessary to refer to the early case of *Pope v. Huth*, 14 Cal. 403.

There is no question in this case as to the lien of the mortgages attaching to the proceeds of the sale of the cattle. Neither is the conclusion to which we have arrived opposed to the decision in *Maier v. Freeman*, 112 Cal. 8, 44 Pac. 357. The facts of the two cases are widely variant. In that case the sheep had not been sold at the time the agreement between the mortgagor and mortgagee was made; and, in addition to that important fact, there the mortgagor was to receive the proceeds of the sale of the sheep. Here neither of these controlling circumstances is presented. In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If, from the entire transaction, it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. There is no question of fraud involved, and the intention of the parties to clothe the mortgagees with title to the claim against Hauser is made out from the pleading. For the foregoing reasons, the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(130 Cal. 649)

PORTLAND CRACKER CO. v. MURPHY.
(S. F. 1,637.)

(Supreme Court of California. Dec. 14, 1900.)
JUDGMENTS—CONFORMITY TO VERDICT—VERDICT—DISREGARD OF INSTRUCTIONS.

1. The complaint in an action for the recovery of money alleged that the money was embezzled by defendant while acting as plaintiff's agent, and demanded judgment for the imprisonment of defendant until the money judgment demanded should be paid. The jury found a general verdict for plaintiff on the issue of the money demand, but found for defendant on a special issue submitting the question of embezzlement. *Held*, that the special and

general verdicts were consistent. It was, therefore, proper to enter a money judgment in favor of plaintiff on the general verdict.

2. In an action for the recovery of money alleged to have been embezzled by defendant while acting as plaintiff's agent, the court charged, in effect, that, if plaintiff failed to prove the fraudulent appropriation, the verdict should be for defendant on that issue. *Held*, that a verdict for plaintiff on the money demand and for defendant on the issue as to fraudulent appropriation was not contrary to the instructions.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by the Portland Cracker Company against A. H. Murphy. From a judgment for plaintiff, defendant appeals. Affirmed.

Grove L. Johnson, John H. Hansen, and Garret W. McEnerney, for appellant. Charles H. Jackson, J. F. Riley, and Thornton & Merzbach, for respondent.

VAN DYKE, J. The complaint alleges that the defendant embezzled and fraudulently misapplied and converted to his own use the sum of \$1,271.94, which had come into his hands in the course of his employment as the agent and clerk of the plaintiff, and the complaint prays that judgment against the defendant may be had in said sum, and for costs of suit, and that the defendant be arrested and held to bail; that judgment may be entered against the person of said defendant that he be imprisoned until the payment of said sum; and for further relief. Upon the issuance of the summons plaintiff applied for and obtained an order for the arrest of the defendant under section 479, subd. 2, Code Civ. Proc. The necessary affidavit and undertaking being furnished, the order for arrest was made, and the defendant was thereupon arrested, but was released on the same day upon giving an undertaking as required by section 487, Id. The answer denies that the defendant embezzled, fraudulently or otherwise misapplied, or converted to his own use, the sum of \$1,271.94, or any other sum, which had come into his hands in the course of his employment as the agent or clerk of the plaintiff, or at all. Upon the issues presented the case was tried by a jury, and a general verdict rendered in favor of the plaintiff for the sum of \$750, and also found on the special issue submitted, to wit: "Did the defendant fraudulently appropriate the money of the plaintiff, as alleged in the complaint? Answer. No." Upon the coming in of the verdict the defendant moved the court to enter judgment in his favor upon the ground that the special issue controlled, and that the defendant was entitled to a judgment thereon. The court denied defendant's motion, and entered a money judgment in favor of the plaintiff upon the general verdict.

The defendant appeals from the judgment so entered upon a bill of exceptions, and relies for a reversal upon two alleged errors: (1) That upon the verdict the judgment

should have been for the defendant; (2) that the verdict is contrary to law, in this: that it is contrary to the instructions of the court. The theory of the defendant is that, inasmuch as the plaintiff alleged that the money had been embezzled and fraudulently appropriated, he cannot recover at all, unless the issue upon such allegation is found in its favor. In this appellant is clearly mistaken. The action is for the recovery of money in the hands of the defendant belonging to the plaintiff, and whether that money had been embezzled or fraudulently appropriated would not defeat the recovery of a simple money judgment for the amount of money in the hands of the defendant due the plaintiff; but, unless the issue in reference to embezzlement or fraudulent appropriation were found in favor of the plaintiff, it could not recover a judgment for the imprisonment of the defendant until the money found due should be paid, as in this state no person can be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud. *Payne v. Elliot*, 54 Cal. 339, was an action for the fraudulent conversion of mining stock. The plaintiff had judgment for the amount of the mining stock so converted, and a further judgment that the plaintiff was entitled to an order of arrest against the defendant until the same should be paid. On appeal it was held "that the court below did not err in overruling the demurrer to the complaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial, but that the judgment for fraud exceeded the relief to which the plaintiff was entitled by his complaint"; that the averments thereof were not sufficient to support that portion of the judgment. The court below was therefore directed to strike from the judgment the portion in reference to the arrest of the defendant, and, thus modified, the judgment was affirmed. In *Kullmann v. Greenebaum*, 84 Cal. 98, 24 Pac. 49, the plaintiff had a money judgment in the court below, and appealed for the purpose of having the judgment modified by directing the court below to enter judgment in accordance with the facts found by the jury adjudging the defendants guilty of fraud, and directing process to issue against the person according to law. The court say: "This we decline to do, for the reason that the complaint sets up no fraud by defendants of which plaintiff can complain. * * * It may be conceded that the court was bound to enter judgment on the verdict of the jury, but, under the state of facts above pointed out, the court did not err in disregarding the verdict of the jury in respect of fraud," and affirmed the judgment. *Obersteller v. Assurance Co.*, 96 Cal. 645, 31 Pac. 587, is an appeal from a judgment recovered by the plaintiff against the defendant in an action upon a policy of insurance. The answer of the defendant charged fraud on the part of the plaintiff in procuring the policy.

In that case there was a general verdict in favor of the plaintiff for the sum of \$500, and also a special verdict, and upon the entry of the general and special verdicts defendant moved the court for a judgment for the defendant on the ground that the verdict found fraud upon the part of the plaintiff, which motion was denied; and the court, in its opinion, says: "The Code provides, 'Where a special finding of facts is inconsistent with the general verdict the former controls the latter, and the court must give judgment accordingly.' Code Civ. Proc. § 625. This proceeding is not authorized in any other case, and the general and special verdicts in this case are entirely consistent. The special verdict finds the total value of the property insured and destroyed to be the sum of five hundred dollars, and the general verdict is for that sum. If, in their special verdict, the jury had found the value of the property to be less than five hundred dollars, and had rendered a general verdict for that or a greater sum, it would as clearly be within the provision above quoted as it now as clearly is not. All that can now be said is that the jury found that plaintiff's loss was not so great as he represented it to be. That was favorable to the defendant. We think that finding was not conclusively a finding of fraud on the part of the plaintiff. Standing alone, it shows that he overestimated his property. Whether or not that vitiated the policy of insurance was a question not involved in the motion for judgment for the defendant upon the verdict. That motion, as we have before stated, could not be granted on any other ground than the one specified in the Code, viz. inconsistency between the general and special verdicts. The motion was properly denied." In this case the special verdict was not inconsistent with the general verdict. The complaint set forth a cause of action for a money demand, and also set forth facts which, if proven, would have justified a judgment for the arrest and detention of the defendant until the money judgment should be paid. The jury found in favor of the plaintiff on the issue of the money demand, although not to the amount claimed, and found in favor of the defendant on the issue of the embezzlement and fraudulent appropriation of the money. Clearly, when the defendant had money in his hands belonging to the plaintiff, the plaintiff was entitled to a money judgment, although the defendant may not have been guilty of embezzlement or fraudulent appropriation. And such was the judgment entered in this case.

The appellant contends that the verdict is contrary to law, in that it is contrary to the following instruction: "The plaintiff has the burden of proving the fraudulent appropriation of the money by the defendant while acting as its agent, and the defendant is not required to prove that he did not make such appropriation. If the plaintiff has proved by a preponderance of the evidence that the defendant did make such fraudulent appropri-

tion, then your verdict must be for the plaintiff, not exceeding the amount claimed by it in its complaint. On the other hand, if the plaintiff has failed to do this, your verdict must be for the defendant." But, when this instruction is taken in connection with the other instructions, it will be manifest that the meaning of the court was that, if the plaintiff failed to prove the fraudulent appropriation, the verdict should be for the defendant on that issue. In the other instructions the court says: "Should you find a verdict for the plaintiff, you must ascertain the amount of money which the defendant has fraudulently appropriated, and on this amount the plaintiff is entitled to interest at the rate of seven per cent. per annum from the time of the conversion fixed in the complaint, to wit, February 12, 1896, up to the present time. Should you find a verdict for the plaintiff, you are requested to answer the following interrogatory: 'Did the defendant fraudulently appropriate the money of the plaintiff, as alleged in the complaint?' This interrogatory need not be answered should you find a verdict for the defendant." In other words, in order to find a verdict for the defendant, they would have to find that he had no money in his hands, either fraudulently or otherwise, belonging to the plaintiff; but they could find for the plaintiff on the money demand, and also find for the defendant that the money had not been fraudulently appropriated,—that is to say, simply a finding for the plaintiff as on a demand for money had and received by defendant to the use of the plaintiff. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(130 Cal. 689)

LAKE SHORE CATTLE CO. v. MODOC
LAND & LIVE-STOCK CO.

(Sac. 644.)¹

(Supreme Court of California. Dec. 15, 1900.)

SALES—AGENCY—EVIDENCE—INSTRUCTIONS—
APPEAL—JUDGMENT.

1. Where the issue was whether certain cattle purchased by defendant's superintendent had been purchased for defendant or by the superintendent individually, and the evidence was conflicting, and it could not be said that there was not substantial evidence to sustain a verdict in favor of plaintiff finding that the purchase was for defendant, the judgment based thereon would not be disturbed on appeal.

2. On an issue whether cattle purchased by the superintendent of a corporation had been purchased for the corporation or by him individually, that a note in part payment was signed by the superintendent individually was not conclusive as showing the sale to have been to him.

3. On an issue whether cattle purchased by the superintendent of a corporation had been purchased by him individually or for the corporation, evidence that the superintendent had made a similar purchase from other persons on behalf of the corporation was admissible.

4. On an issue whether cattle purchased by the superintendent of a corporation had been purchased for the corporation or by the super-

¹ Rehearing denied January 12, 1901.

intendent for himself, if it was error to allow the seller of the cattle to read in evidence entries from a book kept by the superintendent, consisting of entries of account between himself and the corporation, the same was not prejudicial, the items of any significance being included in reports sent by the superintendent to the corporation.

5. Where the court charged that, if the jury found for plaintiff in any amount, they should add interest at the rate of 7 per cent. per annum, and the verdict was for a certain sum, with interest at ".07 per cent.," a judgment entered for the principal sum and interest at 7 per cent. was not erroneous on the ground that ".07" did not mean 7 per cent., since it was clearly a clerical error.

Department 2. Appeal from superior court, Modoc county; J. W. Harrington, Judge.

Action by the Lake Shore Cattle Company against the Modoc Land & Live-Stock Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Spencer & Raker and Clarence A. Raker, for appellant. G. F. Harris, H. L. Sprague, J. T. Richards, and E. C. Bonner, for respondent.

McFARLAND, J. This action was brought to recover \$4,800 and interest, balance due on an alleged sale of cattle by plaintiff to defendant, made November 6, 1892. The jury returned a verdict for plaintiff for the amount claimed, and judgment was rendered accordingly. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The transcript presents a dreary mass of matter covering over 800 printed pages, and should not have occupied more than one-fourth of that amount of space. It might be somewhat justly characterized by the comparison of "two grains of wheat hid in two bushels of chaff," which Bassanio uses to illustrate the "reasons" of Gratiano. A good deal of the testimony of witnesses is given at length by question and answer. Many questions substantially the same are asked over and over again; and a very large part of the transcript is taken up with objections of counsel, the same objections being repeated many times. Under the head of "Errors of Law Occurring at the Trial" there are 499 separate specifications covering 126 pages; to the points that the evidence is insufficient to justify the verdict, and that it is against law, there are many other specifications; and there are, in addition, about 40 exceptions to the giving and refusing of instructions. Most, although not quite all, of these exceptions and specifications are mentioned in appellant's briefs, the briefs themselves covering over 200 printed pages. It is, therefore, entirely impracticable to undertake to notice appellant's points in detail. The respondent and appellant are corporations. It is averred in the complaint that the appellant, acting by and through its agent, W. H. Nelson, bought the cattle in

question of respondent; and it is not disputed that one C. E. Crowder, superintendent of respondent, sold the cattle at the time mentioned in the complaint to said Nelson, who was then superintendent of the appellant. The number of cattle sold, the price, and the facts that about one-third of the purchase price was paid at the time, and that \$4,800 was the balance remaining unpaid, are all admitted, or proved beyond question. The real merits of the case are involved in the question whether or not the purchase was made by Nelson as agent of and for the corporation appellant. Appellant contends that Nelson made the purchase entirely for himself individually; that he was not either the actual or ostensible agent of appellant for the purpose of making such purchase; and that, therefore, appellant was not bound by the transaction. Respondent contends that he was appellant's actual agent; and, moreover, that, whatever may have been the private understanding between him and appellant, the latter, by its acts, clothed him with ostensible authority upon which respondent had the right to rely. As to this question the evidence was conflicting. The headquarters of appellant was in the city of San Francisco, while its main business was carried on in Modoc county, several hundred miles distant from said city. Its business is described in its charter as "the dealing in, buying and selling, management and disposition of land and live stock, and everything pertaining thereto in all respects." It was incorporated in 1886, and a few months afterwards Nelson, as the minute book of the directors shows, was elected vice president and superintendent, and as such he was "authorized to sign checks, and make and sign contracts necessary for the proper performance of the business of the corporation." He was the only member of the corporation who lived in Modoc county; and from December, 1886, to April, 1893, during which period the sale here involved occurred, he was superintendent, and attended to all the business of appellant in that county. The appellant had a large tract of land in Modoc county, and raised and bought and sold cattle there, and the business was done entirely by and through Nelson, who was the only agent or representative of the appellant in that region of the country. These general facts were themselves strong evidence to the point that appellant had intrusted Nelson with all business in that remote country, and clothed him with authority to do all acts necessary to its transaction. We will not undertake to here review the evidence. It was "conflicting" within the rule so often stated, and it cannot be said that there was no substantial evidence to sustain the verdict. The fact so much relied on by appellant, that Nelson signed his individual name to the note given for the balance of the purchase price, is merely a circumstance more or less favorable to appellant's contention.

It is not by any means conclusive of the issue.

Many of appellant's objections were to evidence introduced by respondent to show that Nelson had made similar purchases of other persons, and we think that such evidence was entirely proper. There were also many objections to the testimony of Nelson upon the ground that he should not be allowed to testify as to his agency and his acts in purchasing the cattle for appellant. These objections were apparently on the theory that his declarations as to agency were not admissible; but he was present on the witness stand, testifying to the matters objected to, and we see no ground for rejecting his testimony. We see no point in the objections made to the introduction of the books of the appellant. They were produced in court by appellant as appellant's books in response to a demand made for their production. We have no doubt that appellant's objections to evidence introduced by respondent were properly overruled, except, perhaps, in one instance. Nelson himself kept a book in which he, as superintendent, made entries of items of account between him and appellant; and respondent was allowed, over appellant's objections, to read certain entries from that book. The point that this was error is not very strongly urged by appellant in the briefs; still it is made. Whether or not the entries in this book were strictly admissible under the general law as to books of account is a somewhat doubtful question; but we do not deem it necessary to definitely determine it, because most of the items of any considerable significance which were introduced in evidence were included in reports sent by Nelson, as superintendent, to the appellant, and the others were of too little importance to be prejudicial, or to warrant a reversal.

We see no error in the instructions given at the request of respondent. As to the instructions asked by appellant, the court gave the first 25 instructions asked, many of which are quite elaborate; and gave also 3 others with slight modifications. It would seem that these numerous instructions ought to include all that counsel could reasonably ask on one side of the case; and we think that they do. The instructions given presented the law of the case fairly and correctly to the jury, and sufficiently include whatever was correct in the instructions refused; and we do not think that any error was committed in the matter of giving and refusing instructions.

The court instructed the jury that, if they found for plaintiff in any amount, they should add to such amount interest from the time it became due until the date of the verdict "at the rate of seven per cent. per annum, simple interest"; and the verdict was for \$4,800, "with interest at .07 per cent. per annum from November 6, 1892," until the date of the verdict. Judgment was entered

for \$4,800, with interest at 7 per cent. per annum, and counsel for appellant strenuously contend that this was error, because ".07 per cent." does not mean "seven per cent." It is sufficient to say that the expression ".07" was clearly a clerical error, and must be construed as an intended compliance with the instructions of the court.

We have noticed the prominent facts of the case, and we deem it enough to say in conclusion that the record presents no ground for reversal of the judgment or of the order denying a new trial. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.

(6 Cal. Unrep. 606)

RICHARDSON et al. v. CHICAGO PACKING & PROVISION CO. et al.

(S. F. 1,689.)

(Supreme Court of California. Dec. 19, 1900.)

CORPORATIONS — CREDITORS AS STOCKHOLDERS — UNPAID SUBSCRIPTIONS — CONTRIBUTION — STIPULATION — ESTOPPEL — APPEAL.

1. A judgment creditor of a corporation sued to enforce unpaid balances on stock subscriptions of 15 stockholders. One of the defendants was also a judgment creditor of the corporation, but the action was dismissed as to him, and he became plaintiff by the court's order. The corporation owed no other debts. The original plaintiff's claim was paid by the 14 remaining defendants, under a stipulation in which none of the other plaintiff's rights were relinquished, and the court gave the 14 defendants a several judgment against such plaintiff by way of contribution, ignoring the fact that he was also a creditor of the corporation. *Held*, that such plaintiff was entitled to have the amount of his proportionate liability to the corporation on both claims deducted from his own claim, and the balance due him apportioned against the 14 defendants.

2. Where a creditor has the right to be subrogated to the rights of a corporation to claim unpaid balances due on shares, he does not lose that right by reason of the fact that he is a stockholder.

3. Where plaintiff's attorney entered into a stipulation with defendants solely on behalf of a co-plaintiff, reserving all plaintiff's rights, the fact that the attorney was also attorney for plaintiff did not render the agreement binding on plaintiff.

4. Where a subscriber for corporate stock sought to enforce subscriptions made under the same circumstances as his own, he could not repudiate his liability thereon under Civ. Code, § 359, providing that no corporation shall issue stock except for money paid, labor done, or property received.

5. Where stockholders agreed that shares should be deemed fully paid by payment of a stated amount less than the par value, a creditor, who was also a stockholder, could not compel the payment of the par value of shares owned by other stockholders, the creditor being a party to the agreement.

Department 1. Appeal from superior court, city and county of San Francisco; J. Q. B. Hebbard, Judge.

Action by Thomas Richardson and V. L. Fortin against the Chicago Packing & Provision Company and others. From a judgment for defendants, and from an order denying

a new trial, plaintiff Fortin appeals. Reversed.

Wm. H. Jordan (H. M. Barstow, of counsel), for appellant. Edw. C. Robinson, B. McFadden, and Fitzgerald & Abbott, for respondents.

PER CURIAM. Action to recover from the stockholders of defendant corporation the unpaid balance of their subscriptions. Defendants had judgment, from which, and, from an order denying his motion for new trial, plaintiff V. L. Fortin appeals.

The action was originally brought by plaintiff Richardson, as a judgment creditor of defendant corporation, against 17 defendants, among them Fortin; but the action was dismissed as to him, and he became, by order of the court, a co-plaintiff. Judgment was afterwards entered by stipulation in favor of Richardson against the defendants severally excepting Lieb and Buttenbach (as to whom the action had been dismissed), and Fortin became the sole plaintiff, whose complaint was similar to that of Richardson. After Fortin had filed his complaint as co-plaintiff, the defendants obtained leave of court to file and did file a cross bill with the object of bringing in some 41 parties as co-defendants, who, it was alleged, were subscribers to the capital stock of defendant corporation, but had not been made defendants at the commencement of the action. The prayer of this cross complaint was that the persons named therein as co-defendants "be compelled to pay to these defendants filing this cross complaint, by way of contribution, such proportion of any judgment or judgments in favor of said Thomas Richardson or said V. L. Fortin which have been or may be recovered in this action as may be just and equitable in the action," and for further relief, etc. This cross complaint was served on 30-odd of such new parties, 3 of whom defaulted; the others answered severally. Fortin's complaint was answered by the original defendants, but the cross bill of the 14 defendants was not served on Fortin, nor was it answered by him.

The court found the number of shares subscribed by each of the 14 original defendants (the action having been dismissed as to defendants Fortin, Lieb, and Buttenbach); that said defendants had subscribed to the stock with the agreement among all the said original 17, including Fortin, with the corporation, that each of them should be liable to pay \$50 per share, and no more, on shares of the par value of \$100, and that said subscribed shares should be deemed fully paid up when said \$50 per share had been paid thereon; that said agreement was well known to Fortin at the time he became a creditor of the corporation for the goods and merchandise and labor, the subject of his action, and that Fortin was himself a subscriber to 50 shares of said stock under said

agreement; that there were 7 original corporators and promoters of the corporation, who are among the said 14 defendants, and were the directors and the only subscribers at that time; and "it was then unanimously agreed between and among themselves that it was for the best interests of the corporation to sell and dispose of the first half of the capital stock, to wit, 2,500 shares, at the price of \$50 per share, for the purpose of raising working capital to start and carry on the business of the corporation"; and it was likewise so agreed that the said 7 original corporators should be required to pay \$50 per share on their subscribed stock, and no more, and that, such payment being made, their shares should be deemed fully paid up, "and that all persons who should thereafter subscribe for said capital stock, until one-half thereof should be taken, should be required to pay the same price, to wit, \$50 per share, and no more"; and it is found that Fortin had knowledge of this agreement when he became creditor of the corporation; that subscription books were opened by the said 7 directors (they being then the only subscribers), in which books such limitation of liability was stated, and all subscriptions to stock thereafter made by said 14 defendants and all others "were made in said books upon said terms"; that "said agreement among and by said directors was not evidenced by any formal resolution of the board of directors or the stockholders theretofore or at that time passed or entered in the records of the corporation, but was unanimously agreed to by said 7 directors and only stockholders, and on March 26, 1888, was ratified by resolution duly passed by the board of directors and entered upon the minutes of said board of directors"; that Fortin subscribed to 50 shares of said stock on February 9, 1888, upon the same terms as did the defendants; that all these agreements and the said subscriptions of stock thereunder "were each and all made openly and in good faith, and for the purpose of raising money to fairly launch a new and struggling enterprise, and not for the purpose of defrauding the corporation or its stockholders or creditors"; that \$50 per share was the full value of said stock, and all that the subscribers were willing to subscribe therefor or become liable thereon; that all the subscribers to stock, of whom there were many besides the said 14 defendants and said plaintiff Fortin, received their stock under this agreement, and said Fortin "had full notice and knowledge of that fact before he sold and delivered, or agreed to sell or deliver, any part of the goods * * * for which he is seeking to recover in this action." The court then finds the sums subscribed by each of the 14 defendants and the amount each has paid thereon, and that Fortin has paid nothing on the 50 shares subscribed for by him; that the last meeting of the board was held April 4, 1888, since which time "it has ceased to meet and has not dis-

charged any of the duties of a board of directors of said corporation; that on or about the — day of May, 1888, the defendant corporation ceased to exercise its corporate franchise, and then or thereabouts abandoned its corporate franchise, and ever since has failed and ceased to act as a corporation; that said corporation has no property or assets save and except its equitable asset represented by the unpaid subscriptions of the various subscribers to its capital stock, and has and had, at the time this action was commenced, no creditors save and except Thomas Richardson and V. L. Fortin, the plaintiffs herein." The court found that the judgment entered in favor of plaintiff Richardson was for \$6,074.60, in pursuance of a stipulation entered into by said 14 defendants, and each was to pay and did pay his pro rata share thereof; and that said 14 defendants were indebted to the corporation for subscriptions to its stock the sum of \$7,250, and no more; that they paid upon their subscriptions \$7,275, including said Richardson judgment, in paying which some subscribers paid slightly more than their proportion, and others paid slightly less, the total overpayments being \$100, and the underpayments \$75.40, and that said defendants are indebted to the corporation for this latter amount, and no more. The court found that Fortin was indebted to the corporation for the unpaid subscription for 50 shares of stock, or \$2,500, and that the judgment held by him against the corporation for which he sued was \$6,514, entered on September 24, 1888, with interest at 7 per cent. from that date; that he realized thereon, through an execution duly issued, and sale of certain property of the corporation, a certain sum, leaving still due a deficiency of \$4,992.50, which was docketed November 28, 1888, and is still unsatisfied.

As conclusions of law the court found, in effect: That the said 14 defendants were liable to the corporation only for any unpaid balance of \$50 on each share subscribed for by them respectively; that, as Fortin had knowledge of the agreements herein stated before he sold or delivered the goods sued for, he has no greater rights against said defendants than against the corporation itself, and that Fortin is equally bound by said \$50 per share agreements, and can exact no more than \$50 per share on defendant's subscriptions; that the unpaid balance thereof is \$75.40, and no more; that Fortin, "being an unpaid subscriber at the time these 14 defendants paid the Richardson judgment, is liable to said 14 defendants, by way of contribution, for his just proportion of said Richardson judgment, * * * and his proportion is \$1,482, with interest * * *; making * * * \$1,793.82." Decree was accordingly entered in favor of the 14 defendants severally against Fortin in sums varying according to their respective payments on the Richardson judgment. The stipulation to pay Richardson

was signed by counsel for the 14 defendants, and at the time the attorney of Richardson was the attorney of Fortin, and it was stipulated that the Richardson "judgment shall in no respect affect the right of plaintiff V. L. Fortin to judgment, and shall not be an adjudication of any point or matter either against or in favor of said V. L. Fortin." The court made no findings as to the 30-odd new defendants, who were made parties to the action by the cross complaint of the 14 original defendants. Appellant contends that the decision is against law in the following particulars: (1) In failing to determine the issues arising upon the cross complaint of the 14 original defendants, and the answers thereto; (2) in adjudging Fortin indebted to these 14 defendants by virtue of his stock subscription; (3) in failing to adjudge Fortin entitled to recover the sum found due him on his judgment against the corporation; and (4) in deciding that the sum of \$50 per share constituted the entire subscription liability of each defendant.

1. Assuming the validity of the agreement under which the stock was issued, and that it was binding on the stockholders who received shares under it, as between themselves, and that upon payment of 50 per cent. by a stockholder his liability to the corporation was fully discharged, did the payment to Richardson have the effect found by the court? Richardson and Fortin were both creditors, the latter being also a stockholder. The findings show that the total indebtedness of the corporation was made up of the two judgments held by Richardson and Fortin, respectively; the total debt was the sum of these two judgments; the 14 defendants and plaintiff Fortin, as stockholders, were respectively liable to the corporation to the extent of any unpaid balance of their stock, and the creditors were entitled to be subrogated to the rights of the corporation. But the court treated the payment of Richardson's judgment by the 14 defendants not only as discharging them from liability to Fortin as a creditor, but as giving them a right to a several judgment against Fortin by way of contribution, entirely ignoring the fact that Fortin was a creditor of, as well as debtor to, the corporation. Fortin could not complain if he had agreed that these defendants might pay Richardson in full, and thus discharge their liability to the corporation. The stipulation, however, under which the 14 defendants paid the Richardson judgment expressly reserved to Fortin all rights in the pending action, and under that stipulation these defendants could not deprive Fortin of his right to contribution as a stockholder or his right as a creditor of the corporation. When the 14 defendants paid Richardson, it was subject to an equitable adjustment of their and Fortin's rights as stockholders and Fortin's rights as a creditor, as shown by the pleadings and evidence,

Simply stated: The 14 defendants and Fortin were liable for the two judgments sued upon, within the limit of \$50 per share, to the extent of the unpaid balance of their subscribed stock. A judgment could not be entered against Fortin in his own favor, as he was plaintiff; but the proportionate amount due from him on both claims sued upon should have been deducted from the amount due him on his judgment, and he should have had a several judgment against each of the 14 defendants for his proportionate share of the indebtedness of the corporation to him. In other words, Fortin should be treated as both creditor and debtor, and in arriving at what should be paid him there should be first deducted from his claim the amount of his proportionate liability to the corporation on both claims, and the balance should be apportioned among the said 14 defendants, and judgment entered accordingly. The right of the creditors to be subrogated to the corporation to the extent of claiming any unpaid balance due from the stockholder to the corporation is too well settled to require any citation of authorities, and a creditor does not lose this right by being a stockholder. He may be postponed to other creditors not stockholders, but the principle does not apply here, as the only other creditor was fully paid. This principle admitted, it seems to us too plain to require argument that the trial court erred in ignoring Fortin's relation as a creditor. If the 14 original defendants chose voluntarily to pay Richardson, stipulating that Fortin's rights should be unaffected thereby, we do not see upon what principle Fortin can be made to suffer. The claim that Fortin is estopped because his attorney was Richardson's attorney is not tenable. The attorney did not stipulate for Fortin, and, besides, if he had, Fortin was fully protected by the terms of the stipulation. It was held in *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319, that when the corporation is insolvent (as is the case here) the creditors cannot take upon themselves the authority of the corporation, and pay the subscription to one creditor to the injury of the other creditors. This was, in effect, what these 14 defendants did. They undertook to relieve themselves by paying their entire subscription to one creditor,—Richardson,—wholly disregarding the rights of the remaining creditor, Fortin.

2. In the cross bill filed with the answers of the 14 original defendants certain 30-odd other stockholders were brought into the action, and most of them were served, and appeared by answer; and it was alleged in the cross bill that they were solvent, and able to contribute their share of any judgment rendered. This cross bill was not served on Fortin, the co-plaintiff, nor was it answered by him. But he claims that the parties were before the court, and the issues presented by their pleadings were there also; and that, as the avow-

ed object of the pleadings was to have an adjudication of the liability of these new parties, and to compel them to bear their just proportion of any relief to which the original complainant should be found to be entitled, the court should have found upon these issues. The 14 defendants having, as they supposed, fully discharged their liability by paying Richardson (in which they each paid substantially 50 per cent. of their corporate liability), and the court having so regarded their payment, it became a matter of indifference to them, and apparently so to the court, what was done with these new parties; and the trial court therefore cut the case in the middle at this point, and made no findings as to them, thus in effect increasing the burden of the original 14 defendants and Fortin also. These 14 defendants do not appeal, and cannot complain; but Fortin complains, and now insists that he should have had the benefit of findings, and, if these additional parties were in fact stockholders, and still owed the corporation as subscribers to its stock, they should have been made to share his burden. The question need not be decided, since the case must be remanded, and plaintiff Fortin can, if he wishes, easily remove all question by an appropriate pleading, or by obtaining the proper order of the court.

3. Appellant makes the point that, as the court found that he has never paid anything to the corporation for his shares, the stock was, therefore, void, and he was not liable thereon. Appellant relies on section 359, Civ. Code, which provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received." The court did not find that Fortin was to receive these shares as a gratuity. It found that he, as did all other stockholders, subscribed for certain shares, and agreed to pay therefor \$50 per share, but had not paid. He became creditor of the corporation beyond the amount he owed it as a subscriber, about the time he subscribed, and it may have been for this reason that he was not called upon to pay at the time he subscribed, or at all. Whatever the reason was, he entered into the agreement with his fellow stockholders, and he furnished merchandise and labor to the corporation with knowledge of the agreement, and became indebted to the corporation for his shares as the others did. Under the circumstances he cannot be heard to question his liability as one of the original promoters of the enterprise which the corporation was formed to carry out. Fortin is in the same position as the stockholders whom he sues. They had not paid, nor had he. To obtain a judgment against them, he assumes that they are liable on their subscriptions, but for his subscription, made under the same circumstances as theirs, he is not liable. If the position be sound, he is "hoist with his own petard," and they, too, must escape liability. But we do not decide how far a promise to pay in the future for shares delivered will

be regarded as "money paid, labor done, or property actually received." Respondents contend, and with reason, that a promise to pay may be enforced, and is property; that, for example, a promissory note given in good faith by a solvent subscriber in payment of his subscription is "property actually received." The question does not necessarily arise. Appellant is in no position to repudiate his obligation to the corporation. The law on the point, as upon other questions in this case, will be found in a learned note to *Thompson v. Bank* (Nev.) 8 Am. St. Rep. 797 (s. c. 7 Pac. 68).

4. It is not necessary to pass upon the motion to dismiss the appeal from the judgment. The errors complained of are reviewable on the appeal from the order, and hence the alleged defective appeal from the judgment is immaterial. Nor is it necessary to decide whether an agreement may be made among all the stockholders that the shares shall be deemed fully paid by payment of an agreed amount less than the par value. Such an agreement has been held to be good among the stockholders under circumstances when not conclusive as to creditors. See *Thompson v. Bank*, supra, note. Appellant, as a stockholder, was party to the agreement in the present case, and cannot avoid its consequences as a creditor. The judgment and order are reversed, and the cause remanded for a new trial.

(130 Cal. 631)

SAN MATEO COUNTY v. COBURN. (S. F. 1,450.)¹

(Supreme Court of California. Dec. 12, 1900.)

COUNTY HIGHWAY — CONDEMNATION PROCEEDINGS — DECISION OF COUNTY BOARD — COLLATERAL ATTACK — COMPENSATION — CONSTITUTIONAL LAW — APPEAL — REVERSAL OF DECREE — EFFECT ON ORDER FOR POSSESSION.

1. The necessity, location, and extent of a public highway are matters of a political or legislative character, and the legislature, by Pol. Code, § 2681 et seq., having vested in county boards of supervisors power to determine such questions, the decision of a county board proceeding in accordance therewith is not subject to collateral attack; and in a subsequent proceeding by the public to condemn a right of way for a public road the court cannot review the action of the board in determining these questions, notwithstanding section 2690 provides that the suit for condemnation "shall be determined by the court or jury in accordance with the rights of the respective parties, as shown in court independent of such proceedings before said board."

2. A county being a political and not a municipal corporation, it cannot appropriate a right of way to its use until full compensation has been first made in money, or ascertained and paid into court for the owner, irrespective of any benefit, as required by Const. art. 1, § 14, in relation to such appropriations by corporations other than municipal.

3. As a final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him, an order for possession, being founded on the decree, must fall with the reversal thereof for inadequacy of the compensation made.

Department 1. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Proceedings by the county of San Mateo against Loren Coburn to condemn land for a public road. From a decree confirming the amount of damage awarded him by the county board, from an order denying a new trial, and from an order permitting plaintiff to enter into possession of the land, defendant appeals. Reversed.

Joseph H. Skirm, for appellant. Henry W. Walker and Geo. C. Ross, for respondent.

HARRISON, J. The plaintiff seeks to acquire by condemnation a right of way over certain lands of the defendant for a public road. It is shown by the complaint that a sufficient petition for laying out a public road was presented to the board of supervisors of the plaintiff, and that viewers were thereupon appointed, and that their report was afterwards approved by the board, and the amount of damage that would be sustained by the defendant was ascertained and declared, and by order awarded to him; that the amount so awarded was set apart for him in the county treasury, and notice thereof given to him, and that he did not accept the same within 10 days thereafter; that thereupon the board of supervisors by an order directed that proceedings be instituted by the district attorney to procure the right of way under the provisions of the Code of Civil Procedure. The defendant, in his answer, denied the necessity of a right of way over his lands for any public use, or that the laying out or opening of a public road on said lands is a public necessity, and, in addition thereto, claimed that he would sustain damage much greater in amount than had been awarded by the supervisors. The cause was tried by the court, and findings made in accordance with the allegations of the complaint, and that the value of the land taken for the road and the improvements thereon was \$800. The court also found that the benefits which the defendant would receive from the opening of the road would be equal to the damage occasioned thereby to his remaining land. Judgment was thereupon entered in favor of the defendant for \$800, and for the condemnation of a right of way over his lands as set forth in the complaint. The plaintiff paid into court for the use of the defendant the amount of the judgment, and the court thereupon entered its judgment of final condemnation of said land for the purposes of a public highway. Defendant gave notice of a motion for a new trial, and while said motion was pending the court, upon motion of the plaintiff, made an order that, upon the payment into court of a further sum of money as a fund to compensate the defendant, the plaintiff might take possession and use the land so condemned until the final adjudication of the controversy. The defendant's motion for a new trial was denied, and he has appealed from this order, and also

¹ For opinion on rehearing, see 63 Pac. 321.

from the decree of confirmation, and from the order permitting the plaintiff to enter into possession of the land. At the trial, when the plaintiff rested its case, the defendant moved to dismiss the proceeding upon the ground that no evidence had been offered tending to show that the use for which the condemnation of his land was sought was a public use. The court denied this motion, and afterwards excluded evidence of that character offered by the defendant, and ruled that the only issue to be tried was the value of the lands to be condemned. These rulings are now assigned as error.

1. The right of the state to appropriate private property for public use is an element of sovereignty, and in section 14 of article 1 of the constitution the people of this state have limited this right by declaring the conditions upon which alone it may be exercised. It is the function of the legislative department to determine in the first instance what shall constitute a public use, and whether any private property shall be taken for such use, as well as the extent to which such property may be taken; and in section 1237 et seq., Code Civ. Proc., the legislature has enumerated certain public uses for which the state may exercise its eminent domain, as well as the manner and extent of its exercise for those uses. It is not to be held, however, that the mere declaration by the legislature that the object for which private property may be taken is a public use will preclude the owner from contesting the right to deprive him of his property. If it is sought to condemn the property for a use which is evidently private, or to accomplish some purpose which is not of a public character, courts will disregard the legislative declaration that such use is public. The declaration by the legislature is entitled to great consideration, and if the purpose for which the condemnation is sought is clearly for a public use, or one which in ordinary acceptance or experience expresses a public use, it will be conclusive upon the judiciary. *Stockton & V. R. Co. v. Common Council of City of Stockton*, 41 Cal. 175. But, if it is clear that it is for a private purpose, the legislative declaration will be of no avail. *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269. So, too, if it can be shown by extrinsic evidence that the end sought to be accomplished is not of a public character, but is solely for private purposes, the condemnation will be denied, as being in excess of the legislative power. *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429. As was said by the court in this case: "It is difficult to make an exact definition of a public use. It is easier to define it by negation than by affirmation." And in another portion of the same opinion: "The general principle is now well settled that, when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to

be used, and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government, while, on the other hand, the question whether the uses are in fact public, so as to justify the taking in invitum of private property therefor, is a judicial question, to be determined by the courts." See, also, *Lewis, Em. Dom.* § 158. There is no room in the present case for any question as to the character of the use for which the condemnation of the land is sought. It needs no argument to show that a highway or public road is a public use. See *Lewis, Em. Dom.* § 166. If it would be claimed otherwise in any particular case, or that the road is in fact for a private use, the burden of showing such fact rests upon the contestant. Whether a public highway is demanded in any particular region, as well as its location and extent, are also matters of a political or legislative character. *Wulzen v. Board*, 101 Cal. 15, 35 Pac. 353; *Siskiyou Co. v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Lewis, Em. Dom.* §§ 238, 239. In the Political Code of this state (section 2681 et seq.) the legislature has established a tribunal for determining these questions, and has provided for notice to all persons interested therein, and given them an opportunity to be heard. If this tribunal proceeded in accordance with the provisions of these sections, it acquired jurisdiction to determine these questions, and its determination is not subject to collateral attack. In a proceeding thereafter by the public to condemn a right of way for this public road, the court is not authorized to review the action of the board of supervisors in determining these questions. The provision in section 2690, Pol. Code, that the suit for condemnation "shall be determined by the court or jury in accordance with the rights of the respective parties, as shown in court independent of said proceedings before said board," is not to be construed as authorizing the court to review the determination of the board of supervisors as to the proper location of the highway, or the propriety or necessity of establishing it. The clause is not without ambiguity, but full effect is given to its provisions by holding that, after the suit for condemnation has been brought, the court, in determining the rights of the parties thereto, shall disregard any "informalities" which may have occurred in the proceedings before the board. If it had been the intention of the legislature to establish a different rule upon this subject from that which had previously existed, it is reasonable to suppose that it would have expressed such intention distinctly and in unambiguous terms.

2. The court, however, erred in failing to determine the amount of damages that the opening of the road would cause to the lands of the defendant not taken for the road. The defendant testified that damage would be caused to the remainder of his lands by such opening, and the finding of the court that

the benefits which the other portion of his lands would receive from the opening of the road are equal to the damages occasioned by its severance implies that some damage would be caused thereby. Const. art. 1, § 14, declares that "no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner irrespective of any benefit from any improvement proposed by such corporation." It is unnecessary to determine whether a county is a "corporation," within the meaning of this clause, since, if this be conceded, it is a corporation "other than municipal." A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government. It was held in *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, that under the constitution of this state a county is not a municipal corporation, but, if it may be regarded as a corporation at all, it is but a "political corporation." See, also, *People v. Sacramento Co.*, 45 Cal. 695; *State v. Leffingwell*, 54 Mo. 458; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *Askew v. Hale Co.*, 54 Ala. 639; *Commissioners v. Mighels*, 7 Ohio St. 109; *Woods v. Colfax Co.*, 10 Neb. 554, 7 N. W. 269; *Stermer v. Board*, 5 Colo. App. 379, 38 Pac. 839; *Dill. Mun. Corp.* § 22.

3. As the error of the court in determining the amount of damages necessitates a reversal of the judgment, the order permitting the plaintiff to take possession of the land sought to be condemned must also be reversed. A final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him: and, as the order for possession pending the appeal must have this final decree for its foundation, it must fall with the reversal of the decree. The judgments and the orders appealed from are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(120 Cal. 674)

MURPHY v. MADDEN, Treasurer. (Sac. 673.)

(Supreme Court of California. Dec. 17, 1900.)

CRIMINAL LAW—WITNESSES—FEES.

Pen. Code, § 1329, declares that when a person attends the trial of a criminal case as a witness, on a subpoena, and he has come from without the county, or is unable to pay the expenses of such attendance, the court may direct, by an order on its minutes, that an order be drawn on the county treasurer in favor of the witness for a reasonable sum. St. 1895, p. 267, determines the fees of witnesses, but makes no provision as to the enforcement of payment. Held, that where petitioner attended as a witness in a criminal case, on a subpoena, and the judge made an order in writing,

but not entered on the minutes, that a warrant be drawn on the treasurer for a certain sum in favor of the "above-named witness" (no name being given), and subsequently a succeeding justice made an order on the minutes, termed a "nunc pro tunc order," that a warrant be drawn for the witness, and that such order operate as if made on the date of the former, it was proper for the county treasurer to refuse payment, since the first order was ineffectual, and the nunc pro tunc order had no valid prior order to rest on, and was void.

Department 2. Appeal from superior court, Modoc county; N. D. Arnot, Judge.

Petition by John Murphy for mandamus against John Madden, treasurer of Modoc county, to compel the payment of a warrant drawn on him by the county auditor. From a judgment denying the writ, plaintiff appeals. Affirmed.

G. F. Harris, for appellant. John E. Raker and E. C. Bonner, Dist. Atty., for respondent.

TEMPLE, J. This appeal is from a judgment in the superior court denying a writ of mandate to the county treasurer. The judgment was upon demurrer, the plaintiff declining to amend. The petition shows that petitioner attended as a witness in the trial of a criminal case, in obedience to a subpoena, for seven days, and, to attend, traveled one mile. Judge Clafin, who presided at the trial, made an order in writing, but which was not entered in the minutes of the court, as follows, after the title of the cause: "The auditor of Modoc county, California, is directed to draw his warrant upon the treasurer of said county in favor of the above-named witness, payable out of the general fund of the county, for ten dollars and sixty cents. Witness my hand this 19th day of December, 1896. C. L. Clafin, Judge of Superior Court." Thereafter, March 8, 1897, upon a showing, the superior court made what is called an "order nunc pro tunc." That was after the term of Judge Clafin had expired, and Hon. J. W. Harrington was superior judge. In this order, inter alia, it is recited that it appeared that the plaintiff, in obedience to a subpoena, actually attended as a witness in the trial of a criminal case, and that the amount allowed was necessary for the expenses of the witness, and is not in excess of \$1.50 per day, and 10 cents per mile for travel, and the auditor was ordered to draw his warrant for the amount. The former order made by Judge Clafin is then described as being for the same amount, and the order then proceeds as follows: "It is ordered that this order be entered as of the same date, to wit, 19th day of December, A. D. 1896, and be and operate as fully in particular as if said order had been made and entered by the Honorable Clafin on said date in the minutes of the court." Prior to this so-called nunc pro tunc order, to wit, December 19, 1896, the auditor had issued a warrant to petitioner for the amount. On the 8th day

of March, 1897, after the nunc pro tunc order had been made, this warrant was presented to the treasurer, who refused to pay the same, and thereupon this proceeding was inaugurated.

The order made by Judge Claffin is ineffectual from any point of view. It is in favor of no one, and does not authorize the auditor to draw his warrant for any person. The recital is, "In favor of the above-named witness," but no person is named. It could have no validity under section 1329 of the Penal Code, for the further reason that it was not made by the court and entered in the minutes of the court. Counsel contends that it is, or may be, an ex parte order, and as such might have been made in chambers. But, conceding it to be an ex parte order, still this would not follow; for it is expressly provided in section 1329, *Id.*, as to this order, that it must be, "If the attendance of the witness be upon a trial," by the court, and by order entered upon its minutes; in other cases, by the judge, by written order. The statute itself discriminates between the "court" and the "judge," and provides that in one case the court must act, and in the other the judge may. Whatever is done by the court is also done by the judge, as an essential constituent of the court, but the converse is not true. The order made by Judge Harrington was evidently intended to be a compliance with the act to establish fees, passed in 1895 (*St.* 1895, p. 267), and counsel on both sides seem to so consider it. Supposing that act to apply,—a proposition which is seriously contested,—it simply determines fees which certain persons, officers, witnesses, and others, are entitled to charge, but declares nothing as to who shall pay, or in what mode payment can be enforced. Counsel for appellant contends that section 1329 of the Penal Code provides the mode in which witnesses in criminal cases are to be paid. I am unable to agree with counsel in this contention. Section 1329 provides only for the special cases of witnesses from without the county, and those too poor to pay the expense of attendance. As to neither class does it provide compensation or anything in the nature of fees, and, as to the poor, it simply furnishes the court with the means of procuring the attendance of the witnesses. There being no mode provided for the payment of these fees, supposing they constitute a valid charge against the county,—which we do not determine,—they are to be submitted to the board of supervisors as other claims against the county are submitted.

We have not found it necessary to determine whether the successor of Judge Claffin could pass upon the claim of the witness under the fee bill of 1895. If the court had made a valid order, which for some reason was not entered in the minutes, no doubt this order so made, or another to the same precise effect, could have

been subsequently entered as of the date the first order was made; but as the court in December, 1896, failed to make an order in the matter, the so-called nunc pro tunc order made by Judge Harrington must be sustained, if at all, as an order made in the first instance. Nor do we find it necessary to decide whether Modoc county has a special fee bill. The judgment is affirmed.

I concur: McFARLAND, J.

BEATTY, C. J. I concur. I wish to add to what is said by Justice TEMPLE that, although there is no law which authorizes a court or judge to make an order for the payment of any claim of a witness, except in the cases specified in section 1329 of the Penal Code, I still think that all fees claimed under the act of 1895 (*St.* 1895, p. 273) must be audited by the court before any claim therefor can be allowed and ordered paid by the board of supervisors.

(131 Cal. 1)

THOMPSON et al. v. STAACKE et al. (S. F. 2,301.)¹

BANK OF CALIFORNIA v. SAME.

(Supreme Court of California. Dec. 18, 1900.)

EXECUTOR'S ACCOUNTS — ALLOWANCE TO WIDOW—OBJECTION TO ACCOUNT—COLLATERAL ATTACK.

Where an executor is ordered by the court to pay a certain monthly allowance to the widow of testator, and creditors of the estate do not appeal from the order, which is not void on its face, or ask that it be set aside, they cannot object to the allowance of the executor's account, showing such payments, on the ground that the estate was insolvent when the order was made.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Objection by Louisa J. Thompson and others to the final account of George Staacke as executor of the estate of Thomas Bell, and objection of the Bank of California to the same. From an order allowing the account, the objectors appeal. Affirmed.

A. N. Drown, Naphtaly, Freidenrich & Ackerman, Garret W. McEnerney, Wm. B. Bosley, John S. Drum, Maurice V. Samuels, and James M. Allen (J. F. Leicester, of counsel), for appellants. Sidney V. Smith, T. Z. Blakeman, and Brewton A. Hayne, for respondents.

GAROUTTE, J. Thomas Bell died testate in the city and county of San Francisco. Subsequent to the issuance of letters testamentary, and prior to the return of the inventory and appraisement, the court made an order for a family allowance of \$2,000 per month; this allowance to continue until the further order of the court. The administration of the estate proceeded on its course, and nearly three years later two

¹ For opinion on rehearing, see 63 Pac. 668.

creditors of the estate filed a petition asking that the order for a family allowance previously made be modified. Theresa Bell, the widow of Thomas Bell, deceased, contested the application, and upon the hearing the original order was modified to the extent that the allowance was fixed at \$1,500 per month, commencing at that date. The administration still continuing, about three years later the order of family allowance, at the instance of the same creditors, after a hearing and contest upon the part of the widow, was again modified, being fixed upon that hearing at the amount of \$100 per month. Under these various orders of family allowance more than \$80,000 has been paid by the executors to the widow, and much the greater portion of this amount has been allowed and settled in the accounts rendered by the executors to the court. But upon the hearing of the last account rendered by the sole executor, Staacke, creditors appeared and objected to those items of the account consisting of various sums of money paid by the executor to the widow under the two later orders of family allowance, and these creditors based their objections upon the ground that the two aforesaid orders were void by reason of the fact that the estate was insolvent when they were made. At the hearing of the account they offered evidence tending to show the insolvency of the estate at that time, and this evidence was rejected. The sums paid to the widow to which objections were made were allowed by the court, and this appeal is taken by the creditors from the order settling the account.

This court will not concern itself as to whether or not the original order for a family allowance became void *ipso facto* either upon the return of the inventory, or expired by mere lapse of time upon the expiration of one year from its date, by reason of insolvency coming upon the estate. The moneys here involved are moneys expended under the subsequent orders, and our attention will be directed to these orders alone; for, if the original order was void at the time the later orders were made, and therefore not susceptible of modification, then the second order made was a new and independent order, and must look to itself for sufficient strength to stand alone. Had the court power to make the second order? Or, bringing the question directly home, upon the hearing of an account of the executor may the creditors object to the allowance of moneys paid out under this order? We are entirely satisfied the creditors cannot successfully support the contention made. The order is not void upon its face, and it is too late upon the hearing of the account to show that the estate was insolvent when the order was made, and that therefore the court lacked jurisdiction to make it. Such a holding would place executors and administrators in a sorry plight, as would be fully exemplified in this case if these items for money paid

were rejected from the account. Conceding the court had no power to make the order if the estate was insolvent, still the making of the order in itself is an adjudication that the estate was not insolvent. In principle, this identical question is decided by the case of *In re Welch*, 106 Cal. 430, 39 Pac. 805, where the court, in speaking of an order of family allowance, said: "It is asserted that this order is invalid for lack of a finding that the property exempt from execution, and already set apart to the support of the widow, was insufficient for the purpose. * * *

The fact that the court, after setting aside exempt property, made its order for family allowance, involved of necessity the decision that the amount originally set apart was insufficient. The order for additional allowance in itself was a declaration of that insufficiency." The time for appeal from the order has long gone by, and the attack here made is essentially a collateral attack. The making of the order necessarily involved a determination that the estate was solvent, and it is now proposed to show upon this collateral attack that the finding of the court as to the solvency of the estate is untrue. This cannot be done. These appellants had ample opportunity to protect themselves, if the estate was insolvent, by directly attacking the order. If they had no notice of the hearing upon which the order was made, then, clearly, they had the right subsequently to ask the court to set it aside. Indeed, section 1466 of the Code of Civil Procedure contains no provision for notice to creditors before making an order for the family allowance. *Leach v. Pierce*, 93 Cal. 619, 29 Pac. 235. By the aforesaid section the court only has power to make an order of allowance when the amount already set apart under sections 1464 and 1465 is insufficient for the support of the widow; and appellants here, with equal legal propriety, could contest this account upon the ground that when the order was made the court had previously set apart an amount sufficient for the support of the widow, and that therefore the order made was void. Yet the case of *In re Welch*, supra, holds directly to the contrary of that contention. Again, by section 1466 the court "may make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family." It might with equal legal propriety be contended that the order of allowance was void, or at least void *pro tanto*, upon the ground that it was too large, and that the amount was not necessary for the maintenance of the family. Of course, the validity of an order of allowance cannot be attacked collaterally upon these grounds. As far as the validity of any particular order of allowance is concerned, it must be held that these matters were considered and determined when the order was made, and were determined in a way that supports the validity of the order made. The same rule necessarily

applies upon the question of the insolvency of the estate, and it must be held that, when the court made the order or orders involved, it decided that the estate was solvent. It is said in *Burris v. Kennedy*, 108 Cal. 336, 41 Pac. 458, "The same presumption must now attach to decrees in probate proceedings upon collateral attack as to judgments in cases at common law or in equity."

There are two separate appeals in this case, brought here upon a single record. For the reasons given, the order settling the account of the executor, from which the appeals are taken, is affirmed as to both appeals.

We concur: VAN DYKE, J.; McFARLAND, J.

(130 Cal. 657)

COIT et al. v. WESTERN UNION TEL. CO.
(S. F. 1,521.)¹

(Supreme Court of California. Dec. 14, 1900.)
TELEGRAPHS — UNREPEATED MESSAGE — RELEASE OF LIABILITY — AGENCY — GROSS NEGLIGENCE.

1. A finding that an error in a telegram as delivered was not due to the gross negligence of the telegraph company, or any other degree of negligence, is equivalent to a finding that the company exercised great care, within Civ. Code, § 2162, requiring telegraph companies to exercise great care and diligence in the transmission and delivery of messages, and hence the company was not liable for loss resulting from the error.

2. Where plaintiffs requested certain information by telegram, and it was sent them by an unrepeat message, under a contract with the telegraph company that it should not be liable for mistakes in any unrepeat message, whether happening by the negligence of its servants or otherwise, plaintiffs by such request made the sender their agent, and hence were bound by the contract, and the telegraph company was not liable to them for damages for a mistake not caused by its gross negligence.

3. Plaintiffs' correspondent sent them an unrepeat telegram under a contract releasing the telegraph company from liability for mistakes in unrepeat messages, whether caused by the negligence of its servants or otherwise, in reply to an inquiry for a price on steel rails. At the time the message was received for transmission the telegraph line was working badly, on account of storms along the line, and sometimes messages could not be transmitted, but when the message was sent the line was in working order. *Held*, that the transmission at such time was not gross negligence, and hence plaintiffs could not recover for a mistake in the message as delivered to them.

Department 1. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by Griffith Coit and another against the Western Union Telegraph Company for damages for failure to correctly transmit a message. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Thornton & Merzbach, for appellants. R. B. Carpenter, for respondent.

GAROUTTE, J. Plaintiffs telegraphed to W. B. Dennis, at St. Louis, asking him to tele-

graph them the lowest cash price for 220 tons of 40-pound steel rails. The message was correctly delivered, and in answer thereto Dennis telegraphed to plaintiffs the price to be \$37 per ton. This dispatch was delivered in due time, but when delivered it read \$27 per ton; the mistake in the message having occurred in transit, by reason of atmospheric disturbances. Relying upon the words of the message as delivered, plaintiffs entered into contracts to buy and sell steel rails, and great damage resulted to them by reason of the mistake of defendant heretofore stated. To recover this damage the present action is brought. The facts of the case are largely agreed upon, and in addition the court made a finding of fact as follows: "The defendant, Western Union Telegraph Company, was not guilty of gross or any other degree of negligence in the transmission of the message of Dennis to the plaintiffs; nor was the error or mistake in the said dispatch of said Dennis, as the same was delivered to said plaintiffs, due to or caused by the gross or any other degree of negligence of the said defendant, Western Union Telegraph Company." Upon the facts, judgment was rendered for defendant, and this appeal from the judgment and order denying a motion for a new trial is now before us. This finding in favor of defendant of no negligence is essentially a finding of the ultimate fact in the case, and will be so treated by the court in the consideration of the merits of this appeal.

The Civil Code declares (section 2162), "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." In many jurisdictions it is held that the phrase "gross negligence" is a misnomer, and that the adjective "gross" in no way qualifies the noun "negligence." But in this state the rule is recognized to the contrary, not only by the decisions of this court, but by many sections of our Civil Code. The phrases "gross negligence" and "slight negligence" are found in common use in the law of this state, and, being so used, each must be held to have a distinctive meaning. The defendant in this case was required to use great care in the transmission and delivery of this message. The court found that, in the transmission and delivery of this message, defendant was not guilty of any negligence. Not being guilty of any negligence whatever, defendant must be held to have used great care; and the finding of fact quoted is the equivalent of an express finding that defendant used great care in the performance of its duty in the transmission and delivery of the message here involved. But, in view of the conclusion at which the court has arrived, it is unnecessary to determine whether or not the evidence in this case is sufficient to support a finding of fact to the effect that defendant was not guilty of any negligence whatever, and this conclusion is based upon the following reasons:

The written message which was delivered

¹ Rehearing denied January 12, 1901.

by Dennis to defendant, to be sent to San Francisco and delivered to plaintiffs, contained the following regulation and stipulation bearing upon defendant's duties and liabilities: "It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." In this case the message sent from St. Louis to plaintiffs was not a "repeated message." The foregoing stipulation constituted a valid and binding contract between Dennis, the sender, and the defendant company. As to its validity and binding force in this state, at least, the law may be considered settled. *Hart v. Telegraph Co.*, 66 Cal. 579, 6 Pac. 637; *Redington v. Cable Co.*, 107 Cal. 317, 40 Pac. 432; *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1093, 38 L. Ed. 883. These authorities declare the rule of this state upon the question. It follows, therefore, that if Dennis, the sender of the message, was bringing this action against defendant for damages suffered by him, he would be bound by the agreement made, and could only recover in case defendant was guilty of willful misconduct or gross negligence in the performance of its duty. The interesting question then presents itself, do these plaintiffs, the addressee and receiver of the message, stand in a better position, as against defendant's negligence, than does Dennis, the sender of the message? In England it is held by the courts with entire unanimity that the addressee of a message has no right of action against the telegraph company for failure of performance of duty. And this conclusion is based upon the proposition that the relation between the parties is purely one of contract, and the addressee is not a party thereto. In this country it may be deemed settled law that the addressee has a right of action against the telegraph company when by its negligence he has suffered damages. At the same time the different reasons given by the different courts in adopting this rule of law are many. We will not here enter into a discussion of the general principles governing litigation arising between individuals and telegraph companies in the matter of sending and receiving messages, but will confine ourselves to a consideration of the law bearing upon the facts of this particular case.

Plaintiffs telegraphed to Dennis, in St. Louis, requesting him to send by telegram the price of 220 tons of steel rails. In pursuance of that request, Dennis telegraphed the desired information. It is thus plain that Dennis performed service for plaintiffs at their request. And, that being so, we deem the conclusion irresistible that, in the performance of the service, Dennis was acting for plaintiffs, and was their agent. The fact that plaintiffs by a telegram requested

him to perform this service is immaterial. They could have made the request with the same legal result either by letter or parol. If a party residing in St. Louis had been engaged for a consideration by plaintiffs to telegraph them the information here desired, and that party had done so, certainly such party would have been the agent of plaintiffs. Yet the fact, if it be a fact, that no consideration was paid by plaintiffs for the performance of the service by Dennis is not a material element in the consideration of the question of agency. Dennis, in sending the message, being the agent of plaintiffs, the addressee of the message, they were bound by the contract made with the defendant by their agent. Plaintiffs, by requesting him to send the message, necessarily authorized him to contract with defendant as to how that message should be sent. And this general authorization was sufficiently broad to include the agreement as to nonliability heretofore set out, and therefore the agreement was binding upon the principal, these plaintiffs. In discussing this identical question, Thompson on the Law of Electricity (section 237) says: "In such a case is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the receiver has against the company rests upon privity of contract, and depends upon the circumstances that the sender was his agent,—in other words, if the contract with the telegraph company was the contract of the receiver, through his agent, the sender,—then, on the most unshaken ground, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender." Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation; and, having power to make it, his principal can only stand in his shoes. But it is said the action of the addressee of a message is founded upon tort, namely, a breach of public duty, and that therefore the question of contract does not enter into it. Yet, in a case like the one at bar, it may with equal legal propriety be said that a cause of action by Dennis against defendant would be founded on tort, namely, a breach of public duty, and thus eliminate any question of contract from the case. But this court has said that it cannot be done, and that Dennis must stand upon his contract as made. In cases where no question of privity of contract arises between the sender and the receiver of a message, the addressee may rest his right of action on tort; but where a party to a special contract, either directly, or indirectly through the sender, his agent, brings his action against the company, he must stand upon his contract rights.

We find many cases which support the conclusion at which we have arrived. The roads traveled by courts in arriving at this

conclusion are many, yet those roads all lead to the same destination. In the leading case of *Ellis v. Telegraph Co.*, 13 Allen, 238, no question of agency was adverted to in the opinion, yet the court said: "Besides, it is difficult to see how the plaintiff, who claims through a contract entered into by the sender of the message with the defendants, which created the duty and obligation resting in the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such right accrued or was derived." In *Curtin v. Telegraph Co.* (Sup.) 38 N. Y. Supp. 58, it is said: "The stipulation for exemption from liability contained in the printed blank of the company, upon which the sender writes his message, constitutes a contract which binds him and the person to whom the message is addressed, if the assent of the sender to such stipulation can be assumed." In *Alken v. Telegraph Co.*, 5 S. C. 371, it is held: "It is equally clear that any stipulation of an express nature intended to mold and limit his obligation must be construed as attaching to the obligation in its fullest extent, and affecting equally all the persons related to it, either as sender, receiver, or agent of transmission. Under this view of the contract, the plaintiff is entitled to enforce its performance as a direct party in interest." In *De Rutte v. Telegraph Co.*, 1 Daly, 556, we find this language: "When the defendants, therefore undertook and were paid for sending the message, their contract was with the plaintiff, through his agent, and the action for a breach of it was properly brought by him." There is some authority opposed to the general tenor of the cases cited,—as, for example, *Telegraph Co. v. Dryburg*, 35 Pa. St. 303, and *Olympe de la Grange v. Southwestern Tel. Co.*, 25 La. Ann. 384. But no question of agency appears to have been involved in those cases, and it is upon the contract made by Dennis with the defendant, and the privity of contract existing between Dennis and plaintiffs, that we plant our conclusion upon this branch of the case.

In view of what has been said, the remaining question presents itself, has defendant been guilty of willful misconduct or gross negligence? No question of willful misconduct is presented by the record, and the question then is, does the evidence support the finding of fact that defendant was not guilty of gross negligence? Gross negligence is defined to be "the want of slight diligence." "Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the rights and welfare of others." "Gross negligence is that entire want of care which

would raise a presumption of the conscious indifference to consequences. See *Redington v. Cable Co.*, supra. It is conceded that the mistake in the message was occasioned by atmospheric disturbances, and that "It is impossible to overcome the action of the elements upon the wire and repeaters with any kind of care and diligence." Plaintiff's counsel, in his brief, says: "In this case negligence does not consist in the manner in which the act was attempted to be done, but in the attempt to do the act at all." The mistake in the message arose in transit between Denver and Los Angeles. And, in view of the fact that the message had arrived at Denver from St. Louis in due time and in proper form, there is no showing of gross negligence up to this point. Especially is this true in view of the further fact that when the message arrived at Chicago from St. Louis, in transit to San Francisco, the only open line of communication to the point of its destination was via Denver and Los Angeles. It follows that counsel's claim is that, in view of the general atmospheric disturbances going on between Denver and Los Angeles at the time, defendant should have held the message at Denver until climatic changes for the better had taken place. There can be no question but that it was the duty of defendant to forward this message from Denver at the earliest practicable moment. Our statute, in terms, demands it. Now, this message was received at Denver at 1:55 a. m. February 20th, and a great storm was then prevailing at intervals of distance and intervals of time between that point and Los Angeles. During the night of the 19th-20th more than 200 messages were transmitted over the line in question from Denver. The operator at Denver knew the line had been working badly by reason of the storm, and at times it was impossible to get a message through. The line was working badly at the time the message was received at Denver, and had been so working off and on all night. But at the time the message was sent from Denver, about 5 a. m., the wire was in good working order. The two operators at Denver and Los Angeles respectively engaged in sending and receiving the aforesaid 200 messages subsequently never heard of any complaint as to the manner of their transmission. Under the circumstances here depicted, defendant was required to do either one of two things, namely, hold the message at Denver for an unlimited time, or send it on its way. And, testing the facts in view of the meaning of the words "gross negligence" as the law defines them, this court cannot say that the finding made by the trial court to the effect that defendant was not guilty of gross negligence has no support in the evidence. The wire at the time the message was sent "was in good working order." The fact that a storm was rioting over the route should not of itself convict defendant of

gross negligence in attempting to forward a message. If that be the law, then messages would not be sent for days at a time, or even weeks, during the winter season. The important question is, what is the condition of the wire? Is it in good working order? And is there a reasonable probability that the message as sent will arrive at its destination? Here the salient fact appears that the wire was in good working order when the message was sent. Taking the evidence altogether, the finding of the court that there was no gross negligence upon the part of the defendant will not be disturbed. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(130 Cal. 683)

PEOPLE v. WARREN. (Cr. 667.)

(Supreme Court of California. Dec. 18, 1900.)

LARCENY — INDICTMENT — DESCRIPTION OF PROPERTY — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — REVIEW — PRESUMPTION — INSTRUCTIONS — POSSESSION OF PROPERTY — CURED ERROR.

1. A description of the property stolen, in an indictment for larceny, as "four calves then and there the personal property of A. L.," is sufficiently certain.

2. In reviewing an order denying a new trial for newly-discovered evidence, it will not be presumed, in support of an affidavit of a witness to an alibi, that the offense was committed at a time to which the affidavit related; there being no evidence in the record.

3. Where, on a motion for a new trial on account of newly-discovered evidence, it was not shown why the evidence was not produced, and it appeared from counter affidavits that the substance of what was set forth in the supporting affidavit was testified to by affiant on the trial, the motion was properly denied.

4. In a prosecution for larceny, an instruction offered by defendant that "the possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," was properly modified by striking out the part following the word "exclusive," and adding in lieu thereof, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused."

5. In a prosecution for theft of calves, the jury was erroneously instructed that the distinction between an accessory before the fact and a principal in case of felony had been abrogated, and all persons concerned in its commission, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals; but this was followed by a correct instruction that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid or abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed; and the jury were further instructed that the burden was on the prosecution to prove that the calves were stolen by defendant alone, or by defendant and another person or persons, who had conspired together to do so, or that they were stolen by

some other person or persons, while defendant aided and abetted in stealing them. *Held*, that the error in the first instruction was cured.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

J. A. Warren, Jr., was convicted of larceny, and he appeals. Affirmed.

Graves & Graves, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. The defendant was convicted of the crime of grand larceny, and has appealed from the judgment and from an order denying his motion for a new trial. It is conceded that the evidence was sufficient to justify the verdict, but certain errors are urged which we will notice in the order presented in defendant's brief. It is claimed that the indictment does not state facts sufficient to constitute a public offense, for the reason that the personal property alleged to have been stolen is not described with sufficient certainty. The description is "four calves then and there the personal property of Anton Luchessa." This description is sufficiently certain. *People v. Littlefield*, 5 Cal. 356; *People v. Stanford*, 64 Cal. 28, 28 Pac. 106; *State v. Stelly*, 48 La. Ann. 1480, 21 South. 89; *State v. Friend*, 47 Minn. 449, 50 N. W. 692.

Defendant made a motion for a new trial upon the ground of newly-discovered evidence. In support of the motion he filed the affidavit of one Music, in which it was stated by Music that he was at the ranch of J. A. Warren, Sr., the father of defendant, two or three days before the 17th day of November, 1899, and that the father and two of his sons were marking and branding calves in the corral, and so marked and branded eight or ten calves; that defendant was not there, and Music did not see him that day. The larceny is charged to have occurred on the 22d day of November, 1899. We do not see how the fact that Music did not see defendant at the corral two or three days before the 17th of November, 1899, could have affected the result. It is said the evidence of Music would have tended to prove an alibi. The evidence introduced at the trial is not in the record, and we cannot presume that the larceny was shown to have been committed at the time of marking the calves spoken of by Music. The affidavit of Music shows that George Warren was present in the corral at the time of the marking spoken of by Music, as well as his brother William, and his father, J. A. Warren, Sr. It is not shown why the evidence, if material, was not produced at the trial, as the affidavit shows that at least four parties were present at the marking. It was further shown by counter affidavits that Music was a witness at the trial, and in substance testified to the same facts set forth in his affidavit on motion for a new trial. A motion for a new trial upon the ground of newly-discovered evidence is looked upon

with suspicion and disfavor, and a party who relies upon such ground must make a strong case, both in respect to diligence on his part and as to the truth and materiality of the evidence, and if he fails in either respect his motion must be denied. *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *Same v. Rushing* (Cal.) 62 Pac. 742. The showing made in this case was not sufficient either as to diligence or as to the truth and materiality of the evidence.

The defendant offered the following instruction: "The possession of stolen property in a case of larceny is a circumstance tending to prove guilt only where it appears that the defendant acquired the possession by his own act or with his concurrence or knowledge. The possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant." The court modified the instruction by leaving out the words, "and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," and in lieu thereof added, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused." The modification was proper. It clearly appears therefrom that if the property had been found in the possession of a third party without the knowledge of defendant, and with no assertion of possession on his part, such circumstance would not tend to prove his guilt. The jury were clearly told that the possession of a third party must involve a distinct and conscious assertion of possession by the defendant. Of course, the possession of a third party by the consent and will of defendant and for his benefit would be his possession. The court instructed the jury: "The court further instructs the jury that the distinction between an accessory before the fact and a principal in case of a felony is abrogated, and all persons concerned in the commission of a felony, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals." This instruction was erroneous, as held by this court in *People v. Dole*, 122 Cal. 492, 55 Pac. 581. In that case, however, it was held that where other instructions were given by which it clearly appeared "that merely aiding or assisting in the commission of a crime without guilty knowledge is not criminal," the instructions were to be read together, and the error was cured. In this case the erroneous instruction was followed by the correct instruction: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being pres-

ent, have advised and encouraged its commission, are principals in any crime so committed." And the court further instructed the jury that the burden was upon the prosecution to prove "that the calves were stolen by the defendant and by no other person, or that they were stolen by the defendant and another person or persons who had conspired together to commit the crime, or that they were stolen by some other person or persons, while the defendant aided and abetted such other person or persons in stealing them." The jury could not, in view of these instructions as a whole, have believed that defendant could be found guilty for merely aiding innocently, and without guilty knowledge or intent, in the commission of the offense charged. We advise that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(130 Cal. 678)

PEOPLE v. WARREN. (Cr. 666.)

(Supreme Court of California. Dec. 18, 1900.)

CRIMINAL LAW—TRIAL—INTOXICATION OF COUNSEL—COMMITMENT FOR CONTEMPT—ADJOURNMENT—CONTINUANCE—DENIAL—RECEPTION OF VERDICT—INSTRUCTIONS—CURED ERROR.

1. After the jury had been impaneled, and the trial had proceeded to the afternoon of the second day, the court was compelled to commit defendant's counsel for contempt incurred on the court's adjournment of the case by reason of the counsel's intoxication. *Held*, that an adjournment a reasonable time thereafter to allow other counsel to become familiar with the facts of the case was all that defendant could claim, and that a continuance was properly denied.

2. The jury, after being out several hours, asked to have read the testimony of a witness. It was found that this would take several hours, and owing to the lateness of the hour the court, without objection or exception, announced an adjournment until the next day, when the testimony was to be read, but just before the time set therefor the jury announced an agreement. *Held*, that their verdict was thereupon properly received, without the reading of such testimony.

3. Error in an instruction that all persons who aid or abet in the commission of a crime, though not present, shall be prosecuted and punished as principals, was cured where the jury were elsewhere told that all persons who "aid and abet in the commission of a crime are principals," and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

George Warren was convicted of larceny, and he appeals. Affirmed.

Louis Lamy, C. A. Palmer, and Graves & Graves, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. Defendant was jointly indicted with one J. A. Warren, Jr., for grand

larceny, and convicted. This appeal is from the judgment and an order denying a new trial. It is conceded that the evidence is sufficient to sustain the verdict.

Defendant contends that the indictment did not describe the property alleged to have been stolen with sufficient certainty. The description has been held sufficient in *People v. Warren* (this day filed) 63 Pac. 86; and upon the authority of that case the point is settled.

Error is assigned in the refusal of the court to continue the case during the trial for the purpose of allowing defendant to employ other counsel. The facts, as shown in the record, are as follows: The trial commenced on Monday, April 2, 1900, and a jury was impaneled. At 1:30 p. m. of April 3d, at the opening of the afternoon session, Ernest Graves, who had up to that time been defendant's sole attorney, came into court in an intoxicated condition; and, after some time taken up in attempt to proceed with the trial, it became apparent to the judge presiding that the defendant's attorney was so much under the influence of liquor that the business of the court could not proceed in regular order. The court thereupon admonished counsel, stating that counsel was evidently not in a condition to proceed with the trial; and, while the court was so speaking, counsel interrupted in an insolent and impudent manner, saying, "The allegations of the court are false." Thereupon the court fined the attorney \$50 for contempt of court, but suspended the execution of the fine until the conclusion of the trial, expressly stating that it was not the intention of the court to stop the proceedings of the trial. The court thereupon admonished the jury, and adjourned until 3 o'clock p. m. of the same day. Just as the judge rose to leave the bench the attorney, in a loud, violent, and offensive manner, applied to the judge an insulting epithet. The court then ordered the attorney into custody of the sheriff, and made an order for him to show cause on the following day, April 4th, at 9 o'clock a. m., why he should not be punished for contempt. The case was then continued until April 4th, at 9 o'clock a. m., at which time the court imposed a further fine upon the attorney, and made an order committing him to jail for five days. The court thereupon sent for William Graves, the partner of Ernest Graves who had been sent to jail, and appointed said William Graves as counsel for defendant. The said William Graves requested time to investigate the facts of the case, and the court thereupon continued the case until 1:30 p. m., and directed the reporter to read to said William Graves, if desired, all the proceedings in the case. Upon the calling of court at 1:30 p. m., William Graves made a motion for a continuance, upon his own affidavit and the affidavit of defendant, in which it was stated that William Graves was not

familiar with the facts of the case, and could not safely proceed, and that he was pressed with other, professional engagements. The court, after the motion for a continuance was argued and considered, remarked: "I would wish very much to be able to give the defendant an adjournment for some time if it were not for the fact that the jury has been impaneled, and that there are a large number of witnesses here in attendance, and we are in the midst of the trial. Mr. Graves has pleaded other engagements,—Mr. William Graves. I will not set aside the order I made yesterday. I will still let you stand as attorney of record, and I will appoint Mr. Palmer—Charles Palmer—as additional counsel for defendant. I will let this case stand over until to-morrow at half-past one p. m., at which time the defendant will be prepared to proceed. Mr. Reporter, you will read for the counsel any of the testimony that has been taken in the proceeding, that they may be fully advised of the proceedings to date, whenever they desire it, between now and 1:30 p. m. to-morrow." April 5th, at 1:30 p. m., Louis Lamy, an attorney at law, appeared at the request of William Graves, and, with said Palmer, acted as attorney for defendant. The said attorneys, Lamy and Palmer, renewed the motion for a continuance, which the court denied and ordered the trial to proceed. The trial then proceeded, witnesses were examined, and on April 9th, after serving out his five days, Ernest Graves appeared in court and assisted the said Lamy and Palmer in the defense. The trial was completed on April 11th, and the case argued to the jury, and Ernest Graves took part in the argument. We do not think the court erred in refusing to further continue the case. Motions of this kind rest much in the discretion of the court below, and it is only in cases of arbitrary action or abuse of discretion that we would be justified in interfering with the order of the court. In this case the court did not act arbitrarily, but proceeded with care and a constant regard for the rights of defendant. Several adjournments were granted to give counsel time to prepare for trial and to become familiar with the case. While the rights of a defendant should always be carefully guarded, so that his defense may be fully presented, at the same time the public interest and business must be conducted in an orderly manner. Here a jury had been impaneled, and the trial had progressed to the afternoon of the second day. Witnesses were in attendance, and the case taking its regular course. The counsel could not, by becoming intoxicated or incurring the penalty of contempt, give the defendant the right to an indefinite postponement of the case. All the defendant could require, as a matter of right, would be a reasonable time to have other counsel become familiar with the facts of the case. This time was granted by the

court, and, under the circumstances, appears to have been amply sufficient. The court must have discretion in such cases. *People v. Goldenson*, 76 Cal. 341, 19 Pac. 161.

It is claimed that the court erred in not ordering the testimony of J. A. Warren, Sr., read to the jury. The case had been submitted to the jury about three hours, when they came into court after 11 o'clock p. m. and asked to have the testimony of said Warren read. The judge then asked the reporter how long it would take to read the testimony, and was informed that it would take about two hours, as there was about 300 pages of it. The judge then announced to the jury, in the presence of counsel, that owing to the lateness of the hour it would be necessary to adjourn until the next day at 9 o'clock a. m., when the testimony would be read. No objection or exception was then made, and the jury retired and court adjourned. A few minutes before 9 o'clock the next morning the jury came into court and announced that they had agreed upon a verdict. Counsel then objected to the verdict being received because the testimony called for by the jury had not been read. The judge remarked that the jury had found a verdict without having such testimony read, and that he knew of no course except to receive it, and that the jury might be polled, and, if any juror desired to express himself, he might do so. The jury were polled, and all answered that it was their verdict. The court did not deny the right of defendant to have the testimony read. Neither was it an abuse of discretion to adjourn court till the following day for such purpose. The court would not be required to remain in session all night for the purpose of having testimony read to the jury.

The court erred in giving to the jury the instruction to the effect that all persons who aid or abet in the commission of a crime, though not present, shall be prosecuted and punished as principals (*People v. Warren* [this day filed] 63 Pac. 86); but the error was cured, as in that case, by a direct and clear statement of the law in other parts of the charge. The jury were elsewhere told that all persons who "aid and abet in the commission of a crime are principals," and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." In such case we cannot believe that the jury understood that a person who innocently aids in the commission of an offense may be found guilty. The jury, if possessed of common sense, could not have given the word "aid" its extremely narrow and literal sense. The judgment and order should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

STATE v. MINER.

(Court of Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.)

On rehearing. Affirmed.

For former opinion, see 58 Pac. 274.

PER CURIAM. Appellant was convicted in the district court of Montgomery county upon a charge of violating the prohibitory liquor law. From the judgment of the court below he prosecuted an appeal to this court. When the case was submitted in this court, counsel for appellee challenged the sufficiency of the record, and asked that the case be dismissed. The objection appearing to be well grounded, the appeal was dismissed, but afterwards, upon motion of counsel for appellant, the case was reinstated. In the opinion rendered at the time the case was dismissed we stated that, "notwithstanding the imperfect condition of the record, we have examined it, and are of the opinion that, even were the record in such condition that we could decide the case upon its merits, we would be obliged to affirm the judgment of the district court." We have again carefully examined the record, and considered the authorities cited and argument advanced in the brief of counsel for appellant, and we are still of the opinion that the case must be affirmed. No good purpose will be served by writing an extended opinion. The judgment of the district court will be affirmed.

(10 Kan. App. 496)

GILMORE v. BANK OF GARNETT.

(Court of Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.)

DEMURRER TO EVIDENCE—APPEAL—REVIEW.

1. Where the evidence demurred to is such that the jury might reasonably have drawn therefrom a conclusion favorable to the party introducing such evidence, it is error to sustain the demurrer.

2. A ruling of the trial court sustaining a demurrer to the evidence is presented for review by a motion for a new trial, duly filed, which alleges "that the decision of the court is not sustained by sufficient evidence and is contrary to law," although no other exception to the ruling appears in the record.

(Syllabus by the Court.)

Error from district court, Anderson county; A. W. Benson, Judge.

Action by the Bank of Garnett against J. A. Gilmore. Judgment for plaintiff. Defendant brings error. Reversed.

Oscar Foust & Son, for plaintiff in error. Noah L. Bowman, for defendant in error.

MILTON, J. This action was brought by the Bank of Garnett against J. A. Gilmore to recover upon a promissory note for \$955.96 given by Gilmore to the bank. The answer, besides a general denial, averred "that said note is an accommodation note given to plaintiff to represent certain real estate, to wit,

* * * situated in the city of Garnett, Anderson county, Kansas, owned by plaintiff, but not appearing in its assets; that said note was given without any good or valuable consideration whatever; that said note was made, executed, and delivered to said plaintiff by mistake, the defendant being informed by plaintiff, and believing at the time of delivery of said note, that his account with plaintiff had been given a credit of \$1,000 to which he was not entitled; that defendant discovered that he was entitled to the credit of \$1,000 within a few hours after the delivery of the said note; that he immediately demanded of plaintiff possession of said note. Defendant further says that the real estate owned by plaintiff, and represented in the assets of plaintiff by said note, has been sold by plaintiff; that plaintiff has received the rents and profits from said real estate, and the proceeds from the sale thereof; and that said note has been fully paid. Defendant says that he has demanded of plaintiff a surrender of said note, or cancellation of his signature. Wherefore defendant asks that plaintiff be ordered and decreed to deliver said note to defendant for cancellation and destruction, and that he have judgment for costs." The reply, besides a denial of the allegations of the answer which were inconsistent with those of the petition, alleged that the defendant held the title to the real property described in the answer, exercised exclusive control over the same, collected all the rents and profits arising therefrom, procured loans thereon, and used the proceeds of such loans, and afterwards sold the property and used the proceeds arising from its sale. The court sustained the plaintiff's demurrer to the defendant's evidence, and rendered judgment as prayed for in the petition.

A critical examination of the evidence demurred to leads us to conclude that the jury, from whose consideration the case was withdrawn, might reasonably have drawn therefrom any one of the three following inferences: (1) That the note was given by Gilmore for his own debt; (2) that the note was given for accommodation of the bank, for the purpose of keeping its paper assets in an apparently proper condition, and thus avoiding direct ownership by it of real estate; (3) that the note was given by Gilmore under mistake of fact respecting his indebtedness to the bank, he being entitled to a credit of \$1,000, which was overlooked at the time the note was executed. Either of the last two inferences would have warranted a verdict for the plaintiff. It is clear that, where the evidence demurred to is such that the jury might reasonably have drawn therefrom a conclusion favorable to the party introducing such evidence, it is error to sustain the demurrer.

The motion to dismiss filed by the defendant in error will be overruled, the grounds thereof having been shown to be untenable by affidavits on behalf of the plaintiff in error.

The defendant in error objects to the consideration of the petition in error, for the reason that no exception appears to have been taken to the ruling of the court sustaining the demurrer to the evidence at the time the ruling was made. The journal entry of judgment shows that immediately after sustaining the demurrer the court entered judgment for the plaintiff. The motion for a new trial alleges that the decision of the court is not sustained by sufficient evidence and is contrary to law. This is sufficient to present for review the ruling of the trial court on the demurrer. *Gruble v. Ryus*, 23 Kan. 195; *Pratt v. Kelley*, 24 Kan. 111. The judgment of the district court is reversed, and the cause remanded for a new trial.

DENNISON, P. J., concurring. SCHOONOVER, J., not sitting.

(10 Kan. App. 504)

LINCOLN TP. v. KOENIG.

(Court of Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.)

DEFECTIVE HIGHWAY—QUESTION FOR JURY—LIABILITY OF MUNICIPALITY.

1. Whether a highway 12 feet in width, and lying on a hill slope, in a deep cut, and between ditches from 3 to 4 feet in width and from 1½ to 2½ feet in depth, is a defective highway, within the meaning of the statute making counties and townships liable in damages to persons injured by reason of defective highways and bridges, held to be a question for the jury.

2. When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect.

(Syllabus by the Court.)

Error from district court, Franklin county; Samuel A. Riggs, Judge.

Action by Joseph Koenig against Lincoln township. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Deford and W. A. Deford, for plaintiff in error. Benson & Smart, for defendant in error.

MILTON, J. This action was brought by the defendant in error against the plaintiff in error to recover damages for a personal injury sustained as the result of a collision between the wagon of one Fred Wickie, drawn by a runaway team, and the plaintiff's wagon, on a public highway in Lincoln township, Franklin county, whereby the plaintiff was thrown violently from his wagon and was severely hurt. The verdict and judgment were for the plaintiff, in the sum of \$375. The alleged negligence of the township consisted in the fact that the roadway at the point where the injury occurred, being on a long hill slope and in a deep cut, was made and permitted to remain in an unsafe condition, by being only about 12 feet wide, and

between ditches from 3 to 4 feet in width and from $1\frac{1}{2}$ to $2\frac{1}{2}$ feet in depth. Both teams were being driven in a westerly direction down the slope, and Koenig's wagon was nearing the narrowest part of the roadway, and was somewhat north of the center thereof, when Wickie's team, having been frightened by a dog, got so far beyond the driver's control that they came dashing down the hill. Wickie tried to turn his team so as to pass on the south side of Koenig's wagon, but could not do so, because of the ditch by the roadway, and his wagon struck Koenig's wagon with great force, causing the injury complained of. The evidence introduced by the plaintiff tended to prove the foregoing facts, and also that the plaintiff was unaware of the approach of the runaway team and of his own danger; that he had resided for many years in sight of the road where the collision occurred, and was quite well acquainted with the highway and its condition; that Wickie, as he approached Koenig, endeavored to warn the latter by shouting, but without success; that the trustee of the said township more than five days prior to the injury had full knowledge of the condition of the highway on the hill slope, but had not altered the same; that some time after the accident the overseer of the road district in which the said highway was located repaired the same at the point named by widening it to the width of about 18 feet between the ditches, and by reducing the depth of the ditches. The defendant claimed that the road at the point where the collision occurred was in good order, and was about 16 feet in width; that the road at that point could not have been kept in a fit condition for ordinary travel without ditches on each side thereof; that the traveled portion might have been made 25 or 30 feet wide, with proper ditches for drainage; that the plaintiff failed to observe the approach of the runaway team, and failed to notice the shouts of Wickie and the gestures of another who sought to warn him of his peril. The jury made one special finding of fact, as follows: "At the time and place at which plaintiff was injured, would the narrowness of the roadway, or the ditches at its sides, or both ditches and roadway together, have caused plaintiff's injury, without the intervention of the force and violence of the runaway team, and its collision with Koenig's wagon? Answer. No."

By the provisions of section 1, c. 237, Laws 1887, counties and townships are made liable in damages to persons injured by reason of defective highways and bridges. The evidence in the present case showed notice and knowledge on the part of the township trustee respecting the condition of the road at the point where the plaintiff was injured. Only the most careful driving would have enabled two wagons to pass at that point. Anything preventing the exercise of such care on the part of the drivers of teams so passing would necessarily have resulted in a collision

of the vehicles, or an overturning of one of them into the ditch. It was practicable to have made the roadway at that point considerably wider, and to have reduced the depth of the ditches, as is shown by the fact that such improvements were subsequently made.

It is contended that the court committed error in not giving a requested instruction wherein the meaning of the term "proximate cause" was defined, and that it was error to overrule the defendant's motion for judgment on the special finding of fact. We have examined all the instructions given, and think they fairly and fully cover the questions arising upon the evidence. The instruction asked for was properly refused. Counsel argue that the pleadings and evidence show that the highway at the point in question was not "defective," within the meaning of the statute, since it "was at least twelve feet wide, solid and smooth between the ditches, so that wagons and teams could easily and safely pass each other," and that it was error to submit to the jury the question as to "whether it was in a reasonably safe condition for travel in the ordinary modes." In the case of *Reading Tp. v. Telfer*, 57 Kan. 798, 48 Pac. 134, the court, referring to the statute under which this action was brought, said, "The statute which gives the right of action in question is a remedial one, and should, therefore, be liberally, rather than restrictively, construed." In that case the court held that in order to constitute a public road a defective highway, within the meaning of the statute, it is not necessary that it shall first be improved and put into condition for travel, and then allowed to become defective through lack of repair. Guided by the foregoing, we think it was proper to submit to the jury the question whether the roadway at the point where the plaintiff was injured was a "defective highway," within the meaning of the statute. *City of Wellington v. Gregson*, 31 Kan. 99, 1 Pac. 253. The general verdict shows that the jury regarded the highway as defective, and its defective condition as a proximate cause of the plaintiff's injury. The rule applicable to the present case is thus stated in the case of *Ring v. City of Cohoes*, 77 N. Y. 83, 88: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect." In the case of *Railway Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012, the same doctrine is thus declared in the syllabus: "The rule is that where two causes combined to produce the injury, both in their nature proximate,—the one being a defect or obstruction in a public street, and the other some occurrence for which neither party is responsible,—the city is liable, provided the injury would not have been sustained but for the

defect in the street." Another paragraph of the syllabus reads: "According to the weight of authority, a city is liable where a horse takes fright, without any negligence on the part of the driver, at some object for which the municipality is not responsible, and gets beyond the control of his driver and runs away, and comes in contact with some obstruction or defect in the road or street which the city had been negligent in not removing or repairing, if the injuries would not have been sustained but for the obstruction or defect." In 16 Am. & Eng. Enc. Law, 440, 441, it is said: "It is no defense, in an action for a negligent injury, that the negligence of a third person, or an inevitable accident, or an inanimate thing contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury. In such cases the fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in the production of the injury, he is liable to respond in damages, whether the other cause was a guilty or an innocent one." Whether or not the defendant's negligent act is in any case the proximate cause of the plaintiff's injury is for determination by the jury. *Sellick v. Railway Co.* (Mich.) 53 N. W. 556. In view of the foregoing considerations, the judgment of the district court will be affirmed.

(10 Kan. App. 499)

NEOSHO VALLEY INV. CO. v. HANNUM.

(Court or Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.)

CORPORATIONS—POWERS—CONTRACTS.

1. Where a corporation, chartered to do a general real-estate business, entered into a contract under the terms of which it agreed to take possession of certain real estate, offer it for sale, collect rents, and, at the expiration of a certain period, purchase the interest of a lienholder, held, that such contract was not beyond the powers of such corporation.

2. Where the vice president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face, and not shown to be outside of the regular business of the corporation, it is prima facie evidence that it was executed with authority, and those who deny the authority take upon themselves the burden of establishing their claim.

(Syllabus by the Court.)

Error from district court, Labette county; A. H. Skidmore, Judge.

Action by C. H. Hannum against the Neosho Valley Investment Company. Judgment for plaintiff. Defendant brings error. Affirmed.

A. D. Neale, for plaintiff in error. Forkner & Forkner, for defendant in error.

SCHOONOVER, J. Defendant in error, Hannum, brought this action in the district

court of Labette county to recover judgment upon a written agreement, alleged to have been executed by the Neosho Valley Investment Company, plaintiff in error, of which agreement the following is a copy: "This agreement, made and entered into this twentieth day of November, 1889, by and between the Neosho Valley Investment Co. (a corporation), of Chetopa, Labette county, Kansas, of the first part, and C. H. Hannum, of the county of Chester and state of Pennsylvania, of the second part, witnesseth that the said party of the first part has become the purchaser at sheriff's sale of the following described real estate, situated in the county of Labette and state of Kansas, to wit: Lots Nos. thirty-one (31) and thirty-two (32) of block No. twenty-three (23), in the city of Chetopa. That said second party has a claim by reason of a judgment obtained in the district court of said county upon the foreclosure of a mortgage on said above-described real estate, amounting to the sum of five hundred sixty-six and $\frac{9}{100}$ dollars. The said first party hereby acknowledges the above claim to be a first lien upon the above-described real estate, and that the same shall bear interest at the rate of seven per cent. per annum from the date hereof until paid. The said first party further agrees that it will take charge of said property, look after the collection of the rents thereof, and apply the proceeds of such rents—First, to the payment of the taxes assessed against said property; second, to the payment of the interest on the claim of said second party; the remainder, if any there be, to be applied on the claim of said first party for costs and other amounts paid by them for which they claim a lien upon said described premises subject and inferior to the lien of said second party. The said first party agrees to offer said property for sale, and to sell and convey the same when a purchaser can be found who will pay a sufficient sum to cover all claims of the parties to this agreement and against said real estate. The said second party, in accepting this agreement, agrees that, upon payment to him of the full amount due him at the time of making such payment, he will make a quitclaim deed to said first party, releasing all claims to the real estate described herein. The said first party agrees that if, at the expiration of three years from the date hereof, no purchaser shall have been secured, it will pay to the said second party, or his heirs or assigns, the amount then due him according to this agreement, and upon making such payment it shall receive from said second party, his heirs or assigns, a quitclaim deed to the premises herein described. In witness whereof the Neosho Valley Investment Company has caused these presents to be signed by its vice president and secretary the day and year first above written. [Seal.] Neosho Valley Investment Company, by E. W. Bedell, Vice President; John W. Breidenthal, Secretary." Judgment was demanded by plaintiff

for the sum of \$566.60, with interest, and plaintiff also prayed that his lien might be foreclosed, and an order made directing a sale of such real estate, and an application of the proceeds to the satisfaction of the judgment prayed for. The case was tried to the court, and resulted in a judgment in favor of plaintiff. The defendant brings the case here.

It is contended by counsel for plaintiff in error that the court erred in overruling the demurrer of defendant to plaintiff's evidence. It is urged that the record shows that the agreement upon which this action is based was not introduced in evidence. The record shows that plaintiff offered the agreement in evidence, and that defendant objected to its introduction. The court reserved its ruling, and there is nothing to show that any ruling was made upon defendant's objection. This whole matter is, however, disposed of by the fact that the plaintiff alleged in his petition that the investment company executed the agreement in question; a copy of the agreement being attached to the petition. Under the rules of pleading, the execution of the agreement stands admitted unless denied by plaintiff's answer. There is nothing in defendant's answer which can be held by us to be a denial of the execution of the agreement, and whether it was or was not admitted in evidence is wholly immaterial.

Counsel for plaintiff in error denies that Bedell and Breidenthal had any authority to execute the agreement, and it is also urged that the investment company had no power to make such a contract. In its answer the company sets out the following provision of its charter: "That the purpose for which this corporation is formed is to receive, collect, take charge of, and loan money on real estate or other security, as principal or as agent for any persons, corporations, or firms who may intrust funds to its care; to transact a general real-estate and insurance business, and any other business appertaining to the foregoing." We think that the agreement was within the powers of the company as enumerated in its charter. Under the terms of the agreement, the company was to take charge of the property, offer it for sale, collect rents, and, at the expiration of three years from the date of the agreement, was to purchase Hannum's interest, if, in the meantime, no purchaser had been found. The consideration to be paid for such interest was the amount due on Hannum's judgment, and Hannum reserved a lien on the property for the amount of his claim. We certainly think that a company chartered to do a "general real-estate business" would have a right to do these things.

As to the proposition that Bedell and Breidenthal had no authority to execute the contract, it may be admitted that the record does not show any direct author-

ity. There is evidence, however, tending to show that these persons had, in a general way, transacted the business of the company at its Western office, and defendant expressly admitted in its answer that Bedell and Breidenthal were vice president and secretary of the company. In the case of *Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569, our supreme court held: "Where the president and secretary of a corporation executes a contract in behalf of the company, which is regular on its face, and not shown to be outside of the regular business of the corporation, it is prima facie evidence that it was executed with authority, and those who deny the authority take upon themselves the burden of establishing their claim." Under the authority of this case, we hold that the burden of proving want of authority on the part of Bedell and Breidenthal to execute the contract rested upon the defendant, and we cannot say that defendant proved that they did not have such authority.

It is also urged by counsel for the investment company that there is no evidence in the record to show that Hannum ever tendered to the company a quitclaim deed to the property. We do not think that it makes any difference whether he did or did not. So far as the evidence shows, the company repudiated the contract, and denied any liability under it. It set up a defense in its answer wholly inconsistent with the idea that it would have complied with the terms of the contract in the event that Hannum had tendered a deed. Under the law of this state, a failure to make a demand will not bar a right of recovery if the facts and circumstances clearly indicate that a demand would have been fruitless. *Raper v. Harrison*, 37 Kan. 243, 15 Pac. 219. See, also, 5 Am. & Eng. Enc. Law, p. 528a, note 2.

It is also contended that the record shows that the cause was barred by the statute of limitations. The agreement was entered into November 20, 1889. Under its terms, no cause of action accrued until November 20, 1892. Section 12, c. 95, Gen. St. 1897. The cause would not, therefore, be barred until November 20, 1897. Plaintiff filed his petition April 6, 1897. The cause was therefore brought in time. Other errors are assigned by plaintiff in error, but they are not such as to require a reversal of the case. The judgment of the district court is affirmed.

(10 Kan. A. 488)

BRETNALL v. MARSHALL.

(Court of Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.)

APPEAL—HARMLESS ERROR—VARIANCE—VEN-
DOR AND PURCHASER.

1. "Where there is a variance between the allegations of a bill of particulars and the facts proved and specifically found by the jury on

the trial, yet if it be a case where an amendment to a bill of particulars ought to be allowed, to conform it to the facts proved and found, the judgment in favor of the plaintiff will not be reversed on account of the variance, if no substantial rights of the defendant have been prejudiced." *Jung v. Liebert*, 24 Pac. 474, 44 Kan. 304.

2. Where, by the terms of a contract for the sale and conveyance of land, the purchase price is made payable in installments, and the conveyance is to be made upon the payment of the last installment, and where default is made by the purchaser in the payment of installments, and no action is taken by the vendor, either to enforce or rescind the contract, until after the maturity of the last installment, the obligations of the parties to the contract are mutual and dependent, and the vendor cannot put the purchaser in default, save by an offer to convey the land.

(Syllabus by the Court.)

Error from district court, Osage county; William Thomson, Judge.

Action by Samuel Marshall against Samuel Brentnall, before a justice. Judgment for plaintiff was affirmed on appeal, and defendant brings error. Affirmed.

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error. C. S. Martin and J. H. Stavely, for defendant in error.

SCHOONOVER, J. On May 22, 1886, the Osage Carbon Company, a corporation doing business under the laws of Kansas, entered into a written contract by which it agreed to sell and convey to Samuel Marshall, the defendant in error herein, certain real estate in Osage county, Kan. Marshall made a cash payment upon the land of \$545, and agreed to pay the balance of the purchase price, \$2,160, with accruing interest, in five installments; the last installment being due May 22, 1891. The contract contained, among others, the following provisions: "And it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in the contract. And in case the third party shall fail to make the payments aforesaid, and each of them, punctually, and upon the strict terms and times herein limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid strictly and literally, without any failure or default, including the prompt payment of all taxes and assessments upon said land before the same shall become delinquent according to law, then this contract, so far as it may bind said party of the first part, shall become utterly null and void. And all rights and interests hereby created or then existing in favor of the third party, or derived from him, shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted shall revert to and revest in said party of the first part, without any declaration of forfeiture or act of re-entry, or any other act of said party of the first part to be performed, and without any right of said third party to reclamation or compensation for moneys paid or services per-

formed or improvements made, as absolutely, fully, and perfectly as if this contract had never been made. And said party of the first part, its successors or assigns, shall have the right, immediately upon the failure of the party of the third part to comply with the stipulations of this contract, including the payment of all taxes before the same shall become delinquent, to enter upon the land aforesaid and to take immediate possession thereof, together with the improvements and appurtenances thereto belonging. And the said party of the third part covenants and agrees that he will surrender unto the said Osage Carbon Company the said lands and appurtenances without delay or hindrance, and no court shall relieve the party of the third part from a failure to comply strictly and literally with this contract. In case the third party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually and at the times above limited, and shall strictly and literally perform all and singular his agreements and stipulations aforesaid, after their true tenor and intent, including the prompt payment of all taxes and assessments upon the said land before the same shall become delinquent according to law, then the said trustee shall release and discharge the said land from any and all incumbrances created by the said deed of trust, and the said first party shall, upon surrender of this contract, execute and deliver to the said party of the third part, his heirs or assigns, a proper deed for the said premises, conveying the same absolutely in fee simple, with the ordinary covenants of warranty." Marshall entered into possession of and occupied the land, and made some substantial improvements upon it. In March, 1894, he leased the premises for a term of one year to Samuel Brentnall, plaintiff in error, who took possession of and occupied the same. Marshall failed to pay all the installments as provided by the terms of the contract, and in December, 1894, the Osage Carbon Company canceled the contract. Marshall did not consent to such cancellation, otherwise than by the terms of the contract itself. On January 18, 1894, the Osage Carbon Company executed a written lease of the premises to plaintiff in error, Brentnall, who continued in possession of the land until March 1, 1896, claiming, however, to hold possession of the premises from January 18, 1896, to March 1, 1896, under and by virtue of the lease executed to him by the Osage Carbon Company. Marshall brought suit against Brentnall, before a justice of the peace of Osage county, to recover \$200, as rent for the premises for one year, from March 1, 1895, to March 1, 1896, and succeeded in obtaining a judgment in his favor. The case was then taken on appeal to the district court of Osage county, where a judgment was again rendered in Marshall's favor. Brentnall brings the case here for review.

Plaintiff in error contends that as this action was founded upon a written lease of the

land, and the proof showed that the tenant was never put in possession of the land and never occupied it, there was, therefore, no right of recovery. The lease upon which the action is founded and plaintiff's petition described the land as being situated in township 17, Osage county, Kan., while the proof showed that the land was situated in township 16, Osage county, Kan. We think that the record clearly shows that the case was tried upon the theory that the suit was to recover rent for the use and occupancy of land situated in township 16, Osage county, Kan. The case was tried, in part, upon an agreed statement of facts. It appears from this statement that Brentnall actually leased the S. W. $\frac{1}{4}$ of section 34, in township 16, Osage county, Kan., and that under his lease he went into possession of the land and occupied it for more than two years, but that for the last year he paid no rent to Marshall, claiming to hold the land during that year under a lease from the Osage Carbon Company. If, therefore, the Osage Carbon Company was not, and Marshall was, entitled to the possession of the land during the last year of Brentnall's tenancy, it is clear that Marshall has a cause of action against Brentnall; and, this being true, the variance between the pleading and proof was not prejudicial to Brentnall's rights. In the case of *Jung v. Liebert*, 44 Kan. 304, 24 Pac. 474, the court held that, "where there is a variance between the allegations of a bill of particulars and the facts proved and specifically found by the jury on the trial, yet, if it be a case where an amendment to a bill of particulars ought to be allowed, to conform it to the facts proved and found, the judgment in favor of the plaintiff will not be reversed on account of the variance, if no substantial rights of the defendant have been prejudiced." Continuing, the court says: "Though no formal amendment was made or requested in the trial court, we think, as Mrs. Liebert was clearly entitled to her railroad fare or expense, and as the defendant was notified upon the trial of her intention to claim the same, we may properly treat the case as if an amendment to the bill of particulars to accord with the special findings of the jury was in fact made. Therefore we hold that no substantial rights of the defendant have been prejudiced. An account or bill of particulars filed with a justice of the peace is not usually framed with much care or nicety, and the strict rules applicable to the construction of pleadings are not to control such accounts or claims. Morally and legally, the plaintiff below is entitled to the amount she recovered, and this court ought not, on account of a mere technicality which does not affect the substantial rights of the parties, to set the judgment aside."

As we have already remarked, it is clear from the record that the case was tried upon the theory that this was an action to recover rent for the use and occupancy of land in township 16, Osage county, Kan.

We think, also, that the record shows that the defense relied upon was that Marshall, by reason of his failure to pay the installments as provided by the terms of the contract of sale entered into between himself and the Osage Carbon Company, had forfeited his right to the possession of the land, and that he (Brentnall) had, therefore, a legal right to recognize the Osage Carbon Company as his landlord. So far as the record shows, Marshall never paid any of the installments named in the contract. More than $3\frac{1}{2}$ years elapsed from the time the last installment was due before the Osage Carbon Company canceled the contract. How it was canceled, the record does not disclose. It is not shown that any notice of such cancellation was ever given to Marshall; that the company tendered to Marshall a deed to the land, with a demand for performance on his part, or did any act which indicated an intention to terminate the relation existing between it and Marshall, prior to the time of the execution of the lease to Brentnall. On the part of plaintiff in error, it is contended that Marshall, by reason of his failure to pay the installments as provided by the terms of the contract of sale, had forfeited absolutely all his interest in the land, including the right of possession. On the part of defendant in error, it is contended that the Osage Carbon Company, by its delay in attempting to regain possession of the land after Marshall had made default in the payment of the installments, waived the provisions of the contract as to time and punctuality, and that no act on its part would, therefore, be binding on Marshall, without his consent, unless the company had fully complied with the terms of the agreement and tendered to him a deed. In the case of *Soper v. Gabe*, 55 Kan. 648, 41 Pac. 969, the supreme court held that "where, by the terms of a contract for the sale and conveyance of land, the purchase price is made payable in installments, and the conveyance is to be made upon the payment of the last installment, and where default is made by the purchasers in the payment, and no action is brought by the vendors to enforce the contract until after the maturity of the last installment, the obligations of the parties to the contract are mutual and dependent; and the vendors cannot maintain an action to enforce the contract specifically, or to recover any part of the purchase money, until they make or tender a conveyance of the land." In this case the terms of the contract providing for a forfeiture in case of failure to make prompt payment of installments when due, as well as the agreement to make conveyance of the land upon payment of all installments, etc., were, in effect, identical with the provisions of the contract in the case at bar. In its opinion, the court said: "The obligations of the contract are mutual and dependent, and, before one party can enforce performance, it must

appear that he is not himself in default. The Gabes might have enforced the collection of all the installments preceding the last one without having tendered a conveyance of the property sold; but, as no steps were taken to collect the several installments until after the last one was due, a single cause of action exists for the collection of the purchase money, and payment cannot be compelled until they have complied or tendered compliance with the obligations resting upon them." The court cited the opinion of *Iles v. Elledge*, 18 Kan. 296,—a somewhat similar case,—wherein it was held that "all parties to the papers must perform at the same time, neither being under any obligations to trust the other. As it appears that Elledge has neither delivered nor tendered a deed, he cannot maintain an action for the purchase money embraced in the note sued on." Applying the rule stated in these cases to the facts in the case at bar, we hold that, before the Osage Carbon Company could place Marshall in default, it must have tendered to him a deed to the land. It is true that, upon the failure of Marshall to pay any of the installments preceding the last, it might have canceled the contract and recovered possession of the land without any offer on its part to perform; and, as Marshall's right of possession would have been terminated absolutely, it is possible that Brentnall might legally have recognized the Osage Carbon Company as his landlord. But, as the company delayed action until long after the last installment became due, it was then as much its duty to tender a deed as it was Marshall's duty to tender payment; for, as was said in the case of *Soper v. Gabe*, supra, after the last payment became due the terms of the contract were mutual and dependent. If, then, the Osage Carbon Company could not put Marshall in default save by an offer to perform, it follows that the right of possession was in Marshall during the year that Brentnall claimed to hold the land under a lease from the Osage Carbon Company, and Marshall was entitled to rent for that time. Under the circumstances, the well-settled principle that the tenant cannot dispute his landlord's title would apply. No error appearing in the record, the judgment of the district court will be affirmed.

(23 Utah, 432)

STATE v. BEDDO.

(Supreme Court of Utah. Nov. 23, 1900.)

CONSTITUTIONAL LAW—RESTRICTIVE AND MANDATORY PROVISIONS—REVISION AND AMENDMENT OF EXISTING LAWS—DISTRICT ATTORNEYS—CRIMINAL PLEADING—LEGISLATIVE ACT—PART UNCONSTITUTIONAL—WHEN BALANCE MAY STAND—INFORMATIONS—HOW SIGNED—JURISDICTION OF TRIAL COURT—INFORMATION IMPROPERLY SIGNED.

1. The provisions of section 22, art. 6, of the state constitution, providing that "no law shall be revised or amended by reference to its title

only; but the act as revised, shall be re-enacted and published at length," are restrictive and mandatory; and when an act or a section is revised or amended the same must be complete within itself, so that when published as revised or amended it will contain all the law upon the subject embraced in the act or section.

2. Chapter 56, Sess. Laws 1899, clearly reveals the fact that the legislature attempted to change an existing law without pursuing the method pointed out by the fundamental law. The changes made are therefore in violation of it, and so much of chapter 56 as attempts to confer the power to file informations in criminal prosecutions upon a district attorney, when the old law made it incumbent upon the county attorney to file such informations, is without force or effect.

3. When a portion of an act is unconstitutional, and such portion can be rejected, and the remaining portion is properly indicated by the title, and forms a complete enactment in itself, capable of being executed according to the manifest intention of the legislature, independently of the part stricken out, such portion must be sustained.

4. Chapter 56, Sess. Laws 1899, in so far as it is amendatory of sections 633, 2061, 2449, 4692, 4693, Rev. St. 1893, is void; and district attorneys whose offices were created by said act have no power to sign and file informations in criminal cases.

5. The conviction and sentence of a person charged with crime, by an information not signed by the person designated by law, are void for want of jurisdiction in the trial court.

(Syllabus by the Court.)

Appeal from district court, Uinta county; John E. Booth, Judge.

James W. Beddo was convicted of crime, and appeals. Reversed.

W. H. Frye and E. A. Walton, for appellant. A. C. Bishop, Atty. Gen., and Wm. A. Lee, Asst. Atty. Gen., for the State.

BARTCH, C. J. The defendant herein was prosecuted for and convicted of the crime of rape, committed upon the person of a little girl 12 years of age. Upon having been sentenced to undergo imprisonment in the penitentiary for a period of 5 years, he appealed to this court.

The record shows that the information under which the prosecution was conducted was filed by the district attorney under chapter 56, Sess. Laws 1899, p. 77, and not by the county attorney, as provided in section 4692, Rev. St. It is insisted on behalf of the prisoner that such portions of chapter 56 as are claimed by the prosecution to authorize district attorneys to file informations in criminal cases are void, as being in conflict with article 1, § 24, and article 6, §§ 22, 23, of the state constitution, and that therefore, the information having been filed by such district attorney, instead of the county attorney, the court acquired no jurisdiction to try the case. The decisive question herein, it seems, arises under section 22, art. 6, Const., which, so far as important here, provides that "no law shall be revised or amended by reference to its title only; but the act as revised, shall be re-enacted and published at length."

These provisions are clearly restrictive and mandatory. Under the first clause the legislature is deprived of all power to revise or amend any law by merely referring to its title. To make a valid revision of or amendment to any law, the act as revised, or section as amended, must be re-enacted and published at length as provided in the latter clause quoted. This is a wise provision of the constitution, and was intended to avoid that confusion which would inevitably follow if an act or section could be revised or amended by mere reference to the title or section or word or line as to which the change was intended to be made; for, after repeated amendments so made, the statute law would be rendered so ambiguous and imperfect, and in the course of time would require the examination of so many enactments to ascertain what statutes were in force, as to render any satisfactory determination or conclusion exceedingly difficult, if not impossible. Such revisions and amendments by mere reference to title, however, not only render the statute law difficult of construction, but they are calculated to confuse and mislead the public, and are therefore inimical to business transactions and the interests of the people. So they have a tendency to encourage improvident legislation, by misleading the average legislator, who, because of numerous additions, insertions, or substitutions, made with mere reference to the old statute or section, is unable to ascertain what the exact state of the law is; and yet it is of the highest importance that every member of the legislature shall have a correct understanding of what the existing law is, before he attempts to revise or amend it. This fact was doubtless recognized by the framers of the constitution, who evidently intended the provisions above quoted as a remedy for the evils referred to. Therefore when an act or a section is revised or amended the same must be complete within itself, so that when published as revised or amended it will contain all the law upon the subject embraced in the act or section; and any matter contained in the old statute or section which is not contained in the new ceases to have the force of law, except as to past transactions. *Suth. St. Const. § 131; Blakemore v. Dolan*, 50 Ind. 194; *Dodd v. State*, 18 Ind. 56. If, then, chapter 56, Sess. Laws 1899, were in no respect violative of any constitutional provision, it would contain all the law upon the subject embraced therein; and the old law respecting prosecutions for crimes, according to the terms of which the county attorney was to file all informations, would cease to exist. But an examination and comparison of that chapter with the various sections of the Revised Statutes referred to in the title of the act which forms the chapter clearly reveal the fact that the

legislature attempted to change an existing law without pursuing the method pointed out by the fundamental law, and the changes made are therefore in violation of it. In no other light can this legislation be regarded than as an effort to amend those sections of the Revised Statutes by transferring some of the duties imposed by an existing law upon the county attorney to another and different officer. This might have been accomplished had the mode pointed out by the fundamental law been followed, and the sections amended stated in full and published at length in the amending act. As this was not done, and since the positive mandate of the constitution was violated by not following the method prescribed in relation to revisions and amendments of existing laws, so much of chapter 56 as attempts to confer the power to file informations in criminal prosecutions upon a district attorney, when the old law made it incumbent upon the county attorney to file such informations, must be held to be without force or effect. We do not think the whole act is necessarily void. The main subject of the act is independent, embracing matter not previously legislated upon, and is properly described in the title. It is a new subject, and makes a new enactment. The foreign matter consists of the amendatory portion of the act, and may be readily separated from the main subject and rejected, so as to leave a sensible and complete enactment, which may be executed. Where a portion of an act is unconstitutional, and such portion can be rejected, and the remaining portion is properly indicated by the title, and forms a complete enactment in itself, capable of being executed according to the manifest intention of the legislature, independently of the part stricken out, such remaining portion must be sustained. *Suth. St. Const. § 103; Cooley, Const. Lim.* 177, 178; *Davis v. State*, 7 Md. 151; *State v. Becker* (S. D.) 51 N. W. 1018; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670.

We are of the opinion that the act of 1899, in so far as it is amendatory of sections 633, 2061, 2449, 4692, and 4693 of the Revised Statutes, is void; that the district attorney, whose office was created by that act, had no power to sign and file the information in this case; that he, and not the county attorney, having signed and filed the information under which the defendant was prosecuted, the court acquired no jurisdiction to try the case; and that the conviction and sentence of the prisoner are void. Having taken this view, we do not deem it important to decide any other question presented in the record. The case must be reversed and remanded to the court below, to be disposed of as required by law. It is so ordered.

MINER and BASKIN, JJ., concur.

(24 Mont. 515)

MORRISON v. CLARK et al.

(Supreme Court of Montana. Dec. 17, 1900.)

CORPORATIONS—FAILURE TO COMMENCE BUSINESS—FORFEITURE OF CHARTER—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

1. Under Rev. St. 1879, §§ 244, 245, providing that on filing a required certificate the persons signing it shall be a body corporate, and may acquire realty necessary to carry on the operations named in the certificate, the failure of a mining company which has filed such certificate to hold any meetings of its stockholders, and omission to commence business, will not invalidate a conveyance of mining claims to the corporation; for neither such failure nor omission dissolved the corporation, or invalidated the proceedings already taken, under which it became a corporation.

2. Const. 1889, art. 15, § 1, providing that all existing charters or grants of special or exclusive privileges under which the grantees shall not have organized or commenced business in good faith at its adoption shall thereafter have no validity, does not affect a mining company incorporated under general laws, though it had omitted to commence business prior to the adoption of such constitution, since such section only annulled private charters or special grants then existing, under which the corporations thereby authorized had not organized.

Appeal from district court, Deerlodge county; Theodore Brantly, Judge.

Action by Alexander M. R. Morrison against William A. Clark and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. E. Healy, for appellant. J. L. Wines, for respondents.

PIGOTT, J. The plaintiff has appealed from a judgment entered against him upon his failure to plead further after a demurrer to the complaint had been sustained. Eliminating allegations not material to the case as presented, as well as mere legal conclusions, and confining our inquiry to the points made in this court by counsel for the plaintiff, the questions arise out of the following facts admitted by the demurrer: On July 8, 1886, the plaintiff and one Napton delivered to the Golden Gate Mining Company, a corporation formed under the provisions of chapter 15, div. 5, Gen. Laws, Rev. St. Mont. 1879, their deed conveying to it certain lode-mining claims owned by them as tenants in common. The certificate of association or articles of incorporation had been duly filed in the proper offices, but neither at the time when the deed was delivered, nor at any time before November 8, 1889, when the constitution of Montana was finally adopted, had a meeting of the stockholders or directors of the Golden Gate Mining Company been held; nor did the company ever commence business, in good faith or otherwise. In 1894 two of the defendants recovered a judgment against the Golden Gate Mining Company upon a promissory note executed by it, and the property so conveyed by the plaintiff and Napton was afterwards sold under execution to the judgment creditors. The company was not made a party to the action. The plaintiff prays that the deed from him to

the company be declared void, and that the judgment and execution sale be set aside, and the defendants decreed to be without right in or lien upon the property so theretofore granted to the Golden Gate Mining Company. The contention of the plaintiff is thus stated by his counsel: "The complaint proceeds upon the theory that the corporation went out of existence upon the adoption of the state constitution, the 8th day of November, 1889, and that all subsequent acts mentioned in the complaint were null and void; that the deed from plaintiff became of no force or virtue; that the note given was void; that the sale was void, and that Clark & Bro. have the sheriff's certificate of sale to property which belongs to the plaintiff, and hold an adverse claim thereto against him, thereby casting a cloud upon the title of the plaintiff to the property,—that is, conceding, for the sake of the argument, that the facts stated show that the corporation had a de facto existence prior to the adoption of the constitution." There are, therefore, but two questions to be determined; the first being whether the Golden Gate Mining Company had a legal existence as a corporation at the time the plaintiff made the grant to it.

1. It should seem that, in the absence of fraud, accident, and mistake, the plaintiff, having described the Golden Gate Mining Company as a corporation in the deed of conveyance, ought to be estopped from denying that it was a corporation at that time; but, however this may be, sections 244 and 245 of chapter 15, supra, provide that when the certificate required by the former section shall have been duly filed the persons who signed and acknowledged it, and their successors, shall be a body politic and corporate in fact and in name, and by the name stated in the certificate shall have succession, and be capable of acquiring by purchase or otherwise, and holding or conveying by deed or otherwise, any real or personal estate whatever which may be necessary to enable it to carry on the operations named in the certificate. Failure to hold any meeting of the stockholders or directors and omission to commence business in no wise prevented the Golden Gate Mining Company from becoming a corporation; nor did either omission, or both of such omissions, operate to dissolve the corporation, or invalidate its acts or proceedings already taken, under which it had become a corporation. By the conveyance it became invested with whatever title the plaintiff possessed.

2. The other question is, did the Golden Gate Mining Company cease to exist as a corporation on November 8, 1889? Counsel for the plaintiff asserts that the corporation went out of existence upon the adoption of the constitution, and cites section 1 of article 15 of that instrument to support the assertion. The section ordains that "all existing charters, or grants of special or exclusive privileges, under which the corporations or grantees shall not have organized or commenced

business in good faith at the time of the adoption of this constitution, shall thereafter have no validity." Even if this section was intended to apply to corporations formed under general incorporation acts, we are satisfied, upon the plainest principles, that it did not have the effect, either at law or in equity, of divesting such corporations of title to property, and reinvesting the grantors therewith. Whether the section would of its own force have worked the utter destruction of such corporations, or would have affected only the validity of corporate acts performed after the constitution was adopted, is a question that need not be considered. By the transfer from the plaintiff the Golden Gate Mining Company acquired the title then in him, and the section quoted does not purport to take away from a corporation falling within its provisions title to property theretofore acquired by it. It is probable, however, that the precise point which the counsel for the plaintiff desires to make is that the corporation ceased to exist upon the adoption of the constitution, and that therefore the Golden Gate Mining Company was not and could not have been the party defendant in the action purporting to be against it, wherein judgment was entered and a sale made of the property. To this question we direct our attention. We are, however, of the opinion that the section does not refer to corporations formed by virtue of compliance with the general laws providing for their organization. The charter of such a corporation consists of the general laws under which it is formed, coupled with the articles of association or agreement adopted in conformity with them. Prior to 1887, when congress prohibited the legislative assembly of the territory of Montana from granting private charters or special privileges (section 1889 of the Revised Statutes of the United States), the assembly had by special laws granted many private charters for corporations, and a multitude of special privileges to natural persons. Some of the charters and grants were for specified periods, while others were not limited as to duration, and were therefore perpetual. Existing "charters," as the term is used in section 1, means much the same as existing "grants of special or exclusive privileges"; the former referring more particularly to corporations. Without expressing any views in respect of the effect of the section upon corporations theretofore created and formed, and then in being, by virtue of special charters, or of its effect upon the rights of natural persons to whom had been granted special privileges, we are of the opinion that the section, in so far as its purpose need now be inquired into, was intended to annul all private charters or special grants then existing under which the corporations thereby authorized had not organized—that is, been formed—or commenced business in good faith before the adoption of the constitution. The section has nothing to do with corporations formed under authority of the general laws. Such corporations are

organized by a compliance with the provisions of general laws permitting corporations to be formed. A compliance with these laws results, of itself, in the organization of the corporations. Such organization has no reference to the internal proceedings of the corporation, such as a meeting of stockholders and the like. It means the formation or birth of the body corporate. On the other hand, a special or private charter purporting to create a corporation does not necessarily organize it. In order that the corporation be organized, there must be an acceptance of the charter, and a compliance with whatever the special law may require. The word "organize," as used in section 1, is not appropriate, and was not employed, to describe what corporations formed under general laws must do before the adoption of the constitution in order to preserve their franchises; for such corporations had already been organized, by virtue of the filing in the proper offices of the certificates required. That section 1 was not designed to include within its provisions corporations formed and existing under general laws would seem to be countenanced by section 2 of article 15, which, after prohibiting the legislative assembly from granting, extending, or amending by special law any charter of incorporation, enjoins upon it the duty of providing "by general law for the organization of corporations hereafter to be created." To hold that section 1 was designed to invalidate, for failure to organize (in the sense of electing directors, or the like) or commence business before the adoption of the constitution, the charters of corporations formed under the general laws, we must declare that the framers of the constitution intended to annul the charters of corporations so failing, although such charters were obtained by filing the certificates of incorporation on the day next preceding the 8th of November, 1889. The section is not to be so interpreted. It follows that the Golden Gate Mining Company, for aught that appears in the complaint, continued to exist as a corporation after the adoption of the constitution. The judgment is affirmed. Affirmed.

WORD, J., concurs. BRANTLY, C. J., having tried the case in the court below, does not participate in the foregoing decision.

(24 Mont. 521)

STATE ex rel. HELENA WATERWORKS CO. v. CITY OF HELENA et al.

(Supreme Court of Montana. Dec. 17, 1900.)

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT—CONTRACTS EXCEEDING—VALIDITY—APPROPRIATION TO PAY—NOTICE OF LIMIT—MANDAMUS.

1. A city had already exceeded the constitutional limit of indebtedness. A water company furnished it water for fire, sewerage, and other municipal purposes under an ordinance providing for the obtaining of water for such purposes for a certain period, at a certain price, payable monthly, appropriating out of the city's yearly revenues sufficient money to pay for it, and ordering the city council for such term to

levy annual taxes sufficient to meet the appropriation, under the Political Code of the state, authorizing the levy of taxes for general purposes. *Held*, that the company could not recover for water so furnished, under Const. art. 13, § 6, providing that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding 3 per centum of the taxable property therein, since, as the liability of the city would be general and not special thereunder, the contract entered into created, and the amount due for water furnished thereunder constitutes, an indebtedness within the prohibition of the constitution.

2. The fact that the city council, in accordance with Pol. Code, § 4874, providing that the city council must at a certain time pass an annual appropriation ordinance sufficient to defray the expenses or liabilities of the city for the ensuing year, specifying the amount for each object, appropriated a sum to pay for water furnished under such contract, does not make the city liable therefor, since the contract out of which the liability arose is void, and no lawful authority to pay it exists.

3. Where the liability of a city under a contract is general, and not special, if there is no limit to the amount for which such city can become indebted for a failure on the part of the city to meet its obligations under the contract as they fell due, the other party can recover a general judgment against the city, and have a mandamus for the levy and collection of a tax to pay it.

4. Where the powers of a city to incur indebtedness are limited, it is the duty of one who makes a contract with such a city, whereby an indebtedness is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness exceeds the constitutional limitation, and, not having done so, he cannot recover where the city is already indebted beyond that limit.

Appeal from district court, Lewis and Clarke county; S. H. McIntire, Judge.

Application by the state of Montana, on the relation of the Helena Waterworks Company, for a writ of mandamus against the city of Helena and the city council of the city of Helena. From a judgment on the pleadings in favor of defendants, plaintiff appeals. Affirmed.

The appellant, in the district court of Lewis and Clarke county, made an application for a writ of mandamus requiring the city of Helena, and the city council of the city of Helena, to audit, allow, and pay certain claims for water furnished to said city during and since the month of May, 1898, under the terms of an ordinance passed by the city council of the city of Helena on the 17th day of August, 1897, and also requiring the city and said city council to appropriate sufficient of the tax levied in the year 1899 to pay the amount due and to become due under said ordinance for water furnished during the fiscal year commencing the first Monday in May, 1900.

The facts are substantially as follows: On the 16th day of March, 1897, in a suit then pending in the circuit court of the United States in and for the district of Montana, one James H. Mills was appointed receiver of the water plant owned and operated by the Helena Consolidated Water Company, and used for the purpose of supplying the city of Helena and the inhabitants thereof with water. On August 17, 1897, as stated above, the city

council of the city of Helena duly passed Ordinance No. 367, entitled "To provide the city of Helena with water for fire, sewerage and other municipal purposes for a period of five years from August 1st, 1897." Among other things, said ordinance provided that James H. Mills, as receiver of the Helena Consolidated Water Company, should furnish to the city of Helena, for a period of five years from the 1st day of August, 1897, an ample and sufficient supply of good, pure, wholesome, and clear water for fire, sewerage, and other municipal purposes. The consideration for the water so furnished was the sum of \$1,500 per month, payable on or before the 10th day of each month, for water furnished during the preceding month. Section 11 of said ordinance is as follows: "There is hereby appropriated out of the yearly revenues of said city of Helena, for the use and benefit of said receiver, during the full term of five years from and after the first day of August, A. D. 1897, the sum of fifteen hundred dollars per month for the use of water through the present existing hydrants, by said city, for the purpose of fire, sewerage and other municipal purposes; and the further sum of five dollars and eighty-three cents per month per hydrant for each and every hydrant hereafter ordered to be erected by said city council for the use of water through the same for fire, sewerage and other municipal purposes. And it is hereby made the duty of said city council during the term of five years to levy annual taxes under the provisions of the Political Code of the State of Montana authorizing the levy of taxes for general purposes, sufficient in amount to meet the appropriations hereby made." Said ordinance further provided that within 30 days after the passage thereof said receiver should file with the city clerk an acceptance in writing of all the terms and conditions thereof, and that immediately thereafter said ordinance should become effectual as a contract between the city and said receiver, for the purposes and upon the terms and conditions named therein. It appears from the petition that within said period of 30 days said James H. Mills, as receiver, filed his acceptance in writing of the terms and conditions of said ordinance. It further appears that since the acceptance of said ordinance water has been furnished to the city of Helena in accordance with the terms thereof, and has been used by said city for the purposes mentioned therein. It also appears that nothing has been paid for water furnished since the 1st day of May, 1898.

It is alleged in the petition that the said city of Helena levied a tax for general municipal and administrative purposes sufficient in amount to meet and discharge the appropriation made in said ordinance for the fiscal year beginning with the first Monday in May, 1898, together with all other liabilities and expenses of said city for said year; that a like tax was levied by the city council for the fiscal years commencing with the first Monday in May, 1899 and 1900, respectively, in each

instance sufficient in amount to pay and discharge the appropriation made by said ordinance for each of said years, together with the other liabilities and expenses of the city. It is alleged that each year since the passage, approval, and acceptance of said ordinance the said city council has appropriated in the annual appropriation ordinance the sum of \$18,000 to pay for water furnished under said ordinance. Then follows an allegation that the water plant and system of appellant is the only one in the city of Helena, and that no other person or corporation was, either at the time of the passage or acceptance of said ordinance, or long prior thereto, or is now, in a position to furnish water to said city of Helena for the purposes specified in said ordinance.

The amended answer to the petition consisted of denials of certain allegations contained therein, certain allegations not now material, and separate defenses in substance as follows: (1) That no bids were ever asked for or received prior to entering into the alleged contract between the said city and said James H. Mills, receiver, predecessor in interest of appellant; that no bids for entering into said alleged contract were ever asked or advertised for as required by the provisions of article 1 of chapter 18, relating to contracts, of the Revised Ordinances of 1897 of said city of Helena; and that when said contract was entered into a contract could have been made with responsible parties, who would have agreed within six months thereafter to supply the said city with water for the purposes mentioned in said ordinance, from sources other than those owned or controlled by the appellant. (2) That at the time the city entered into said contract, and during all of the year 1897, as shown by the last assessment for state and county taxes, the value of the taxable property in the city of Helena did not exceed the sum of \$12,656,783, and that it has not at any time since exceeded such sum; that at the time said contract was entered into, and at all times since, the aggregate indebtedness of the city was, and still is, largely in excess of the 3 per centum of the value of the taxable property therein, as shown by all the assessments for state and county taxes made during any of the times mentioned in said petition, and was at all of said times, and still is, in excess of the sum of \$516,000. To the amended answer a replication was filed. Defendant moved for judgment on the pleadings, which motion was by the court sustained. From the judgment entered upon said order, this appeal is taken.

Clayberg & Gunn, for appellant. Edward Horsky, for respondent.

WORD, J. (after stating the facts). The first question we shall consider is, did the city of Helena, by entering into the contract for a water supply, incur an "indebtedness," within the meaning of that term as it is used in section 6 of article 13 of the constitution of Montana? Section 6 of article 13 of the con-

stitution is as follows: "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void: provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality, which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." It is admitted by the pleadings that at the time when the contract between James H. Mills, receiver, and the city of Helena was executed the city of Helena was indebted in a sum in excess of 3 per centum of the assessed valuation of the taxable property in said city, as ascertained by the last assessment prior thereto for state and county taxes. In the court below counsel for defendants took the position that the city, thus indebted by entering into said contract, created an indebtedness, within the prohibition of the constitution. In support of this position, the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, among others, was cited. In view of the fact that the respondents claim that this decision is conclusive of the questions here presented, and inasmuch as the appellant seeks to show that this case has been overruled, or, at least, should not, in the light of the facts here presented, be held to control the decision upon this appeal, we will examine the case of *Davenport v. Kleinschmidt*, and seek to determine if any of the questions therein decided are the same as those now presented.

The suit of *Davenport v. Kleinschmidt* was one for a perpetual injunction, brought against the mayor and aldermen of the city of Helena and George F. Woolston, to restrain them from carrying out a certain contract, alleged to be illegal, by laying water mains or erecting hydrants in the city, or by issuing any warrants for any water supplied to said city under said contract. Passing over those portions of the opinion given up to matters not now material, we come to a question like unto the one now before us. We quote as follows: "But is such a contract as that proposed by the ordinance in controversy actually forbidden by the charter of the city, as is contended by the respondents? Let us examine the charter, for the purpose of pointing out the precise section imposing the restriction. It is therein prescribed 'that said city shall not be authorized to incur any indebtedness on behalf of said city, for any

purpose whatever, to exceed the sum of \$20,000.' Section 17, as amended by Act 1883 (page 19, Charter). The allegations of the complaint, which, for the purpose of this case, are for the present taken as true, show the present bonded indebtedness of the city to be \$19,500, and the floating debt, consisting of outstanding warrants, to be \$15,000. No distinction is drawn in the charter between bonded debt and floating debt, and, from the figures presented, it clearly appears that the limit has been already reached, and that the city cannot incur any further indebtedness, until some of that outstanding has been discharged, or the limit enlarged by the legislature. Then if, by entering into the proposed contract, the city council would 'incur an indebtedness,' the same is plainly prohibited by the express terms of the charter." The court then goes on to interpret the term "indebtedness" as used in the city charter, and exhaustively reviews the decisions of Iowa, Illinois, and Indiana, wherein the meaning of constitutional provisions practically the same as those of section 6 of article 13 of the constitution of Montana is determined, and reaches the conclusion that the contract before the court involved a liability to pay money on a contingency morally sure to take place, irrespective of any action taken, or option exercised, by the city in the future, and so constituted an indebtedness such as was prohibited by the express terms of the charter. Among other cases cited from and commented on by the court in reaching this conclusion were *Water Co. v. Woodward*, 49 Iowa, 59, and *Grant v. City of Davenport*, 36 Iowa, 401. Counsel for appellant contend that these decisions were misinterpreted by the court in *Davenport v. Kleinschmidt*, and so, when carefully considered, do not support the conclusion drawn therefrom. Let us see if this is so. The supreme court of Iowa in *Water Co. v. Woodward*, supra, construing a constitutional provision almost identical with our own, says: "It is believed the constitution applies not only to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends on some contingency before a liability is created. But it must appear that such contingency is sure to take place, irrespective of any action taken, or option exercised, by the city in the future. That is, if a present indebtedness is incurred, or obligations assumed, which, without further action on the part of the city, have the effect to create an indebtedness at some future day, such are within the inhibition of the constitution. But if the fact of the indebtedness depends upon some act of the city, or upon its volition, to be exercised or determined at some future date, then no present indebtedness is incurred, and none will be until the period arrives, and the required act or option is exercised, and from that time only can it be said there exists an indebtedness." Commenting on the above,

this court in *Davenport v. Kleinschmidt* held that case analogous to the one then before it. Such, in our opinion, is true, in view of the conclusions reached; for it is to be noted that the Iowa decisions are in accord with the views expressed in *Davenport v. Kleinschmidt* to this extent, at least, that a contract for a water supply entered into by a city which has already exceeded the constitutional limit of indebtedness, and which water supply such city is not able to pay for out of its current revenues, together with its other current expenses, is a contract within the prohibition of the constitution. The Iowa court, however, goes further, and holds "that when the contract made by the municipal corporation pertains to the ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'the incurring of indebtedness,' within the meaning of the constitutional provisions." *Grant v. City of Davenport*, supra. But this court in *Davenport v. Kleinschmidt* refused to adopt the construction of this constitutional prohibition against incurring indebtedness, though urged upon its attention by counsel, but, on the contrary, approved the construction given by the courts of Illinois and other states to a constitutional provision practically the same as our own.

It is said that in *Davenport v. Kleinschmidt* it did not appear, as it does from the pleadings in the case at bar, that for each year since the making of the contract the city had levied and collected taxes in an amount sufficient to make the payments provided for in said contract, and to meet all the other liabilities and expenses of the city; but the authorities cited and approved by the court passed upon a like contention, and held it to be against the plain meaning of the constitution, and so without merit. Thus, in *City of Springfield v. Edwards*, 84 Ill. 626, the court say: "Appellant contends that when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not 'debts,' within the meaning of the prohibition of the constitution; and that temporary loans are not, when within the limits of the revenue expected to be realized. The first branch of this position has support in *Grant v. City of Davenport*, 36 Iowa, 396; *People v. Pacheco*, 27 Cal. 175; *Koplikus v. Commissioners*, 16 Cal. 253; *State v. McCauley*, 15 Cal. 455; *State v. Medbery*, 7 Ohio St. 522; and *State v. Mayor*, etc., of City of New Orleans, 23 La. Ann. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered,—thus discharging the liabilities as they arise, or rather anticipating and

preventing their existence. In considering what construction shall be given to a constitution or a statute, we are to resort to the natural signification of the words employed, in the order and grammatical arrangement in which they are placed; and if, when thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the instrument, then such meaning is the only one we are at liberty to say was intended to be conveyed. There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under consideration, and to give them that meaning involves no absurdity or contradiction with other clauses of the constitution. The prohibition is against becoming indebted,—that is, voluntarily incurring a legal liability to pay,—“in any manner or for any purpose,” when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute,—the debt exists,—and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else.” And, as if these propositions did not cover the question, the court went further, and held it unlawful for a city indebted beyond the constitutional limit to incur a liability for current expenses or for anything else, even though it should at the same time make a formal appropriation, within the limits of its revenue, to meet it; that to avail itself of current, but uncollected, revenue for such purpose it must go further, and assign the amount out of a tax actually levied, and without recourse, in such a manner as to “leave upon the city no future obligation, either absolute or contingent, whereby its debt might be increased.” *Prince v. City of Quincy*, 128 Ill. 443, 21 N. E. 768. In *Law v. People*, 87 Ill. 385, the case of *City of Springfield v. Edwards*, supra, is approved, the propositions above quoted therefrom are affirmed, and it is there declared that the inhibition of the constitution includes “indebtedness” of every kind and character, and in every sense of the term, no matter

what the form by which it is evidenced may be, when contracted or issued after the statutory limit is reached. In *Buchanan v. City of Litchfield*, 102 U. S. 278, 26 L. Ed. 138, and *City of Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, the construction placed upon that section of the Illinois constitution before the court in *City of Springfield v. Edwards* and *Law v. People*, supra, is approved. In the latter case, Mr. Justice Miller, speaking for the court, says: “The language of the constitution is that no city, etc., ‘shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.’ It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.” Such was the interpretation by the highest court in the land of this constitutional provision of the state of Illinois when our own constitution containing a like provision was adopted.

We have carefully examined those sections of our constitution wherein counsel for appellant claim an interpretation of the term “indebtedness,” as used in the constitution, may be found. The sections cited are by their terms applicable to the state alone. By them the limit of state indebtedness is fixed, as is the limit of taxation as well. In the case of cities, etc., the limit of indebtedness is fixed by the constitution, but the limit of taxation is fixed by the Code, and so subject to change. Why cities, etc., were not included within the terms of section 2, art. 13, and section 12, art. 12, we need not pause to inquire, since we find as to them an express provision, the meaning of which is now before us for determination. Nothing is said in the constitution as to the manner in which a city shall meet its current expenses. The inhibition is against a city becoming indebted in any manner or for any purpose to an amount exceeding a certain per cent. of its taxable property.

In view of these holdings, we can conceive of no possible ground for the supposed distinction between an indebtedness for current expenses, payable out of the current revenues, and one for the payment of which no provision has been made, and for which the city is generally liable. See, also, *Fuller v. City of Chicago*, 89 Ill. 262; *Fuller v. Heath*, Id.

296; *Howell v. City of Peoria*, 90 Ill. 104; *Prince v. City of Quincy*, 105 Ill. 138; *City of Chicago v. McDonald* (Ill. Sup.) 52 N. E. 982; *City of Helena v. Mills*, 36 C. C. A. 1, 94 Fed. 916; *Beard v. City of Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402; *Spillman v. City of Parkersburg*, 35 W. Va. 606, 14 S. E. 279; *People v. May*, 9 Colo. 404, 12 Pac. 839; *Niles Waterworks v. City of Niles*, 59 Mich. 311, 26 N. W. 525; *Sackett v. City of New Albany*, 88 Ind. 473; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Jay v. School Dist. (Mont.)* 61 Pac. 250.

Counsel for appellant next contend that, even if this court is of opinion that the case of *Davenport v. Kleinschmidt* supports the proposition that, by entering into the contract now before us, the city incurred an indebtedness such as is prohibited by the constitution, yet that case cannot be looked to as an authority, for the reason that it has been overruled by the case of *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15. We do not so read this last case. At the time the contract before the court in the *Great Falls Case* was entered into there existed an act of the legislature conferring upon cities the power to levy and collect a tax, not to exceed five mills on the dollar, for fire and water purposes. The court said: "This law was in force when Ordinance No. 17 was passed, approved, and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with rates prescribed in the ordinance contract, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five-mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder, and the legislature in said act contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose. The case of *Davenport v. Kleinschmidt*, supra, does not disapprove the Iowa cases holding that, because a general law provided for payment from a special fund, a liability incurred by a city to supply its inhabitants with water was not a 'debt,' in the sense of the term as employed in the constitution of Iowa, forbidding cities to incur debts in excess of a certain proportion of their assessable property. It was under different conditions of law and fact that the supreme court of the territory of Montana held in *Davenport v. Kleinschmidt* that the liability incurred by the city of Helena under its ordinance contract was a debt. This appears from a careful reading of the case."

The case of *Davenport v. Kleinschmidt* and the *Great Falls Case* stand for two different and distinct principles. The first is an au-

thority for the proposition that when a municipality has exceeded the constitutional limit of indebtedness a contract for a water supply, under which the city is liable generally, is the incurring of an indebtedness, within the meaning of the constitution, and the *Great Falls Case* is an authority for the proposition that such a contract does not create an indebtedness when the city making the contract is authorized by law to levy a special tax expressly for the payment of such contract liability. In a case falling within the first class, the liability of the city is general, and is payable out of all its revenues. Thus, in the case at bar, section 11 of the ordinance makes it the duty of the "city council during the term of five years to levy annual taxes under the provisions of the Political Code of the state of Montana authorizing the levy of taxes for general purposes, sufficient in amount to meet the appropriations hereby made," which, as appropriated by the same section, is the sum of \$1,500 per month for water furnished. In cases falling within the second class, the liability is special, and is limited to the amount of the special tax the levy of which is expressly authorized by law. So it may be said that the *Great Falls Case* approves, rather than overrules, the case of *Davenport v. Kleinschmidt*. See *City of Helena v. Mills*, supra. And it may be here noted that since the decision of the *Great Falls Case* the special tax for fire and water purposes therein considered has been abrogated by the adoption of the Codes, and the same conditions are now presented as existed at the time the case of *Davenport v. Kleinschmidt* was decided. *City of Helena v. Mills*, supra.

Counsel for appellant contend that the conclusions reached by this court in *Davenport v. Kleinschmidt* are in conflict with the decision of the supreme court of the United States in *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. With this we cannot agree. In the first place, it appears from a reading of the opinion in the *Walla Walla Case* that at the time the bill in equity was filed, and the preliminary injunction against the city was granted, the city of Walla Walla was not indebted to an amount in excess of the limit of indebtedness fixed in its charter. Commenting on limitations of this character, the court in the *Walla Walla Case* say: "The obvious purpose of limitations of this kind in municipal charters is to prevent the imprudent contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at lib-

erty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor. It is true that in the case of *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, it was held by this court that a similar provision in the constitution of Colorado was an absolute limitation upon the power to contract any and all indebtedness, including warrants used for county expenses, such as for witness and jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc. But the case is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defense being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but as it appears that the limit of indebtedness was \$50,000, and the amount of the city debt but \$16,000, it is clear that the payment of an annual rental of but \$1,500, would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness, a different question would be presented." The *Walla Walla* Case is an authority for the proposition "that the contract of a municipal corporation for a useful and necessary thing, such as water or light, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual compensation has been earned, but that, if the amount agreed to be paid in any installment in compliance with such contract transcends the amount of permitted indebtedness, the city is not liable therefor." *City of Helena v. Mills*, *supra*, and cases cited. With the city already indebted when the contract before us was made, in a sum largely in excess of the constitutional limit, how can it be said that the amount to be raised each year under the contract does not exceed the amount of indebtedness permitted by our constitution? A fortiori is this true when the water rent and the other expenses of the city for each year are taken together, as they must be, under our understanding of the constitution. If, by entering into the contract before us, an indebtedness was not created, what was the purpose of section 11 of the ordinance, wherein the city bound itself during the term of five years to levy annual

taxes under the provisions of the Political Code authorizing the levying of taxes for general purposes to pay for water supplied under the contract? It may well be said that this obligation in itself implied the existence of a debt in favor of appellant and against the city. It follows, from the view we have taken of the propositions before us, that the question asked in the beginning of this opinion must be answered in the affirmative.

2. The next question presented for our consideration is this: Does the amount now due and unpaid for water furnished to the city under the contract before us constitute an "indebtedness," within the meaning of the term as used in that section of the constitution above considered? This question is virtually answered by the conclusion we have already reached. Holding, as we do, that the contract itself is void, any obligation flowing from it is void also. This view accords with that portion of section 6, art. 13, *supra*, wherein it is declared "that all bonds or obligations in excess of such amount [the limit of indebtedness] given by or on behalf of such city," etc., "shall be void." Nor can it make any difference, in our opinion, that the city council, in accordance with the provisions of section 4874 of the Political Code or otherwise, appropriated \$18,000 or other sum to pay for water furnished under said contract for a given year. The contract out of which these liabilities arose being void, it necessarily follows that no lawful authority to pay them exists. As we have indicated, the liability of the city under the contract before us, if any existed, would be general, not special, and, were there no limit to the amount for which the city could become indebted, for a failure on the part of the city to meet its obligations for water rent as they fell due, the appellant could recover a general judgment against the city, and have a mandamus for the levy and collection of a tax to pay it. Counsel for appellant say that the logical result of holding that the constitution prohibits a contract for current expenses which a city can meet out of its current revenues together with its other current expenses is that the city government must end; that the city cannot pay one dollar out of its treasury for the necessities to sustain corporate life. Were it true that such dire results would flow from giving force to the plain terms of the constitution, it were better so than that this court should, by a loose construction of that instrument, endanger those sacred rights which by its terms are guaranteed to all the people. *Palmer v. City of Helena*, 19 Mont. 68, 47 Pac. 209. But that no such results need follow from the construction we give to this provision of our constitution is made plain by a consideration of the course pursued in those states where a like interpretation of a similar constitutional provision is adhered to. "The effect of this constitutional inhibition is to require

cities indebted to the limit fixed by the constitution to carry on their corporate operations, while so indebted, upon the cash or pay as you go plan, and not upon credit, to any extent or for any purpose." *Prince v. City of Quincy*, 128 Ill. 443, 21 N. E. 768. A way in which, under such circumstances, the operations of a city may be carried on is pointed out in *City of Springfield v. Edwards*, supra; and in commenting thereon in *Law v. People*, supra, the court say: "The theory is that a corporation which has reached the constitutional limit of its power to create indebtedness may, when a tax is levied, but not collected, draw against the fund thus levied and provided, although not in the treasury, and thus appropriate, and virtually assign, the amount specified in the warrant on the treasury to the person to whom it is issued and delivered, and that amount, being assigned or set apart to him, when collected, he has the right to receive, and it becomes the duty of the officers to collect and pay it to him; and, failing in their duty, he would have an action against them for its recovery. But, with a corporation thus situated, the legal effect of the issuing and receiving of the warrant is that the person receiving an assignment or appropriation of so much of the specific tax already levied, and against which the warrant is drawn, by receiving it discharges the corporation from all liability on account of the services or articles for which it is drawn, and agrees to look to the tax thus levied and appropriated, and to the officers, for his pay, and he thereby discharges the corporation from any and every kind of liability therefor. In such a case the warrant is given and received in full satisfaction for the services rendered or the material furnished." See *Lake Co. v. Rollins and People v. May*, supra.

From the view we take of the question considered, it follows that the answer to the second question must also be in the affirmative. This makes it unnecessary for us to pass upon the other questions presented on this appeal.

It may be the decision of this case will work a hardship upon those whose money has been the means of supplying the city with water for the time disclosed by the pleadings. In this regard, "it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases." *Buchanan v. City of Litchfield*, supra; *Sanford v. Gates*, 21 Mont. 277, 290, 53 Pac. 749; *Lake Co. v. Rollins*, supra. And in this connection it is to be observed that, where the powers of a city to incur indebtedness are limited, it becomes the duty of one who contracts with such a city, whereby an indebtedness is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness is in excess of the constitutional limitation. *French v. City*

of Burlington, 42 Iowa, 617; *Buchanan v. City of Litchfield*, supra.

The importance of this case, because of the questions and amount involved, and the rights necessarily to be determined, has led us to give it most careful consideration, and, after so doing, we are of opinion that the judgment of the court below should be affirmed; and it is so ordered. Affirmed.

BRANTLY, C. J., and PIGOTT, J., concur.

(7 Idaho, 367)

FREMONT COUNTY v. WARNER et al.

(Supreme Court of Idaho. Dec. 6, 1900.)

ESTOPPEL—ACCEPTANCE OF BENEFITS.

W., being found indebted to the county upon a settlement of his accounts as sheriff, compromised such indebtedness by giving his note for a certain sum, with the other defendants as joint makers. In an action upon such note by the county, defendant pleaded ultra vires, and that plaintiff had no authority to accept such compromise. Held, that the defendant, having accepted the benefit of the compromise, was estopped from pleading ultra vires.

(Syllabus by the Court.)

Appeal from district court, Fremont county; J. C. Rich, Judge.

Action by Fremont county against J. P. Warner and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hawley & Puckett, for appellants. F. S. Dietrich, for respondent.

HUSTON, C. J. This action was brought upon a promissory note made by defendants to plaintiff. The case was heard by the trial court upon the following stipulation of facts: "It is agreed that the facts herein involved are as follows: (1) That for the year 1895 and 1896 the defendant J. P. Warner was the duly elected, qualified, and acting sheriff of the plaintiff county. (2) That upon the expiration of his said term of office the plaintiff county made a claim against said defendant Warner for moneys amounting to over one thousand dollars, which it was claimed said defendant had received as such officer, and had not accounted for; that, upon the refusal of said defendant to pay the same, suit was instituted against said Warner, which said suit was pending in the district court of Fremont county at the date of execution and delivery of the note in question. (3) That there was at said time a dispute between plaintiff and said Warner as to how much, if anything, was due from said Warner to plaintiff, and the solvency and financial responsibility of said Warner and his bondsmen were in doubt. (4) That thereupon the attorneys for the respective parties, being authorized so to do, entered into a compromise settlement, by which it was agreed that there was due plaintiff the sum of \$525, and said suit should be dismissed in consideration of the defendants

agreeing to execute, and executing, an agreement to pay said sum at the time, and in the manner, and upon the conditions, stated and agreed upon in the note set out in the complaint. (5) That, pursuant to said agreement and settlement, defendants executed and delivered said note, and said suit was dismissed. (6) That no part of said note, either principal or interest, has been paid, except the sum of \$133.50 paid January 16, 1899, and plaintiff is still the owner and holder thereof. (7) That \$40 is reasonable as attorney's fee to be allowed herein, if plaintiff recovers in this action, and as a matter of law an attorney's fee is allowable. (8) The question sought to be raised by this stipulation and the contention of defendant is that said note and transaction was and is ultra vires, and the same is therefore not binding, but void. (9) This stipulation may be adopted as the court's finding of fact, and shall be a part of the record, on appeal from the judgment." Upon this stipulation of facts, judgment was rendered by the district court in favor of plaintiff, and against defendants, and from such judgment this appeal is taken.

It is claimed by appellants, first, that the action of the board of commissioners in taking the note of the defendants, in settlement of the claim of the county, was ultra vires and void. Without passing upon this question, it is sufficient to say that the defendants were competent parties, and, having received the benefits of the contract, they are now estopped from setting up the defense of ultra vires. This rule is so well established, and is consonant with every principle of equity and common honesty, that it needs no citation of authority to support it. Judgment of the district court affirmed, with costs to respondent.

QUARLES and SULLIVAN, JJ., concur.

(7 Idaho, 342)

CITY OF BOISE CITY v. UNION BANK & TRUST CO.

(Supreme Court of Idaho. Nov. 30, 1900.)

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—ISSUANCE OF BONDS—INTEREST AND SINKING FUND.

1. Where the city council provided by ordinance for the levy of an annual tax for the payment of all interest to accrue on funding bonds about to be issued, and also by such ordinance provided for the levy of an annual tax after the year 1900 to constitute a sinking fund for the payment of the principal of such bonds, which tax is amply sufficient for that purpose, the provisions of section 3, art. 8, of the constitution of Idaho, with reference to the levy of an annual tax to pay the interest on such bonds, and to create a sinking fund for the payment of the principal of the same, are complied with.

2. Held, under the facts of this case, that said bonds were legally issued, and that they created a valid indebtedness against said city.

(Syllabus by the Court.)

Appeal from district court, Ada county; George H. Stewart, Judge.

Action by the city of Boise City against the Union Bank & Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Oliver O. Haga, for appellant. C. C. Cavannah, City Atty., and N. M. Ruick, for respondent.

SULLIVAN, J. This suit arose out of the following facts: The respondent, the municipal corporation of Boise City, accepted appellant's bid for \$59,854.65 municipal funding bonds then about to be issued by said city. Respondent thereupon tendered to appellant the bonds so bid for, but appellant refused to accept and pay for them, for the reason that said bonds do not constitute a valid indebtedness against said city, for the reason that section 7 of Ordinance No. 311 of said city does not sufficiently comply with the requirements of section 3 of article 8 of the constitution of Idaho in the matter of constituting or providing a sinking fund for the redemption of said bonds as they become due. The facts of the case were stipulated by the respective parties, and appear in the record. Upon those facts, the case was submitted to the court below, and judgment was entered in favor of the city, from which judgment this appeal was taken.

The provisions of section 3 of article 8 of our state constitution, which, it is contended, have not been complied with by section 7 of Ordinance 311 of said city, are as follows: "No county, city, town, township, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding, in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state." Section 7 of said Ordinance 311 is as follows: "Be it further ordained that in order to provide a fund to pay the interest on such \$59,854.65 municipal funding bonds, as it falls due, and also to constitute a sinking fund on and after the year 1910, for the payment of the principal of such municipal bonds within twenty years from the date of the same, there shall be levied, assessed and collected, annually, upon all the taxable property within Boise City (in addition to all authorized

taxes), a special tax each year producing a sum sufficient to pay the interest falling due on such municipal bonds in that year, and when any of such bonds have been paid, then the sum of \$2,992.75 each year less the annual amount of interest on such municipal bonds as shall have been paid, and also producing the sum of \$5,985.46 additional each year on and after the year 1909, to constitute a sinking fund for the payment of the principal of such municipal bonds; said sinking fund to be separate and distinct from all other funds or moneys, and to be held and kept as a fund out of which to pay the principal of such municipal bonds, and to be held and safely invested, with the income thereof, in such manner as the mayor and common council from time to time shall direct, and the same or any part thereof may from time to time be applied in the discretion of said mayor and common council, to the redemption, in numerical order, after 1909, of any of such municipal bonds; it being the intention and purpose hereof to make full and adequate provision for the collection of an annual tax sufficient to pay the interest on such municipal bonds as it falls due, and also to constitute a sinking fund on and after the year 1910 for the payment of the principal of such municipal bonds and within twenty years from the time of contracting the debt evidenced by the same; and such special tax shall be levied, assessed and collected annually, as other city taxes are, and in addition thereto the faith and credit of, and all the taxable property within, Boise City are and shall continue pledged, and the proper officers of Boise City shall continue to assess and collect such special taxes on all taxable property within the limits of Boise City and shall apply such special tax solely to pay such municipal bonds and the interest thereon until the same are fully paid. Should the special tax levied and collected for the payment of the interest on such municipal bonds or the principal thereof, or both, not be sufficient for the same, then such interest or principal, or both, shall be paid out of the general fund of Boise City, and should there be any surplus of said special tax moneys remaining after the principal of such municipal bonds, and all the interest thereon, have been fully paid, then such surplus shall be paid over to the general fund of Boise City."

The questions submitted for decision are as follows: "(1) Have the provisions of section 3, art. 8, Const. Idaho, been sufficiently complied with, in the issuing of said bonds hereinbefore described, in the matter of constituting a sinking fund for the payment of the principal thereof, within twenty years from time of issue? (2) Have the provisions of the constitution and laws of the state of Idaho been sufficiently complied with, in the matter of the proposed issue of the \$59,854.65 municipal funding bonds of Boise

City, Idaho, hereinbefore referred to and described, and are said bonds valid?"

Appellant contends that said provision of the constitution requires the levy and collection of a tax each year after the issuance of such bonds, to constitute a sinking fund for their payment, and that as said ordinance does not authorize or direct the collection of a sinking fund for the payment of the principal of said bonds until 1909, and annually thereafter until said bonds are paid, it does not meet the requirements of the provisions of said section 3 of article 8 of the constitution. Said section of the constitution provides that before or at the time of incurring the indebtedness provision must be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within 20 years from the time of contracting the same. We think the clear intention of said provisions of the constitution has been substantially complied with by the provisions of said ordinance in providing for an annual tax sufficient to pay the interest as it accrues on said indebtedness, and the provision therein for creating a sinking fund for the payment of the principal of said indebtedness within 20 years from the time of creating the same will accomplish that purpose, and is in substantial compliance with said provision of the constitution. We therefore conclude that the provisions of section 3 of article 8 of our state constitution have been complied with in the issuing of said bonds, and in the matter of constituting a sinking fund for the payment of the principal thereof within 20 years from the time of contracting the same, and that in the proposed issue of said \$59,854.65 of municipal funding bonds the provisions of the constitution have been complied with, and that said bonds are valid indebtedness against said city. The judgment of the court below is affirmed, with costs in favor of respondent.

HUSTON, C. J., and QUARLES, J., concur.

(7 Idaho, 348)

MALE et al. v. LEFLANG et al.

(Supreme Court of Idaho. Dec. 1, 1900.)

WATER RIGHTS—IRRIGATING DITCH.

1. The defendants having purchased a tract of land together with a certain ditch and water rights upon which plaintiffs held a mortgage, default being made in the payments secured by the mortgage, the attorney of plaintiffs, to avoid delay and expense of foreclosure, agreed with the defendants, if they would convey the title to said property to plaintiffs, he (the agent) would give them the right to enlarge the said ditch so as to bring the water to the tract of land subsequently purchased by the defendants, and through which said ditch ran, and to take water therefrom for the purpose of irrigating such land. Defendants, having execut-

ed the deed, proceeded to enlarge said ditch and utilize said water as agreed. In an action by plaintiffs to enjoin defendants from using said ditch or water, *held*, that under the provisions of section 6008, Rev. St., the defendants were entitled to enlarge said ditch and utilize said waters as agreed.

2. *Case of McGinness v. Stanfield* (Idaho) 55 Pac. 1020, distinguished.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Action by William H. Male and Merrit A. Comstock against Ingsborg H. Leflang and Otto H. Leflang. Judgment for plaintiffs. Defendants appeal. Reversed.

L. L. Sullivan, for appellants. Bruner & Bruner, for respondents.

HUSTON, C. J. This is an action brought by plaintiffs against defendants to enjoin them from taking water from or interfering with a certain ditch located in Blaine county, and taking water from Big Wood river, and for damages. The facts, as they appear in the record, are substantially as follows: One Yager, being the owner of the certain tract of land described in the complaint as now being owned by the plaintiff Male, being 400 acres, mortgaged the same to said Male, or the New York Loan & Trust Company, or both together, with his interest—being two-thirds—in the ditch conveying water onto said land from Big Wood river. Yager subsequently to the making of the mortgage, but whether after or before default was made does not appear, sold the property to defendants. Default having been made in the payments secured by the mortgage, proceedings were, or were about to be, commenced to foreclose the same. Defendants having purchased a tract of land lying above the tract purchased by them of Yager, and upon and along the same ditch, and being unable to pay the mortgage, one P. M. Bruner, acting as the attorney of the mortgagees, made a proposal to defendants, to deed the property to the mortgagees or to Male. There is considerable conflict in the testimony as to the nature and terms of the agreement resulting from this proposal. The defendants both testify that they positively refused to sign the deed required by Bruner, unless he would give them the right to enlarge the ditch so as to carry 200 inches more water, and that it was upon this consideration, and this only, that they signed the deed; and in this contention the defendants seem to be quite fully sustained by Leon Fuld, the notary public whom Bruner had taken with him to take the acknowledgment of the deed from the defendants. Bruner insists that he only agreed to use his influence with said mortgagees to secure such right to the defendants, and that he told defendants, as an inducement to them to make the deed, that if, as defendants claimed, the land was worth little or nothing, then “we [the mortgagees meaning] would certainly have a deficiency judgment docketed up

against you” (the defendants meaning). Just how Mr. Bruner was going to manage to get a deficiency judgment against the defendants, who were not parties to either the note or mortgage, but simply purchasers of the legal title, is not entirely clear. It must not be overlooked that at the time this right to enlarge the ditch is alleged by the defendants to have been given the defendants held the title to both the land and the ditch. And we think the weight of the evidence is in favor of the contention of the defendants that the signing of the deed conveying the title to Male was the consideration they paid for the right to enlarge the ditch, and convey water through the same. Certainly, the granting of the right could in no way injure the plaintiffs. Their land was situate below that of defendants, and it was not intended by defendants to interfere with the ditch upon the land of plaintiffs. The supply of water from Big Wood river appears to be abundant for both. To deprive defendants of the water, without the use of which their land would be valueless, would, it seems to us, under the circumstances developed by the record, be most inequitable and unjust. Mr. Bruner himself says he sees no good reason why the right should not be given to defendants, provided they enlarge the ditch; but he avers that they have not done so. Upon this latter question the testimony is conflicting. We have examined it with much care. Some of the witnesses evince a degree of animosity against the defendants not entirely consistent with a desire to aid in meting out that “even-handed justice” which is so desirable and commendable. We are inclined to take the testimony of the witness Frank Mandel as the most convincing and satisfactory upon this question. He is evidently unprejudiced and fair-minded, is thoroughly competent to testify upon the subject; more so, doubtless, than any other witness who testified upon the question. He is a civil engineer by profession, is county surveyor, and he says: “I have measured the amount of water flowing in that ditch. I measured the water at a point about a quarter of a mile above the Leflang house in the field on the 5th day of July, 1899, and found that there were 350 miners’ inches in the ditch. The ditch would carry over 500 inches of water at that point, I figured. At the time I measured, the water line showed that the water had been two inches deeper a short time before; and that would make (in the same proportion that I found there)—would make the quantity of water equal to 500 miners’ inches (10 cubic feet) per second. The ditch would carry 500 inches of water to the upper end of Leflang’s field.” The facts in this case, as they are shown by the record, bring it clearly within the provisions of section 6008, Rev. St. Idaho, and do not come within the rule laid down in *McGinness v. Stanfield* (Idaho) 55 Pac. 1020. In that case we held that “under the statutes of Idaho a verbal contract for the sale or transfer

of real estate is not admissible in evidence against a stranger to such contract,"—a very different case. The judgment of the district court is reversed, and the cause remanded, with instructions to the district court to enter judgment in accordance with the prayer of defendants' cross complaint. Costs awarded to appellants.

QUARLES and SULLIVAN, JJ., concur.

(7 Idaho, 335)

GIVENS v. KEENEY et al.

(Supreme Court of Idaho. Nov. 30, 1900.)

CONTRACT—CONSTRUCTION—MOTION FOR NONSUIT.

1. An obligation, in case of ambiguity, should be construed in the light of the surroundings of the parties thereto.

2. A motion for nonsuit upon the ground that "plaintiff has shown by his own evidence that he has no right of recovery in this action" was properly overruled, as the statement of said ground is too vague, uncertain, and indefinite to entitle the same to consideration.

(Syllabus by the Court.)

Appeal from district court, Bingham county; J. C. Rich, Judge.

Action by J. W. Givens against J. W. Keeney and George A. Robethen. Judgment for plaintiff. Defendants appeal. Affirmed.

Winters & Guheen, for appellants. F. S. Dietrich and J. M. Stevens, for respondent.

QUARLES, J. This appeal is taken from the judgment in favor of the plaintiff in the lower court, John W. Givens, upon the following instrument, to wit:

"Know all men by these presents, that whereas, the plaintiff herein and his wife, Grace N. Beane, did on or about March 20th, 1895, execute and deliver to the defendant their certain promissory note (secured by chattel mortgage), in words and figures the following, to wit: '\$345.00. Blackfoot, Idaho, March 20, 1895. Nine months after date, without grace, for value received, I promise to pay to the order of Jno. W. Givens three hundred and forty-five dollars, negotiable and payable at the banking house of C. Bunting & Co., of Blackfoot, Idaho, without defalcation or discount, with interest at the rate of one per cent. per month from date until paid, both before and after judgment, interest payable every three months; and, if suit be instituted for the collection of this note, I agree to pay such an additional sum as the court may judge reasonable attorney's fees. Frank W. Beane. Grace N. Beane.'—and whereas, a temporary injunction was heretofore issued herein restraining from proceeding to enforce the payment of said note and mortgage; and whereas, said order of injunction was, on the 27th day of March, 1896, vacated and dissolved by the honorable judge of said court; and whereas, the plaintiff is desirous of staying the payment of said note and mortgage until after the trial of this cause, or the dis-

missal thereof: Now, therefore, in consideration of the premises and the stay of proceedings to enforce the payment of said note and mortgage as aforesaid, we, the undersigned, are held and firmly bound unto the defendant John W. Givens, and jointly and severally promise and agree to pay to said Jno. W. Givens and his assigns the amount of said note now due or to become due, in accordance with the terms thereof, after deducting therefrom the amount of the judgment, if any, which the plaintiff may finally recover herein against the defendant upon the cause of action set forth in the complaint. And we further promise and agree to pay such sums as the court shall adjudge reasonable, if suit be instituted to enforce the obligation, as attorney's fees for services in and about such suit. It is further understood and agreed that in accepting this obligation the defendant agrees only to stay proceedings upon said note and mortgage, and that he does not waive any of the rights or remedies thereunder, and that, after judgment in this action, he may proceed either upon said note and mortgage or upon this obligation, at his option; and in giving this undertaking the said Beane and wife do not waive any rights to question the validity of this note and mortgage as having been obtained by fraud. Geo. A. Robethen. J. W. Keeney.

"State of Idaho, County of Bannock—ss.: George A. Robethen and J. W. Keeney, being first duly and severally sworn, each for himself says that he is a resident freeholder of Bannock county, Idaho, and is worth the sum of six hundred dollars over and above his just debts and liabilities, exclusive of property exempt from execution. Geo. A. Robethen. J. W. Keeney.

"Subscribed and sworn to before me on this 28th day of March, 1896. Thos. F. Terrell, Notary Public. [Seal.]"

The circumstances under which the said obligation was given are as follows: Said Givens held the note set forth in said obligation, quoted above, to secure the payment of which said Frank W. Beane and his wife, Grace N. Beane, executed to said Givens a certain chattel mortgage. After the said note and mortgage became due, and while said Givens, the mortgagee therein, was threatening to foreclose said mortgage by notice and sheriff's sale, without action, the said mortgagor Frank W. Beane commenced an action in the district court of the Fifth judicial district in and for Bingham county seeking to recover a judgment upon three several actions for debt, aggregating in all the sum of \$500, against said Givens. The complaint in said action also contained a fourth and separate cause of action, wherein it was alleged that the said note and mortgage were procured from said Beane and wife fraudulently by said Givens. Said plaintiff Beane asked judgment for the amount of his several alleged debts, and also for an injunction re-

straining said Givens from foreclosing the said chattel mortgage by notice and sheriff's sale, and that said mortgage and note be adjudged fraudulent, and that the same be canceled, and held for naught. A temporary injunction was issued, restraining Givens from proceeding to enforce the said chattel mortgage, and the same was dissolved, as recited in the above-quoted obligation. This action went to judgment, and the plaintiff Beane obtained judgment, which upon appeal to this court was reversed. See 51 Pac. 987. Upon a new trial in the district court judgment was rendered in favor of the defendant therein, John W. Givens, upon his cross complaint, based upon said note and chattel mortgage, for the sum of said note and accrued interest, and decreeing a foreclosure of said chattel mortgage upon the property therein mortgaged, except the piano, folding bed, sewing machine, kitchen range, books, and book shelves, to satisfy said indebtedness. Said exception from the operation of said mortgage was made by the district court upon the ground that said piano, etc., were the separate estate of the wife, Grace N. Beane, who did not, separately and apart from her said husband, acknowledge the execution of said mortgage. After judgment in said action, and prior to the commencement of this action, the said defendant Givens made demand upon said obligees, George A. Robethen and J. W. Keeney, that they pay the amount of the judgment recovered by him against said Beane, and said Givens there and then offered to assign to the said obligees the said note and mortgage and judgment of foreclosure into which they had been merged, but said obligees refused to pay said amount of said judgment, whereupon the said Givens commenced this action upon said obligation to recover the amount of said note, \$345, with interest thereon from March 20, 1895, at the rate of 1 per cent. per month, less \$20 interest paid thereon; and the further sum of \$100 attorney's fees. Upon the trial the plaintiff in this action, John W. Givens, recovered judgment against the said defendants George A. Robethen and J. W. Keeney in the sum of \$425, and costs amounting to \$13.40, from which this appeal is taken. The appellants specify three errors, as follows: "(1) The court erred in overruling the demurrer of appellants to the respondent's complaint as amended. (2) The court erred in denying appellants' motion for a nonsuit at the close of respondent's testimony. (3) The court erred in making and entering findings and judgment against the appellants."

Appellants contend that the obligation aforesaid, which they claim is a guaranty, was given in consideration of the plaintiff agreeing to forbear to foreclose the chattel mortgage by notice and sale, and that that was the only consideration. The appellants contend that there was an absolute want of consideration, for the reason "that there is no law in the state of Idaho authorizing any

such proceedings." This contention involves the validity of section 3390 et seq., Rev. St., which they contend are void. Much of appellants' brief is devoted to this question, but we do not deem it necessary to seriously consider this point. The validity of said statutes has been repeatedly recognized in the jurisprudence of this state, and we see no reason now for holding said statutes invalid. The complaint substantially set forth in detail the facts hereinbefore abbreviated. We think that the court properly overruled the demurrer to said complaint.

The said obligation seems somewhat ambiguous, but a casual reading of the obligation sued upon, considering the conditions and circumstances under which the same was given, is sufficient to show the consideration for said obligation. That consideration was that said Beane should have ample time and opportunity to have the three different claims for debt which he was asserting against said Givens, and the validity of the said note and mortgage, adjudicated before said Givens should enforce by legal process his rights under the said note and mortgage. There was no failure of this consideration. The very action commenced by the mortgagor, Beane, demanded an adjudication upon the question of the validity of the said note and mortgage. Under our Code of Civil Procedure (sections 4183-4185, Rev. St.) the defendant, Givens, was called upon, and it was his duty so to do, to set up by way of cross complaint or counterclaim his said note and mortgage, and to have his rights thereunder adjudicated. This he did. It is unreasonable to contend that the obligees in the obligation sued upon understood, or had any reason to understand, that the rights of the said Givens under the said note and mortgage were not to be adjudicated in the said action. That action necessarily would result in a judgment that the defendant, Givens, take nothing by reason of his said note and mortgage, or that he was entitled thereunder to a certain sum for which judgment of foreclosure would be entered.

It is contended by the appellants that the respondent, Givens, through his attorney, agreed that certain of the mortgaged property should be exempted from the operation of said mortgage, and that this lessened his security, by reason of which fact said obligees are released from their obligation of guaranty. A careful consideration of the record convinces us that this contention is not sustained. The action of the court in exempting the piano, etc., on the grounds above stated, was correct, under the law and evidence of the case.

At the close of the trial the appellants moved for a nonsuit, upon the following grounds, to wit: "(1) Plaintiff has shown by his own evidence that he has no right of recovery in this action. (2) That the undertaking or instrument sued upon contains an option in regard to the foreclosing of the mortgage or

bringing an action on undertaking; and plaintiff has used said option by foreclosing the mortgage, and is, therefore, estopped from maintaining an action on the undertaking." This motion was overruled by the court, and upon this action of the court the second assignment of error is based. The first ground of the motion set forth above is too vague, uncertain, and indefinite. The motion upon that ground is properly overruled for that reason. The second ground for the motion involves a construction of the obligation, and one which is also involved in passing upon the demurrer to the complaint. As before stated, a proper construction of said obligation, the conditions and circumstances under which the same was given being considered, is that all parties thereto contemplated that the action then pending, and in which said obligation was given, should proceed to final determination. We are of the opinion that the option mentioned in said obligation is the one which was exercised by the respondent, Givens, when he elected to sue upon said obligation rather than proceed under the judgment of foreclosure which he had obtained in the former action. The second ground of nonsuit was not well taken. The motion for nonsuit was properly overruled.

We have carefully examined the findings on the judgment in this case, and are of the opinion that said findings were supported by the evidence, and that the pleadings support the findings and the judgment; wherefore the judgment appealed from is affirmed. Costs awarded to respondent.

HUSTON, C. J., and SULLIVAN, J., concur.

(7 Idaho, 355)

JOHNSON et al. v. OREGON SHORT-LINE R. CO.

(Supreme Court of Idaho. Dec. 5, 1900.)

DOMESTIC ANIMALS — FENCES — RAILROAD CORPORATIONS—POLICE REGULATIONS—DAMAGES — ANIMALS KILLED — PRIVATE PROPERTY.

1. The common-law rule that a man must confine his own domestic animals to his own inclosure has never obtained in this state.

2. The statute requiring railroad companies to fence their right of way where the same is contiguous to private property is a police regulation adopted to protect human life and property for the benefit of the general public, and not for the sole benefit of adjoining or contiguous landowners.

3. A homestead entry, after it is entered, is private property, within the meaning of the statute requiring railroad companies to fence their track when their right of way "passes through or along or abuts upon or is contiguous to private property."

4. In an action to recover damages for horses killed by a railroad company, it was clearly shown that, if the railway company had fenced its track as required by the statutes, plaintiffs' horses would not have wandered upon the railroad track and been injured. *Held*, that a verdict for plaintiffs was proper, and should not be disturbed.

(Syllabus by the Court.)

Appeal from district court, Bannock county; J. C. Rich, Judge.

Action by Enoch Johnson and others against the Oregon Short-Line Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

P. L. Williams and F. S. Dietrich, for appellant. Winters & Guheen, for respondents.

QUARLES, J. This action was brought by the respondents to recover from the appellant the value of seven head of horses which the appellant's train of cars ran over, mangled, and killed. The case was tried to a jury, which found a general verdict in favor of the plaintiffs for damages in the sum of \$340. The jury also found the following special verdict: "We, the jury in the above-entitled cause, find as follows upon the special questions submitted to us: Q. 1. Did the horses in question come upon defendant's track or right of way, last before they were struck, from government land, or from land, entry, or claim of some private person? A. 1. Private or entered land. Q. 2. If you answer that the horses last came upon defendant's track or right of way from the land, claim, or entry of a private person, state the name of such person. A. 2. Gibson. Q. 3. From which side of defendant's right of way did the horses last come upon the track before being killed? A. 3. Northeast. Q. 4. About where (describe where) the horses last came upon defendant's track? A. 4. Gibson, and followed track to place of killing. Q. 5. Were any of defendant's trainmen negligent or careless in handling or managing the train in question? A. 5. No negligence. Q. 6. If you answer number 5 'Yes,' state which one of said trainmen. A. 6. —. Q. 7. If you answer number 5 'Yes,' state in what respect or how such trainmen were careless or negligent. A. 7. —. J. B. Hicks, Foreman."

Appellant specifies three errors, to wit: (1) "The action of the court in overruling its demurrer;" (2) "the action of the court in denying its motion to strike;" (3) "the action of the court in overruling appellant's motion for a new trial." The first paragraph of the complaint alleges the corporate capacity of the appellant. The second paragraph is as follows: "That at all the times when, and at all the points where, the acts of negligence and damage hereinafter set out and complained of were committed and occurred, the track, right of way, and property of the defendant company passes and then passed through and along and abutted upon and was contiguous to private property, such that the defendant company then was and is required by law to make and maintain a good and sufficient fence on both sides of its track and property, but that said defendant has at all times failed, neglected, and refused to make or maintain a good or

any fence on both or either side of its said track, property, or right of way, where the same passes and passed through said private property, except for a very short distance on the north side of its said track; that said defendant company never paid to the owners of said land, or to any one, any price or reward for, or cost of, making or maintaining any such, or any fence; that the plaintiff Enoch Johnson then and there was, and now is, the owner of, and in the actual possession of, the north one-half of the north one-half of section three in township nine south, of range forty east of Boise meridian, in said Bannock county, the same being a part of the said private lands through which the said track, property, and right of way of said defendant company passes and did pass as aforesaid, and the horses of plaintiffs hereinafter more particularly described, were at the time, as hereinafter mentioned, grazing upon said land of said plaintiff Enoch Johnson by his consent and permission." The third paragraph of the complaint, after particularly describing said horses and alleging their value, then avers: "And which horses, and each of them, casually, on said date, and without any fault of the plaintiffs, or either of them, but by reason of the failure, neglect, and refusal of the defendant company to securely fence the said track and property as required by law, as hereinbefore set out, strayed in and upon the track and grounds occupied by the railroad of said defendant company, at a point near the center of the north half of section three in township nine south, of range forty east of Boise meridian, in said Bannock county, and where the said line of road of the said defendant company passes through the said lands of the plaintiff Enoch Johnson." The complaint then avers that the defendant, through its servants and agents, ran its locomotives and cars against and over the said horses, and there destroyed and killed said horses, to the damage of plaintiff in the sum of \$415. And for a second cause of action the plaintiffs, after reiterating the first three paragraphs of the complaint, further alleged as follows: "That the line of the track of said defendant company at the said point where the said horses came upon the said track is and was almost straight, there being no curves or cuts to obstruct the view of the enginemen and trainmen for several miles in either direction, and the said enginemen and trainmen could, with reasonable diligence, observe and see the said horses a sufficient distance from said train to have prevented striking or injuring the same, but the said agents and servants of said defendant company negligently, carelessly, and recklessly and without any reason therefor, so handled, managed, and ran said train, cars, and locomotives as to run and chase the said horses, and each of them, along and upon said track of defendant company for about one mile, and ahead of

said train, and then ran said locomotives and cars against, upon, and over the said horses, and each of them, and killed and destroyed the said horses, and each of them, except the said brown mare, which was thereby maimed and bruised so as to absolutely ruin the said mare, and as a result thereof she is of no value, all of which is to the damage of plaintiffs in the sum of four hundred and fifteen dollars."

To the complaint the appellant filed a demurrer upon the grounds that it did not state a cause of action; that neither the first nor second causes of action stated facts sufficient to constitute a cause of action; that paragraph 2 in the first cause of action is ambiguous and uncertain, in that it does not clearly show whether defendant's right of way passed through or abutted upon private property, or that it was the duty of the defendant to fence both sides of its right of way at the point or points in question,—and pointed out other particulars in which it claimed that said complaint was uncertain. This demurrer was overruled by the court, and this action of the court is the basis of appellant's first assignment of error. Upon this point it is argued by counsel for the appellant, with much force and earnestness, that the statutes requiring railroad companies to fence their right of way where it runs through or abuts upon private property is not a police regulation, but enacted for the benefit solely of abutting landowners. Counsel for appellant argues with much seriousness that the demurrer should have been sustained because the complaint did not state with certainty, at the points upon the appellant's right of way in question, whether the abutting lands were owned by private parties in fee simple, or whether said lands were public lands in the possession of, and inclosed by, private individuals. This contention of counsel appears to us to be purely technical. But, to understand the grounds of this contention, we must keep in mind the provisions of the statute relating to fencing of rights of way of railroad companies, viz. section 2679, Rev. St., which is as follows, to wit: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track or property, whenever the line of their road at any time passes through or along, or abuts upon, or is contiguous to, private property or enclosed land in the actual possession of another. Railroad corporations paying to the owner of the land through or along which their road is located, an agreed price, for making and maintaining such fence or paying the cost of such fence with the award of damages allowed for the right of way for such railroad are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being up-

on their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents or employees." We will consider the first and third assignments of error together, as both raise the question not only of the sufficiency of the complaint, but as well that of the special verdict and the agreed evidence in the case.

We think the averments of the complaint, as well as the special verdict, make it clear that the point where said horses strayed upon appellant's track is upon private property, within the meaning and intent of said statute. It is equally clear, from the allegations of said complaint and from said special verdict, that at said point the appellant had not fenced its right of way as required by the statute. From the map made by the engineer of the appellant company, which was used upon the trial, and which is brought here by appellant by the consent of respondents, it appears that said horses came upon appellant's right of way at a point marked "11" on said map, which is upon the homestead entry of James A. Gibson, and which was entered October 22, 1898; that from this point said horses proceeded along the right of way of the appellant some two miles or more, in an easterly direction, near a cattle guard, where they were killed. It is argued on behalf of the appellant that private property does not include a homestead entry prior to patent. We cannot agree with this contention. The laws of this state recognize such entry as private property, and make the certificate of entry primary evidence that the holder thereof is the owner of the lands therein described. See section 5983, Rev. St. The words "private property" in section 2679, Rev. St., quoted above, have no reference to the title as between the private owner and the government of the United States, but relate solely to the railroad corporation and the private owner. As between the railroad company and the homestead entryman, the latter, after entry, is the owner, and the homestead entry is private property.

Nor can we agree with the contention of the appellant that said statute (section 2679, Rev. St.) was enacted solely for the protection of private abutting owners of lands. We have carefully examined the authorities cited upon this point by the appellant, and do not regard them as establishing the rule contended for. It is true that the supreme court of California, in *Enright v. Railroad Co.*, 33 Cal. 230, seems to hold to this rule. But the other authorities cited by appellant, to wit, *Pierce*, R. R. 344; *Redf. R. R.* 373; *Hurd v. Railroad Co.*, 25 Vt. 116; *Tombs v. Railroad Co.*, 18 Barb. 583,—do not sustain this contention. The decision in *Hurd v. Railroad Co.*, *supra*, is based largely upon the old English common-law rule that every man must confine his own cattle to his own land,—a rule that has never obtained in

this state. These authorities hold that where, by contract with the railroad, or for other reason, it has become the duty of the abutting or contiguous owner to fence, as between him and the railroad, his neglect in that respect does not relieve the railroad from its duty to fence when required by statute, but does relieve it from damages for stock of such abutting owner killed through his neglect to fence, or to make a sufficient fence. Mr. Pierce, in his work on Railways (one of the authorities cited by counsel for appellant), at pages 414 and 415, says: "The statute may, however, be construed to be a general police regulation, designed not merely for the benefit of adjoining owners, but for the protection of property in domestic animals generally, and for the safety of passengers who would be exposed to peril of collisions with cattle coming upon the track. When the statute is deemed to be of this character, the company is held to be under a general obligation to the public, and not under a limited obligation to adjoining land-owners; and, when in default for not complying with the statute, it is liable for injuries to cattle unlawfully on the adjoining land, and coming therefrom upon its track. It is held chargeable with a breach of public duty, and liable to all persons suffering injury from its default." Mr. Redfield says: "The building of fences along the line of a railway track is, no doubt, in regard to the security of travel thereon, to be regarded as a matter of police, and a duty which the company cannot shift upon others by contracts to maintain such fences." 1 Redf. R. R. 494. Mr. Elliott, in his work on Railroads, at section 1182, says: "The running of railway trains and locomotives is necessarily attended with many dangers. This results from the great force used, the large bodies placed in motion, and the rapidity with which trains are run. The object of a railway being the carrying of passengers and freight from place to place, and as the performance of such an object is necessarily attended with many dangers, it follows that every practicable safeguard should be used and every caution taken to prevent injury to persons or property carried. One of the sources of danger to railway trains is from collisions with animals on the track. Such danger has been recognized by nearly all our state legislatures, and their statutory enactments are for the purpose of reducing this danger as much as possible. Where any particular kind of property is inherently dangerous, or the operation of certain property is necessarily dangerous, it is within the power of the state, under what is called its 'police power,' to prescribe such regulations in the use of such property as will render consequent danger small as possible. Since imposing upon railway companies the duty of fencing their tracks is for the sole purpose of lessening the danger in running trains, it is held that the enactment of such fencing

statutes is a valid exercise of the police power, and it is upon that power that such statutes rest." And at section 1190 of the same work Mr. Elliott further says: "Statutes requiring railway companies to erect and maintain fences along their rights of way rest, as we have heretofore seen, upon the police power of the state. The exercise of the police power of the state by the enactment of police regulations is for the benefit of the whole public, as a general rule. And, since statutes imposing the duty to fence upon railway companies rest upon the police power, it follows that they are for the benefit of the general public, and to this effect is the almost unanimous weight of judicial authority. Such statutes are not intended merely for the protection of the adjoining landowners, unless it clearly and unmistakably appears from the language used that it was the intention of the legislature to protect only such owners. Where the animals are unlawfully on the adjoining premises, from which they escape to the company's track, there is some conflict in the authorities as to whether or not the company is liable to the owner of such animals. The weight of authority is to the effect that the company may be liable in such cases, and this we believe to be the correct rule, although there are some authorities which hold that the company is not liable. Where the animals are on the adjoining premises by consent of the owner of such premises, there is no question as to the liability of the company." Under the authorities, we do not feel authorized to hold that the statute requires fencing merely for the protection of adjoining landowners. When the statute was enacted, Idaho was a sparsely-settled territory. Large sections were unsettled, with practically no cattle or stock running at large. The legislature evidently thought it would be too great a hardship to compel railway companies to fence their tracks through the territory, and only required it in the settled portions, where horses and cattle would be found in large numbers. When we passed into statehood through the provisions of the constitution, we continued the statute in force. We cannot conclude that the legislature exercised this police power, which is so necessary for the protection of human life and private property, for private abutting or contiguous landowners only, but must conclude that it was enacted for the good of the general public.

We think that it sufficiently appears from the complaint in this action, from the special verdict of the jury, and from the agreed facts, and that part of the evidence which is in the record before us, that the loss sustained by the respondents was occasioned by the neglect of the appellant to fence its track at points where it is required by the statute to fence. It is true that the evidence fails to disclose whether the land at the particular point where the horses were killed was

private property, or public lands of the United States. Yet it clearly appears that the private lands of the respondents jointly, by their own fences and connecting fences of William Banks and James A. Gibson, inclosed all of the respondents' lands north of appellant's track, with the exception of the southerly side thereof, adjoining said railroad track, and that, if the appellant had fenced its track as required by said statute, respondents' lands, jointly with those of said Gibson, north of said track, would have been entirely inclosed; hence it is apparent that the loss of respondents resulted primarily from the neglect of the appellant to fence its track at points where it is required by law to fence. If the appellant had obeyed the police regulation adopted by the statute, —had fenced its track with a sufficient fence as required by the statute,—this loss would not have been sustained by the respondents. For these reasons, the verdict should not be disturbed.

The case at bar is very much like the case of *Patrie v. Railroad Co.*, decided by this court, and reported in 56 Pac. 82, and, we think, should be determined by the rules therein enunciated. In that case this court said: "The controlling contention is whether, under the facts, the defendant is liable in damages because of its failure to fence its track at the points where said horses were killed. The provisions of the statutes controlling this matter are found in section 2679, Rev. St. * * * Counsel for appellant contend that the legislative intent in the enactment of section 2679 was to require railroad corporations only to fence their roads whenever, on either side, the same are contiguous to private property which is inclosed, or to land which is not actually owned by the one who is using it, or is in the actual possession thereof and has it inclosed. * * * If the provisions of said section require the defendant corporation to fence its track wherever and whenever it runs through land owned by private persons, the judgment must be sustained. The intent of the legislature in enacting said section must be arrived at from a literal construction, if such construction would not result in an absurdity or inconsistency. The statute declares that a railroad corporation must make and maintain a good and sufficient fence on either or both sides of their track or property, wherever the line of road passes through or along, or abuts upon, or is contiguous to private property or inclosed land in the actual possession of another. The record shows that said track passes through private property, and we think the statute, as applied to the facts of this case, is too clear to require any construction. To hold that it does not require the defendant corporation to fence its track except when and where a private person may fence his land would be injecting language into said section that is not found there, and could not be put there by a fair implication

and reasonable construction. We think the record fairly shows that if the said track had been fenced where it passes through said sections 29, 20, and 17, said horses would not have been killed. It may be said that building a fence on the east side of said track, where it passes through said private property, would be no protection to stock; that stock could pass around the ends of such fence and get upon the track. The fencing of the railroad track, when required by statute, where it passes through private property, as in this case, implies the construction of sufficient cattle guards at the ends of such fences. 3 Elliott, R. R. § 1198, and notes. We think the record shows that said horses would not have been killed where and when they were killed if the defendant had maintained such a fence as the law requires. It is contended by counsel for appellant that there is no proof that said horses came upon the track at a point where the company was required to fence. It is admitted that they were killed on the track at points where it is the duty to fence, and the presumption is, in the absence of proof, that the animals came upon the track at such points." In the case at bar, plaintiffs turned their horses upon their own lands, where, as it appears from the record, they would have remained if the appellant had fenced its track at points where it is required by law to fence. Hence we are constrained, under the authorities, to hold the appellant responsible in damages for the killing of said horses.

What we have said disposes of the first and third assignments of error. The second assignment of error relates to the action of the court in refusing to strike from the complaint certain matters. This assignment of error, however, is not discussed in appellant's brief, but what we have hereinbefore said virtually disposes of it. Some other questions are discussed in appellant's brief, which are outside of the assignments of error contained therein, and which we do not deem it necessary to consider. For the foregoing reasons, the judgment and the order denying a new trial are both affirmed. Costs of appeal awarded to the respondents.

HUSTON, C. J., and SULLIVAN, J., concur.

(38 Or. 184)

HOWELL v. FOLSOM et al.

(Supreme Court of Oregon. Dec. 31, 1900.)

HUSBAND AND WIFE—ESTATES BY ENTIRETY—MORTGAGE—DEATH OF HUSBAND.

Sess. Laws 1893, p. 170, authorizing a married woman to convey her property to the same extent as her husband can property belonging to him, having removed the wife's common-law disability to convey her interest in an estate of the entirety with her husband, where a married woman mortgaged such an estate, and the death of the husband removed his right of survivorship, the mortgage was a valid lien on the fee.

Appeal from circuit court, Marion county; R. P. Boise, Judge.

Suit by Linnie J. Howell against Maggie Folsom and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

On November 21, 1895, the defendant Maggie Folsom, being the owner, with her husband, of an estate by the entirety in lots 3 and 4, block B, in Simpson's addition to Salem, mortgaged the same to plaintiff to secure a loan of \$350; and, the husband having subsequently died, this suit was instituted to foreclose the mortgage, but the court held it void because the husband did not join in its execution, and plaintiff appeals.

Geo. G. Bingham, for appellant. R. J. Fleming and Tilmon Ford, for respondents.

BEAN, C. J. It is argued in support of the decree of the court below that neither spouse can convey an estate by the entirety without the assent of the other, and therefore the mortgage sought to be foreclosed is void, even as against the mortgagor. It is often said in judicial opinions that at common law, under a conveyance of real property to husband and wife, both are seised of the entirety, and neither can alienate or dispose of any part of the estate without the consent of the other. It is believed, however, this means that "one cannot sever the interest or make any disposition of the estate so as to affect the right of survivorship." *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. 539; *Ames v. Norman*, 70 Am. Dec. 269, note. According to the great weight of authority, at common law a conveyance of the estate by the husband during the lifetime of the wife is valid as against him, and vests the fee in the purchaser in case the husband survive the wife. Mr. Tiedeman thus states the rule: "During coverture the husband has the entire control of the estate, may convey it away, and it is liable to be sold under execution for his debts. If the husband survives the wife, this conveyance of it to a stranger will be as absolute as if the estate had been one in severalty. But, if the wife survives the husband, she acquires, by right of survivorship, the entire interest in the land, and is entitled to her proper action for the recovery of possession." *Tied. Real Prop.* § 242. And Mr. Washburn says: "If the husband convey the entire estate during coverture, and dies, his conveyance will not have affected her rights of survivorship to the entire estate. But if, in such case, the husband survive, his conveyance becomes as effective to pass the whole estate as it would have been had the husband been sole seised when he conveyed it." 1 Washb. *Real Prop.* (5th Ed.) 707. See, also, 1 Bish. *Mar. Wom.* § 621; 1 Ballard, *Real Prop.* § 240; 15 Am. & Eng. *Enc. Law* (2d Ed.) 848; *Den v. Hardenbergh*, 18 Am. Dec. 371, note; *Branch v. Polk* (Ark.) 30 L. R. A. 324, 328, note (s. c. 33 S. W. 424); *Hiles v. Fisher* (N. Y. App.) 43 Am.

St. Rep. 762, 768, note (a. c. 39 N. E. 337). We take the rule, therefore, to be abundantly established that a husband can convey an estate held by himself and wife as tenants by the entirety, and that such conveyance will vest the fee in the purchaser, if the husband survive the wife. And, as our statute has given the wife power and authority to sell and convey her property "to the same extent and in the same manner that her husband can property belonging to him" (Sess. Laws 1893, p. 170, amending section 2992, Hill's Ann. Laws), we think it clear she may convey an estate by the entirety with like effect as her husband. The right at common law of the husband during coverture to the control and usufruct of the land, and the inability of the wife to convey without her husband joining in the deed, were not incidents of such an estate, but of the marital disabilities and rights which have been removed and enlarged by modern legislation. The courts of other states have held that, under acts relating to married women, of similar import to ours, the wife is entitled to the same use and benefit of an estate by the entirety as the husband, and has the same power of alienation. Thus, in *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695, it was held, under the legislation of that state, which preserves to married women their separate rights of property, that the wife is endowed with the capacity, during the lives of herself and husband, to hold in her possession one-half the estate held by them as tenants by the entirety in common with her husband, as fully as if she were a single woman. In *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, a husband and wife were seised of an estate by the entirety. The husband alone mortgaged the entire estate to secure his individual debt, and subsequently conveyed the property to his wife. Thereafter the mortgage was foreclosed, and the purchaser at the sale insisted that he was entitled to the possession of the entire property during the joint lives of the husband and wife, and to the fee in case the husband survived the wife, while the wife maintained that the mortgage given by her husband was void because not signed by her, and that, his interest having been conveyed to her, she was the absolute owner of the property. But the court held, in a very satisfactory opinion by Mr. Chief Justice Andrews, that, under the general statutory provisions of that state giving married women power to control or dispose of their own property, a husband and wife are entitled to the rents and profits of an estate by the entirety in separate moieties, and that a purchaser at a foreclosure sale, under a mortgage given by the husband alone when the wife is alive at the time of the sale, obtains the husband's interest, subject to the right of the wife, if she survive him, with a right to use an undivided half during the joint lives of husband and wife, and to the fee if the husband survive. Again, in *Branch v. Polk*, 61 Ark. 388, 33 S. W. 424, 30 L. R.

A. 324, under a statute authorizing a married woman to dispose of her property as a feme sole, it was held that she might convey or mortgage her interest in an estate by the entirety, subject to the right of survivorship in her husband, without his joining in the instrument, and that such mortgage was valid as against the wife, she having survived her husband. It was suggested at the argument that under section 3003, Hill's Ann. Laws Or., a married woman cannot convey her real property without her husband joining in the deed. But that section has been modified or amended by subsequent legislation (Sess. Laws 1893, p. 170), and she may now sell or convey her property by her sole deed. *Velten v. Carmack*, 23 Or. 282, 31 Pac. 658, 20 L. R. A. 101. The decree of the court below is therefore reversed, and a decree will be entered here as prayed for in the complaint.

(38 Or. 189)

DURKEE v. CARR.

(Supreme Court of Oregon. Dec. 31, 1900.)

PRINCIPAL AND AGENT — AUTHORITY TO LEASE — EVIDENCE — COVENANT TO IRRIGATE — ACTION FOR BREACH — PLEADING — CURED DEFECTS — ANSWERING OVER — WAIVER OF PERFORMANCE.

1. In an action by a lessee against a lessor of arid land on a covenant to irrigate the demised premises, it appeared that defendant, who was a nonresident, wrote his agent, merely requesting him to lease the land, reserving such a share of the crop as he saw fit, and that pursuant thereto the agent leased the same and other lands of defendant, under leases containing a like covenant. Lessor also visited the land in May, saw the crop growing thereon, and knew that it had been leased, but until July or August was ignorant of such covenant, and the agent swore that he had no authority to make the same. *Held*, that there was no evidence of authority to make such covenant, or ratification thereof, and that the lease was inadmissible.

2. The authority of an agent authorized to lease his principal's land extends not alone to what is necessary therefor, but to that which is "proper, usual, and reasonable," as well as necessary.

3. In an action on a covenant in a lease to irrigate the demised premises from a specified ditch where practicable, failure of the complaint to aver the extent thereof capable of being practically irrigated is a defect curable by motion to make more definite and certain, and hence is waived by answering over.

4. A claim that the complaint in an action on a covenant in a lease to irrigate the demised premises failed to allege any demand therefor is without merit, where it appears from the complaint "that the defendant totally failed to furnish or supply any water whatever upon said premises, though often requested to do so."

5. In an action on a lease the complaint averred that plaintiff "in all respects has lawfully executed and complied with the contract on his part, in so far as he was allowed so to do by defendant's agent." *Held* that, in so far as it alleged a waiver of performance by plaintiff, any defect therein was cured by answering over.

Appeal from circuit court, Klamath county; Henry L. Benson, Judge.

Action by George A. Durkee against Jesse D. Carr. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover damages for the breach of an alleged contract. It is substantially averred in the complaint that on May 15, 1898, the defendant, by J. F. Adams, his authorized agent, demised to plaintiff for the term of five months 200 acres of arid land in Klamath county, Or., and in the written lease covenanted that he would, free of charge, construct all main ditches to and upon the premises, and furnish sufficient water from the Little Klamath water ditch properly to irrigate the same where practicable, in consideration of which the plaintiff agreed to plow and sow the land, chiefly to wheat, and to deliver one-fourth of the grain raised, as rent therefor; that in pursuance of the lease the plaintiff entered into possession, plowed and sowed 185 acres thereof to wheat and barley, and in all respects fully complied with his part of the contract in so far as he was allowed to do so by defendant's said agent, but defendant, though often requested so to do, neglected to furnish any water for irrigation, thereby rendering it impossible to raise a crop on such land, to plaintiff's damage in the sum of \$1,826.87. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been overruled, an answer was filed, denying the material allegations of the complaint, and a trial, being had, resulted in a verdict and judgment for plaintiff in the sum of \$1,000, and the defendant appeals.

C. A. Cogswell, for appellant. A. S. Hammond, for respondent.

MOORE, J. (after stating the facts). It is contended by defendant's counsel that the testimony was insufficient to establish Adams' authority to execute, as defendant's agent, the covenant to furnish water, and hence the court erred in admitting the lease in evidence over their objection and exception. The testimony shows that the defendant owns a section of land in said county, incapable of producing grain without irrigation; that in the spring of 1898 he caused it to be prepared for cultivation by grubbing up the sagebrush growing thereon; that, being a resident of California, he wrote to Adams, requesting him to lease said land to be sowed to grain, reserving for rent such a share of the crop to be raised as he might think proper, but did not suggest that any water should be furnished for irrigation. In pursuance of such correspondence Adams executed, in the defendant's name, a written lease to plaintiff, containing the following stipulation: "The party of the first part covenants and agrees to furnish water from the Little Klamath water ditch sufficient to properly irrigate said tract, where practicable, and to construct all main ditches for conveying said water to and upon said tract, free of charge." Adams also leased other parts of said section to Thomas Bailey, R. C.

Anderson, Thomas Roberts, and Bert Davis, respectively, who entered into possession thereof under leases containing a like covenant. In May, 1898, the defendant visited said land, saw the wheat growing thereon, and knew that it had been leased, but until about July or August of that year he had no knowledge of the existence of such covenant. J. F. Adams, as plaintiff's witness, on cross-examination testified that he had no authority from the defendant to agree to furnish water to the plaintiff or other lessees for irrigation.

The foregoing is a fair summary of the testimony respecting Adams' authority to execute the covenant relied upon, and, while the bill of exceptions does not purport to contain all the testimony given by the witnesses, the court certifies that, except so far as it can be inferred from the arid character of the land, no evidence was introduced to show that it was necessary to agree to furnish water for the irrigation in order to effect a lease of the premises, or that it was a custom in that vicinity for landlords to furnish water to their tenants to irrigate the premises leased, or that the plaintiff had any knowledge of Adams' instructions to lease the land, or that the latter had ever acted as defendant's agent, or was held out by him as having authority to execute a covenant to furnish water for irrigation, except as the execution of the leases of other parts of said section might lead to such an inference. Adams' power to lease the premises having been admitted, the question presented for consideration is whether the testimony adverted to is sufficient to establish his authority to agree on behalf of his principal to furnish water to the plaintiff, to be used in irrigating the land so leased. The rule is elementary and universal that every grant of power by a principal to his agent, where no limitations are apparent, is to be construed as carrying with it, as an incident thereto, the authority to do all things proper, usual, necessary, and reasonable to carry into effect the objects and purposes sought to be accomplished by the authority conferred. 1 Am. & Eng. Enc. Law (2d Ed.) 997; Mechem, Ag. § 311; Story, Ag. (9th Ed.) § 60; Whart. Ag. § 126. But stipulations in a lease executed by an agent whose authority therefor is not reasonably implied in the power delegated are not binding upon his principal. Thus, in *Halbut v. Town of Forrest City*, 34 Ark. 246, it was held that a power conferred upon an agent to lease certain premises did not authorize him to covenant on behalf of his principal to repair or rebuild a house thereon in case of its injury or destruction by fire. In *Loftin v. Crossland*, 94 N. C. 76, it was held that a married woman, having appointed her husband to lease her land, was not bound by his attempt to subject the rents accruing therefrom to a lien for agricultural supplies advanced to the tenant. In *Schumacher v.*

Brewing Co. (Minn.) 80 N. W. 838, it was held that an agent who was authorized to negotiate a lease for three years had no authority to execute one for that term with a privilege to the lessee of a renewal for two years more after the expiration of the original term. So, too, in *Borderre v. Den* (Cal.) 39 Pac. 946, it was held that an agent authorized to lease a tract of land for one year at \$600 could not bind his principal by a lease of a part thereof at \$225 for a term exceeding one year.

The letter which authorized the leasing of the premises not having been produced, the contents thereof were established by Adams, who, as defendant's witness, testified that he was thereby requested to rent the land for such a share of the crop as he might think proper, and to furnish money to buy grain to seed the place, if necessary, taking a mortgage on the crop to be grown thereon as security therefor. The authority conferred being evidenced by an informal writing, which is not subject to a strict construction, the power to be implied therefrom ought not to be extended beyond the scope necessary to carry into effect that which is expressly granted. If it had appeared from the evidence that it was the well-known and general custom of landlords in the vicinity of the premises so leased to furnish to their tenants water for irrigation, so that the plaintiff, in dealing with Adams, might have reasonably inferred that he possessed plenary power to execute a lease with a covenant to that effect, the verdict of the jury, given in pursuance of proper instructions upon the subject, would have freed the inquiry from doubt (*Wright v. Solomon*, 19 Cal. 64; *Corbett v. Underwood*, 83 Ill. 324; *Randall v. Kehler*, 60 Me. 37; *Rosenstock v. Tormey*, 32 Md. 169; *Mixer v. Coburn*, 11 Metc. [Mass.] 559); for every contract is presumed to have been made with reference to the well-defined and publicly known customs and usages of the section of the country in which the terms of the agreement are to be performed, and these customs and usages, in the absence of anything to indicate a contrary intent, enter into and become a part of all contracts, though not particularly specified therein (*Mechem, Ag.* § 281; *McCulsky v. Klosterman*, 20 Or. 108, 25 Pac. 366, 10 L. R. A. 785; *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705). In the absence of any proof of such general custom, if it had appeared from the testimony introduced at the trial that it was Carr's habit in leasing land to furnish water to his tenants for irrigation, and that such habit was well known to the plaintiff, who, from the execution of a covenant to that effect, might have reasonably inferred that Adams possessed the requisite degree of power in this respect, the lease would probably have been admissible in evidence. *Wilcox v. Railway Co.*, 24 Minn. 269; *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; *Olcott*

v. Railroad Co., 27 N. Y. 546; *McAlpin v. Cassidy*, 17 Tex. 449.

The bill of exceptions shows that in 1898 Adams, as defendant's agent, leased land to other tenants, with whom he covenanted that his principal would furnish water for irrigation. The testimony does not show, however, that these leases were entered into before plaintiff's, so that it might have been inferred from the execution of the power that Adams had authority to covenant upon behalf of his principal to furnish water to his tenants for irrigation; but, inasmuch as it appears that the defendant had no knowledge of the execution of these covenants until July or August of that year, the testimony, in our judgment, was insufficient to show that Adams had been held out to the public as possessing sufficient power to execute a covenant to furnish water for such purpose. In the absence of any proof of the principal's habit of ratifying the unauthorized acts of his agent, no reason exists upon which to predicate a rule that the principal should be bound by such unauthorized act because his agent, without his knowledge, exceeded his power in more than one instance.

The bill of exceptions not purporting to contain all the evidence given at the trial, if any testimony was introduced tending to prove the defendant's habit in leasing land to furnish water to his tenants, or that it was his custom to ratify all agreements entered into on his behalf by Adams, the plaintiff should have secured the court's certificate to that effect, or incorporated such testimony in the bill of exceptions; for, while error will not be presumed (*O'Kelly v. Territory*, 1 Or. 51; *State v. Garrand*, 5 Or. 216), nevertheless, when it is manifest, prejudice is presumed, unless the bill of exceptions affirmatively shows that no injury could have resulted therefrom (*Inverarity v. Stowell*, 10 Or. 261; *Du Bois v. Perkins*, 21 Or. 189, 27 Pac. 1044; *Nickum v. Gaston*, 24 Or. 380, 33 Pac. 671, 35 Pac. 31; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435; *Carney v. Dunaway*, 35 Or. 131, 57 Pac. 192, 58 Pac. 105). The error being apparent, and the record not affirmatively showing that injury did not result therefrom, the court erred in admitting the lease in evidence.

The court, over defendant's objection and exception, charged the jury as follows: "I therefore instruct you that in making the lease Mr. Adams acted as the agent of the defendant, Jesse D. Carr, and that in making said lease Adams had authority to do whatever was necessary to accomplish that object." And it is contended that an error was committed in this respect. We think the instruction is erroneous, because the court extended the agent's authority to whatever was necessary to the execution of the power, when it should have limited such authority to that which is "proper, usual, and reason-

able," as well as necessary. Fertile soil, balmy atmosphere, and genial sunshine are great factors in producing and maturing successful crops, to accomplish which, in the arid region, water is necessary for irrigation. But the cost of securing it for that purpose may be so great as to render its use neither proper, usual, nor reasonable. The necessity for the use of water for irrigation by the plaintiff may be reasonably inferred from the arid character of the land leased, but unless it was usual, proper, and reasonable for a landlord, in that vicinity, to furnish water to his tenants for that purpose, necessity alone would be insufficient to confer upon an agent implied power to covenant so as to bind his principal to furnish water; for, while the land was leased to be sowed in grain, it is possible that, in consequence of a rainy season, the grain might be profitably matured without moisture supplied by artificial means. The authority of an agent to enter into a contract so as to bind his principal thereby cannot always be implied from necessity alone. Thus, in *Hawtayne v. Bourne*, 7 Mees. & W. 595, the laborers employed in a mine, not having received their wages, secured warrants of distress upon the materials belonging to the mine, whereupon an agent engaged to operate the mine obtained from a bank a loan of money, which he used in paying the claims of said laborers; and, in an action against the principal to recover on account of the loan, the judge charged the jury that, although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal so as to bind him, yet, when it becomes absolutely necessary to raise money in order to preserve the property of the principal, the law would imply authority in the agent to do so to the extent of the necessity, and left it to the jury to say whether the pressure superinduced by the action of the laborers was sufficient to render the advance of money a case of such necessity; and, the jury having found for the plaintiff, a new trial was awarded on appeal, the court holding that an agent of the character indicated had no authority to borrow money on account of his principal in any case of necessity, however pressing. In the absence of the limiting words to which attention had been called, we think the court erred in giving the instruction complained of.

In view of another trial, it becomes important to consider some questions which may arise in the lower court for consideration. It is contended by defendant's counsel that, the lease having stipulated that the defendant would furnish sufficient water to properly irrigate the premises where practicable, the complaint did not state facts sufficient to constitute a cause of action, in failing to allege that the land so sowed to grain could have been practically irrigated from the Little Klamath water ditch, and hence the court erred in overruling the de-

murrer, while plaintiff's counsel insist that the failure of the plaintiff in this respect constitutes a defective statement only, which the defendant waived by answering over after the demurrer was overruled. The lease, having stipulated that the defendant would furnish water from said ditch to irrigate the premises "where" practicable, implies that a portion thereof, at least, was susceptible of irrigation from the source specified. Had the memorandum stated that the water would be supplied to irrigate the land "if" practicable, the necessity of alleging that the premises so sowed to grain could have been irrigated by water taken from said ditch becomes apparent. It being reasonably inferable from the lease, which is set out in the complaint, that a part of the premises could have been irrigated in the manner indicated, the failure of the plaintiff to aver the extent thereof which was capable of being practicably irrigated was a defective statement, which could have been cured by a motion to make more definite and certain, and any failure in this averment was waived by answering over to the merits. *Olds v. Cary*, 13 Or. 362, 10 Pac. 786; *Drake v. Sworts*, 24 Or. 198, 33 Pac. 563.

It is also claimed that the court erred in overruling the demurrer because the complaint fails to allege that any demand was made upon the defendant to furnish water for irrigation. The point contended for, however, is without merit; for it is averred in the complaint "that the defendant totally failed to furnish or supply any water whatever upon said premises, though often requested to do so."

It is maintained that the complaint is insufficient because it does not allege that the plaintiff substantially complied with or performed the parts of the contract assumed by him. It is argued that the averment that plaintiff "in all respects has lawfully executed and complied with the contract on his part in so far as he was allowed so to do by defendant's agent, said J. F. Adams," is an admission that he has not fully performed his part of the agreement, and there being no averment that Adams acted as defendant's agent in preventing a compliance with the terms of the contract, or that any action on his part prevented plaintiff's performance thereof, the court erred in overruling the demurrer. The rules of the common law respecting the allegation of the performance of a condition precedent have been changed by our statute so as to permit a party to plead generally that he has duly performed all the conditions imposed upon him by his agreement. *Hill's Ann. Laws Or.* § 87. But, when he relies upon a waiver of such performance by the adverse party, he should aver the fact, so as to let in the evidence thereof. *Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Or. 569, 43 Pac. 366; *Hannan v. Greenfield*, 38 Or. 97, 58 Pac. 888. The plaintiff alleges in his complaint a waiver of the performance of

the conditions of the agreement, and while, perhaps, the averment of the fact relied upon is not so specific as it might have been, any defect therein was undoubtedly cured by answering thereto. *Fisk v. Henarie*, 13 Or. 158, 9 Pac. 322. In consequence of the error of the court in admitting the lease in evidence and in giving the instruction complained of, the judgment is reversed and a new trial ordered.

(15 Colo. App. 461)

LEWIN et al. v. BARRY.

(Court of Appeals of Colorado. Dec. 10, 1900.)

PARTNERSHIP—GUARANTY—ACTIONS AGAINST—BURDEN OF PROOF—NONSUIT—JUDGMENT—FORM OF VERDICT—GUARANTY—CONSIDERATION—EVIDENCE—APPEAL AND ERROR—REJECTION OF EVIDENCE—CURING ERROR BY INSTRUCTION.

1. Plaintiff's husband rented a building to one of defendants for a specified term; and one of the other defendants, as a member of a firm, guarantied the rent in the name of the firm. Plaintiff, as representative of her deceased husband, sued the tenant and the firm for unpaid rent accruing after the tenant's removal from the building, and before the expiration of the term. Plaintiff testified that, after the execution of the lease, she went to the firm, and the member making the guaranty told her that it was all right; but she did not show his authority to sign for the firm, nor that his partner knew of it, and there was no evidence from which authority could be presumed to execute such guaranty. Held error to refuse the firm's motion for a nonsuit, since the contract was not shown to be within the scope of the business of the firm, nor any authority of the signing partner, nor facts from which ratification might be presumed.

2. The defendant firm showed that the partner signing the guaranty had no authority to do so, or to bind the firm thereby; that the other member of the firm had no knowledge of the execution of the guaranty until after suit was brought to enforce it, and never ratified it. Held error to render a judgment against the firm, since the other partner was not bound, and the partnership, as such, was not liable.

3. Where, in an action on a lease and on the contract of guaranty of the rent by a firm, there was evidence that the guaranty was not signed until after the tenant went into possession, and after the lease had been executed and delivered, it was error to reject evidence that no new consideration passed between the firm and the landlord, since such consideration would be necessary to bind the firm.

4. The error of rejecting such evidence was not cured by an instruction that there must be a new consideration, if the guaranty was signed after the execution and delivery of the lease, since there was no evidence on which to base such instruction.

5. Where, in an action on a lease and on a contract of guaranty of the rent thereunder by a firm, the firm denied liability, the court having given the jury only two forms of verdict, one for the plaintiff and one for defendants, it was error to refuse to give a form of verdict whereby the jury might find for plaintiff against the tenant and for the other defendants.

Appeal from district court, Arapahoe county.

Action for rent by Mary E. Barry against one Roblyer and others. From a judgment in favor of plaintiff, Philip Lewin & Co. appeal. Reversed.

Muller & Well, for appellants. John R. Smith, for appellee.

BISSELL, P. J. However inequitable the result may appear to be, it is quite plain from the record that Mrs. Barry was not entitled to judgment against both the firm of Lewin & Co. and Roblyer, the tenant. It is quite possible that in an action properly conceived she may have been entitled to judgment against Lewin and Roblyer, but, without other proof than that which she made upon the trial, she could not recover against the firm. In 1891, John O'Brien was the owner of some premises in Littleton. In May he leased them for a term of three years to Roblyer, who occupied them as a saloon, at an agreed rental of \$40 per month. At some time either before or after possession was taken, and either before or after the lease was executed by the lessor and the lessee,—and we do not undertake to determine which,—the lease was underwritten with this clause: "I hereby guaranty the payment of the above-mentioned rent. Ph. Lewin & Co." The time this guaranty was affixed and signed may be, under some circumstances, a very important consideration, and the evidence of the circumstances attending it may be of controlling force. We practically make no suggestion about it, leaving it for the jury to determine. Roblyer went into possession, and remained there for a little upwards of a year, paying his rent, and then moved out. Shortly after, Lewin, or Lewin & Co., removed the fixtures, on which they held a mortgage, and the premises were practically abandoned, though the key seems to have been with the widow of Mr. O'Brien, who had died. His widow subsequently remarried. On the conclusion of the term, Mrs. Barry, being the widow and the representative, brought this suit against Roblyer and Lewin & Co. to recover the unpaid rental for a little less than two years, and she had judgment for somewhat more than \$1,200. She was the only witness for herself. The lease was produced, and about it there was no dispute, and then she gave evidence to the point that at some time, the date of which was disputed, she took the lease, and went, as she claims, to the place of business of Lewin & Co., and showed the lease to Lewin, with the guaranty written on it, and asked him if it was all right. We do not need to detail the conversation. It is enough to state this was the purport of her inquiry, and Lewin said it was all right, or at least gave her to so understand. Relying on this assurance, matters went along until the premises were abandoned. The plaintiff gave no evidence respecting the authority of Lewin to sign for the firm, respecting the knowledge of the co-partner, Levy, and made no proof about the business of the partnership from which authority could be presumed to execute a guaranty for the payment of rent. On the conclusion of the plaintiff's case the defendants

moved for a nonsuit, which certainly ought, under this evidence, to have been granted. It was denied, and the defendants went to proof. They produced evidence to the point that there was no specific authority given to Lewin by the firm or by Mr. Levy to guaranty the rent, and direct evidence to the point that Levy knew nothing about it until suit was begun to collect it. Much evidence was also offered by the defendants to show that the guaranty was not signed until after the tenant went into possession, and after the lease had been executed and delivered as a completed contract binding on both the landlord and the tenant. After this proposition had been supported, the defendants then offered to prove that no new consideration passed between the firm and the landlord. This evidence was rejected. When the trial was concluded, the court gave the jury two forms of verdict; one for the plaintiff and one for the defendants. The defendants then asked that a form of verdict be given whereby the jury might, if they chose, find a verdict for the plaintiff and against Roblyer, the tenant, and for the other defendants. This the court declined to give. This statement very clearly indicates the errors which inhere in the record.

A learned discussion respecting the law of partnership, the powers of partners, and the law of agency which controls in such organizations, would be profitless. It is enough to announce the general rules which control these matters. It is, and always has been, the law that one partner can bind his co-partner only by those contracts which are within the scope of the business of the firm, or so closely related to it as to permit third parties to lawfully assume authority to execute them. It makes no difference that the contract was not within the purview of the business, provided there be specific antecedent authority, or there be proof to show that, after the contract has been entered into, the co-partner has ratified and confirmed what has been done. All the books are clear on this subject, and it is only by way of definition and the application of this law to particular states of facts that there has been any modification in the statement of the rule. We do not undertake to state it in its entirety, nor otherwise than with a general sort of accuracy which will not be misleading. It is equally clear that, where a plaintiff brings a suit on a contract which is not within the scope of the business of the firm, the plaintiff is bound to offer evidence to show authority on the part of the signing partner, or facts from which a ratification can be presumed. The burden is on the plaintiff, which must be measurably sustained before she can be permitted to go to the jury. The evidence need not necessarily be direct or positive, but there must be something from which the jury may lawfully have the right to assume the existence of the authority, or a subsequent ratification. These matters may not be prov-

en, however, as seems quite clear from the cases, by the declarations of the signing partner, who, under these circumstances, may not bind his co-partner by his statements. This authority cannot be presumed because of any collateral or incidental benefit to the firm, unless some direct profit has come from the contract which the firm has appropriated; though whether this may be done without knowledge it is unnecessary to decide. This principle is laid down by many cases. It is also clear that, where the guaranty is subsequent to the execution of the original contract, there must be some new consideration moving between the parties to bind the guarantors. If at the time, or prior to completion, the guaranty be executed, the original consideration would, of course, be enough. 1 Brandt, Sur. § 18; Story, Partn. § 127; Sweetser v. French, 2 Cush. 309; Avery v. Rowell, 59 Wis. 82, 17 N. W. 875; Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215; Taft v. Church, 162 Mass. 527, 39 N. E. 293; Shaaber v. Bushong, 105 Pa. St. 514; Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Fore v. Hitson, 70 Tex. 517, 8 S. W. 292; Wilson v. Williams, 14 Wend. 158; Bank v. Rice, 48 Neb. 428, 67 N. W. 185; Heffron v. Hanaford, 40 Mich. 305. These authorities might be multiplied indefinitely, but they announce the rules which have established the rights, duties, and obligations of co-partners with reference to each other and with reference to third persons. In what have been cited, however, will be found adjudications supporting the several propositions which we have stated. When once these principles are conceded, it is quite plain that their application to the evidence in the record clearly demonstrates error. In the first place, Mrs. Barry neither proved direct authority on the part of Lewin to sign for the firm, nor did she offer evidence to show that the guaranty was within the usual course of business of the firm, nor did she prove that the business of the co-partnership was such that she had a right to presume authority on the part of the co-partner to sign the contract. On the other hand, from the defendants' testimony it was well established that Lewin had no authority to sign the guaranty for the firm, and bind it thereby; and likewise that Levy, the other member of the firm, had no knowledge whatever of the execution of the guaranty, was not a consenting party, never authorized it, never ratified it, and had no knowledge about it until after the suit was brought to enforce the obligation. Under these circumstances Levy was not bound, and the co-partnership, as such, was not obligated, and no verdict ought to have been rendered against the firm, or judgment entered thereon. From the plaintiff's testimony it not only appears that there was no direct authority on the part of Lewin to sign for the firm, but evidence from which the jury must necessarily have found that the matter was not within the scope of the firm's busi-

ness. Under these circumstances she should have gone nonsuit.

Further than this, it is quite clear the court erred with reference to the rejection of proof offered by the defendants to show that there was no new consideration passing between the parties when the guaranty was signed. If we were to pass upon the weight of the testimony, we should probably state that the great preponderance of it lay with the defendants with respect to the time at which the guaranty was executed. How it may be on the subsequent trial we do not know, and therefore our opinion is rested entirely on what appears in the present record, and we go no further than to suggest it. This is far enough, however, to show that it was a question of fact for the jury to determine when the guaranty was signed,—whether before the tenant had gone into possession and the execution of the lease, or whether the guaranty was contemporaneous with the execution and the occupation by the tenant. Should the jury find from the testimony that the tenant had gone into possession, that the lease was executed and delivered before the guaranty was signed, it will be an important and pivotal question for them to determine whether any new consideration passed between the parties; for otherwise the firm would not be bound. The court would not permit the defendants to make proof on this subject. It is quite clear from the instructions that the court attempted to correct this error, because he gave instructions directly on this point. We do not believe, however, the instructions were enough to cure the difficulty, because there was no evidence before the jury on the subject. While the court charged them that there must be a new consideration if the guaranty was signed after the execution of the lease and its delivery, yet there is nothing from which the jury could determine whether there was or was not a new consideration passing between the parties. It was, consequently, error to refuse the testimony, and error which was not cured by the instructions.

The court likewise erred in refusing to give the third form of verdict to the jury, for, if the jury found Lewin & Co. were not bound on any basis of fact or question of law submitted to them, it was quite impossible for them to render a verdict for the plaintiff and against Roblyer, the tenant, and possibly, on proper application, dispose of the suit against the firm, leaving it to run only against Lewin, and render a verdict against him because he had signed it. It is not at all clear, and we are not called upon to decide, whether an action will not lie directly against Roblyer and Lewin to recover this money, for the reason that Lewin signed the firm name, and led the landlord to believe it was a guaranty of the firm. There are cases which hold this doctrine.

During the trial there was evidence offered

by the defendants to show that Lewin intended to mislead O'Brien or his wife by the signature, believing that he incurred no legal responsibility because of it. He offered evidence tending to show that he consulted with his brother, who was a banker, and perhaps a lawyer, who advised him that there was no liability attaching to the signature, because it was after the execution, delivery, and occupancy, and there was no consideration. This evidence was objected to, or, at least, some part of it was, or some of the evidence tending in this direction; and the court remarked to the jury that it was not possible for a defendant to sign a contract of this kind, and then attempt to escape liability. This matter is shown by the affidavit of Mr. Levy on the motion for a new trial, and is the subject of complaint on this appeal. We do not intend to determine whether this constitutes reversible error, because the other errors are sufficient to reverse the case; but we desire to suggest to the trial court that it is a matter of grave question whether such statements by the court in the presence of the jury are not radically wrong, and clearly prejudicial to the defendants against whom the remark is directed. We have no doubt it was an inadvertence, but it is a very dangerous one, and will doubtless be avoided on the subsequent trial. It probably cropped out because of the court's impression—which we fully appreciate—that there was on the part of Mr. Lewin, at least, an evident attempt to mislead the O'Briens, and induce them to make a lease relying on a guaranty which had no legal or binding force. If the jury should find the facts to be as they were authorized to find them from the testimony, it would look like a piece of very bad faith on the part of Mr. Lewin, and very properly subject him to grave criticism. For these errors, which appear in the record, and which we have demonstrated, the judgment entered on the verdict must be reversed, and the case sent back for a new trial not inconsistent with this opinion. Reversed.

(15 Colo. A. 453)

DOYLE v. NICHOLS et al.

(Court of Appeals of Colorado. Dec. 10, 1900.)

APPEAL AND ERROR—CONFLICTING EVIDENCE—CONCLUSIVENESS—GUARANTY—CONTINUING—WHAT CONSTITUTES.

1. Where, in an action for goods sold, the evidence was conflicting, the judgment of the trial court will not be disturbed on appeal.

2. Where plaintiffs furnished groceries to a party running a hotel on the order of defendant to them to kindly furnish such party with groceries, containing no restrictions or limitations, the liability of defendant continued until he gave notice of some kind to plaintiffs that he would no longer be liable, since the guaranty acted as a continuing one.

Appeal from El Paso county court.

Action by W. S. Nichols and others against James Doyle. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Scott Ashton, for appellant. G. W. Musser, for appellees.

WILSON, J. This was an action in debt to recover on account. It was commenced before a justice of the peace, and hence there are no written pleadings. It appears that George F. Harbaugh, in March, 1895, being about to commence running a hotel or boarding house in Colorado Springs, applied for credit to the appellees (plaintiffs in this suit), who were grocery merchants in that city, stating the fact of his intended business, and that the defendant, Doyle, would be responsible for the supplies purchased by him. Plaintiffs thereupon wrote to Mr. Doyle, stating what Harbaugh had informed them, and from him received the following reply: "Victor, Colo., March 11th, 1895. W. S. Nichols & Co., Colo. Springs, Colo.: Yours of March 8th, inquiring about Geo. F. Harbaugh, is correct, and in reply would say to give him supplies for 30 days, and render bill at end of month. Yours, truly, James Doyle." In pursuance of this order, Harbaugh was from time to time furnished with supplies, upon the account for which he made a number of payments. About the latter part of May there was owing by Harbaugh a balance on account of about \$216. A statement of this was rendered by plaintiffs to Doyle, and thereupon he paid it. Thereafter Harbaugh, seeking further credit, was informed that the order of Mr. Doyle had expired, and that they could not extend credit to him any further. Thereupon he procured from Doyle, and furnished to plaintiffs, the following order: "Colorado Springs, May 25th, 1895. W. S. Nichols & Co.: Kindly furnish Mr. Geo. F. Harbaugh with groceries, and oblige, James Doyle. You can phone or write me at the Portland mine." Thereafter, and in pursuance of this order, plaintiffs continued to supply Harbaugh with groceries, on account of which Harbaugh made numerous payments, until the latter part of August following, when, being notified by a brother of Mr. Doyle that he would be no longer responsible, the plaintiffs closed the account, and notified Mr. Doyle by letter, sending him a statement of the balance then due. This suit is brought to recover that balance, amounting to nearly \$300. Judgment both in the justice court and in the county court was for plaintiffs. From the latter defendant appeals.

All of the assignments of error are substantially embraced in the one single statement that the judgment was contrary to the law and the evidence. The case hinged entirely upon questions of fact, and under the well-settled rules this court is bound by the judgment of the trial court, because the evidence was conflicting, but there was amply sufficient to sustain it. Mr. Doyle disputed some of the statements of plaintiffs in regard to notices which they were said to have given to him, but this, as we view it, was im-

material; and, in any event, the trial court was the best judge of the weight of the testimony under all the attendant circumstances. There is some argument in the briefs of counsel as to whether the defendant, if liable at all, was liable on the original undertaking as a principal debtor, or upon a collateral undertaking as guarantor. The trial court made no special findings, and we are, therefore, not advised as to what its views were upon this question. We regard it as immaterial, however. Even if liable only as a guarantor, under the evidence in this case it would seem quite clear that the guaranty was intended, received, and acted upon as a continuing one. This being true, the liability of the guarantor would continue until notice of some kind was given by him to the plaintiffs that he would be no longer liable. There were no restrictions or limitations upon the last order. It was given to enable Harbaugh to conduct a hotel or boarding house. It is obvious that such a house could not be run without the procuring of grocery supplies daily, almost, and this circumstance the court was entitled to take into consideration in determining the construction of the order, guaranty, or undertaking, whatever it may be called. The case of *Patterson v. Gage*, 11 Colo. 51, 16 Pac. 560, to which we are referred by counsel, is not in point. The order or guaranty in that case was in the following words: "Denver, Colo., September 27th, 1882. David Gage, Esq.—Dear Sir: I will be responsible for the hotel bill of J. W. Hamm, Esq., and will see it paid within twenty days. T. M. Patterson." The court held that the words "within twenty days" controlled, and made it clear that by the terms of the instrument the undertaking of the guarantor was not a continuing one, but was only to the extent that he would see the hotel bill then owing by Hamm at the date of the guaranty paid. There are no such words in the guaranty under consideration; in fact, no words of restriction or limitation, or showing any intent that the guaranty should be other than a continuing one. We see no error, and the judgment will therefore be affirmed. Affirmed.

(15 Colo. App. 475)

SHOLES v. NORRIS.

(Court of Appeals of Colorado. Dec. 10, 1900.)

BILL OF EXCEPTIONS—TIME OF FILING—NECESSITY OF BILL—LEGALITY OF VERDICT—ERRONEOUS INSTRUCTIONS—CONSIDERATION ON APPEAL.

1. Where a bill of exceptions was never filed in the district court, and contained no certificate of the clerk which showed that it was filed, and was signed at a term succeeding that of the trial, and not within the time allowed after verdict and overruling a motion for a new trial, or within any time granted during the term, such bill cannot be considered a part of the record.

2. Where a cause was commenced before a justice of the peace, and contained no written pleadings, and the bill of exceptions was not made a part of the record because not filed

in time, errors respecting the legality and sufficiency of the verdict and erroneous instructions cannot be considered on appeal, since, without a bill of exceptions, it was impossible to tell what were the issues.

Appeal from Phillips county court.

Action between O. H. Sholes and Harrison Norris. From a judgment in favor of Norris, Sholes appeals. Affirmed.

J. S. Bennett and Wm. T. Rogers, for appellant. W. D. Kelsey and Allen & Webster, for appellee.

BISSELL, P. J. This appeal is prosecuted to set aside a judgment of \$20, entered in favor of the appellee and against the appellant in what was apparently a replevin suit. We are very much in the dark as to what the suit was about, what the controversy was, or the issue on which the case was tried. In fact, we do not know anything about it; that is, we have no legitimate and legal information concerning it. The case comes up here on a record to which is attached what purports to be a bill of exceptions. The bill of exceptions was never filed in the district court, nor is there any certificate of the clerk which shows that the bill of exceptions was filed. Besides, taking the certificate at the end of the bill to be true, it was signed at a term succeeding that of the trial, and not within the time allowed after the verdict and the overruling of a motion for a new trial, nor within any time thereafter granted during the term. In point of fact, it was signed some 10 or 11 days after the expiration of the time fixed, although under what purports to be an order of the court, made on application therefor. This statement is all that is necessary for the purposes of this decision. It illustrates the difficulties under which we labor, and the absence of any right on the part of the appellant to present, or argue, or insist on any errors which are discussed in his brief. In the first place, he discusses in reality but two errors. One respects the legality and sufficiency of the verdict, which was that the jury found for the plaintiff, and assessed his damages at a fixed sum; and the other errors, which may be grouped into one, rest upon an attack made on the instructions given to the jury. It is quite apparent that, to demonstrate the validity of either assignment, or of any assignment included in the groups, a bill of exceptions is absolutely indispensable. We do not know, without the bill of exceptions, what the issues were. The case was begun before a justice of the peace, and tried there, and afterwards heard in the county court; and there were no pleadings, and are none in the record, and we do not know on what the case went to trial. It has been determined by the supreme court that a bill of exceptions which has been filed, and which is not certified to by the clerk, is not legitimately a part of the record, and cannot be considered on the appeal. *Pettit v. People*, 24 Colo. 517, 52 Pac. 676. It has likewise been

decided by both appellate courts that the court is powerless to extend the time for filing the bill of exceptions after the term, and a bill thus filed is of no value, unless it can be supported on some principle of estoppel which will obviate the difficulty resulting from lack of power. *Marble Co. v. Dixon*, 12 Colo. App. 525, 56 Pac. 814. The bill of exceptions being removed from the record, and left unconsidered, there is no basis on which we can discuss the instructions. The necessity of a bill is equally strong to enable us to determine whether the verdict was good or bad. This might not be the case, and the authorities cited by appellant's counsel might be of great force and of determinative significance, if the case had been tried on written pleadings, so that we could see what the issues were, and whether or not the verdict was responsive. Much learning has been expended on these matters, and we might be compelled to consider and discuss the matter but for the want of anything which enables us to ascertain the issues. The supreme court has decided that a verdict in this precise form is perfectly good where it cannot be seen the verdict was irresponsible. *Sears v. Andrews*, 1 Colo. 88. Since this case is directly decisive of the sufficiency of a verdict of the kind under consideration, under circumstances like those which prevail here, we must decline further to discuss the question, and simply affirm the judgment, which is accordingly done. Affirmed.

(15 Colo. App. 477)

MATHESON v. KUHN.

(Court of Appeals of Colorado. Dec. 10, 1900.)
ANIMALS—DRIVING STOCK FROM RANGE—ACTION FOR DAMAGES—INSTRUCTIONS.

Where the complaint, in an action for damages for driving stock from its range, is framed on the theory of common-law liability, and does not state a case under Gen. St. § 3183, making a class of persons liable for damages for driving stock off its range, and the evidence shows that defendant does not belong to such class, an instruction authorizing a recovery under the statute is erroneous, since it does not submit the case made by the pleading or proof.

Appeal from district court, Elbert county.

Action by Charles E. Kuhn against Hector Matheson. From a judgment for plaintiff, defendant appeals. Reversed.

Crowell & McParlin and Wells & Taylor, for appellant.

THOMSON, J. The appellee complained that his stock had been wrongfully driven from his range by the appellant, and that, in consequence of the appellant's unlawful act, many of his cattle and horses were lost. He sought compensation for his alleged damage. The answer was a denial. The cause was tried by a jury, who, after listening to the evidence, gave the plaintiff a verdict, and from the judgment which followed the defendant appeals.

The court instructed the jury as follows: "The statute prescribed, among other things,

that when stock of any person in Colorado shall be driven off its range without the owner's consent, by the drover of any herd or drove, every person engaged as drover of such stock, or otherwise engaged in the care and management thereof, shall be liable for damages for each head so driven off, together with all costs accruing in the trial of said cause. Upon that point the court instructs you that, if you find from the evidence that the defendant did so willfully drive the cattle of the plaintiff off from their regular range, then your verdict should be for the plaintiff, and you may award him damages in such sum as you may find him entitled to under the proof; this to be determined by the value per head of the stock so driven off, the value and number of stock to be determined by you from the evidence in the case." It is evident that in so instructing the court was of the opinion that the action was statutory, and was controlled by section 3183 of the General Statutes. That section reads as follows: "When the stock of any person in Colorado shall be driven off its range without the owner's consent, by the drover of any herd or drove, every person engaged as drover of such stock, or otherwise engaged in the care and management thereof, shall be liable to indictment and punishment as for larceny, and shall be liable for damages to the amount of two hundred (200) dollars for each head so driven off, together with all costs accruing in the trial of said cause, and said herd of stock, or a sufficient number to cover all damages and costs, shall be held liable for the same." The complaint did not purport to state a case under the statute. It was framed upon the theory of a common-law liability. And it is clear from the evidence that the defendant was not a drover. He was the occupant and proprietor of land in the vicinity of the land of the plaintiff, and was the plaintiff's neighbor, and if he did what was charged against him he was a trespasser, but he incurred no liability under the statute. Those instructions were fatally erroneous. The defendant did not belong to the class against whom it was the purpose of the statute to safeguard local owners of stock. The statute, therefore, had no relevancy to the case, and the instructions supposed a false state of facts. They did not submit the case made by the pleadings or shown by the evidence. The verdict was returned in response to those instructions, and should not be suffered to stand. The judgment is reversed. Reversed.

(26 Nev. 68)

LEWIS v. HYAMS et al. (No. 1,582.)

(Supreme Court of Nevada. Dec. 29, 1900.)

LIMITATION OF ACTIONS—BAR—OPERATION—REMEDIES IN OTHER STATES.

Where default is made in the payment of a firm note executed in California by a partner residing there, and the other partner is a resident of New York, the right of action, as

against him, accrues in New York, and not in California; and, if no action is brought on the note in New York within the time prescribed by the statutes of limitation of that state, the holder cannot maintain an action against him in Nevada by reason of Comp. Laws, § 3736, providing that when a cause of action has arisen in any other state, and by the laws thereof an action there cannot be maintained by reason of lapse of time, no action shall be maintained in Nevada.

Appeal from district court, Storey county; C. E. Mack, Judge.

Action by Harris Lewis against Edward Hyams and William Hyams. From a judgment against William Hyams, and from an order denying his motion for a new trial, he appeals. Reversed.

Trenmor Coffin, M. S. Elsner, F. M. Hufaker, and W. D. Jones, for appellant. W. E. F. Deal and Edmund Tauszky, for respondent.

BONNIFIELD, C. J. This action was commenced on December 31, 1897, in the district court of the First judicial district in and for Storey county, against Edward Hyams and William Hyams upon a promissory note executed in the state of California, of which the following is a copy, to wit: "San Francisco, March 1st, 1882. \$5,000.00. Three months after date, without grace, we promise to pay to ourselves or order the sum of five thousand dollars, payable only in gold coin of the government of the United States, for value received, with interest in like gold coin at the rate of one (1) per cent. per month from — until paid. Hyam Bros." Indorsed: "Hyam Bros." The case was tried by the court sitting with a jury. The trial resulted in a judgment in favor of the plaintiff against defendant William Hyams for the sum of \$14,475, together with interest on the sum of \$5,000 thereof from the 17th day of May, 1899, till paid, at the rate of 1 per cent. per month, together with the further sum of \$1,021.50 taxed as costs. This appeal is taken by William Hyams from said judgment, and from the order of the trial court denying his motion for a new trial.

It appears that the plaintiff and Edward Hyams were, at the time of the execution of said promissory note, ever since have been, and now are, residents of the state of California; that said Edward has not been absent from the state of California, the place where the note was executed, altogether more than 18 months since the execution of said note. It also appears that William Hyams was at the time of the execution of said note, ever since has been, and now is, a resident of the state of New York, and that he has not been absent from said state of New York altogether more than 18 months since the execution of said note. It appears that at the time of the execution of said note Edward Hyams and William Hyams were co-partners, and for a number of years prior thereto had been co-partners, under the firm

name of Hyams Bros., carrying on business as wholesale manufacturers and dealers in clothing, both at the city of San Francisco, state of California, and at the city of New York, state of New York. The manufacturing of clothing for the firm was carried on in the city of New York, and the business there was conducted by William Hyams, and the business of the sale of the clothing by Hyams Bros. was carried on in San Francisco, Cal., and conducted by Edward Hyams; and Edward Hyams made, executed, and indorsed said note, and delivered the same to the plaintiff, for and in the name of said firm of Hyams Bros. In 1884 said co-partnership was dissolved.

Among other defenses, the defendants pleaded sections 32 and 33 of the statute of limitations of this state. Section 32 limits the time in which an action may be commenced on a contract, etc., made out of the state, to two years after a cause of action has accrued. Comp. Laws, § 3735. Section 33 provides: "When the cause of action has arisen in any other state or territory of the United States, or in a foreign country, and by the laws thereof an action there cannot be maintained against a person by reason of the lapse of time, no action shall be maintained against him in this state." Comp. Laws, § 3736. The defendants also pleaded certain laws of the state of California, in connection with said section 33 of the Nevada statute, by which the period is limited to four years for commencing an action after it has accrued upon any contract, obligation, or liability founded upon an instrument in writing executed in that state, and also the laws of the state of New York, which limits the time to six years for commencing an action upon a contract, obligation, or liability, express or implied, except a judgment or sealed instrument.

It is contended by counsel for appellant that an action upon said note was barred as against him, long before the commencement of this action, by the laws of the state of New York, and that, therefore, by reason of the provisions of said section 33 of our statute, no action can be maintained against him in this state. It is admitted by respondent's counsel that, if the cause of action against appellant arose in New York, this action cannot be maintained, provided said section 33 has not been repealed. Counsel in their brief say: "We admit that if respondent's cause of action against appellant arose in New York, and if section 33 of our statute has not been repealed, appellant's motion for a nonsuit should have been granted." Appellant's motion for nonsuit was granted as to Edward Hyams, it appearing that the cause of action against him arose in California, and by the laws of that state an action thereon had been barred there. It is contended on the part of respondent that the cause of action against both of the defendants arose in the state of California,

and that by reason of the nonresidence of William Hyams, and his absence from that state, an action against him was not barred there, the place where the cause of action arose, and that, therefore, it is not barred here, under said section 33. Appellant's counsel contend that the cause of action against him arose in New York, and, an action thereon having been barred in that state, no action can be maintained against him in this state, as it is barred by said section 33.

A "cause of action" is defined by Bouvier to be a right to bring an action. The cause of action is a claim which may be enforced. *Bucklin v. Ford*, 5 Barb. 393; *Halsey v. Reid*, 4 Hun, 777. It is the right which a party has to institute and carry through an action. *Meyer v. Van Collem*, 28 Barb. 230. The right to prosecute an action with effect. *Douglas v. Forrest*, 4 Bing. 704 (15 E. C. L. 120). The term "cause of action" is synonymous with "right of action." Am. & Eng. Enc. Law, 46, note. The phrase in said section 33, "when the cause of action has arisen," is the same, in the sense of the statute, as if the following expression had been used in its stead, "when a cause of action has accrued."

Did the right to bring an action on said note accrue in California against the appellant, a nonresident of that state, and absent therefrom? Could the claim of the respondent have been enforced in that state through the process issued by any court of that state? Did the respondent have the right to institute and carry through an action against the appellant in California? Could he have prosecuted an action against the appellant with effect in that state? We answer "No" to each of the above questions. No court in California could have acquired jurisdiction of the person of the appellant by any process it could have issued.

But the right to bring an action on said note by respondent against the appellant accrued in the state of New York, his place of residence; the place where any competent court of New York could, by its process, have acquired jurisdiction of his person; the place where the respondent's claim against the appellant could have been enforced; the place where the respondent had the right to institute and carry through an action against the appellant; and the place where the respondent could have prosecuted the action against the appellant with effect. We are of opinion that, when default was made in the payment of said note, the cause of action thereon against the appellant arose or accrued in the state of New York; that in such case as this the cause of action accrues in any state against the defendant where he may be found.

We are of opinion that section 9 of the statute of 1867, which amends section 33 of the statute of 1861, and incorporates it or makes it a part of the statute of 1867, is not

repealed. But, if it was repealed, it would not avail the respondent. Section 508 of the civil practice act, which was enacted in 1869 (Comp. Laws, § 3603), provides: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of a citizen thereof who has held the cause of action from the time it accrued." The respondent is not a citizen of this state. The appellant offered to prove the laws of New York to show that by said laws an action on said promissory note cannot be maintained there against the appellant by reason of the lapse of time. The court refused the offer, but, from the admissions of respondent above given, we take it that he admits that the laws of that state are as appellant claims them to be. We do not deem it necessary to pass upon the contention of the respective counsel with respect to the proper construction of section 21 of our statute of limitations; for, if we are correct in our conclusion that the cause of action arose or accrued against the appellant in the state of New York,—and we think we are,—then an action thereon was barred there by reason of the lapse of time, and it is therefore barred here. The judgment and order appealed from are reversed.

MASSEY and BELKNAP, JJ., concur.

(25 Nev. 131)

STATE ex rel. McMILLAN v. SADLER. (No. 1,555.)

(Supreme Court of Nevada. Dec. 26, 1900.)

COSTS—FAILURE TO OBJECT TO COST BILL—JUDGMENT—MODIFICATION—STRIKING OUT ITEMS OF COST.

Rule 6, subd. 2, of the supreme court (49 Pac. viii.) provides that either party desiring to recover as costs his expenses for printing or typewriting in any cause in this court shall file with the clerk, before said cause is submitted, a verified cost bill; and subdivision 3 requires that, if either party desires to object to the costs claimed by the other party, he shall file his objections with the clerk within 10 days after service on him of a copy of the cost bill. *Held* that, where a party did not object to the costs claimed by the other party within 10 days after the service on him of the cost bill, the judgment will not be modified by striking out the items of cost, after they have entered into and become a part of the judgment, simply because the cost bill was prematurely filed.

Motion to reconsider decision on motion to retax costs. Modified.

For former opinions, see 58 Pac. 284, and 59 Pac. 546.

PER CURIAM. We have carefully reconsidered the question presented on the motion to retax costs, as suggested in the order reopening the matter, but have been unable to reach a different conclusion. Concede

that the cost bills were filed prematurely; it does not necessarily follow, under the facts of the record, that, after the costs have entered into and become a part of the judgment, the judgment should be modified by striking the same therefrom. Rule 6 of this court (49 Pac. viii.) is, we believe, broader in its scope than claimed by the counsel for the relator. The language used is broader. It not only covers matters of procedure relating to costs of printing and typewriting transcripts on appeal, and papers in original proceedings, but also the taxation of "all other costs." In subdivision 3, general language is used, requiring objections to costs claimed to be made within a specified time. A similar requirement has been incorporated into the rules of the district court, upon the theory, no doubt, to supply what seems to be an omission in the statute. We do not believe that we are required by the rules or the statute, under the facts, to modify the judgment because of irregularity of proceeding, claiming costs which were properly taxable within the meaning of the word, where the party asking the modification is proceeding in an irregular manner. As to those items which could not have been taxed in a regular proceeding, our opinion remains the same. They should be stricken out. Therefore the items for typewriting, amounting in the aggregate to \$131.50, will be stricken out, and the judgment to that extent modified.

(131 Cal. 105)

LEMASTERS v. SOUTHERN PAC. CO. (L. A. 791.)

(Supreme Court of California. Dec. 24, 1900.)

RAILWAYS—COLLISION—INJURY TO LICENSEE—CONTRIBUTORY NEGLIGENCE—WILLFUL AND WANTON MISCONDUCT—IMMATURE AGE OF DECEASED—INSTRUCTIONS NOT SUPPORTED BY EVIDENCE.

1. Where deceased, a fireman on a switch engine of defendant, while not on duty jumped on the rear footboard of the switch engine, to ride to the roundhouse, and was killed in a collision, and it was against the rules of defendant to ride on the footboard, of which deceased had knowledge, the contributory negligence of deceased barred a recovery for his death.

2. Where deceased was killed in a collision caused by an open switch, while riding on the footboard of a switch engine, instructions on the question of willful and wanton misconduct on the part of the defendant were improper, as the evidence presented no question of that character.

3. Where deceased, a bright and active boy of 17 years, who had been employed for 2 months as fireman on defendant's switch engine, was killed while riding on the footboard of the engine when not on duty, an instruction that if deceased was a trespasser the jury could take into consideration his youth, and the immature judgment which naturally belongs to youth, in determining his negligence, was erroneous; the evidence presenting no question that deceased was immature or inexperienced.

4. Where the court charged that, if deceased was killed through the wanton and willful neglect of the defendant, the jury must be satisfied that the accident causing the death was not

caused alone by negligence, but that the negligence must have been willful and wanton, to make the defendant liable, and also charged that if defendant failed to give proper signals and keep a proper lookout in order to prevent a collision, and by reason of such negligence, without fault of the deceased, he was killed in a collision, the verdict must be for the plaintiff, the two instructions were directly contradictory and erroneous.

5. Where deceased, a fireman on a switch engine, was killed in a collision while riding on the footboard of the engine while not on duty, an instruction that if the servants of defendant in charge of the engine knew that deceased was riding on the footboard, in a dangerous position, and they did not stop and order him off or compel him to get off, but allowed him to remain without objection until the collision occurred, defendant was liable for his death, provided the defendant did not exercise ordinary care to prevent the accident, was erroneous.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by John Lemasters against the Southern Pacific Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. W. Ahern and Walter J. Trask, for appellant. A. J. Bledsoe, for respondent.

GAROUTTE, J. This action was brought by a father to recover damages for the death of his son. The deceased was a bright, active boy, nearly 17 years of age. He was a fireman upon a switch engine of defendant, and had been working in that capacity for nearly 2 months. At the time of the accident he was not on duty. The pay car of defendant, to which was attached a switch engine, started to go from the railroad station to the roundhouse. A board is attached respectively to the front and rear of this engine, about a foot above the track. This board is placed there for the use of the yardmen in directing the movements of the engine. As the engine started to the roundhouse, the deceased, in company with three others, jumped upon the rear board; and while standing upon it, and riding towards the roundhouse, the engine, by reason of an open switch, passed to another track and collided with a stationary engine there located. Deceased was killed, being jammed between the engine and the car, and the other three parties were severely injured. If deceased had been a passenger upon the train of defendant, and had located himself in a position of danger similar to that where he here placed himself, it is evident damages could not be recovered for his death. His contributory negligence in placing himself in that position would be a complete bar to a recovery. And we cannot see how plaintiff is in a better position to bring this action than he would have been if deceased had been a passenger upon defendant's train. As disclosed by the facts, deceased was either a trespasser or a mere licensee. As a trespasser, defendant owed him no duty; and if he was a mere licensee riding upon the train, even conceding that de-

fendant owed him a duty, still he certainly had no more rights than a passenger situated under the same circumstances. It would be an anomaly to hold that a mere licensee could occupy a position, as to the defendant, more favorable to himself than could the ordinary passenger traveling upon the train. Again, if deceased was a licensee, he was only a licensee to ride upon the train. He was not a licensee to ride upon this board attached to the engine. It was against the rules of defendant for persons to ride upon this board, and deceased was acquainted with that fact. In addition to these circumstances, there is no evidence that the deceased, or anyone else, with the consent of defendant, at this particular time or at any other time, rode upon this board. In this case the doctrine of *Esrey v. Southern Pac. Co.*, 108 Cal. 541, 37 Pac. 500, is invoked,—a case of wanton and willful misconduct upon the part of the defendant. But this is no such case. Here defendant did not know that deceased was upon the board, and, even if it had known it, it did not know that the switch was open. If defendant had known that the switch was open and that deceased was upon the board, and, being possessed of that knowledge, had run the train upon the other track, thereby colliding with the second engine, possibly the doctrine of the case cited could be invoked. *Willcox v. Railway Co.* (Tex. Civ. App.) 33 S. W. 379, in its facts, is similar to the case at bar, except by the facts of that case it appears that the young man injured was riding on the engine board with the consent of the engineer and other employes. Yet it was there held that, having placed himself in the position of danger, he was barred from recovering damages for injuries received by reason of defendant's negligence. See, also, *Eaton v. Railroad Co.*, 57 N. Y. 382.

Instructions of the court were given to the jury upon the question of willful and wanton misconduct upon the part of defendant. In view of what has been said, the evidence presented no question of that character.

Again, the court instructed the jury that, if deceased was a trespasser, the jury could take into consideration his youth, and the immature judgment which naturally belongs to youth, etc. When we consider that the deceased was nearly 17 years of age,—a bright, active boy who had been for 2 months working as a fireman upon the identical engine upon which he was riding at the time of the accident,—we feel assured there is no place to be found in the case where instructions were appropriate, which deal with this question of the immature judgment of childhood.

The court gave the jury the following instruction at the instance of defendant: "In this case the plaintiff claims that his son, Charles Lemasters, was killed * * * through wanton and willful neglect of the defendant; and, before you can find a verdict against the defendant, you must be sat-

lished that the accident causing the death was not caused alone by negligence, but that negligence must have been willful and wanton." The following instruction was given at the request of plaintiff, in speaking as to the duty of the defendant to give signals and keep a proper lookout in order to prevent a collision: "And if you find from the evidence that the servants of defendant failed therein, and by reason of their negligence, and without the fault of the deceased, Charley Lemasters, he was killed in a collision as alleged in the complaint, it will be your duty to find a verdict for the plaintiff." These two instructions are directly contradictory. The court also gave the jury the following instruction: "And if the servants of defendant in charge of and operating said engine and train, knowing that the deceased, Charley Lemasters, was riding on the foot-board of said switch engine, in a dangerous position, yet did not stop the train and order him off, or compel him to get off, but allowed him to remain where he was, without objection, until the collision occurred, then the defendant is liable for his death, and your verdict must be for the plaintiff, provided you find the defendant did not exercise ordinary care to prevent the accident." If this instruction be sound law, then the ordinary tramp riding upon a brakebeam could recover damages for injuries received in a collision occasioned by the negligence of defendant, if the defendant knew the tramp was riding. The instruction does not contain a sound exposition of law. For the foregoing reasons, the judgment and order are reversed and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

(6 Cal. Unrep. 626)

EASTON PACKING CO. v. KENNEDY et al.
(S. F. 2,118.)

(Supreme Court of California. Dec. 24, 1900.)

BILLS AND NOTES—CONSIDERATION—FAILURE—PROOF—SUFFICIENCY—BONA FIDE PURCHASERS—NOTICE OF FAILURE OF CONSIDERATION—REJECTION OF EVIDENCE—HARMLESS ERROR.

1. Defendants executed two notes, for \$385 each, in payment of a commission for selling land, and payable only in the event that the vendees of the land remained on it for one year, and made improvements equal in value to the notes. The vendees plowed 100 acres, which increased its value \$2.50 per acre, erected buildings, constructed drainage worth \$75, and a levee worth \$64, but with the consent of defendants, to whom they executed a reconveyance, abandoned the premises before the expiration of the year. *Held*, that a finding that there was not a failure of consideration for the notes was proper.

2. Where there was sufficient evidence of plaintiff's ownership of the notes in suit, and the court found against the defendants on the only defense set up by them, error of the court in finding that plaintiff came into possession of the notes without notice of equities in favor of defendants was harmless.

3. Error in rejecting certain evidence as to the conditional delivery of a note was cured by the subsequent admission of all facts tending to show the real consideration for the note.

4. Where the makers of notes resisted payment on the ground of failure of consideration, evidence to vary the terms of the notes, which in no way related to consideration, was properly excluded.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by the Easton Packing Company against J. W. Kennedy and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. *Affirmed*.

Harris & Hubbard and George L. Warlow, for appellants. Frank Kauke and A. M. Drew, for respondent.

CHIPMAN, C. Action on two promissory notes. The complaint was dismissed as to defendant Pool. Plaintiff had judgment against defendants Kennedy and McCormick, from which, and from the order denying motion for new trial, they appeal. The notes in suit were executed by defendants, and delivered to one Summers, the payee, October 30, 1893, and each was for \$385, due one year from date, and provided for payment of a reasonable attorney's fee and expenses of suit, if sued upon. Plaintiff became the holder and owner of the notes, as found by the court, January 19, 1897. Defendants, in a separate defense, alleged that it was agreed that the notes were "payable only in the event that the purchasers of certain real property, that day (October 30, 1893) conveyed to certain parties by these defendants, should make the payments for said property as stipulated in the agreement of purchase and sale and the mortgage for the purchase price of said premises, in which sale the said Summers had assisted"; that the true and only consideration for the notes was the payment to be made by the purchasers of said property; that before the maturity of the notes sued on the purchasers abandoned it, surrendered possession to defendants, and refused to continue in possession of the property under the agreement of purchase or to make any payments; that the consideration for said notes has wholly failed. The court found that Summers rendered service to defendants Kennedy and McCormick in negotiating and assisting in a sale and in securing purchasers for certain real estate belonging to Kennedy and McCormick, and the notes sued on were executed for and in consideration of said services so rendered, and said services were rendered and fully performed at and prior to the execution of said two notes on the said 30th day of October, 1893. And said notes were payable one year after their said date, and were so payable without regard to the payments to be made by the said purchasers of said real property. The court

found against defendants on the special defense pleaded, and finds that the consideration for the notes had not failed.

The evidence showed that the notes represented Summers' commission for finding purchasers for the Kennedy and McCormick land. He found the purchasers, and the sale was made, the vendees taking a deed. They assumed the payment of a mortgage resting on the land for \$4,000, and gave their notes and mortgage for the balance of the purchase price, the first notes falling due two years after date, or one year after the notes in question became due. The remaining ten equal payments matured at annual intervals of one year, the last being twelve years from date. Defendants seem to have abandoned the special defense set forth, and relied on evidence that the consideration was that the vendees of the land should remain on it for at least one year, and within that time make certain improvements, of a value not less than the notes given to Summers. Kennedy and McCormick testified that such was the consideration for the notes. Summers was called as a witness for defendants. He was not asked by defendants as to the consideration of the notes nor as to the alleged agreement. On cross-examination he testified: "These two notes came through a land transaction for commission. At the time of the delivery of these notes there was nothing further that I had to do. As far as I had to do the sale was complete, but there was a stipulation,—a verbal agreement—" The witness was interrupted by plaintiff's counsel at this point, and was told that he had not asked him as to any agreement, and this witness for some reason was not interrogated by either party as to the consideration for the notes, although he was a party to the alleged agreement that they were not to be paid unless the work referred to was performed. There was evidence tending to show that the vendees of defendants plowed about 100 acres of the land, and that this was worth \$2.50 per acre; that they made some improvements thereon, erected some buildings of uncertain value, dug a half mile of drainage ditch, costing \$75, and erected a levee of about same length, costing 40 cents a rod. There was some question as to whether the work was judiciously made, and benefited the land to the extent of its cost. But the alleged agreement proven may fairly apply to work done, and not to its ultimate value to the property. It appeared, also, that the vendees left the ranch before the first year expired, and refused to return to it when requested by defendants; and defendants thereupon, on November 8, 1894, a few days after the notes here in suit were due, and without the consent of the holders of the notes, took a reconveyance of the property from the purchasers, and canceled their notes and mortgage, and allowed the vendees to remove the buildings from the land. What became of the ven-

dees' obligation to pay the prior mortgage is not shown, and so far as appears they are still liable for that amount, and defendants have the benefit of the agreement to pay this amount. It appears, also, that while Summers held the notes it became necessary for him to raise \$200, which he was enabled to do by procuring the individual indorsement of one Rowell, then president of plaintiff company, and delivered the notes in suit to Rowell as collateral security, and he delivered them to the bank that furnished the money, with the note signed by Summers as principal and Rowell as surety. Before Rowell consented to become surety for Summers, he spoke to defendant McCormick, one of the owners of the land, about the notes in suit. Rowell testified: "Before I took these notes at all, I saw McCormick in regard to them, and asked him if the notes were all right. He said they were, and if it hadn't been for that I never should have taken them. Had no knowledge or information of the notes prior to that time. Had no other information than what I got from McCormick at that time." He further testified that McCormick explained to him that the notes were given to Summers "as commission on a land trade"; that he asked him if there was any condition, and McCormick said that Summers was to keep the notes until a certain amount of work was done on the land, "and that the work was done, and more too." Defendants paid \$114.29 on this note, which was credited on the notes in suit by the court.

Conceding that defendants showed that the consideration for the notes was the doing of certain work by the vendees of defendants, and that the vendees would remain on the property one year, the evidence is sufficient to warrant the trial court in its finding that the consideration had not failed. I do not think the fact that the vendees left the land before the expiration of the year shows failure of consideration, the essential thing to defendants, as guaranty of good faith in making the purchase, was that the vendees should expend an amount of money on the land at least equal to the commissions paid to Summers. They did the work, but concluded to give up the place, and defendants consented that they should do so, and took a reconveyance, and canceled the mortgage.

Appellants claim that the findings that plaintiff came into possession of the notes on January 19, 1897, as owner and holder, without notice of any defense by the defendants, is not justified by the evidence. Conceding that plaintiff took its title to the notes subject to all the equities of the makers, the evidence supports the findings of the court against the only defense set up by defendants, and it is therefore immaterial whether or not plaintiff had notice, and, if the court erred in finding that plaintiff had no notice of any defense claimed by defend-

ants, the error was harmless. There is sufficient evidence of plaintiff's ownership of the notes.

Error is claimed in rejecting certain of defendants' offered evidence relating to the alleged conditional delivery of the notes to Summers. The points raised would be worthy of attention if it did not appear from the record that defendants succeeded in getting before the court all the facts bearing upon the question of the consideration for the notes. We have carefully examined the alleged errors, and, conceding error, we find them cured by the unrestrained admission of all the facts tending to show what the consideration was. Evidence tending to vary the terms of the note, not related to the question of consideration, was properly excluded. We advise that the judgment and order be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(31 Cal. 55)

SPIELBERGER v. THOMPSON. (Sac. 734.)¹
(Supreme Court of California. Dec. 21, 1900.)

NOTES—CONSIDERATION—HOLDER.

1. A nonsuit cannot be urged against plaintiff on the ground that he was not the holder at the time of the trial of the note sued on, where it appears that before it was assigned to plaintiff it was placed in the hands of C. as collateral, that the indebtedness for which it was held as security was paid by plaintiff's assignor, and under instructions from defendant, the maker, C. refused to return it to plaintiff, and the answer alleged that C. held it as trustee of defendant.

2. There is consideration for a note where, all the parties to a litigation over the estate being anxious to amicably terminate it, and, the attorney for one of the plaintiffs therein refusing to consent to a dismissal till his fee was paid, one of the defendants told said plaintiff, who had not money to pay his attorney, that if he would dismiss the case she would give him a note to pay his attorney, and would pay the note when she got her money from the estate, and this was agreed to, and steps were immediately taken towards, and resulting in, dismissal, after some delay, largely occasioned by said defendant.

Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by Joseph Spielberger against California Thompson. Judgment for plaintiff, and defendant appeals. Affirmed.

McKune & George, for appellant. Edward J. Dwyer and Devlin & Devlin, for respondent.

GAROUTTE, J. Plaintiff, as assignee, brings this action upon a promissory note, against the maker thereof. Its execution and delivery are admitted, but various defenses to its payment are made. These defenses will be considered.

1. It is claimed that plaintiff was not the holder of the note either when the action was brought or the trial had, and for this reason a nonsuit should have been granted. Under the facts disclosed by the record, there is nothing in the point. Before the note was assigned to plaintiff it was placed in the hands of C. W. Clarke as collateral security. The indebtedness for which the note was held as security was paid by plaintiff's assignor, and, under instructions from the defendant, Clarke refused to return the note to him. But, beyond this, defendant alleges in her answer that Clarke held the note as her trustee. If the note was in the possession of her trustee, it was in her possession, and she is foreclosed by her allegation in the answer from successfully urging a nonsuit upon the ground that plaintiff was not the holder of the note at the time of the trial.

2. It is claimed that the note was given without consideration. Let us pause for a moment to look at the facts. The Oppenheimers were engaged in litigation regarding certain trust property; some were plaintiffs, others were defendants, and still others cross complainants. The payee and assignor of the note was a son. The drawer and defendant was a daughter. All parties litigant appeared to be anxious to bring the litigation to an amicable conclusion. Plaintiff's attorney in the litigation would not consent to a dismissal of the actions until his fee was paid, and his objection to a dismissal was a formidable bar in the way looking towards the accomplishment of the desired end. The evidence at this point is somewhat conflicting as between the assignor of the note and the defendant, but upon this evidence the court found against the defendant's testimony, and we are only concerned in testing the sufficiency of the evidence to support the aforesaid finding. In substance, the payee of the note testified that he told defendant he had no money with which to pay the fee of plaintiff's attorney, and she then said "if I would dismiss the case she would give me a note for fifteen hundred dollars to pay the fee of Mr. Johnson, and would pay the note when she got her money from the estate. The note was given to me in consideration of the dismissal of the cases pending at the time. I immediately took numerous steps, and tried numerous times, by my attorneys, to dismiss the action." It further appeared that the plaintiff's assignor paid the attorney his fee, and some time thereafter the action was dismissed. The dismissal was delayed for some months after the execution of the note, but this delay was largely occasioned by defendant herself. It was essentially a question of fact as to the intention of these two parties, respectively, in the making and receiving of the note in controversy. There is no question of actual fraud involved in its procurement. It is not shown but that the attorney was in fact objecting to the dismissal of the action until his fee was paid. And there is no claim

¹ For opinion on motion for rehearing, see 63 Pac. 673.

that he ever objected to its dismissal after the note was given. From all these facts and circumstances, the finding of a sufficient consideration for the giving of the note will be upheld.

3. We find nothing in the offered and rejected documentary evidence which demands a new trial. We do not see that it had any substantial bearing upon the issues of fact under examination. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(131 Cal. 64)

WILLIAMS v. TAM. (S. F. 1,520.)

(Supreme Court of California. Dec. 21, 1900.)
GIFTS—PARTNERS—SALE—INTEREST OF THIRD PARTY—NOTICE.

1. Where one refuses to accept the money which his wife's daughter owes him, but, on his wife insisting that he should accept it, he tells her to take it and use it herself, and she does take it from a loan thereafter obtained on the daughter's property, the gift is to take effect at once, and so is a valid gift *inter vivos*.

2. A partnership in training and racing horses does not give one of the partners authority to sell a horse owned by them as tenants in common, though by them trained and raced as partners.

3. Where W., on selling a horse, tells the buyer that his wife owns a half interest therein, the buyer is put on inquiry as to the authority of W. to sell her interest.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by Amanda M. Williams against Joseph H. Tam. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas A. McGowan, for appellant. Geo. D. Collins, for respondent.

HAYNES, C. The complaint alleges that the plaintiff and defendant are owners in common of two horses named, respectively, "Midas" and "Sport McAllister"; that said horses are in the possession of defendant; that she is excluded from the use and possession of the horses,—and prays for a decree of partition, that a sale of the horses be ordered, and for an accounting. The defendant denies that the plaintiff has any interest in the horses, and claims to be the sole owner of them by virtue of a sale to him by the husband of the plaintiff, one Dow Williams. The decree granted the prayer for a sale and partition, but denied the accounting; and defendant appeals from the judgment, and also from an order denying a new trial.

Appellant specifies many particulars in which he insists the evidence does not justify the findings. The evidence, however, is sharply conflicting in most material particulars. The facts may be briefly stated as follows: Dow Williams, the husband of the plaintiff, and one Manuel Morris jointly purchased the horse Midas. In the early part

of 1895 Morris sold his interest in the horse Midas to the plaintiff, and executed a bill of sale to her. Appellant contends that the purchase was made with community funds, and that the horse became community property, and that Midas and Sport McAllister, subsequently acquired, were sold and transferred to him by the husband, Dow Williams. Plaintiff insists that the purchase was made with her separate money. The price was \$500. Plaintiff's daughter, Miss Riley, owed Mr. Williams \$450, but he refused to accept it from her. Plaintiff insisted that he should accept it, and he told her to take the money and use it herself. Plaintiff then secured a loan of \$750 upon her daughter's property, and out of that money paid Morris for his interest in the horse Midas. The other horse was afterwards purchased with the earnings of Midas. The court found these facts upon sufficient testimony, and concluded that said interest in said horses constituted her separate property. The interest acquired by the plaintiff from Morris was in the early part of 1895. These horses were trained and run on the race track until in March, 1896, when Dow Williams was excluded from the privileges of the Bay District track. Not being able to find a purchaser readily, and being told that the horses would also be ruled off, he testified that he went to the defendant, Tam, for legal advice; that it resulted in the execution of a bill of sale of the horses to defendant, dated April 9, 1896, the consideration recited being \$10; and that he then informed "Judge Tam Mrs. Williams had a half interest in those horses." On April 9, 1897, Dow Williams gave Tam his personal receipt for \$200 "in full of all demands on account of the sale of the horses Midas, Sport McAllister, and Venus;" and the court found that on that date, and at no other time, Dow Williams sold and conveyed his interest in said horses to the defendant, "and that prior to such sale and conveyance defendant had notice of the said ownership of plaintiff in said horses."

1. Appellant contends "that there is no evidence to sustain the finding that the half interest in the horses became the separate property of the plaintiff by reason of their being purchased with this alleged gift." Sections 1146 and 1147 of the Civil Code, and several cases, are cited to support said proposition. There is here no question as to what is essential to constitute a valid gift. As stated in *Zeller v. Jordan*, 105 Cal. 148, 38 Pac. 640, cited by appellant: "A gift *inter vivos*, to be valid, must take effect at once, and there must remain nothing to be done essential to its delivery. If it is to take effect in the future, it is no gift, only a promise to give." But the gift was not to take effect in the future, as in the case above cited, where it was "to take effect at the death of the donor." Here there was no revocation of the gift, and it was in fact received by the donee and appropriated to her own use.

2. It is next contended by appellant that,

if said money was the separate property of the wife, she and her husband were co-partners, and that his transfer to defendant was valid and transferred her interest. Plaintiff and her husband were not engaged in the business of buying and selling horses for profit. Their business was training and running horses upon the race track. As to the horses, which were kept and used for a special purpose, they were tenants in common. "A husband and wife may hold property as joint tenants, tenants in common, or as community property." Civ. Code, § 161. There can be no implication arising from the use made of the horses, nor from the relationship of the parties, that Williams had any authority to sell his wife's interest in the horses, and no authority is shown to have been given him by the plaintiff for such purpose; nor was there any evidence of an agency, whether real or ostensible, for the sale of the plaintiff's interest in the horses. The evidence is that defendant was informed by Dow Williams that his wife owned a half interest in the horses, and that should have put him upon inquiry as to Dow Williams' authority to represent his wife in a transfer of the property. Besides, the bill of sale did not purport to be executed by the plaintiff, nor on her behalf. He cannot, therefore, successfully contend that the plaintiff is estopped by the fact that the horses were in the possession and apparent control of Dow Williams.

3. The motion for nonsuit was properly denied. In his brief, appellant rests this point upon his argument of the points above noticed, and therefore it need not be further discussed.

4. It is contended that the court failed to find upon the special defense that the husband was the reputed owner of the horses, and that defendant purchased them in good faith. The court expressly found "that prior to such sale and conveyance defendant had notice of the said ownership of plaintiff in said horses." The judgment and order appealed from should be affirmed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(131 Cal. 41)

STARR v. KREUZBERGER et al. (Sac. 739.)
(Supreme Court of California. Dec. 20, 1900.)

APPEALS—FROM JUDGMENT AND ORDER DENYING NEW TRIAL—STAY BONDS.

An appeal on a stay bond from an order denying a new trial, being prior to dismissal of the appeal from the judgment, stays execution on the judgment; so that, pending the appeal from the order, judgment cannot be entered against the sureties on the stay bond on the appeal from the judgment, though it in terms provides that the sureties will pay the judgment if the appeal be dismissed.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by Albert H. Starr against Lucas Kreuzberger and another. Plaintiff's motion for judgment against John Skelton and others, sureties on defendants' stay bond on appeal, was denied, and he appeals. Affirmed.

A. L. Shinn and H. Starr, for appellant.
Holl & Dunn, for respondents.

CHIPMAN, C. Appeal from an order denying plaintiff's motion for judgment against the sureties on a stay bond. The action was for personal injuries, and plaintiff had judgment March 15, 1898. April 4, 1898, defendants appealed from the judgment, and gave the usual appeal bond, and also an undertaking to stay execution of the judgment. The appeal was dismissed by this court on November 14, 1898 (grounds not shown), and on December 22, 1898, remittitur was filed in the court below. On January 27, 1899, plaintiff moved for judgment against the sureties upon the stay bond. The appeal bond provided, among other things, that: "If the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay the amount directed to be paid by the judgment; and that, if the appellants do not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered in said action on motion of respondents, and without notice to us or either of us, in his favor, against the undersigned sureties," etc. This bond was given under section 942, Code Civ. Proc. It appeared that defendants gave notice of motion for a new trial in due time, and in due time their statement on the motion was duly settled and filed. Thereafter, to wit, on September 13, 1898, the motion was duly made, and on the same day was denied, and on October 28, 1898, defendants served and filed their notice of appeal from the order, and on the same day duly filed an undertaking on appeal, which was substantially the same in form as the bond given on the appeal from the judgment, and was in fact a stay bond. At the hearing of plaintiff's motion for judgment on the first bond the court denied the motion, and this appeal is from that order.

It will be observed that before the judgment was entered here (November 14, 1898) dismissing the appeal from the judgment, the motion for a new trial had been heard and denied (September 13, 1898), and the appeal taken from the order, and the stay bond filed (October 28, 1898). In *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9, it was held that upon an appeal from an order denying a new trial in an action for the recovery of money the reversal of the order would necessarily set aside the judgment; and it was

further held, approving *Fulton v. Hanna*, 40 Cal. 278, that such bond operates to stay execution pending such appeal. See, also, *Owen v. Water Co.*, 124 Cal. 331, 57 Pac. 71. In the *Holland-McDade Case*, Holland was defendant in the case of Curry against Holland, in which Curry had judgment. Holland moved for a new trial, and his motion was denied, whereupon he appealed from the order denying the motion, and, without appealing from the judgment, gave a stay bond on his appeal. Notwithstanding this appeal, and after the stay bond was filed, Curry took out execution on his judgment, and McDade, as sheriff, served it by levying on certain property belonging to Holland, and on his refusal to release it from execution Holland sued him for damages. The question was, did the stay bond given on the appeal from the order have the effect to stay execution on the judgment? The answer was in the affirmative. In the case now here plaintiff could not have had execution if defendants had not appealed from the judgment (*Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185, and cases supra); nor could he if defendants had appealed from the judgment, and had given an insufficient or fatally defective bond, and the appeal for that reason had been dismissed, because they would then have been in the same position as if they had not appealed at all from the judgment. We cannot see that any different result would follow where the appeal is from the judgment, and a sufficient stay bond has been given, but for failure for some defect in the proceedings the appeal is dismissed after a stay bond has been filed in the appeal from the order. This latter bond must have the same effect whether the appeal is from the judgment or not, and the fact that a stay bond has been given on the appeal from the judgment can make no difference. It is true, the bond given on the appeal from the judgment in the present case in terms provides that the sureties will pay the judgment if the appeal be dismissed; but the sureties are not liable before the principal, the judgment debtor, has himself become liable. If execution will not issue against the judgment debtor, the plaintiff cannot proceed against the sureties. *Parnell v. Hancock*, 48 Cal. 452. See, also, *Sharon v. Sharon*, 84 Cal. 424, 23 Pac. 1100; *Id.*, 84 Cal. 433, 23 Pac. 1102. If it be true, as is now settled, that the stay bond given on the appeal from the order stays execution on the judgment, it must stay its execution for all purposes and as to all persons. To hold that it may be executed against the sureties when it may not be executed against the principal "would," as was said in *Parnell v. Hancock*, supra, "be to place the sureties in a position apparently less favorable than that occupied by their principal." Besides, defendants may prevail, and secure the reversal of the order, the effect of which would be to set aside the judgment; but their appeal would be barren of

results if the judgment had already been enforced either against the principal or the sureties. We think the reasoning in *Holland v. McDade* applies with equal force to the present case, and is authority for holding that the lower court rightly decided the motion. We advise that the order be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(131 Cal. 101)

JONES v. IVERSON et al. (S. F. 613.)¹

(Supreme Court of California. Dec. 22, 1900.)

APPEAL—NOTICE—SUFFICIENCY—PLEADING—DEMURRER—APPEAL—TRANSCRIPT—FOREIGN MATTER—REVERSAL—COSTS.

1. Where the record on appeal showed only one judgment, and no order in the nature of a judgment, a notice of appeal "from said judgment made and entered in said action in favor of defendants and against the plaintiff" was sufficiently specific to entitle appellant to be heard on appeal.

2. Where a portion of the complaint stated a cause of action, a general demurrer to the whole complaint was improperly sustained.

3. Where the first part of the complaint stated a cause of action, and was followed by matter foreign to such cause of action, which was objectionable for misjoinder of actions and parties and for ambiguity, a special demurrer to the whole complaint was improperly sustained; since, if any part of the complaint shows a cause of action free from objection, a special demurrer to the whole will not lie.

4. Where the transcript on appeal is filled with matters foreign to the case, full costs will not be awarded to appellant on reversal.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; H. L. Gillespie, Judge.

Action by David Jones, as administrator with the will annexed of Evan Davis, deceased, against Nells Iverson and others. From a judgment in favor of defendants, entered on demurrer to the complaint, plaintiff appeals. Reversed.

David Jones, in pro. per. L. G. Morse, for respondents.

CHIPMAN, C. Defendants demurred to the complaint on several grounds. The demurrer was sustained, and, plaintiff declining to amend, defendants had judgment, from which plaintiff appeals.

1. Respondents object to the consideration of the appeal on the ground of the insufficiency of the notice. It is as follows: "[Title, court, and cause.] Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the state of California from said judgment made and entered in said action in favor of the defendants and against the plaintiff. * * * The notice does not give the date of the judgment, nor identify it in any way, except by the statement as above given. If the record

¹ Rehearing denied January 22, 1901.

showed more than one judgment, or if it showed, in addition to that judgment, an order in the nature of a judgment, the notice might be ineffectual for uncertainty. But, as there was but one judgment, to wit, the judgment on demurrer in favor of defendants and against the plaintiff, we think the notice was sufficiently definite to entitle appellant to be heard here.

2. The demurrer went to the sufficiency of the complaint, and also specially set forth as grounds misjoinder of parties defendant, that several causes of action have been improperly united, that the complaint is unintelligible, uncertain, and ambiguous. The complaint was drawn by plaintiff and signed in propria persona. It is obvious that he is a layman with a very imperfect notion of what constitutes the statement of a cause of action in plain and concise language. Briefly, it is alleged in the complaint that one Evan Davis died testate in April, 1888, seised of certain land in Mendocino county, and plaintiff was duly appointed administrator of the estate of deceased, with the will annexed; that on May 3, 1892, "plaintiff was, ever since has been, and now is, the owner, and seised in fee, and entitled to the possession of that certain tract of land" (here follows a description of the land of which the complaint alleges ownership of deceased at his death, and also an additional tract not in the former description). The complaint (paragraph 11) then sets forth that while plaintiff was such owner, possessed and entitled to possession of said land, the defendants wrongfully and unlawfully entered into and upon the said land, and ousted plaintiff therefrom, and ever since have wrongfully and unlawfully withheld and now withhold possession, etc., to plaintiff's damage in the sum of \$50,000. Then follow some 60-odd folios of allegations of various incidents in the history of plaintiff and the said Davis, and their relations with sundry persons, and sets forth certain litigation had by plaintiff and said Davis with sundry persons that apparently have nothing whatever to do with the cause of action set out in the first 11 paragraphs of the complaint, and ought to have been stricken out on motion. The special demurrer seems to have been directed to this portion of the complaint, although it in terms applies to the entire complaint; and might, as to the matters referred to, have been sustained. But we think there is a cause of action stated in the earlier part of the complaint, which must be held to be sufficiently pleaded as against a general demurrer, and is equally good against the special demurrer. The rule is well established that a general demurrer directed to the whole of the complaint should be overruled if some portion of the complaint states a cause of action. A special demurrer is, or should be, directed to specific portions of the complaint, and the grounds should be specifically pointed out. The grounds for the special demurrer in the

present case are not pointed to any particular paragraph or paragraphs, but are directed to the whole complaint. But the first 11 paragraphs state a cause of action, and, separated from the succeeding paragraphs, are not obnoxious to the special demurrer. We must look to these succeeding paragraphs to ascertain the grounds for the special demurrer. It may be admitted that these subsequent matters are wholly foreign to the cause of action stated in the first part of the complaint; it may be that, as to these foreign and irrelevant matters, there would appear misjoinder of actions and parties, and unintelligibility and ambiguity of statement; still, as the demurrer is to the whole complaint, and there remains a good cause of action elsewhere stated, it was error to sustain the demurrer. If enough appears to make the pleading easy of comprehension and free from reasonable doubt, a demurrer on the ground of ambiguity should be overruled. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376, citing *Salmon v. Wilson*, 41 Cal. 595. In *Weaver v. Conger*, 10 Cal. 234, the court said: "The complaint was very loosely drawn, and contains much useless verbiage; but, taking it altogether, the facts stated were sufficient to sustain an action. The demurrer was to the whole complaint; and, not being good as to all, was properly overruled." In that case there was a general demurrer and a special demurrer for misjoinder of causes of action. See, also, *People v. Morrill*, 26 Cal. 336. Where the special demurrer is to the whole of the complaint, the rule should be the same as in the case of a general demurrer to the whole complaint. If in a portion of the complaint there is stated a good cause of action, free from ambiguity or uncertainty, or which, in short, is not amenable to any of the grounds urged in the special demurrer, it is error to sustain the demurrer as to the entire complaint. It would seem that the redundant and irrelevant matter to which the special demurrer was directed in this case could have been reached better by a motion to strike out. However this may be, the court should have overruled the general demurrer, and should have sustained the special demurrer as to all that part of the complaint following the first 11 paragraphs, with leave to amend. If plaintiff had, in such case, persisted and refused to amend, there would be some reason for sustaining a judgment against him on the demurrer. The judgment should be reversed, but, as the transcript is stuffed with matters having nothing to do with the case, plaintiff should recover no more than one-fifth of the costs of appeal.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, plaintiff to be allowed one-fifth of the costs of the appeal.

(181 Cal. 80)

KLUMPKE v. BAKER et al. (S. F. 1,640.)¹
(Supreme Court of California. Dec. 22, 1900.)

TAXATION—ASSESSMENT—LANDS JOINTLY ASSESSED—EFFECT—COLLECTOR'S RECORDS—ERROR—EFFECT ON TAX DEED.

1. Pol. Code, § 3628, provides that no mistake in the name of the owner to whom real estate is assessed shall invalidate the assessment. *Id.* § 3650, subsec. 3, provides that the assessor shall specify, in the assessment book, city and town lots, naming the city or town, and the number of the lot or block, according to the system of numbering of such city or town. *Held* that, where there was no system of subdividing blocks into lots, the assessor was authorized to assess parts of blocks according to ownership, and his error in including in one parcel land owned by more than one person would not invalidate the assessment, such error being merely a mistake in the name of the owner.

2. Pol. Code, § 3778, requires the tax collector, before delivering any certificate of sale for taxes to the purchaser, to copy from such certificate the description of the lands sold into a book to be kept in his office. Section 3787 declares that a tax deed shall be conclusive evidence of the regularity of all proceedings, from the assessment to the execution of the deed. *Held*, that where the collector made a mistake in the copy of the description of the land kept in his office, such error would not prejudice the rights of a purchaser at the tax sale after receiving his tax deed.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Klumpke against Baker and others. From an order denying a new trial, plaintiff appeals. Reversed.

R. H. Countryman, for appellant. H. C. Firebaugh, D. T. Sullivan, and W. F. Sullivan, for respondents.

HARRISON, J. Action to quiet title. Judgment was rendered in favor of the defendants, and the plaintiff has appealed from an order denying a new trial. The plaintiff's title is based upon certain tax deeds for different portions of the premises described in the complaint, three of the deeds being for the taxes thereon for the fiscal year ending June 30, 1883, and one for the succeeding year. The deeds were all executed to the plaintiff July 13, 1886, and this action was commenced July 11, 1891. Upon the introduction of the deeds in evidence the plaintiff rested. Unless, therefore, some evidence was introduced on the part of the defendants which had the effect to impeach the validity of these deeds, the plaintiff was entitled to judgment. Pol. Code, § 3788.

The defendants offered certain evidence to the effect that the lots for which the deeds had been executed had not been assessed to their respective owners, two of said lots having been assessed to the defendant George H. Baker, whereas they were, at the time of the assessment, the property of his wife, Mary A. Baker, and stood of record in her name. Evidence was also introduced to the

effect that each of these lots included a portion of the lot belonging to an adjacent owner. The respondents contend that, by reason of the assessments thus made, the tax deeds are entirely inoperative, and confer no title upon the plaintiff. Section 3628, Pol. Code, provides that the assessor shall assess the property "to the person by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner, or supposed owner of real property, shall render the assessment thereof invalid." The assessment is not against the owner, but is of the property, and that must be correctly described. The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment. In *Lake Co. v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 20, 4 Pac. 876, it was said: "The ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final so far as the validity of the tax is concerned." The failure of the assessor to describe the land in accordance with the metes and bounds given in the conveyance to the person who is assessed therefor, as well as his including therein land which is owned by another person, is only "a mistake in the name of the owner" of the lot assessed, and does not render the assessment invalid. The cases cited by the respondents arose under a statute which did not contain the above provision of section 3628. Each of the parcels described in the other two tax deeds was assessed to unknown owners. Such assessment is expressly authorized by section 3636, Pol. Code.

The provision in subdivision 3 of section 3650, that the assessor must specify in the assessment book, under its appropriate head, "city and town lots, naming the city or town and the number of the lot or block, according to the system of numbering of such city or town, and improvements thereon," was followed in the present assessments. The assessor observed the provisions of this section by specifying the number of the block according to the official subdivisions of the land in that portion of the city; and it does not appear that there is any "system" in San Francisco for the subdivision of the blocks into lots. In such a case, the assessor may assess any subdivisions according to their individual ownership, and his determination thereon is not open to review, and, if erroneous, does not invalidate the assessment. In *Cadwalader v. Nash*, 73 Cal. 43, 14 Pac. 385, cited by the respondents, it appeared that the pueblo lots had been officially divided into city blocks, and these blocks again subdivided into a large number of lots, which were desig-

¹ For opinion on motion for rehearing, see 63 Pac. 676.

nated by numbers upon the official map, and that the assessor disregarded these subdivisions, and assessed the east half of the pueblo lot as a single parcel.

Section 3778, as it stood at the time of the tax sales in question, provided that the tax collector, before delivering any certificate, must enter in a book kept for that purpose in his office a description of the land sold, corresponding with the description in the certificate, and certain other particulars. At the trial herein the defendants offered this book in evidence, and in one instance the description therein of the land sold varied from that contained in the certificate and in the tax deed, and was in itself defective, and they contend that by reason thereof the deed was ineffective. A proper construction of the several provisions of the statute fails to sustain this contention. Section 3776 provides that, after receiving the amount of the taxes and costs, the collector must make out, in duplicate, a certificate, stating certain matters therein specified; and section 3777 declares that one copy of the certificate must be delivered to the purchaser, and the other filed in the office of the county recorder. By section 3779 it is declared that "on filing the certificate with the county recorder the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon." Section 3786 declares that "the matters recited in the certificate of sale must be recited in the deed," and that such deed is primary evidence of certain facts; and section 3787 declares that the deed is "conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed," one of which is the act of the tax collector in copying the certificate into the book of descriptions. It is not to be held that the rights of the purchaser can be impaired by the failure of the tax collector to make a correct copy of the certificate in this book.

In one of the deeds the land is described as commencing at a point 69 feet easterly from Lyon street, and the complaint describes the land in controversy with the same boundary. Evidence was offered in behalf of the defendant O'Connor to the effect that the block which embraces the land in controversy is of smaller dimensions than that delineated upon the assessor's map, and that the land claimed by him commences, for its western boundary, at a point 15 feet east of Lyon street. Whether the land claimed by him is included in the tax deed is to be determined by ascertaining the actual location of Lyon street. The court made no finding upon this subject, and the record does not contain any evidence from which that fact can be ascertained. The evidence introduced on behalf of the defendants was insufficient to defeat the title of the plaintiff as shown by

the tax deeds, and for that reason the court erred in refusing to grant a new trial. The order is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(130 Cal. 642)

PEOPLE v. CLARKE (Cr. 635.)¹

(Supreme Court of California. Dec. 14, 1900.)

MURDER—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. One accused of murder, on the day of the killing, borrowed a shotgun and four shells, stating his purpose was to shoot squirrels. He used two of the shells in shooting squirrels. Between 5 and 6 o'clock of the same day a Chinese laundryman, with his laundry, went into the house where accused boarded, and never came out. Next day his body was found concealed beneath the floor of the house. Death had resulted from two shotgun wounds inflicted with the borrowed gun and two of the borrowed shells. Gunshots, coming from the house, were heard about the time the Chinaman was at the house. Accused was seen at the house shortly after the shots were heard. The owner of the house, who was absent that day, returned to his house drunk between 7 and 8 o'clock that night. Accused made false statements when questioned by the officers after the killing, and made a bold attempt to escape from their custody. Held sufficient to sustain a conviction of murder in the second degree.

2. On a trial for murder alleged to have been committed in a house, a witness who heard the shots may be asked if he could tell from the sound of the shots whether they were in the house or out of it.

3. Where a witness states that he could distinguish by the sound the difference between shots fired with a shotgun and those fired with a rifle, and that he heard the shots which killed deceased, on a trial for the murder he may state that the shots sounded like those from a shotgun.

4. Where on a trial for murder a witness states that he was sitting on a rock near the house where deceased was killed, and heard shots in the house, and shortly thereafter saw accused come out, third persons, to whom such witness stated he pointed out the rock, may state that the house could be seen from the rock, in rebuttal of evidence by accused that it could not be seen therefrom.

5. Where a murder was committed either by accused or another, and accused claimed on the trial that it was committed by such other, the prosecution may prove by the latter that he did not kill the deceased.

6. On a trial for murder, the motive for which is assigned as robbery, accused cannot be impeached by showing his illicit relations with a certain woman.

7. On a trial for murder, the motive for which is assigned as robbery, the improper admission of evidence of accused's illicit relations with a certain woman is not reversible error, where evidence of the same general character was introduced by accused.

8. Where a motion for a new trial for newly-discovered evidence is based on accused's affidavit, stating that his evidence on the trial was false, and on affidavits of others setting out matters merely cumulative, its refusal will not be disturbed on appeal.

9. On a trial for murder, based on circumstantial evidence, an instruction authorizing the jury, if they have a reasonable doubt as to which of two opposing conclusions the chain of circumstances leads, they should give ac-

¹ Rehearing denied January 10, 1901.

cused the benefit of such doubt, is properly refused, where both of the opposing conclusions might lead to accused's guilt.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Harry W. Clarke was convicted of murder in the second degree, and he appeals. Affirmed.

W. H. Shinn and D. Allen, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. The defendant has been convicted of the crime of murder of the second degree, and appeals to this court. It is earnestly insisted that the evidence does not warrant a conviction. The evidence was purely circumstantial, and the salient facts are these: One Joseph Hunter, a constable, lived in a four-room house near the public road, some three miles distant from the city of Los Angeles. The defendant, a young man of slight physique and weight, afflicted with a perceptible lameness in one leg, had been living with Hunter for some weeks. Upon the day of the killing, Hunter was in the city of Los Angeles; the defendant being alone at the house. During the early part of the day defendant borrowed a shotgun of one neighbor, and four loaded shells of another, stating his purpose was to shoot squirrels. And during the early afternoon he undoubtedly fired two of these shells at squirrels near his house. Between 5 and 6 o'clock of this day a Chinese laundryman drove up to the house for the purpose of delivering laundry, as was his usual weekly custom. He went into the house with the laundry, and never came out. His horse and wagon stood in front of the house for an hour or more, and then the horse wandered away aimlessly down the road. Upon the following morning suspicion of murder became rife in the neighborhood, and upon the third or fourth day thereafter the dead body of the Chinaman was found concealed beneath the floor of the house. Death had resulted from two shotgun wounds inflicted with the borrowed gun and two of the borrowed shells. At some time between the hours of 5 and 6 o'clock of this day, and after the Chinaman had entered Hunter's house, one witness heard two shotgun shots, apparently coming from within the house, and other witnesses heard at least one shot coming from the same direction. Two bedsheets, evidently taken from defendant's bed, were found wrapped around the head and shoulders of the dead man. Spots of blood were found at various points in the house, and evidence of an attempt to conceal and erase them was apparent. Indeed, there is no question but that the Chinaman was killed in the house by gunshot wounds inflicted with the borrowed gun and shells. Defendant made many false statements when questioned by the officers after the killing, and also made a bold effort to escape from their custody. He was seen at the house by one witness a few minutes after the two shots were heard,

although he claims to have left the house soon after the Chinaman had entered it and not to have returned until an hour or two later. About 10 or 11 o'clock of that night, at the house, he showed a woman friend considerable silver money, and the theory of the state is that the purpose of the killing was robbery. Hunter returned to his house drunk, at some time between 7 and 8 o'clock of that night. There are other items of evidence looking towards defendant's guilt, which it is not necessary to here detail. If the Chinaman was killed between the hours of 5 and 6 o'clock of that afternoon, or even as late as 7 o'clock, the defendant's guilt is well assured; and that the gunshots heard by the aforesaid witnesses as coming from the direction of the house caused the death of the Chinaman is equally well assured. There were but four loaded shells for the gun, and two of these shells had been fired early in the afternoon at squirrels. The remaining two shells were the shells used in the killing. Defendant, by his counsel, claims that Hunter must have killed deceased; but that theory is confronted with the fact that Hunter did not return to his house until after 7 o'clock, at least, and the two shots from the gun, as testified to by the witnesses, must have been fired previous to that time. While the fact cannot be considered upon the question of the sufficiency of the evidence to support the verdict, still it may be mentioned that the correctness of the jury's disbelief in the evidence of defendant as to his alibi was subsequently impreguably fortified by his own affidavit introduced upon his motion for a new trial, wherein, under oath, he admitted his testimony at the trial to be false, and stated that he was present at the killing, and saw Hunter fire the shots that killed the deceased, and subsequently stood by when Hunter concealed the dead body. We have given the salient facts disclosed by the record. In addition to these, there are many others of minor importance; and, taking them altogether, we are prepared to say that the verdict of the jury has full support in the evidence, and it will not be disturbed by this court upon the ground urged.

A witness, under objection, was asked the following question: "Q. Could you tell from the sound of the shots about where they were, —whether they were in the house or out of the house?" The objection was properly overruled. *People v. Chin Hane*, 108 Cal. 602, 41 Pac. 697. The witness was also justified in testifying that the shots sounded like those fired from a shotgun. Even if it be conceded that this evidence should only come from the mouth of an expert, still there was no objection to the question upon that ground; and the witness also stated that he was able to distinguish, by the sound, the difference between shots fired from a shotgun and those fired from a rifle.

The witness Le Page testified that he was sitting upon a rock several hundred feet from

Hunter's house when he heard the shots fired, and that a few minutes thereafter he saw defendant come out of the house, look into the wagon of the Chinaman, and then return into the house. The defendant offered evidence to the effect that a person sitting on the rock described by the witness could not see Hunter's house. The location of this particular rock, therefore, became very material; and in rebuttal Le Page testified that he pointed out to the state's witnesses the rock upon which he was sitting when he saw defendant at the house. These witnesses then testified that the house could be seen from the rock pointed out by Le Page. We see no valid objection to this line of testimony.

There was no error committed by the court in allowing the prosecution to prove by Hunter that he did not kill the Chinaman. It may be said the evidence points with unerring certainty to the fact that either the defendant or Hunter killed the Chinaman. Indeed, counsel for defendant all through the trial of the case claim that deceased must have been killed by Hunter. Under these circumstances, the testimony of Hunter was competent and admissible. *People v. Van Horn*, 119 Cal. 328, 51 Pac. 538.

The defendant, when on the witness stand, was asked in regard to one Miss Letitia Allec: "Q. You were living there with her, was you not?" The question was clearly objectionable, and clearly prejudicially objectionable. You cannot degrade or impeach a witness in this way. Under almost any circumstances other than those here presented, this error would demand a reversal of the judgment and a new trial of the defendant. This court has held questions of this character prejudicially objectionable so many times in the past that it is surprising the state's officers will continue to indulge in the practice of asking them. In the very recent case of *People v. Crandall*, 125 Cal. 135, 57 Pac. 785, the whole matter is fully discussed, and the authorities cited. But, in view of the fact that other evidence of the same general tenor was introduced upon the part of the defendant, we think it apparent that the error committed by the trial court in the admission of the answer to this question did not prejudice him. The record discloses, by the evidence of defendant's witnesses, that this woman had been living a portion of her time prior to the killing at Hunter's house, with defendant. The woman herself testified in answer to defendant's counsel: "About two weeks before the shooting I remember riding from the city with Joe Hunter towards his place. At that time, and between the city and his place, on the road, he said to me: 'Why don't you get rid of Harry? He hasn't got any money, and if you get rid of him I will give you all the money and

fine clothes you want.' He also said on the same occasion that Harry was no good, only for his good looks." And upon cross-examination she says: "Joe Hunter didn't say to me that I had better marry Clarke. He wanted me to quit Harry and go with him. That is all."

Defendant made a motion for a new trial upon the ground of newly-discovered evidence, and in support of his motion presented many affidavits. He himself made an affidavit to the effect that his testimony bearing upon his claim of an alibi was false, and that he was present in the house and saw Hunter kill the Chinaman and subsequently conceal the body. As tending to furnish statutory grounds for a new trial, we attach no importance whatever to this affidavit. The court below evidently had but little doubt of its falsity. Indeed, it appears by the record that, subsequent to defendant's conviction, Hunter was tried for the murder of the Chinaman and acquitted; the jury evidently not believing defendant's testimony, which was in line with his affidavit here under consideration. We have also examined the contents of the other affidavits introduced by him as showing newly-discovered evidence. As to some of them,—for example, that of Anna Bibby,—it may well have impressed the trial court as being entirely unbelievable. Others contain matters of minor importance, and still others set out matters of an entirely cumulative character. In view of the law by which this court is governed in reviewing a question of this character, we will not disturb the order denying the new trial upon the ground of newly-discovered evidence. *People v. Demasters*, 109 Cal. 807, 42 Pac. 236. We do not find it necessary to pass upon the admissibility of certain counter affidavits offered by the state upon the hearing of the motion for a new trial.

Complaint is made of the court's refusal to give the following instruction: "The court instructs the jury that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong; and therefore, in such a case, if you have a reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would thereby be created, and you should give the defendant the benefit of such doubt and acquit him." In view of the fact that both of these "opposing conclusions" might lead to defendant's guilt, the instruction, for this reason alone, was properly refused.

There is no substantial error disclosed by the record. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

(131 Cal. 112)

PEOPLE v. TERRILL. (Cr. 634.)

(Supreme Court of California. Dec. 27, 1900.)

CRIMINAL LAW—BILL OF EXCEPTIONS—NECESSITY—RULE OF COURT.

Rule 29 of the supreme court provides that, in all cases of appeal to the supreme court from orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions. *Held*, that where an information was set aside on the ground that the defendant had not been legally committed by a magistrate, and the record, on an appeal from the order, did not include the affidavits and papers used on the preliminary examination in a bill of exceptions, the order must be affirmed.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by the people against Samuel B. Terrill. From an order granting a motion to set aside the information, the people appeal. Affirmed.

Atty. Gen. Ford and James H. Campbell, for appellant. Jackson Hatch, for respondent.

McFARLAND, J. This is an appeal by the people from an order of the court below granting a motion to set aside the information. The main ground of the motion was that prior to the information respondent had not been legally committed by a magistrate. What is called the "Transcript on Appeal" shows what purport to be a large number of affidavits and other papers and testimony given and proceedings had at the preliminary examination; but there is no bill of exceptions authenticating these matters, and therefore there is nothing before us into which we can look to see whether the order appealed from was or was not erroneous. The Codes contain no provision, either in civil or criminal cases, for authenticating papers or evidence used on a motion, other than a bill of exceptions, and formerly there was great difficulty and confusion on the subject. It was held in *Walsh v. Hutchings*, 60 Cal. 228, that the certificate of the clerk would not do. In *Peper v. Land Co.*, 56 Cal. 173, the judge of the lower court had certified to the papers used, and the court said that, "as the Codes had prescribed no mode of authentication, this court has the power to prescribe by a rule how such papers can be brought before it on appeal," and that, "as it has such right to make a rule in advance, it has a like power to ratify and adopt the mode followed in this case," and the papers named in the judge's certificate were considered. There is no decision as to when the judge must make his certificate, and his recollection of the facts might be very indistinct; and in *Borkheim v. Insurance Co.*, 38 Cal. 627, the court suggests to members of the bar that they "request the judge, at the hearing of such motion, to indorse each affidavit or other document as having been

used upon the motion." In *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, the whole matter was extensively discussed, several justices expressing opinions. It was held in the leading opinion "that the papers could only be presented to this court by bill of exceptions," but, as the certificate of the judge was itself insufficient, it was probably on that ground that the appeal was dismissed; the court being embarrassed by former decisions. But it was suggested in that case, which was decided in 1899, that there should be a rule of court on the subject to "operate prospectively"; and immediately afterwards the rule, then No. 32, and now No. 29, was adopted, which is as follows: "In all cases of appeal to this court from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." Afterwards, in March, 1891, the case of *White v. White*, 88 Cal. 429, 26 Pac. 236, was decided, in which this court said: "The transcript on appeal herein purports to show that certain affidavits and testimony of witnesses were used upon the hearing of the motion which resulted in the order appealed from, but there is no bill of exceptions in the record. In the case of *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967, the members of this court were divided as to the proper practice to be pursued in authenticating the record on appeal from this class of orders, but since then the court has adopted rule 32, which, we think, should be deemed as settling the practice, so far as relates to appeals taken since it went into effect; and, this appeal having been taken since that date, the rule is decisive of the question arising on this motion." That case was decided nearly 10 years ago, and the rule itself has been in existence more than 11 years, and there is no reason why since then all difficulties on the subject should not be avoided by a compliance with the rule. Of course, the rule does not apply to papers which are themselves parts of the judgment roll, as was the case in *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(131 Cal. 91)

DENNIS v. KOLM et al. (KOLM, Intervener).

(L. A. 748.)

(Supreme Court of California. Dec. 22, 1900.)

ACTION AGAINST FIRM—INTERVENTION—INTERESTED PARTY—EVIDENCE OF PARTNERSHIP—PRIMA FACIE CASE—ADMISSION OF DECLARATIONS.

1. In an action against a firm, an Intervener claiming to own money attached therein as the property of one who denied that he was a member, and alleging that the money was the proceeds of a note and mortgage which he assigned to her, is an interested party, within

Code Civ. Proc. § 387, authorizing intervention by any one having "an interest in the matter in litigation."

2. On an issue in an action against a firm as to whether an intervener owned the proceeds of a note and mortgage attached as the property of a defendant, who denied that he was a member, and which note and mortgage she claimed he had assigned to her, declarations made by the other defendants as to the partnership affairs, who composed the firm, the amount of the investments of each in the business, and the object of the member in question in disposing of the note and mortgage to intervener, were admissible.

3. After a prima facie case as to partnership is made, the admissions and conduct of the several partners in the course of the partnership business are admissible against the others.

4. Whether a prima facie case as to partnership has been made, so as to justify admission of the declarations of partners, is for the court to determine in a trial before a jury.

5. On an issue as to whether a mercantile partnership existed between two brothers and a third, who denied it, it appeared that the latter was in the store, and in and about the business, conducting and managing it, apparently as the others. Before the business started in the place in question, he said to one witness that he was going to invest some money, and look around and start in business there. He afterwards said to another that he had more money invested in the business than his brothers. After the store was closed, and he had removed to a distant city, and begun business alone, he said, in answer to a question as to some of his goods, that "we" (meaning himself and brothers) had a store at the place in question, but could not agree, and, after disposing of what they could, the balance of the goods were to be shipped to where he then was. He also said in a letter that, "We are also through with the business," that each went his own way, and that they could not think of such a thing as to conduct a business in partnership again. *Held* to establish a prima facie case of partnership, warranting the admission, as evidence that he was a partner, of the declarations of his two brothers.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by B. H. Dennis against K., T. E., and H. Kolm, co-partners, doing business as Kolm Bros., in which Bertha Kolm intervened. From a judgment for defendant H. Kolm and the Intervener, and from an order denying a new trial, plaintiff appeals. Reversed.

Dillon & Dunning, for appellant. McKeeley & McKeeley and L. C. Whitney, for respondents.

COOPER, C. This action was brought to recover for goods, wares, and merchandise alleged to have been sold to the defendants as co-partners under the firm name of Kolm Bros. One Perkins had in his hands about \$870, which plaintiff claimed to be the money of H. Kolm, who was alleged to be one of the partners. Plaintiff had the \$870 attached in this action as the property of H. Kolm. Bertha Kolm, a sister, filed a complaint in intervention, in which she denied that the money so attached was the property of H. Kolm, or of Kolm Bros., and alleged that the same was her property, and asked that she be adjudged to be the owner thereof. A de-

murrer was interposed by plaintiff to the complaint in intervention, overruled, and plaintiff filed an answer to said complaint. The respondent H. Kolm filed an answer to the complaint of plaintiff, in which, among other things, he denied that he ever was at any time a member of the firm of Kolm Bros., or that he was in any way indebted to the plaintiff. The case was tried before a jury, and verdicts rendered for the respondent H. Kolm and the Intervener, Bertha Kolm. Upon these verdicts judgment was entered. This appeal is from the judgment and an order denying plaintiff's motion for a new trial.

It is claimed that the court erred in overruling the demurrer to the complaint in intervention, for the reason that the said complaint does not state facts showing that the intervener has any interest in the matter in controversy, or that the decision would in any way affect her rights. It is provided in the Code of Civil Procedure (section 387): "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." In this case the intervener claimed the money in the hands of Perkins as the proceeds of a note and mortgage that had been assigned to her by respondent H. Kolm. She alleged that Kolm Bros. were at no time the owners of said note or mortgage, or of the money in the hands of Perkins, but that she was the owner of the same. If she could show that H. Kolm was not one of the co-partners of the firm of Kolm Bros., then he was not indebted to plaintiff. If plaintiff was not a creditor of H. Kolm at any time, then he could not attack the transfer of the note and mortgage made by H. Kolm to the intervener. We think the intervener had such interest as would entitle her to intervene under the statute. It was said by this court in *Coffey v. Greenfield*, 55 Cal. 382, in speaking of the interest which entitles a party to intervene: "And the Code does not attempt to specify what or how great this interest shall be in order to give a right to intervene. Any interest is sufficient. The fact that the intervener may or may not protect his interest in some other way is not material. If he 'has an interest in the matter in litigation, or in the success of either of the parties,' he has a right to intervene." The provisions of our statute are taken substantially from the Code of Procedure of Louisiana, and the practice in that state is to allow a party to intervene whose property has been seized or attached in the suit. *Pom. Rem. & Rem. Rights*, p. 464, § 427, note 2; *Field v. Harrison*, 20 La. Ann. 411; *Yale v. Hoopes*, 16 La. Ann. 311; *Letchford v. Jacobs*, 17 La. Ann. 79.

Plaintiff claims that the court erred in sustaining objections made by respondents to several questions tending to prove declarations made by F. Kolm and T. E. Kolm as to the partnership affairs, who composed the

firm, the amount of the investments of each of the brothers in the business, as to the object of respondent H. Kolm in disposing of the note and mortgage to respondent Bertha Kolm. The above statement shows generally the nature of the offered evidence, and it will not be necessary to consider the questions and rulings separately. The court, after several questions were asked tending to show the above matters, in sustaining objections to the questions said: "I don't care to hear any authorities upon the proposition that one man can, by any declaration of his, bind another, except he be present and hear it, as to the relation between them. I said yesterday that this is a case of trial by jury in which they determine all questions of fact. It is not within the province or power of this court to say whether any prima facie case or any other case is made out. The objection is sustained." The court erred in excluding the offered evidence. It was one of the main points at issue as to whether or not H. Kolm was one of the partners of the firm of Kolm Bros. It was also material to determine the issue as to the ownership of the note and mortgage which H. Kolm claims to have sold to his sister Bertha. After a prima facie case as to partnership is made, the admissions and conduct of the several partners in the course of the partnership business are admissible as against the others. 1 Greenl. Ev. § 177; Colly. Partn. § 775; 1 Lindl. Partn. (2d Ed.) p. 128, note 2. And in a trial before a jury it is incumbent on the judge to determine the question whether there is prima facie evidence of a partnership. *Hilton v. McDowell*, 87 N. C. 364; *Bryce v. Joynt*, 63 Cal. 378. The ultimate facts in such cases should be determined by the jury upon proper instructions from the court, but, the prima facie showing of a partnership having been made, the court should admit all evidence that is admissible upon the theory that the partnership has been fully proven. Any other rule would deprive a party of very material testimony. In this case, for instance, if the jury had concluded that a partnership existed, and that H. Kolm was a member of the said partnership, it would not have had before it any of the evidence that was offered upon the theory that he was such partner. The exclusion of the evidence was upon the theory that H. Kolm was never a partner of Kolm Bros. If the jury had found such co-partnership, then the evidence was admissible. In order for it to be admitted the case would have to be retried. There was ample evidence to show prima facie that H. Kolm was a partner of Kolm Bros. He was in the store, and was in and about the business, conducting and managing it apparently as the other brothers. Before the business was opened in Los Angeles the witness Linehan testified that H. Kolm told her "that he was going to invest some money, and look around, and start in business here in Los Angeles." The witness Jappa testified that H. Kolm told him that "he had

more money invested in the business than his brothers." The witness Stellinski testified that, after Kolm Bros. had closed their store in Los Angeles, he was present at a store in Chicago being opened by H. Kolm, and witness saw goods marked very low, and some of the cases had "Los Angeles" written upon them, which appeared to be obliterated; and witness said to H. Kolm, "Have you stolen those goods, or found them, because you can sell them so cheap?" Kolm answered: "We had a store in Los Angeles,—we brothers,—but we couldn't agree. * * * After disposing of what we could, the balance was shipped to Chicago." He said they were three in partnership. He said, "The Jews swindled enough, and it is not more than right that we should do the same, or swindle them." In a letter written at Chicago, August 22, 1897, to his sister, the intervener, H. Kolm said: "Now, we are already through with the business, and live again on Fry street here. Each goes his own way whence he came. Theodore will soon be West again, Ferdinand again at Moody's school, and I am out working at present. * * * We cannot think of such a thing as to conduct a business in partnership again." There are other circumstances and admissions, but the above is sufficient. It was the duty of the court to determine whether or not a prima facie case showing H. Kolm to have been a partner was established. Such prima facie case was established. The offered evidence was admissible upon the theory that H. Kolm was a partner. We advise that the judgment and order be reversed.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(131 Cal. 96)

LARRABEE v. TOWN OF CLOVERDALE
et al. (S. F. 1583.)¹

(Supreme Court of California. Dec. 22, 1900.)

MUNICIPAL CORPORATIONS—SURFACE WATER IN STREET—DIVERSION ONTO PRIVATE PROPERTY—ACTION FOR NUISANCE—NON-SUIT—EVIDENCE—GRADE OF STREET—RULE AS TO CONSEQUENTIAL DAMAGES—APPLICATION.

1. In an action against a town for a nuisance caused by the diversion onto plaintiff's lot of surface water running past the same, it was claimed that the water never ran there in a well-defined channel. Plaintiff testified that, from the time she went to reside on the lot in 1886, "there was a waterway at the edge of the sidewalk, * * * perhaps eighteen inches deep," crossed by "a plank about three feet long." Another witness said that the water had flowed along the street in question from the time it was graded, in 1881, and before that, for 25 years or more, had flowed along generally in the direction of the street, in "a well-defined water course and channel, meandering generally along what is now the general course" of such street. Other witnesses said that prior to 1893 there was no regular ditch along the street, but only a gutter, and that the water

¹ Rehearing denied January 22, 1901.

was confined merely by the sidewalk on one side and the rise of the street on the other. *Held*, that it was error to grant a nonsuit on the ground that there was no evidence that the stream had flowed in a clearly-defined channel.

2. A municipality, the same as an individual, has no right to divert surface water from the channel in which it flows in a street, whether natural or artificial, and however it may have come into the street, and throw it onto the land of another.

3. The rule that a city, in grading a street in the regular performance of its legitimate functions, is not responsible for consequential damages, does not apply to its direct invasion of the rights of a lot owner, where it diverts water from its channel in the street, and throws it onto his premises.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Hester A. Larrabee against the town of Cloverdale and others. Plaintiff was nonsuited, and from an order denying a new trial she appeals. Reversed.

Smith & Murasky, for appellant. James W. Oates and J. R. Leppo, for respondents.

SMITH, C. The plaintiff was nonsuited in the court below, and appeals from an order denying a new trial. The suit was brought to enjoin the maintenance of an alleged nuisance, and for damages suffered by the plaintiff by reason of it. The defendants, other than the town, were trustees of the town, but are sued individually. There was no evidence tending to establish the cause of action as against them, and as to them the nonsuit was rightly granted. The material facts of the case, as disclosed by the evidence, are as follows:

Plaintiff is the owner of a lot containing about two acres of land in the town of Cloverdale, fronting northwest on First, and northeast on Washington, street. First street runs northeast and southwest; but the witnesses speak with regard to it as though it ran east and west, and for convenience of expression I will adopt this usage. The plaintiff has been the owner of the lot in question since 1890, and had previously resided thereon with her husband from 1886. During all this time there was a waterway running along the south side of First street past her lot, in which during the rainy season, or at least during wet seasons, there was running water. This water, prior to 1893, crossed Washington street through a culvert, and passed on to West street, about a thousand feet further on, and thence along the same southerly to a large ditch, and into the river. But in that year Washington street was graded across First street so as to form an embankment across the waterway, and without culvert, by which the water was diverted from its former course, and made to flow along the west side of Washington street, near the east boundary of plaintiff's lot. The result was that, during the two rainy seasons following this work, the water was backed up over the land of the plaintiff, and part of

her land, with 30 or 40 feet of her fence on Washington street, washed away. The channel of the water was also washed out to the depth of about 3 or 3½ feet, and to the width of 6 or 7, and access and egress to and from her land thus impeded.

One of the grounds for nonsuit was that prior to 1893 the water—which respondent claims was mere surface water—"never run there in any well-defined channel for any considerable time," and the court seems to have based the decision on this ground, or, as expressed by itself, on "the absence of a clearly-defined channel upon First street prior to 1893." But there was evidence that there was such a channel. The plaintiff testified that from the time she went to reside on the place in 1886 "there was a waterway at the edge of the sidewalk * * * perhaps eighteen inches deep, with a sandy, pebbly bottom," crossed by "a plank about three feet long." And the witness Crigler testified that the water had flowed along First street from the time it was first graded, in 1881, and before that, "for 25 or more years," had "flowed along generally in the direction of First street," in "a well-defined water course and channel, meandering generally along what is now the general course of First street." Some of the witnesses, indeed, testified that prior to 1893 there was no regular ditch along First street, but only a gutter, and that the water was confined merely by the sidewalk on one side and the rise of the street on the other. But this is not in conflict with the other evidence, but equally establishes the existence of a "water course" or "clearly-defined channel"; and, indeed, had it been otherwise, it should, on motion for a nonsuit, have been disregarded.

The fact that the water flowed only during the rainy season, or during rainy weather, or, as claimed by respondent, was mere surface water, is quite immaterial; and it may even be admitted (though there was evidence to the contrary) that the course over which the water flowed was not a natural water course. It was sufficient that there was, and for many years had been, a definite channel, whether natural or artificial, and that the defendant obstructed this channel, and thus diverted the water onto plaintiff's land; that is to say, not only onto the west half of Washington street, which is presumably the land of the plaintiff (Civ. Code, §§ 831, 1112), but onto her lot outside the street. "An individual has no right to collect in artificial channels mere surface water, and precipitate it on the land of another. Nor has a corporation, whether public or private, the right to collect in such channels the mere surface water precipitated by rain or snow over large districts, and throw it upon the property of another." *Conniff v. City and County of San Francisco*, 67 Cal. 45, 7 Pac. 41. With reference, therefore, to the damage accruing from the impact of the water onto the plaintiff's land, the case comes directly within the principle cited.

And, generally, I think, the case comes within the authority of the decision last cited, and of *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 103 Cal. 461, 37 Pac. 375. In *Conniff v. City and County of San Francisco*,—which was a case very similar to this,—the channel obstructed is referred to in the course of the opinion as “a natural channel”; but the meaning of this expression is to be interpreted by reference to the actual character of the channel as shown by the pleadings and evidence in the case, and from this it does not appear to have been anything more than “a water course crossing the street,” and “the channel of usual escape.” We may therefore construe the term “natural channel” as including all channels through which, in the existing condition of the country, the water naturally flows. As is said in *Los Angeles Cemetery Ass'n v. City of Los Angeles* (pages 466, 467, 103 Cal., and page 377, 37 Pac.): “In all regions of country having a broken surface, and subject to heavy rainfall, surface water does make for itself or assume definite channels in seeking, pursuant to the law of gravitation, a lower level;” and it is also said that municipal corporations are bound to provide for the escape of surface water in all “that class of cases where the surface water, owing to the conformation of the adjacent country, has formed for itself a definite channel in which it is accustomed to flow.” In both of the cases cited the decision and language of the court must be construed as referring to the existing condition of the surrounding country, which had come, in each case, to be a part of a city, and thus materially and essentially transformed from its original condition. In each case, though the channel of egress was probably the same as before the city existed, the waters flowing to it—by reason of the grading of lots and streets—may, and, indeed, must, have been different from what before the improvement of the city naturally flowed to the same point; and it is to the conditions existing at the time of the suit, and not to those anciently or originally existing, that the decisions must be understood to relate. And this, on principle, must be the true construction of the term “natural channel,” when used in the present connection; for, by the necessarily great changes that must occur in the conformation of the country in the building of a city, the natural channels for the surface water are changed; and as the changes in the ground are inevitable and legitimate, and therefore natural, the new channels, through which, under natural laws, the surface waters are discharged, must also be regarded as natural.

Some other grounds are urged by respondent in support of the judgment, to which we will briefly advert:

(1) It is claimed that the natural course of the surface waters from the cañon west of the town, in which they have their source, was not along First street, but from the land of one Smith, west of the western terminus

of the street, southwesterly into a ditch passing to the south of the plaintiff's lot; that the waters were diverted to the course along First street by a board fence erected by Smith about the time of the construction of the embankment across First street complained of; and that in fact the damage to the plaintiff was caused by the increased flow of water thus occasioned, and would not otherwise have occurred. To understand this position, it should be understood that prior to 1893 there was a picket fence through Smith's place, on the prolongation of the south line of First street, which in 1893 was replaced by the board fence referred to. But, as we have seen, the evidence showed that long before the year referred to the course of the water had been along First street, and that any material difference was made in the flow is a mere inference. Nor, though it were otherwise, would the liability of the defendant be affected. There is no reason to suppose that the increased flow, if any, would have damaged the plaintiff's land if it had not been turned by the defendant; and, however the water may have come into the street, the defendant had no right to turn it upon the land of the plaintiff.

(2) It is further urged that the grading of Washington street by the city was in the regular performance of its legitimate functions, and that it is not responsible for consequential damages. But the case is not one to which this principle can apply. The act complained of was a direct invasion of the plaintiff's rights, and consequently unlawful. *Conniff v. City and County of San Francisco*, 67 Cal. 50, 7 Pac. 44, and cases cited. I advise that the order denying a new trial be reversed as to respondent the town of Cloverdale.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed, with reference to the respondents other than the town of Cloverdale, and as to the respondent last named it is reversed, and cause remanded for a new trial.

(131 Cal. 24)

STANFORD v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,171.)¹

(Supreme Court of California. Dec. 20, 1900.)

TAXATION—STOCKS AND BONDS—SITUS.

Stocks and bonds of a foreign corporation, owned at the time of his death by a resident of California, where his estate is being administered, and inventoried by his executrix as part of the estate committed to her charge, is there taxable to her, under Const. art. 13, § 8, as property “owned or claimed” by her, though testator had pledged it for a loan in another state, and it still remains so pledged.

Commissioners' decision. Department 2. Appeal from superior court, city and coun-

¹ Rehearing denied January 19, 1901.

ty of San Francisco; J. C. B. Hebbard, Judge.

Action by Jane L. Stanford, executrix of Leland Stanford, deceased, against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Wilson & Wilson, for appellant. Franklin K. Lane, for respondent.

CHIPMAN, C. Action to recover certain taxes, paid under protest, upon certain stocks and bonds situated in New York City. Defendant had judgment on the demurrer to the complaint, from which this appeal is prosecuted.

It appears from the complaint that at his death plaintiff's testator was the owner of a large number of stocks or shares and certain bonds of foreign corporations, all of which, except certain described shares of stocks, were, on and prior to the first Monday in March, 1894, in the state of New York, and pledged as collateral security for the payment of a loan, "and were not on and prior to said date, and thence hitherto never have been, in the possession of this plaintiff as executrix as aforesaid"; that before the assessment in question plaintiff "made a formal statement in writing to said assessor that the said property so assessed by said assessor to this plaintiff as said executrix was not at any time on or since said first Monday in March, 1894, in the possession of said estate * * * or of this plaintiff as executrix," except as above stated, and that "this plaintiff, as such executrix, did not have in her charge, possession, or control the personal property, or any part thereof, so assessed," except as above shown; that plaintiff appeared before the board of equalization, and made application "to strike out the said assessments, and fully set forth the facts upon which it was claimed that the assessments or valuations should be stricken out." The personal property involved is divided into three classes: First, shares of stock of foreign corporations, the certificates of which were physically in the possession of the executrix in San Francisco at the date of the assessment; second, shares of stock of foreign corporations, the certificates of which were not within the state, nor in the actual possession of the executrix, on the tax day, but were in New York City, where they were held in pledge as collateral security for certain advances made thereon prior to the testator's death, the amount of which advances does not appear from the complaint; third, bonds of foreign corporations similarly situated to the shares last above named.

1. As to the assessment of the property falling within the first classification, the learned counsel for plaintiff make no point in their brief. This property is clearly taxable in this state. In *re Fair's Estate* (Cal.) 61 Pac. 184, and cases therein cited. See, also, *Mackay v. City and County of San Fran-*

cisco (Cal.) 61 Pac. 382, and cases therein cited, and *Id.*, 113 Cal. 392, 45 Pac. 696.

2. Plaintiff does not attempt to distinguish between the stocks and bonds which were outside the state before the death of plaintiff's testator, and we see no ground upon which the one may and the other may not be taxed. The same principle must govern both. Appellant contends that, so far as the executrix was concerned, these stocks and bonds had a situs outside of this state, and were never in her possession or control, and are, therefore, not taxable here; that under sections 1613, 1615, Code Civ. Proc., the executrix is chargeable only with such property as may come into her possession, and is not responsible for what she cannot collect. It is stated in the brief of counsel that upon her appointment as executrix plaintiff filed an inventory and appraisal, and, as was her duty, included therein a list of the stocks and bonds in question which she had been informed were in New York City, pledged as aforesaid; but that she never had the property in possession or under her control, and is not accountable to the probate court or to any legatees or devisees for it, nor could she collect commissions on it as executrix; and it cannot, therefore, be taxed here. We do not see that the extent of the executrix's accountability or liability for the property in her official capacity affects the question of its being liable to taxation. While she has not the possession, she yet has a control in so far that she may pay off the lien, and would then be entitled to possession and absolute control. Her pecuniary liability as executrix may be limited by reason of the possession being in another person, and still there remain a responsibility and control. Certainly, the property belongs to the estate, and the executrix, having taken it up on her inventory, is charged with a duty to protect and care for it. We are not willing to admit that she would be free from liability should she negligently allow the property to be lost to the estate. But at most the circumstance alone of her acting in a representative capacity can have but little bearing upon the question as to the situs of the property. That situs is in California, as we shall see under the general rule laid down in this state, unless for some reason it can be excepted therefrom. In short, it seems to us that the case stands as if the testator were alive, and the property had been taxed to him. Plaintiff represents him for purposes of taxation while representing his estate as executrix of his will.

Appellant cites several cases and quotes from *Desty on Taxation* to the point that it is the actual situs of the personal property, and not the domicile of its owner, that determines where the tax should be laid. It is not necessary to enter upon the discussion of this proposition. It has been expressly held by this court, quite recently, that bonds of a West Virginia railroad com-

pany, which had never been physically present in this state, but were kept in New York City, or elsewhere at the East, have their locality or situs for the purposes of taxation "at the place where they are held,—that is, owned." In *re Fair's Estate*, supra. See, also, *Mackay v. City and County of San Francisco*, supra. The testator in the present case died while a resident of California, and in California his estate is being administered by his executrix. Among other of the properties of her testator the executrix inventoried, and thereby charged herself with, the personal property in question as part of the estate committed to her charge. Unquestionably, this property is "held—that is, owned"—in California, and has "its locality for purposes of taxation at the place" where so owned, unless the general rule is subject to modification, or is inapplicable where the stocks and bonds, as in the present case, were pledged by the testator in his lifetime as collateral security without the state. In *Re Fair's Estate*, supra, it was said that there was an exception to the rule there laid down, which had received extensive recognition, namely, "where the paper evidences of debt are in the possession and control of an agent of the owner in a state foreign to the domicile of the latter, and are held by the agent for management in the course of the permanent business of the owner,—as, for example, to collect the money to become due thereon, and to reinvest it,—the securities are deemed taxable at the domicile of such agent." The cases cited as so holding are *Catlin v. Hull*, 21 Vt. 152 (the leading case); *People v. Smith*, 88 N. Y. 576; *Finch v. York Co.*, 19 Neb. 50, 26 N. W. 589; *Goldgart v. People*, 106 Ill. 25. Appellant contends that, if these securities may have a "business situs" in New York, under the circumstances last above cited, "a fortiori they should not be assessed to the executrix when they are held by a pledgee adversely to her, and when she has absolutely no control over the same." But it will be observed that the exception to the general rule assumes that the securities "are held by the agent for management in the permanent business of the owner," at the place where they are held; and, as was said in *Mackay v. City and County of San Francisco*, supra, the investment and reinvestment is "in such manner that the property or credits come in competition with the capital of the citizens of the state in which the agent resides." In the instance of securities thus sent away as the basis for a permanent business in a foreign state, the accumulations to be there invested and reinvested, and the principal to remain as the source of income for the investments, the case is quite different from that of a temporary hypothecation as security for a loan. In the one case there is a transfer of capital from the owner's residence to the foreign state, there to be used in prosecuting

a permanent business, and for the purposes of taxation for that reason is held to have a "business situs"; in the other case the transfer is for a specific and temporary purpose that may be accomplished in a brief space of time, and may be, and presumably is, to aid the business of the owner at his place and residence. The reasons for creating an exception in favor of the "business situs" have no application to the case here, and furnish no argument, a fortiori or otherwise, for making an exception to the rule.

We are cited to *Story*, Conf. Laws, § 550, where it is written: "Although movables are, for many purposes, to be deemed to have no situs except that of the domicile of the owner, yet, this being a legal fiction, it yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." Appellant also cites *Green v. Van Buskirk*, 7 Wall. 140, 19 L. Ed. 109, and adds: "The case at bar is clearly such a case where an examination as to situs is necessary for the purposes of justice." Waiving the question whether Mr. Story referred to intangible property, such as stocks and bonds, when he spoke of "movables," we find no peculiar circumstances in this case that would seem to make it necessary to examine the situs of the property in order to do justice. It is quite common in all parts of the United States for business men engaged in large operations, as was Gov. Stanford, to resort to the principal or some other money center in a foreign state for financial aid, and the pledging of intangible securities is the common means of obtaining such assistance. Sometimes money is borrowed to nearly the full face value of the security (depending upon its stability and character); sometimes on a small margin of that value. If the rule contended for by appellant were adopted, it would furnish an opportunity to escape taxation at the place where the securities are owned by pledging them in a foreign state for a merely nominal loan. We are not informed by the complaint of the circumstances attending the pledging of the securities here in controversy. Even if it be conceded that, where the full value of the securities has been borrowed, an exception might be made (which we by no means would be understood as deciding), no such circumstance is here presented. So far as we know, the equitable interest of the estate in these securities may be equal to nine-tenths of their value, or even more.

The Political Code (section 3629) provides that the assessor "must assess such property [i. e. taxable property] to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian, of the first Monday in March next preceding"; and the constitution provides that all property shall be assessed "to the person by whom it was owned or claimed, or in whose possession or control it was," on the tax day. Const. art. 13, § 8. Shares of stock

and bonds pledged as collaterals to secure advances made thereon are assessable in the name of the pledgor. At his death plaintiff's testator was the owner of the shares and bonds by him pledged. They became part of his estate, and were inventoried as such; and it must follow that they were property "owned or claimed" by appellant as executrix on the statutory tax day, and to her the law directs the assessment to be made. In the state of Ohio the assessment is required by law to be to the person in the possession or control of the property. In *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168, defendant owned certain stocks which he had pledged as collateral security for loans, with power in the pledgees to cause a transfer of the stock to their own names, and to sell if the loans were not paid. It was contended that the shares could not be taxed to the owner, because they were not in his possession or under his control within the meaning of Rev. St. §§ 2730, 2736, 2737. The court said: "We are of a contrary opinion. The books of the company showed the shares to be in the name of the defendant, and he was the real owner. He had the power to resume absolute control by paying off the indebtedness. It is not the policy of our law to assess taxes upon pledged property against the pledgee, and the language of the sections referred to will not, in reason, bear so literal a construction,"—citing *President, etc., of Waltham Bank v. Inhabitants of Waltham*, 10 Metc. (Mass.) 334; *Tucker v. Alken*, 7 N. H. 113. It will be admitted that all property not used for some excepted purpose should bear its share of the public burdens, and it must be admitted that the securities in question should pay taxes somewhere. Doubtless the testator gave his note, or some evidence, for the advances to the New York pledgee, and as his property the pledgee should pay taxes in New York on that note or other evidence of the debt. But it would be gross injustice to compel him to pay tax on the securities held by him in which he has no interest except as security. It was so held in *Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. 871, where plaintiff, a resident of Kansas, having given his own note for \$2,800 to a resident of Missouri, and afterwards indorsed a note secured by mortgage on Kansas lands, and assigned the note and mortgage to the resident of Missouri as collateral security, and they were thereafter held continuously until after the tax day in Kansas. The collateral note was taxed in Kansas. We are clearly of the opinion that upon the complaint presented in this case the demurrer was rightly sustained, and the judgment should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 15)

ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO. (Sac. 733.)

(Supreme Court of California. Dec. 19, 1900.)

MINES—LOCATION—EXTRALATERAL RIGHTS—DIVERGENCE OF END LINES—EFFECT.

1. Act Cong. May 10, 1872, § 3, provides that locators of mining claims shall have certain lodes through their entire depth, though they may extend outside the vertical side lines of the location, provided that such extralateral rights shall only extend to that part of the vein lying between vertical planes through the end lines of the location, and also that no locator shall be authorized by his right to the dip of his lode to enter on the surface of the claim of another. *Held*, that the proviso did not grant any additional rights to one claiming a location under a previous act, since it does not purport to confer ownership of all the lode between such vertical planes, but only to provide that no one shall pass beyond them.

2. Act Cong. 1866, in relation to mining locations, granted extralateral rights, but did not require the end lines of locations to be parallel. Act Cong. May 10, 1872, also granted extralateral rights, but required the end lines to run parallel to each other, and confirmed the rights of locators under former laws. Plaintiff's location and its application for a patent were made under the act of 1866, but patent did not issue till subsequent to the act of 1872. *Held*, that the nonparallelism of its end lines did not deprive plaintiff of the right to follow its vein on the dip beyond the side lines of the surface location.

3. Plaintiff's patent for a mining location granted 1,589.94 feet of the lode through its entire depth, provided that its extralateral rights should be confined to that part of the lode which lay between vertical planes drawn downward through the ends of the survey at the surface. The survey at the surface had end lines diverging in the direction of the dip of the vein. *Held*, that plaintiff was entitled to that part of the vein at any depth which lay between vertical planes drawn at right angles to the general course of the vein on the surface.

In bank. Appeal from superior court, Calaveras county; G. W. Nicol, Judge.

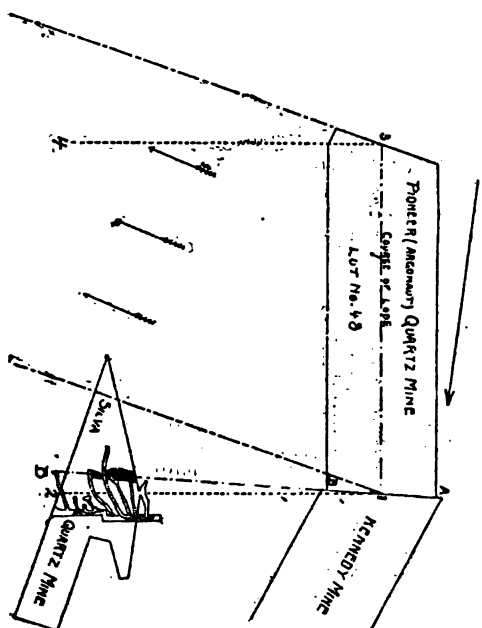
Action by the Argonaut Mining Company against the Kennedy Mining & Milling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John M. Wright and Byron Waters, for appellant. Lindley & Eickhoff, Wm. J. McGee, and F. J. Sollinsky, for respondent.

TEMPLE, J. This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore or gold-bearing rock from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken. The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency, and materiality of any part of it. Certain objections to evidence were made by the appellant, which were overruled by the court, and the main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon

the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred, as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:



The plaintiff owns the Pioneer quartz mine, and the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pioneer location, which is the only lode which has its apex within that location. It enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line. In fact, save that the end lines are not parallel, the location and the lode are the ideals upon which the rules and regulations of miners and the laws of congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that lode is within that loca-

tion. This is asserted, as I understand the contention, upon two grounds: First, defendant contends that, because of nonparallelism of the end lines of the Pioneer, it carries no extralateral rights; and, second, if the court can as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about 60° from the plane of horizon, and the end lines of the Pioneer diverge in that direction to the extent of about $14^\circ 45'$. The ore was taken out directly beneath the Silva surface location at depths varying from 1,400 to 2,000 feet beneath the surface. The Silva location is more than 900 feet easterly from the easterly line of the Pioneer location. The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the 23d day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872. For reasons, which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if, by any process of reasoning, any limitation upon the extralateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end-line plane of such location as it existed." This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator, by reason of his right to the dip of his lode, shall be authorized to enter upon the surface of a claim owned by another. These provisos grant no rights additional to those

already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold hunters to California in 1849: The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily: First, so far as possible, each person was given a specified portion of the ground, which he could mine. Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible, all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims. And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him. These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific Coast, and in all attempts by legislation, territorial, state, or national, to regulate mining locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated *Eureka Case*, 4 Sawy. 302, Fed. Cas. No. 4,548. The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the Champion location, which belonged to plaintiff, and was not within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any

line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory, and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors, and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules. Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners.

If, for instance, the state were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant. The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles, and variations, to any depth, although it may enter land adjoining; that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or "strike," as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited, under the law of 1866, to the specified number of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872, that the end lines shall be parallel, was only directory, was overruled in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, but that the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been 150° instead of 15°, the dip being at a small angle from the plane of the horizon; the statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extend-

ing the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location." These words themselves, in my opinion, are sufficient to support the declaration of the court in the *Eureka Case*. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines: "The act in terms annexes these conditions to the possession, not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes, found within the surface lines." This proposition is substantially reiterated in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, and in many other cases, including the latest to which our attention has been called (*Walrath v. Champion*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170).

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode 1,589.94 linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth; * * * provided, that the right of possession to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added, as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and $\frac{84}{100}$ linear feet of the Pioneer quartz vein, lode, ledge, or deposit, throughout its entire depth," etc. I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion that a patent to a location with end lines diverging in the direction of the strike does not convey all within those planes, but, at the most, not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extralateral rights at all. Such would be the law if the loca-

tion were under the law of 1872, and, as the patent to the Pioneer was issued after that law took effect, counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extralateral rights. Another objection is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted. Parallel end lines were not required in locations by the law of 1866, and yet extralateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rule required parallel end lines. It is claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for congress in the law of 1872 to have required parties who had equitable rights to patents to cause such adjustments of their surface lines as would indicate and define their extralateral rights; in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extralateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them. The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act to have such effect must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extralateral rights are recognized and asserted in the Eureka Case, and I think the language used by Judge Field in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98 (the Horseshoe Case), is equally clear upon this matter: "Under the act of 1866 (14 Stat. 251), parallelism in end lines of a surface location was not required, but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; *Walrath v. Mining Co. (C. C.)* 63 Fed. 552; *Id.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is ad-

mitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limitation must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey; that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course, it is understood that plaintiff contends for all included between planes drawn through its end lines, although they diverge, and would inevitably extend his rights along the strike, while defendant contends that because of such divergence plaintiff has no extralateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it; that by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram. 3-5 is the southern end line continued; 1-6 is a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant. The lines suggested by plaintiff are 1-2 and 3-4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line, B-B', is the northern end line continued, and between that line and 3-5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the basis from which the surface form of the location was projected. As stated, the argument is that, having been first located, it followed, as matter of law, that the other end line must be in the same direction in order that end lines may parallel. But the location was made, surveyed, the land paid for, and application made for the patent, before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extralateral rights, or at all. There was therefore no implication that the second end line should be parallel to that first established. It was not an absolute necessity, that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end, and at right angles to the side line, in a certain direction.

No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location, at right angles to the general course, would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable; at least, theoretically. The congressional system for the sale of mineral lands is founded upon the proposition that the course of the lode can be traced. That nature, in her infinite variety, does not always so deposit her mineral gifts, is unfortunate; but I think, in construing the law, we may have regard to the views of the lawmakers in regard to its subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystallization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually 200 feet. Under such circumstances, it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface form of locations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the Eureka Case. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode. The Eureka Case is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extralateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand *Walrath v. Mining Co.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined the right on the vein below the surface. This accords both with the Eureka Case and the Flagstaff Case, 98 U. S. 463, 25 L. Ed. 253. In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka Case what had been and was the universal understanding and

practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location converge in the direction of the dip. *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* (C. C.) 73 Fed. 597. It was held that the locator had extralateral rights because the conveyance would give less rather than more on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less rather than more than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him, within well-defined boundaries, to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act, as construed, does not grant extralateral rights because the end lines are parallel or converge towards the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extralateral rights because the extent of such rights is definitely described. At least, such was the fact, and no other reason was required. It was therefore not necessary in that case to consider the point here under debate. If this position be correct, the complaint does definitely describe the segment of the lode from which the ore was taken. The judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; HARRISON, J.

(131 Cal. 85)

HOXIE v. BRYANT. (L. A. 774-776.)¹

(Supreme Court of California. Dec. 22, 1900.)

EXECUTION—LEVY ON NOTE AND MORTGAGE—ORDER OF COURT—RIGHT TO OBJECT.

1. It is immaterial whether a levy on a note, which could be taken on execution and sold, was made by an order of court or otherwise.

2. Code Civ. Proc. § 17, subd. 3, includes notes in its definition of personal property. Section 688 provides that property may be attached or taken on execution in like manner as on writ of attachment; and by section 542, subd. 3, personal property capable of manual delivery must be attached by taking it into custody. *Held*, in view of these provisions, that a note of which the sheriff may peaceably take actual possession may be levied on and sold under execution.

3. A judgment provided that a note and mortgage filed in the case should be delivered

¹ Rehearing denied January 22, 1901.

to defendant on his payment of the judgment, but he failed to pay the same, and made no attempt to prevent the note becoming barred by the statute of limitations. *Held*, that he could not object to a levy on, and sale of, the note and mortgage under the judgment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by H. E. Hoxie against E. I. Bryant. There was a judgment for plaintiff, and from orders denying defendant's motion to set aside an order of court authorizing a levy, and denying a motion to set aside a levy and sale, and denying a motion to declare the judgment satisfied and discharged, defendant appeals. Affirmed.

Goodrich & McCutchen, for appellant. Works & Lee and Chas. T. Howland, for respondent.

COOPER, C. In May, 1894, the defendant was the owner of a promissory note and mortgage made by one Lewis to him for the sum of \$500. The maker of the note was insolvent, and the lands described in the mortgage were of small value, not to exceed \$100. Defendant went to plaintiff, and by false representations in regard to the value of the land mortgaged, and by taking plaintiff and showing her different lands, representing that he was showing the lands mortgaged, succeeded in selling the note and mortgage to plaintiff for its face value, \$500. As soon as plaintiff discovered that she had been deceived and defrauded, she brought the present action in the superior court to rescind the sale, and to recover of defendant the amount paid him, with interest. The judge of the court below found the transaction on the part of defendant fraudulent, fully stating the facts constituting the fraud, and adjudged that the sale be rescinded, that plaintiff recover the amount paid to defendant, with interest and costs, and that the note and mortgage, which had been filed with the clerk of the court, be delivered up to defendant upon his paying the amount so adjudged to be due plaintiff. This judgment was entered October 27, 1897, and has become final. The defendant has never paid the judgment, and it does not appear that plaintiff can in any way obtain satisfaction of the same. On the 11th day of March, 1899, the plaintiff filed a petition setting forth, among other things, that the note and mortgage had been filed as exhibits at the trial, and were in the clerk's office; that the judgment had never been paid, and that the note and mortgage would become barred by the statute of limitations on the 5th day of April, 1899; and praying for an order permitting the sheriff to levy an execution in the action upon the said promissory note, and sell the same thereunder. The court made an order as prayed for in the petition, and authorized the clerk to deliver up the said note and mortgage to the sheriff, for the purpose of permitting execution to

be levied thereon. In pursuance of the order, the sheriff levied upon the note and mortgage, took them into his possession, and after notice sold them to plaintiff, who was the highest bidder therefor. On April 4, 1899, the day before the statute would run against the note and mortgage, plaintiff filed a complaint for the foreclosure thereof, which action is still pending. On April 12, 1899, the defendant made three motions: (1) To set aside the order of court authorizing the levy on the note and mortgage; (2) to set aside the levy and sale, and recall the writ of execution; (3) that the judgment in the action be declared paid, satisfied, and discharged. These motions were each denied, and defendant has appealed from the orders by three separate appeals, which are brought up in the same transcript. The first two motions involve practically the same proposition, and may be considered together.

The main question involved and discussed is as to whether or not the sheriff may levy a writ of execution upon a promissory note, and sell it as personal property capable of manual delivery. If the note could be so levied upon and sold, it is immaterial whether done by order of court or otherwise. The order probably was unnecessary, but it did no harm. There is no question here involved as to the right of the sheriff to take possession of a promissory note in the hands of the judgment debtor. Neither is there any question as to the rights of any other creditor, except the plaintiff, who had the execution issued upon her judgment. The question, then, is simply as to the right of the plaintiff to levy an execution upon a promissory note in such position and custody that the sheriff may peaceably take the actual possession of it. The promissory note was personal property. Code Civ. Proc. § 17, subd. 3. Property may be attached or taken on execution in like manner as upon writ of attachment. *Id.* § 688. Personal property capable of manual delivery must be attached by taking it into custody. *Id.* § 542, subd. 3.

In the case of *Davis v. Mitchell*, 34 Cal. 81, the matter was fully considered, and it was held that under the provisions of the practice act, which are similar to the provisions of the Code on the same subject, a promissory note is subject to seizure and sale under execution. This case was cited with approval in *Donohoe v. Gamble*, 38 Cal. 352, and has never been overruled, and we see no reason for changing the rule as therein laid down. This court in *McBride v. Fallon*, 65 Cal. 303, 4 Pac. 19, refers to the case of *Davis v. Mitchell*, *supra*, and says: "We could not, with our present views, assent to the doctrine of that case;" but the court was discussing the question as to whether or not a judgment could be levied upon and sold under execution as personal property capable of manual delivery. The question here presented was not in any way involved in the case. In *Dore v. Dougherty*, 72 Cal. 235, 13

Pac. 621, it was held that a judgment was not subject to levy and sale under execution as personal property capable of manual delivery. The distinction between a judgment and a promissory note is plain. The judgment is a matter of record. It is the record evidence of the debt due by the judgment debtor. It is not capable of being taken out of the book where it is recorded and personally delivered. The sheriff cannot seize the judgment, take possession of it, and sell it. But a promissory note, negotiable in form, which passes in the commercial world by indorsement and delivery, and is subject to sale, is quite different. The owner of such promissory note cannot refuse to pay a just judgment against him, and claim the note as exempt from execution. If it, in any way, can be found and seized by the sheriff on execution, it may be sold and delivered to the purchaser. A similar statute exists in Louisiana (article 647, Code Prac.), and it is held in that state that promissory notes may be levied upon and sold. *Fluker v. Bullard*, 2 La. Ann. 338; *Stockton v. Stanbrough*, 3 La. Ann. 390; *Nugent v. McCaffrey*, 33 La. Ann. 271. In Iowa an execution may be levied upon a promissory note, and the note sold by the sheriff. *Rev. St. Iowa*, § 3272; *Earhart v. Gant*, 32 Iowa, 483. And so in Indiana. 2 *Rev. St. 1876*, p. 208, § 438; *Bay v. Saulspough*, 74 Ind. 399. In *Freem. Judgm.* (3d Ed.) § 112, the author in stating the rule says: "There are many choses in action which, from their intangible character, seem to be incapable of being made the subjects of direct levy and sale. Of this character are all debts and credits not evidenced by writing, or by something capable of being seized and taken into possession, or in some manner made to bear witness to a change in their ownership." He then enumerates both accounts and judgments as being such property. In a late case decided by the supreme court of New York (*Kratzenstein v. Lehman*, 46 N. Y. Supp. 71), in speaking of the authority given by the Code of New York to levy upon a promissory note, the court said: "While they do not always pass by delivery, but sometimes require an indorsement to transfer a complete title, yet they are usually paid or payable only to the person who has them in his actual possession; and the possession itself is ordinarily required as satisfactory evidence of the right to recover the money which is to be paid by their terms. While they are, in a technical sense, choses in action, yet practically the paper itself is property, is regarded as such, and is dealt with like other tangible personal property." The motions were therefore properly denied. Aside from the main point, the defendant is not in position to complain. He does not appear to have paid the judgment, or to have in any way attempted to get the promissory note and mortgage. He made no attempt to prevent the note from becoming barred by the statute, and when he made

these motions the statute, but for the act of plaintiff, would have run. If the motions had been granted, the promissory note and mortgage barred by the statute would probably be worthless. It seems that defendant intends, as appears by this record, not only to leave plaintiff's judgment unpaid, but to attempt to keep plaintiff from selling the mortgaged lands, which the court found to be what is known as "wash land and worthless." While defendant is entitled to his legal rights, yet his position here certainly does not commend him to the favorable consideration of a court of equity. It follows that the orders, and each of them, should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER OURIAM. For the reasons given in the foregoing opinion, the orders, and each of them, are affirmed.

(131 Cal. 51)

ROONEY v. SNOW, City Auditor.

(S. F. 1,629.)¹

(Supreme Court of California. Dec. 21, 1900.)

MANDAMUS—TO CITY AUDITOR—VOLUNTARY PAYMENT—INVALID ORDINANCE.

1. Mandamus will not lie to compel a city auditor to draw a warrant pursuant to an ordinance appropriating money to pay the claim of R., and directing the auditor to draw his warrant in favor of R. for such sum, his duty not being ministerial merely under the city charter providing that every demand shall be presented to him for approval, and that he shall "satisfy himself whether the money is legally due."

2. The voluntary character of a payment to a city for license under the supposition that the place of business is within the city limits is not changed by the subsequent discovery that it is outside; so that an ordinance providing for its repayment is invalid.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Mandamus by Owen F. Rooney against R. W. Snow, auditor of the city of Oakland. Judgment for defendant. Plaintiff appeals. Affirmed.

Reed & Nusbaumer, for appellant. W. A. Dow, for respondent.

VAN DYKE, J. In April, 1898, the city council of the city of Oakland passed an ordinance, the first section of which reads as follows: "The sum of one thousand dollars is hereby appropriated from the general fund of the city of Oakland for the year 1897-98 to pay the claim and demand of Owen F. Rooney for moneys erroneously collected by the city of Oakland from said Owen F. Rooney, and paid by him under protest, as liquor license for the saloon and restaurant kept by said Owen F. Rooney at the end of the Oakland pier." By the second section of the said ordinance the auditor is directed to draw his warrant in favor of said Rooney for the sum of \$1,000, and the treasurer of the city is ordered to pay said

¹ Rehearing denied January 19, 1901.

warrant. The respondent, Snow, as auditor of the city of Oakland, refused to draw his warrant upon the treasurer, as required by said ordinance. Thereupon the plaintiff applied to the superior court of Alameda county for an alternative writ of mandate against said respondent as such auditor, requiring him to show cause why he did not draw a warrant in favor of the plaintiff, as required by said ordinance. The respondent demurred to plaintiff's petition, and the lower court sustained the demurrer. Plaintiff declining to amend, judgment was entered in favor of the defendant for costs, from which judgment this appeal is taken.

The appellant relies upon said ordinance as the foundation of his claim, and maintains that the auditor of said city has no discretion in the matter, but merely a ministerial duty to perform in drawing the warrant in accordance with the ordinance. By section 40 of the charter of the city of Oakland every demand, before it can be paid, must be presented to the auditor to be approved, "who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city is authorized by law, and out of what fund. After such examination he shall approve or reject the claim in whole or in part, and endorse upon such demand his approval or rejection over his signature, together with the date thereof. If it is approved, the fund out of which it is to be paid shall be designated. If the claim is rejected, or any part of it, unless the party presenting it is willing to take in full of the entire demand the sum offered, the auditor shall return it to the council, board or other body which originally authorized it, then if it is allowed by a majority vote of all the members of the council, or of the members of the board or other body authorizing it, and approved by the mayor, it can be audited in the same manner as if it had not been rejected: provided, the said council, board or other body had the authority to make the expenditure out of which the claim arose." St. 1889, p. 531. It is manifest from the city charter that the powers conferred and the duties imposed on the auditor in the premises require the exercise of judgment and discretion, and not merely the performance of clerical or ministerial duties. And this power conferred upon the auditor comes from the same source as that conferred upon the city council, and is of equal rank. The city council has no power to direct the auditor to audit an illegal claim, or to draw his warrant for payment of the same, or one which there is no authority in law to allow; and, if the council should pass such an ordinance, the auditor would not be required to carry out the direction, but it would be his plain duty to refuse to do so,—he must "satisfy himself whether the money is legally due." As said in *Von Schmidt v. Widber*, 105 Cal. 151, 38

Pac. 682: "Powers of a municipality are to be exercised through its legally constituted agents, and the authority of such officer, board, or department to exercise any of the corporate power with which a municipality has been clothed must be distinctly conferred upon that officer, board, or department, or its acts create no obligation against the municipality." The only statement in the petition in reference to the nature of the plaintiff's demand is contained in the said ordinance, which is set out in said petition; and the language of the ordinance is that the claim is for money erroneously collected by the city of Oakland from said Rooney for a liquor license for his saloon and restaurant kept by him at the end of Oakland pier. But the petition does not show how or why the money was erroneously collected. It appears, however, that in *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 50 Pac. 277, this court held that "ship channel," being the western boundary line of the city of Oakland, was the line of ordinary low tide. The end of the Oakland pier, at which point this plaintiff's saloon and restaurant were kept, was discovered not to be within the city of Oakland. The plaintiff and others were supposed to know where the boundary lines of the city of Oakland were as well before as since the decision in question. The charter of the city of Oakland, defining its boundaries, is a public statute, and the lines were not altered or changed by such decision, but simply defined according to the act itself. The payment of the license by Rooney, although it was stated in the ordinance to have been under protest, was, nevertheless, voluntary on his part, and as such cannot be recovered back. "The illegality of the demand paid constitutes of itself no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." *Brumagim v. Tillinghast*, 18 Cal. 271. In *Maxwell v. San Luis Obispo Co.*, 71 Cal. 466, 12 Pac. 484, the plaintiff alleged that "the moneys sued for were exacted and collected by the tax collector without authority of law, and as a condition precedent to the carrying on of business, and by threats, menaces, legal prosecutions, suits, actions, processes, attachments, seizures, confiscations, and sequestrations, which he, the said tax collector, gave out and made for the purpose of causing the payment of said moneys; and that said moneys were all paid under and by reason of said threats and menaces, and would not have been paid but for such threats and menaces." Yet this court in its decision says: "The tax collector had no real or apparent power to execute the threats of seizure, confiscation, and sequestration. The law under which he assumed to exact license taxes authorized him to direct suits to be brought for the recovery of such taxes, and to have attach-

ments issued in such actions;" and adds that the plaintiff was "not liable to anything beyond civil and criminal prosecutions in which the invalidity of the law which authorized the collection of the taxes would have been a perfect defense." Many cases are referred to in support of this view of the court, which it is unnecessary here to quote. It was held in that case that the complaint did not state a cause of action for the recovery of money, and the judgment was reversed, with directions to the court below to sustain the demurrer to the complaint. In *Phelan v. City and County of San Francisco*, 120 Cal. 1, 52 Pac. 38, it is said that, in order to constitute a payment under duress, there must be some coercion or compulsion, or some exercise of authority over the person or property of the party making the payment which controls his action, and which can be avoided only by making the payment. Nor does the payment of the taxes under protest of such party take from the payment its voluntary character unless it is necessary in order to protect his person or property. To the same effect are *O'Brien v. Colusa Co.*, 67 Cal. 503, 8 Pac. 37, and *Grimley v. Santa Clara Co.*, 68 Cal. 575, 9 Pac. 840. The payment of the license tax by the appellant was voluntarily made under the supposition, doubtless, that his place of business was within the city of Oakland. But, because that turns out not to be so, the character of the payment is not altered. In law it is still deemed to be a voluntary payment, and the city is not responsible in the matter, nor required to refund the money so paid. This being so, the ordinance under consideration is without authority of law, and invalid, and the respondent was fully justified in refusing to follow its direction. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(121 Cal. 149)

BLEWETT v. MILLER et al. (Sac. 753.)¹
(Supreme Court of California. Dec. 28, 1900.)

SHERIFFS—LEVY ON EXEMPT PROPERTY—
MEASURE OF DAMAGES—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

1. Where an action is brought against a sheriff for the wrongful sale of exempt property, and the full value thereof is recovered, it is error to refuse a new trial on the ground of newly-discovered evidence on a showing that the owner of the property repurchased it after the sheriff's sale for less than it was worth, since the measure of damages is the sum necessary to compensate the owner as authorized by Civ. Code, § 3333, and not the value of the property as authorized by section 3336, as the latter section does not apply when the property is repurchased.

2. On the trial of an action against a sheriff for the wrongful sale of exempt property, the plaintiff's pleadings did not show that the property had been repurchased after the sale for less than its value, and the plaintiff did not testify to such fact, but a witness testified that

he saw part of the property in plaintiff's possession after the sale. Plaintiff recovered a verdict for the value of the property. Held not to show such a want of diligence on the part of defendant as would warrant a refusal of a new trial on a showing of such repurchase.

3. Where a sheriff wrongfully sells exempt property in connection with other property, and all is repurchased by the owner for less than its value, the amount so paid should be apportioned between the exempt and the other property in determining the damage caused by the sale of the exempt property, in an action against the sheriff to recover therefor.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; William O. Miner, Judge.

Action by H. C. Blewett, administrator, against Henry Miller and others, for the wrongful levy and sale of exempt property. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendants appeal. Reversed.

E. N. Rector and Frank H. Farrar, for appellants. Chas. H. Marks and B. F. Fowler, for respondent.

SMITH, C. The appeal is from a judgment in favor of the plaintiff and from an order denying the defendants' motion for a new trial, but the only point made by the appellants' counsel, and the only point that need be considered, is that a new trial should have been granted on the ground of newly-discovered evidence. The defendant Warfield is sheriff of Merced county, and, it is found, seized under attachment certain property of the plaintiff's intestate that was exempt from execution, namely, a harvester and five gang plows. The other defendants are the sureties on his official bond. The suit was brought to recover damages for this taking. The court found that the harvester was at the time of the taking of the value of \$1,000, and the plows of \$60, and gave judgment for the aggregate amount, with legal interest from the time of the taking. It appears from the affidavit of Warfield that at the sale of the property levied on by him—consisting of the property in controversy and 23 mules and other property—the whole of the property was sold to C. F. Blewett (plaintiff in the attachment suit) for the sum of \$750, who, on the same day, sold the same to the plaintiff's intestate for the sum of \$1,100, and that the mules alone were worth more than that sum. Had this fact been known at the trial, the result must have been different; for the plaintiff—his intestate having recovered the property—was not entitled to recover its full value. The rule is that, "where one recovers his property again which had been unlawfully taken from him, he is considered as having received it in mitigation of damages"; and the measure of damages, in the absence of special damage, is the expense of procuring its return (with interest). 1 *Suth. Dam.* 239. And see 3 *Suth. Dam.* 527, and to same effect 1 *Sedg. Meas. Dam.* § 58. The rule applies generally without regard to the means by which the return

¹ Rehearing denied January 22, 1901.

is secured, whether by purchase or otherwise. "Thus, when plaintiff's property was seized and sold by the defendant [a sheriff], and was repurchased by the plaintiff from one who bought it in at the sheriff's sale, it was held that the measure of damages was the amount paid to repurchase the property." *Id.* The point is directly decided by the court of civil appeals of Texas in *Field v. Munster*, 32 S. W. 417, where the subject is fully discussed, and the above and numerous other authorities cited. The decision was affirmed on writ of error by the supreme court of Texas (*Munster v. Fields*, 33 S. W. 852), the court citing as additional authorities *Kline v. McCandless*, 139 Pa. St. 223, 20 Atl. 1045; *Fields v. Williams* (Ala.) 8 South. 808. The provisions of section 3330, Civ. Code, are to be understood as applying only to cases where the property is not returned or recovered, not as abolishing the rule that the recovery of the property is to be considered in mitigation of damages. In such cases the rule is as stated in section 3333, *Id.*

With regard to the question of diligence on the part of the defendant, I have more difficulty in coming to a conclusion. "The presumption is that the discretion [of the lower court] has been properly exercised." *Heintz v. Cooper*, 104 Cal. 670, 38 Pac. 512. But here the new fact was of such a character that if it might have remained undiscovered by the defendant even after the most extraordinary diligence; nor was there anything in the circumstances of the case to put the defendant on inquiry (104 Cal. 671, 38 Pac. 512), unless it was the statement of the witness Hoult that he had seen the harvester on the ranch of the plaintiff's intestate subsequent to the sheriff's sale. But a statement of this kind, made by a witness on the trial, might, under the circumstances of the case, very well escape the notice even of diligent counsel; for the fact—though known to the plaintiff and his attorneys—was suppressed by them, or at least not referred to in the pleadings, and the plaintiff himself as witness, though sworn to tell the whole truth, said nothing about it. This conduct, whether designed to have such effect or otherwise, would naturally tend to mislead the defendant, and the plaintiff cannot complain if it in fact had such effect.

The case has evidently been tried on a wrong theory, and a new trial should be had. On the new trial the whole amount paid by the plaintiff's intestate on the purchase from C. F. Blewett should be apportioned between the property in controversy and the other property according to relative value; and the defendant should be charged only with the amount apportioned to the former, with legal interest from the date of sale, and any special damages, if any, that may be proved. I advise that the judgment and order appealed from be reversed, and the cause remanded for new trial.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for new trial.

(121 Cal. 73)

MULCAHEY et al. v. DOW et al.

(S. F. 1,719.)

(Supreme Court of California. Dec. 21, 1900.)

INVOLUNTARY TRUSTEE—FRAUD—DECREE OF DISTRIBUTION—EVIDENCE.

1. Civ. Code, § 2224, providing that "one who gains a thing by fraud * * * is * * * an involuntary trustee of the thing gained for the benefit of the person who would otherwise have gained it," if covering property gained by a judicial decree, applies only where the fraud is such as would justify a court of equity in setting aside the decree.

2. A proceeding to secure a decree of distribution being one in rem, the decree therein is binding on one who did not appear, though he had constructive notice only under the statute.

3. A decree of distribution finding the wife of intestate the only heir, and distributing the entire estate to her, cannot be successfully attacked for fraud by general evidence tending in an unsatisfactory way to show merely that several years before her husband's death she knew of the existence of persons who were heirs of his, and that she told the attorney who prepared the petition for letters of administration that her husband had no relatives.

Van Dyke, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; James M. Trontt, Judge.

Action by Margaret Mulcahey and others against Hezekiah Dow and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Myrick & Deering, for appellants. H. H. Reid, W. H. Bodfish, Beatty & Beatty, and A. Ruef, for respondents.

GAROUTTE, J. Arthur Waters died intestate in the city of San Francisco, leaving a wife, Elizabeth, here, and a sister and nephews in other states. Administration was had upon his estate, and in due time, and after due notice, a decree of distribution was entered, which found that the wife, Elizabeth, was the only heir of her husband, and all of his estate was thereupon distributed to her. Subsequently she died, and these defendants are her successors in interest. Plaintiffs—a sister of Arthur Waters, deceased, and a certain nephew and niece—brought this action, claiming to be his heirs at law, and asserting that the wife, Elizabeth, under the decree of distribution, held their respective shares of the property as an involuntary trustee. They were nonsuited, and judgment went against them. The sufficiency of the evidence to support the judgment will be the material matter considered upon this appeal.

As a legal foundation upon which to rest their claims, plaintiffs rely upon section 2224 of the Civil Code, which says: "One who gains a thing by fraud, accident, mistake, un-

due influence, * * * or other wrongful act, is * * * an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." For present purposes it will be conceded that this section, in its terms, is broad enough to apply to judgments of courts adjudicating property rights; and here fraud upon the part of the wife, Elizabeth, in securing a judgment, is relied upon to support a recovery. In cases of this character, in order to substantiate the charge of fraud, evidence must be produced which is fully satisfactory to the judicial mind. The rule is clearly stated in *Wickersham v. Comerford*, 104 Cal. 495, 38 Pac. 101, where this court said: "It was necessary for the plaintiff to establish by clear and indubitable proof, to the satisfaction of the superior court, that the order setting apart the homestead had been obtained through some fraud practiced upon that court by the defendant. * * * She cannot be charged with fraud, or any fraudulent imposition upon the court, for merely failing to state in her petition any facts tending to show that the petition ought not to be granted, unless it is made to appear that she knew the import of these facts, and that they were willfully suppressed by her with the intention of deceiving the court, and thereby inducing it to grant her petition." Again, fraud must be shown which is extrinsic and collateral to the cause. It is held in *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, that neither perjury nor subornation of perjury constitute a fraud which will support a cause of action to set aside a judgment based thereon. In *Fealey v. Fealey*, 104 Cal. 351, 38 Pac. 49, this court said: "The fraud which is set forth as the basis of the plaintiff's cause of action relates to the alleged falsity of defendant's statement made in her petition for the order setting aside the homestead, and again repeated in her testimony upon the hearing of such petition, concerning the nature of the title to the land set apart to her as a homestead; but the question of title thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. * * * Under these circumstances that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved, and settled by that judgment." *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565, is similar to the case at bar, save that the ground there relied upon for equitable relief was not fraud, but mistake. In that case it was held that the decree of distribution was final and conclusive upon all questions of heirship.

The aforesaid section of the Civil Code relating to involuntary trustees places *trust* and fraud in the same category, and, if the reasoning in *Lynch v. Rooney*, be sound, the same reasoning must control here.

In speaking of decrees of distribution, section 1666 of the Code of Civil Procedure reads: "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled. * * * Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." The all-important question upon the hearing of a petition for a decree of distribution of the estate of an intestate is, who are the heirs entitled to take the estate? The identity of the heirs being determined, the proportion of each is not a difficult question to decide, for the law itself fixes those proportions; and, if the question of heirship is not settled by the decree of distribution, then nothing is settled by it, and the whole proceeding is a vain and useless thing. And this section of the Code declares in terms that the decree, subject to appeal, is conclusive as to the rights of heirs, legatees, and devisees. Hence it must be the rule that, conceding section 2224 is broad enough to cover property gained by a judicial decree, still it only applies to cases where the fraud is such as would justify a court of equity in setting aside a judgment. We here have a judicial decree that these plaintiffs are not heirs at law of Arthur Waters, deceased,—a decree that has never been assailed, and which, by the very terms of the section quoted, has become final and conclusive. It seems idle to say that the validity of the decree is recognized by the plaintiffs, and that they rely upon its validity in seeking relief. They are only entitled to the relief sought by showing circumstances in the procurement of the decree itself which would justify a court of equity in setting it aside for fraud. If those circumstances are not shown, they secure no relief. They must attack and overthrow the finding of fact in the decree as to the heirship of the wife, Elizabeth,—a finding expressly placed there by direct authority of the statute,—in order that they may show themselves heirs at law of the deceased, Arthur Waters. It therefore seems inevitable that, in order to secure the relief here sought, they must go behind the decree, and falsify the important finding of fact upon which it is based. In view of the decision in *Pico v. Cohn*, *supra*, and other cases cited, if these plaintiffs had appeared in person at the hearing upon the petition for distribution, and had litigated the question of heirship, and lost their cause, certainly that decree, aside from the question of extrinsic and collateral fraud, would have forever foreclosed them from bringing an action of this character. But now the point is made that plaintiffs only had constructive notice of the hearing, and for that reason a different rule of law applies

to them. The case of *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, and the authorities cited in that decision, are relied upon to support this contention; but that the rule there declared ever applied to a proceeding in rem we gravely doubt. A proceeding to secure a decree of distribution is essentially a proceeding in the nature of one in rem. It has none of the characteristics of a proceeding in personam, as was the case of *Dunlap v. Steere*, supra. In *Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323, this court, speaking through Mr. Justice Harrison, said: "The distribution of the estate includes the determination of the persons who, by law, are entitled thereto, and also the proportions or parts to which each of these persons is entitled. * * * By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their right to any portion of the estate; and every person who may assert any rights or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court." In view of this clear and forcible language, emanating from the court in bank, it would seem that the plaintiffs' claim entirely dissolves, to the extent, at least, of the principle of law invoked in *Dunlap v. Steere*, supra.

The nonsuit was properly granted on the evidence. There was no extrinsic or collateral fraud. Fraud must plainly appear from the evidence, and here it does not appear at all. There is some general evidence tending in an unsatisfactory way to show that Elizabeth Waters knew of the existence of these plaintiffs several years prior to the death of her husband. There is also some evidence showing that she told W. H. Metson, an attorney at law, who prepared the petition for letters of administration in behalf of Grant and Pennell, petitioners for letters, that her husband had no relatives; and this is all the evidence of fraud that we can find in the record. The showing made is too weak to stand alone. It would not support a judgment if one rested upon it. The fact that Elizabeth Waters did not inform these relatives, living in different states, of the death of her husband, is not material here. No legal duty devolved upon her to furnish them with that information. There is nothing to indicate that she acted in bad faith at any stage of the administration, or made the statements to Metson with the purpose or design of defrauding anybody, or imposing upon the court. There is no evidence showing that she knew these plaintiffs were entitled to any part of the estate as heirs at law of her husband.

There is no evidence showing that the decree of distribution, wherein it is found as a fact that she was the only heir, was based upon her testimony, or upon any testimony induced by her to be given before the court. If this decree was based upon the testimony of Grant, one of the administrators, as claimed by plaintiffs, there is no evidence but that his knowledge or information upon the subject came from his friend, Arthur Waters, during his lifetime, or from some source other than that of Elizabeth Waters. And, if all of these things had appeared by the evidence, then whether or not they constituted extrinsic fraud would still be an open question. Tried by the test laid down in *Wickersham v. Comerford*, the nonsuit was properly granted. The errors of law relied upon are unsubstantial. For the foregoing reasons, the judgment and order are affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.; TEMPLE, J.; HARRISON, J.

VAN DYKE, J. I dissent. The purpose of the proceeding is not to disturb this action of the probate court at all. That court had jurisdiction of the matter in question, and upon the testimony and showing before it the decree of distribution could not well have been different from the one entered. The question here is whether a party who has succeeded in obtaining a thing through fraud can be compelled to yield it to whom it properly belongs, and who would not have been deprived of it excepting through such fraud. Our Code lays down the general rule in such cases in the following language: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." Civ. Code, § 2224. It is alleged in the complaint that the plaintiffs were prevented from appearing and presenting their claims by the fraudulent conduct of Elizabeth Waters, who willfully and intentionally represented to the court that she was the sole and only heir, when she knew the plaintiffs were also heirs of the deceased husband, and entitled to a share of his estate. In Story's Equity Jurisprudence it is said: "In general, it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." Story, Eq. Jur. § 885. To the same effect the rule is stated in Pom. Eq. Jur. § 1053; Moore v. Crawford, 130 U. S. 128, 9 Sup. Ct. 447, 32 L. Ed. 878. In *Wickersham v. Comerford*, 96 Cal. 439, 31 Pac. 300,

it was claimed by defendant, as here, that the facts stated in the complaint did not constitute fraud of which the plaintiff was entitled to complain. The justice, in writing the opinion in that case, says: "The complaint charges a willful suppression of a material truth, and a suggestion of a falsehood by defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors. I think this constituted fraud." In *Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853, the defendant had been the administrator upon the estate of his deceased brother, who died in Los Angeles county. The plaintiff was the son of that deceased brother, but resided in the state of Missouri. The defendant, as such administrator, induced the plaintiff, as heir of his deceased father, through false representations, to convey to him (the defendant) his interest in the estate, and afterwards procured the interest to be distributed to him by the probate court. Held, that the defendant was an involuntary trustee for the plaintiff of the property so fraudulently obtained, and that the plaintiff was entitled to the relief sought, to wit, the recovery of the property. See, also, *Latallade v. Orena*, 81 Cal. 576, 27 Pac. 924; *Dunlap v. Steere*, 92 Cal. 347, 28 Pac. 563, 16 L. R. A. 361; *Bergin v. Haight*, 99 Cal. 52-56, 33 Pac. 760; *Curtis v. Schell* (Cal.) 61 Pac. 951,—where the question is fully discussed. The complaint in this case states a cause of action entitling the plaintiffs to the relief asked, and the evidence at least tended to support the material allegations of the complaint. This was sufficient to prevent a nonsuit. *De Ro v. Cordes*, 4 Cal. 117; *Cravens v. Dewey*, 13 Cal. 40; *McKee v. Greene*, 31 Cal. 418.

(131 Cal. 165)

GREENE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (GINN et al., Interveners; S. F. 2,381).

(Supreme Court of California. Dec. 28, 1900.)
SCHOOLS AND SCHOOL DISTRICTS—TEXT-BOOKS—CHANGING—VALIDITY—RESTRAINING.

A board of education, by resolution, adopted a different system of penmanship than the one then in use, without giving the notice required by Pol. Code, § 1874, subd. 3, providing that at least 60 days' notice of any proposed change must be given by publication in a newspaper published in the county, stating the change proposed, that bids for furnishing books to replace them will be received, and when and where such bids will be opened. Held, that the resolution, and contract for supplying books made pursuant thereto, were void.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. C. Greene against the board of education of the city and county of San

Francisco and others. From a judgment in favor of plaintiff and an order denying a new trial, Ginn & Co. appeal. Reversed.

Sheffield S. Sanborn (Wm. B. Bosley, of counsel), for appellants. John H. Dickinson, for respondent J. C. Greene. H. H. Hindry, for respondent H. S. Crocker Co. Franklin K. Lane, for respondent board of education.

COOPER, C. This action was brought by plaintiff, as a citizen and taxpayer, to enjoin the defendants, who are the members of and compose the board of education of the city and county of San Francisco, from using, or causing to be used, until four years after the 9th day of June, 1897, the text-books of the Shaylor system of vertical round-hand penmanship, upon the ground that said text-books have not been legally adopted by the board. The appellants, Ginn & Co., a co-partnership doing business in the state of Massachusetts, were allowed to and did intervene. In their complaint in intervention they alleged that they, as publishers of the said Shaylor system, entered into a contract with defendant board on the 30th day of June, 1899, by which they agreed to supply the public schools of the said city and county with the text-books of said Shaylor system. The case was tried before the court, and findings filed, upon which judgment was entered for plaintiff as prayed for. Appellants made a motion for a new trial, which was denied, and this appeal is from the judgment and from the order denying the motion. It is conceded that in June, 1899, the defendant board passed a resolution regular in form, and, after proper notice as required by statute, adopting as a uniform series of text-books the Shaylor system, and entered into a contract with appellants, whereby they were to furnish at stated prices the copybooks of the Shaylor system to the pupils in the public schools of the city and county of San Francisco. The resolution of the board and the said contract with appellants were valid and legal if the board had power to make them, and this depends upon whether or not the board had, in the month of June, 1897, legally adopted the text-books of the California system of vertical penmanship published by H. S. Crocker & Co. If the California system was legally adopted in June, 1897, the board had no power to change the text-books so adopted until four years from the date of adoption. Pol. Code, § 1874, subd. 1. The main question, therefore, in the case is as to the validity of a resolution passed by the board June 9, 1897, adopting the California system of vertical penmanship. It is provided in Pol. Code, § 1874, subd. 3: "At least sixty days' notice of any proposed change in text books must be given by publication in a newspaper of general circulation, published in the county, if there be one, in which such change is to be made. If there be no newspaper published in the county, then such publication shall be made in

any newspaper having a general circulation in the county. A copy of the newspaper containing such publication, with such notice marked, must, immediately after the first publication thereof, be by the secretary of the board transmitted to the state board of education, and the same, when received, must be filed by the secretary of said state board. Said notice shall state what text books it is proposed to change; that sealed bids or proposals will be received by the board for furnishing books to replace them; the place where and the day and hour when all bids or proposals will be opened, and that the board reserves the right to reject any and all bids or proposals. Said notice shall be published in such newspaper as often as the same shall be issued after the first publication thereof." It is admitted that the board did not comply with the above subdivision of said section, prior to the resolution of June 9, 1897, in regard to the publication of the notice therein required; neither did the board, at any time, comply with the section as to the contract with said H. S. Crocker & Company by publishing any notice prior to making the same. The resolution and contract, as to the California vertical system of text-books, were therefore in excess of the jurisdiction of the board and void. The board, being an inferior tribunal or body, possesses such powers, and such only, as are given it by the statute. The law has prescribed the course to be pursued and the things to be done in order to effect a change in the text-books of the public schools, and the board must follow its mandates. The statute must be substantially followed. If the board could dispense with one of the material requirements of the statute, it could dispense with others, and thus be left with no guide except its absolute will. The board is the agent of the public, and intrusted with the duty of carrying out the mandates of the law in the matter of adopting text-books for the use of the children of the public schools. The evident object of section 1874 is that all parties may have a fair hearing before the board, and that the best text-books may be obtained at the lowest price. The section requires the bids to be publicly opened, and accompanied by sample copies of the books proposed to be furnished. It further provides that no change shall be made except in the months of May or June of the year in which the change is made, and that any books adopted as a uniform series of text-books must be continued in use for not less than four years. The law formerly required six months' notice of any proposed change in text-books, and this court held in *People v. State Board of Education*, 49 Cal. 685, that the board could not make the change without giving the notice. In the opinion it is said: "The authority of the board to effect the change was thereby made dependent upon the giving of the prescribed notice, and its exercise was forbidden except after such notice first given."

The respondents claim that the provisions of the section do not apply, because it does not appear that the attempted change was made as to books "that were in use as a part of a uniform series of books," and that the change refers to a change of a part of a uniform series. We do not think such a narrow construction should be given the statute. Its plain mandate is, "notice of any proposed change in text-books."

It appears from the uncontradicted evidence of the superintendent of the public schools of the city and county of San Francisco that in June, 1897, the Spencerian system was in use in the schools, and that it was the only system in use that was ever brought to his attention, but that they had been experimenting with the vertical system. But if it be conceded that on the 9th day of June, 1897, the Spencerian system and the California system of vertical penmanship were each in use in the public schools, the order adopting the California system would exclude the Spencerian system. This was certainly a change in the text-books in use in the public schools. We do not think the language of the statute applies only to a change of text-books that had been legally adopted. If the Spencerian system was in use in the public schools, whether by legal adoption or by the silent acquiescence of teachers and pupils, the board could not change the text-books so in use without publication as required by the Code. As the plaintiff cannot maintain this action unless the order of the board of June 9, 1897, was valid and is still in force, and as it has been shown to be void, it is not necessary to pass upon the question as to whether or not the plaintiff, as a taxpayer, can maintain the action. We advise that the judgment and order be reversed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(131 Cal. 162)

BOVARD v. DICKENSON. (Sac. 760.)

(Supreme Court of California. Dec. 28, 1900.)

BILLS AND NOTES — ASSIGNMENT BY EXECUTRIX—EVIDENCE—FOREIGN LAWS — PRESUMPTION.

1. Where plaintiff claimed to be the assignee of the note sued on, and the assignment was denied, the burden was on plaintiff to prove it.

2. When plaintiff, suing on a note as the assignee, relied on an assignment executed by an executrix in Missouri, and there was no evidence that such assignment was authorized by any court having jurisdiction of the estate, and no evidence as to the laws of Missouri, there could be no recovery, since the Missouri law would be presumed to be the same as Code Civ. Proc. §§ 1517, 1524, declaring that a chose in action belonging to an estate may not be sold save under order of the superior court.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by John H. Bovard against G. L. Dickenson. From a judgment in favor of defendant and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

R. W. Dodge, for appellant. Budd & Thompson, for respondent.

GRAY, C. Appeal from a judgment in defendant's favor, and from an order denying plaintiff's motion for a new trial. This action was commenced by filing a complaint on November 5, 1898. In that complaint it is alleged that on June 1, 1885, at Atchison, Kan., the defendant made and delivered his promissory note for \$820 and interest, due 90 days after date, to one J. A. Bovard; and thereafter, on December 30, 1894, and February 4, 1898, at Stockton, Cal., in consideration of the foregoing facts and said indebtedness, the said defendant signed two several writings, whereby he acknowledged the said indebtedness, and promised to pay the same according to the terms of said promissory note. It is also alleged that said promissory note and indebtedness and said writings, and every claim and cause of action thereunder against defendant, were duly assigned and transferred to the plaintiff herein, and ever since said assignment plaintiff has been, and now is, the owner of the same. The answer specifically denied the alleged assignment and ownership, and the four-year statute of limitations was also pleaded therein. From the evidence it appears that the payee of the note, J. A. Bovard, died in Missouri in 1894, and that Lucy S. Bovard, appointed in that state as the executrix of his estate, attempted to assign and transfer to plaintiff by instrument in writing, executed by her as such executrix (presumably in the state of Missouri), all the claim and cause of action of said estate under said two instruments of writing. The said executrix also attempted to assign the said promissory note to plaintiff by a written indorsement on the back thereof, signed by her as executrix. There is nothing to show that this action of the executrix was authorized by any order of the court having jurisdiction of said estate. Nor is there anything to show that the transfer by the executrix to plaintiff was intended merely for the purpose of collection, or for any other purpose than that of an absolute assignment, sale, and transfer to said plaintiff as indicated by the said written transfer. The assignment being denied, the burden was on the plaintiff to prove it. This, we think, he failed to do. There being no evidence as to the law of Missouri, it will be deemed, for the purposes of the case, to be the same as the law of California. In California the personal property of a decedent, including choses in action, passes to the heirs or devisees, and no sale can be had without the order of the court. Sections 1517, 1524, Code Civ. Proc. This case cannot be distinguished in principle from *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, which was

approved as to the question here considered in *Rankin v. Newman*, 114 Cal. 635, 46 Pac. 742, at page 660, 114 Cal., and page 749, 46 Pac.; and on the authority of these two cases we hold that the assignment and transfer of the claim and indebtedness from the executrix to plaintiff without authority of the probate court was invalid, and the finding adverse to said alleged assignment is supported by the evidence. This being so, plaintiff cannot recover, and the other points urged by him are immaterial. We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 153)

PEOPLE v. ROSENSTEIN-COHN CIGAR CO. et al. (L. A. 773.)¹

(Supreme Court of California. Dec. 28, 1900.)
CORPORATIONS—DISSOLUTION — FORFEITURE OF CHARTER—INCOMPETENT EVIDENCE—INTEREST OF STOCKHOLDER—MINUTE BOOKS.

1. Where the uncontradicted testimony showed that defendant corporation had organized, elected officers, adopted by-laws and a seal within 30 days after incorporating, commenced and continued business from that date, and legally changed its name thereafter, such evidence was sufficient to support a finding of the trial court that the corporation adopted and used a seal, organized and commenced the business for which it was incorporated immediately after issuance of said certificate of incorporation, and continued the same from that time on, and hence was not liable to forfeiture of its charter, or dissolution, under Civ. Code, § 358, providing that, if a corporation does not organize and commence business within one year from the date of its incorporation, its corporate powers cease.

2. Where the evidence in an action by the people to enforce the forfeiture of defendant's charter showed that the corporation had organized and commenced business within a year from its incorporation, and there was no evidence to show an injury to the public, the trial court's finding that none of defendant's acts were injurious to plaintiff, nor prejudicial to relator, or any of the stockholders or creditors, was correct, and entitled defendant to a judgment.

3. The illegal levy of assessments on the stock of a corporation would be no cause for its dissolution in an action brought by the state for that purpose.

4. In an action by the state to forfeit defendant's charter for not organizing and commencing business within one year after incorporation, a witness was asked what was his interest, as stockholder, on his retirement from the corporation. Held, that an objection to the question was properly sustained, since it could throw no light on the issue.

5. Where the state sought to forfeit defendant's charter because it had not begun business within one year from the date of its incorporation, its objection to defendant's minute book was properly overruled, since this would tend to show all the details of the business of the corporation and the time of its organization.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

¹ Rehearing denied January 24, 1901.

Proceeding in the nature of quo warranto by the people against the Rosenstein-Cohn Cigar Company, a corporation, and others, to dissolve the corporation. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Atty. Gen. Ford and Graves, O'Melveny & Shankland, for the People. Dillon & Dunlavy and A. Heyneman, for respondents.

COOPER, C. This appeal is from a judgment in favor of defendants and from an order denying plaintiff a new trial. The proceeding is in the nature of a quo warranto by the attorney general to deprive the defendant, a corporation, of its corporate charter, and procure its dissolution. The principal ground, as we gather from the complaint, upon which it is claimed the corporation should be deprived of its charter, is that it did not proceed to organize and commence the transaction of business within one year from the date of its incorporation, as provided in Civ. Code, § 358: "If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease." It is alleged that on the 19th day of December, 1894, articles of incorporation were filed with the county clerk of Los Angeles county by the M. L. Polaski Company, Limited, which set forth the object and purposes of the corporation, the place of business, the term for which it was to continue, the names of five directors, the capital stock, the number of shares subscribed, and the amount subscribed by each director; that the said articles were subscribed and acknowledged by the five directors, and a certified copy thereof sent to the secretary of state; and that the secretary of state issued to said M. L. Polaski Company, Limited, the usual certificate, under the great seal of the state, showing "that a copy of the articles containing the required statement of facts had been filed in his office." The complaint then proceeds to allege "that no other, further, or different steps in the organization of said corporation were taken, no by-laws were adopted, no officers were elected, no record was kept embracing the acts done or who were present and who absent, no stock and transfer book was kept, and no meetings of the directors were had." It is not alleged that the said M. L. Polaski Company, Limited, did not organize within the year, nor is there any allegation as to when it commenced the transaction of its business. It is further alleged that a petition was filed in the superior court of Los Angeles county on the 24th day of May, 1897, for change of name of the said M. L. Polaski Company, and that "upon proceedings had therein an order was made and entered on June 29, 1897, changing the name of said corporation to the

Rosenstein-Cohn Cigar Company, the present defendant." No attempt is made to allege that the defendant, under its present name, did not organize and commence business within one year after June 29, 1897. On the contrary, it is alleged that after the order so changing the name the corporation "carried on business in the city of Los Angeles, county and state aforesaid, as cigar dealers under the name of Rosenstein-Cohn Cigar Company, claiming to be a corporation." It is further alleged that "the exercise of corporate power by the defendants, or any of them, is contrary to the statutes of the state of California, and each and every exercise of said corporate power subsequent to the lapse of one year from the date of its incorporation has been, as to the people of the state of California, void, and of no effect." The prayer asks for judgment "that said corporation did not organize within one year from the date of its incorporation, and that its corporate powers ceased at the expiration of the said year."

The evident intention of the pleader was to show that the corporation, while using the name M. L. Polaski Company, Limited, did not, within one year from the date of its incorporation, organize and commence the transaction of its business. We may, for the purposes of this case, concede that the complaint so alleges, and that such facts would entitle the plaintiff to judgment depriving the corporation defendant of its charter. But the court found: "The said corporation adopted and used a seal in due form of law. The said corporation organized and commenced the business for which it was incorporated immediately after the issuance of said certificate of incorporation, and by the 21st day of December, 1894, and ever since that time, has continued to operate, and is now operating, the same." It is claimed by plaintiff that the above finding is not supported by the evidence. We have carefully examined the evidence, and find in it sufficient to support the finding. The witness Rosenstein testified that he was secretary of the M. L. Polaski Company, and further said: "We adopted by-laws the same week of the incorporation. * * * The by-laws were in the safe. * * * Right away after the incorporation of the M. L. Polaski Company we organized by electing officers. It was within thirty days, and the by-laws were adopted within thirty days. We transacted business right away. The company had a seal. The corporate meetings were held at the cigar store regularly." The witness Robertson was bookkeeper for the M. L. Polaski Company, Limited, from the time it was incorporated until its name was changed. He testified: "I was there just about the time the articles of incorporation were filed. I started a set of books. * * * From the 21st of December, the date of the incorporation, the business went right along at the old stand, buying and selling tobacco, cigars, and arti-

cles." The witness Polaski testified: "We were conducting business at the same place as a partnership before the corporation was formed. * * * After the incorporation the business went right along as before, so far as the selling of goods was concerned. Q. Did you organize a board of directors then by the election of officers? A. I think so. Q. Did you commence business? A. Yes, sir." The above evidence not only supports the finding, but is uncontradicted, and upon the finding defendants were entitled to judgment.

The court, after certain other findings, found: "That none of their said acts were injurious to plaintiff, nor prejudicial to the interests of the relator, the said defendant E. Cohn, or any of the stockholders or creditors of said corporation." We think, treating the last-named finding as a conclusion of law, that it is correct, and entitles defendants to judgment. The courts treat a franchise as a trust, and the terms of the charter of a corporation are the conditions of the trust. A forfeiture of the charter takes place when some one or more of the essential conditions of the trust are violated. *People v. Dashaway Ass'n*, 84 Cal. 119, 24 Pac. 277, 12 L. R. A. 117. It is said in the above case that cases of forfeiture are divided into two classes: "(1) Cases of perversion; as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In such cases, unless the perversion is such as to amount to an injury to the public, who are interested in the franchise, it will not work a forfeiture. (2) Cases of usurpation; as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public." In the case at bar it is not pretended that the corporation has usurped a power which it had no right to exercise, and therefore the second class of cases referred to has no application to this case. The evidence shows, and the court found, that the corporation proceeded to carry out the ends and purposes of the grant of its franchise by organizing and commencing business within the year, but, aside from this, there is no evidence in any manner tending to show an injury to the public. The complaint alleges that certain assessments have been levied upon the capital stock of the corporation, and that said assessments were levied "for the purpose of compelling the stockholders thereof to contribute money for the benefit of said corporation." We know of no reason why assessments may not, in proper cases, be levied upon the capital stock for the benefit of a corporation. If we assume that the assessments were illegally levied, this was not a cause for dissolving the corporation. *Burnham v. Manufacturing Co.*, 78 Cal. 24, 17 Pac. 940. It is not necessary to examine the

many specifications of the insufficiency of the evidence to sustain other findings upon immaterial matters. The finding quoted and discussed disposes of the vital issue in the case. The plaintiff called one Polaski as a witness. It appeared from his testimony that he was a stockholder and one of the subscribers of the articles of incorporation of the M. L. Polaski Company, Limited; that he retired May 20, 1897. He was then asked by plaintiff: "Q. What interest in the property was then determined to be your interest?" The court sustained an objection to the question, and it is claimed that the court erred in so doing. We think the ruling correct. The amount of interest of the witness in the property of the corporation was not the subject of investigation. It could not possibly throw any light upon the issue as to whether or not the corporation organized and commenced business within one year after it incorporated. There was no error in overruling plaintiff's objection to the minute book of the corporation. It does not appear that the book was read or considered in evidence, but, if we assume that it was so read in evidence, it was competent. It tended to show the organization of the corporation, its place of business, the nature of the business transacted, the meetings of directors, and other matters as to the good faith of the corporation. There was no question raised as to the identity, genuineness, and regularity of the minutes.

Other objections are made to the overruling of plaintiff's objections to testimony, but counsel have not seen fit to discuss them to any extent, and do not seem to rely upon them. The testimony to which objection was made relates to resolutions, meetings, the adoption of by-laws, who were the stockholders, and the shares held by each. It all tended to show that the corporation was organized and doing business, and was, therefore, competent and material on the issue presented by the pleadings. We discover no error of sufficient importance to justify a reversal of the case. It follows that the judgment and order should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 146)

GREENEBAUM v. DAVIS et al.
(S. F. 1,530.)

(Supreme Court of California. Dec. 28, 1900.)
MORTGAGES — FORECLOSURE — JUDGMENT
THEREIN — CONCLUSIVENESS ON JUN-
IOR LIENHOLDER.

Where plaintiff, who had a lien on defendants' land subject to a mortgage, was made a party to the suit foreclosing the mortgage, but did not answer or set up his claim therein, he is not barred from maintaining an action on his claim against the landowner, since the only

bar raised against him by the decree in the foreclosure suit is on the issue that his claim is subject to the lien of plaintiff therein.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Emil Greenebaum against John Davis and another to foreclose a lien. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

R. H. Latimer, for appellants. Edw. J. Pringle, for respondent.

HAYNES, C. This appeal is from the judgment upon the judgment roll. Defendant John Davis was the owner of an undivided interest in the Rancho San Pablo. In January, 1885, one Lynch obtained a judgment against Davis for \$2,184.04, and \$19 costs, and in February of the same year the undivided interest of Davis in said rancho was sold to one Waterman for the sum of \$2,300.42, who received a sheriff's deed therefor. Said undivided interest so sold was, however, subject to a mortgage for the sum of \$17,960.25 held by Rudolph Hochkofler, the trustee in bankruptcy, for the creditors of D. Ghirardelli. At the time said deed was executed to Waterman there was a suit pending in the superior court of the city and county of San Francisco, brought by Joseph Emeric against Juan B. Alvarado et al., the object of which was to partition said rancho; and said Davis, Hochkofler, and Waterman, who were made defendants to said action, stipulated therein that all such lands as might, upon final partition, be allotted to Davis in satisfaction of his undivided interest in the ranch, should be decreed to him as owner, that the mortgage of Hochkofler should be a lien upon the lands so set apart to Davis for the amount of his mortgage, with interest, and that Waterman should have a lien, subject to said mortgage, for \$2,300.42 and interest; and this stipulation was confirmed by an interlocutory decree entered in said cause, the claim of said Waterman to become due upon the entry of the final decree, which was March 3, 1894, and which confirmed the interlocutory decree. Hochkofler, in 1888, commenced an action to foreclose his mortgage, and made Waterman a defendant; but this suit was not pressed until after the final decree in the partition case, when John Lloyd, who became trustee after the death of Hochkofler, amended the complaint, and prosecuted the foreclosure suit to a final decree. Waterman did not answer or assert his lien in that action, but made default. The officer making the sale under Lloyd's decree was directed to pay into court any surplus money that might remain after paying the amount due to Lloyd. The present action was commenced by the plaintiff, Greenebaum, the successor in interest of Waterman, on March 2, 1897. His prayer is, in substance, that any portions of the lands not sold to satisfy the prior mortgage be sold, and that any

surplus proceeds paid into court under Lloyd's decree be paid to the plaintiff. These facts are, in substance, alleged in the complaint, and the defendants demurred thereto on the following grounds: (1) That there is another action pending between the same parties for the same cause; (2) that the complaint does not state facts sufficient to constitute a cause of action; and (3) that the court has no jurisdiction of the subject of the action. The demurrer was overruled, and the defendant answered. Upon the trial plaintiff had findings and judgment.

Appellants' principal point is thus stated: "The holder of the note secured by the second mortgage cannot, after foreclosure of the prior mortgage by a suit to which he was made a party defendant, and in which all his rights might have been settled, maintain an action upon the note against the maker." To this point he cites *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682, and *Hefner v. Insurance Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309, and other cases. In the first of these cases one Aldrich brought suit to foreclose a mortgage executed by one Willis to secure a promissory note. Brown was made a party to that action because he held, as assignee, a subsequent mortgage upon the same premises to secure a promissory note which was due at the time the suit was commenced by Aldrich. Brown answered, and, as said in the opinion, "set up his note and mortgage, and as the note was due, if his pleadings were appropriate as they should have been, the court could and should have ascertained" the amount due to each of the parties, and ordered a sale, and the application of the proceeds to Aldrich and Brown in the order of priority. The case at bar is materially different. Here the plaintiff, though made a party defendant to the foreclosure suit brought by Hochkofler to foreclose a prior lien, did not answer or set up his claim by cross complaint or otherwise, and therefore the plaintiff in this action is precisely within the rule laid down in the case of *Savings Bank of San Diego Co. v. Central Market Co.*, 122 Cal. 28, 34, 54 Pac. 273, where Mr. Justice Temple cited *Brown v. Willis*, supra, and, commenting thereon, said: "I am unable to comprehend the rationale of the decision, unless it was upon the theory that the second mortgagee had made himself an actor in the case,—had put his rights as mortgagee in issue, and had then through his neglect allowed judgment to go against him adjudging that he had no lien or claim upon the premises. The only issue tendered to the junior mortgagee, by merely making him a party to a suit to foreclose brought by the prior mortgagee, is in the allegation that the right or claim of the junior mortgagee is subject to the lien claimed by the plaintiff in the foreclosure suit. As to any possible defense he may have to that issue so tendered, he is concluded by the decree, whether he appears in the case or not. The doctrine

appealed to does not and cannot go beyond that." The question made by appellants having been thus expressly considered and decided by this court, it is not necessary to examine cases decided in other jurisdictions.

The question whether Waterman or the plaintiff is or was a redemptioner does not arise upon this record; and this remark also applies to appellants' contention that the decree in the Hochkofler foreclosure case, ordering that any surplus remaining after satisfaction of the sums due the plaintiff in that action be paid into court, is void. No issue was made as to said surplus, nor does it even appear that there was in fact a surplus, or that a sale had been made under the decree foreclosing the Hochkofler mortgage. No other questions require notice. I advise that the judgment be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 158)

P. A. BUELL & CO. v. BROWN et al.
(Sac. 709.)

(Supreme Court of California. Dec. 28, 1900.)

MECHANICS' LIENS—CESSATION FROM WORK—NOTICE—CLAIM OF LIEN—TIME FOR FILING—EXTENSION—CONTRACT—CLAIM—VARIANCE.

1. Code Civ. Proc. § 1187, declares that the owner of a building for which materials have been furnished to be used must, within 40 days from cessation from labor thereon, file a notice stating the date when such cessation occurred, in the county recorder's office, and that neglect to file such notice shall estop the owner from maintaining the defense that liens were not filed in time; that a material man must file his lien within 30 days from the filing of notice of cessation of work by the owner; that a cessation from work for 30 days shall be deemed a completion; and that all liens must be filed within 90 days from completion. *Held* that, though the owner of property failed to file a notice of cessation from work within the required time, a material man's lien filed more than 120 days after cessation from work was too late.

2. Where the claim of lien made by a material man stated a contract to deliver the material at the reasonable market value, but on trial it appeared that the contract called for certain prices, the variance was fatal.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by P. A. Buell & Co. against James Brown and others to foreclose a material man's lien. From a judgment in favor of defendants Louis and Jane Doe Dondero, and an order denying a new trial, plaintiff appeals. Affirmed.

Woods & Levinsky, for appellant. F. W. Street, for respondents.

COOPER, C. This action was brought to foreclose a lien for material furnished defendant Brown, and used in the construction

of a barn upon the lands of defendant Dondero and wife. Findings were filed and judgment entered for defendants Dondero. This appeal is from the judgment and an order denying plaintiff's motion for a new trial. The findings are not assailed as to the facts therein determined, but the conclusions of law are challenged. It appears from the findings that between the 12th day of September and the 20th day of November, 1897, the plaintiff furnished defendant Brown mill work, lumber, and materials, amounting at the agreed price to \$426.33; to be used, and which were used, in the construction of a barn upon the premises of defendants Dondero; "that said barn or structure has not been completed; that there has been a cessation of labor on said barn or structure ever since the 20th day of November, 1897, and no notice of the completion or cessation of labor was ever filed or recorded in the recorder's office of said Tuolumne county"; that on the 16th day of April, 1898, plaintiff filed and recorded its notice of lien, which stated, among other things, as part of the terms of the contract by which it is sought to charge the premises with a lien, "said claimant to deliver same [said materials, lumber, and mill work] at said property above described, in said county of Tuolumne, state of California, at the reasonable market rate therefor." The claim of lien was filed nearly five months after cessation of labor upon the barn, and the most material question in the case is as to whether or not the notice or claim of lien was filed within time.

It is provided in the Code of Civil Procedure (section 1187) that the owner of property for which materials have been furnished to be used in the construction thereof must, "within forty days after cessation from labor * * * upon any unfinished building, * * * file for record, in the office of the county recorder of the county * * * in which the property, or some part thereof, is situated, a notice setting forth the date when * * * such cessation actually occurred. * * * In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner * * * shall be estopped, in any proceedings brought to foreclose any mechanic's lien or liens provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter. Every person, save the original contractor, claim~~ing~~og the benefit of this chapter, at any time after the completion of any building * * * and until the expiration of thirty days after the filing of said notice * * * of cessation by said owner, * * * must file for record with the county recorder of the county * * * a claim * * * which claim must be verified by the oath of himself or some other person: provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, * * * and in all cases * * * cessa

tion from labor for thirty days upon * * * any building * * * shall be deemed equivalent to a completion thereof for all the purposes of this chapter." The court found that labor ceased upon said building November 20, 1897, and 30 days thereafter, to wit, December 20, 1897, the building was deemed completed for the purpose of filing liens by all lien claimants. Ninety days were thereafter allowed in which to file and record the claim of lien, and the claim, not having been filed within the 90 days, was too late. It is claimed that the effect of the failure of the owner to file and record the notice of cessation of labor was to indefinitely postpone the time within which the claim of lien could be filed. We do not so construe the section. After stating that the owner failing to give notice shall be estopped from maintaining a defense on the ground that the lien was not filed within the time provided for in the chapter, it is expressly provided "that in any event all claims of lien must be filed within ninety days after the completion of said building." The statute then provides what is equivalent to and shall be deemed completion. The proviso should be read in connection with and as a part of the sentence in regard to the owner being estopped to claim that the lien was not filed in time. This construction gives effect to, and makes all parts of the section consistent. It enlarges the time of 30 days, formerly given the material man in which to file his claim of lien, and gives him 30 days after the filing of notice of cessation of labor by the owner, or, in case the owner does not file such notice, then 120 days after such cessation from labor. The construction contended for by plaintiff would prolong the time in which a claim of lien could be filed for years, in case the owner failed to file and record the notice. Such could not have been the intention of the legislature. It is said the owner could give the notice, and thus prevent the time being so extended. In reply it may be said that the material man can file his claim of lien and commence his suit, and thus prevent the bar of the statute. He is the one seeking to collect his claim, and not only seeking to collect it, but seeking to collect it, by force of the statute, from one who never agreed to pay it. The material man in this case did not sell the materials to the owners of the land, but to Brown, who was building the barn. He could charge the lot belonging to the Donderos, not for anything sold to them, or by virtue of any contract with them, but by reason of the statute alone. To charge their property by virtue of the statute, it was necessary for him to comply with the mandates thereof. We are not required to give a strained construction to the statute in order to enable plaintiff to collect its debt from parties who never agreed to pay it, and who never requested the delivery of the materials. The court found that the claim of lien set forth a contract to deliver the materials at the reasonable market rates, but that the con-

tract was an express one, to wit, \$26.50 per 1,000 for lumber and \$2.50 per 1,000 for shingles. This was a fatal variance, and prevents a recovery by plaintiff. *Wilson v. Nugent*, 125 Cal. 283, 57 Pac. 1008, and cases cited.

Plaintiff claims that the court failed to find as to whether or not the owners, within three days after knowledge that the barn was being constructed, gave notice that they would not be responsible for the same, as required by Code Civ. Proc. § 1192. There was no such issue made by the pleadings, and, if there had been, such finding would not be material, in view of what has been said as to the other points. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(6 Cal. Unrep. 621)

GIBBS. v. TALLY et al. (L. A. 746.)¹

(Supreme Court of California. Dec. 22, 1900.)

MECHANICS' LIENS — BONDS — FAILURE TO TAKE — MEASURE OF DAMAGES — PAYMENT — BURDEN OF PROOF — ASSIGNABLE CLAIM.

1. Under Code Civ. Proc. § 1203, requiring a bond, in case of a building contract, it by its terms to inure to the benefit of persons performing labor and furnishing materials for the contractor, one given to "T. [the owner], legal representatives or assignees," and not in terms inuring to the benefit of any one else, is insufficient.

2. Under Code Civ. Proc. § 1203, requiring a bond, in case of a building contract, in an amount equal to at least 25 per cent. of the contract price, inuring to the benefit of persons performing labor and furnishing materials for the contractor, and providing as limit of damages, in case of a bond, the value of labor and materials furnished, not exceeding the amount of the bond, and declaring that any failure to comply with the provisions of the section shall render the owner and contractor liable to material men and laborers entitled to liens on the property, the measure of damages, in the absence of a bond, is the amount of the claim for labor or material, not exceeding 25 per cent. of the contract price.

3. Under Code Civ. Proc. § 1203, giving action for damages "to any and all material men, laborers and subcontractors entitled to a lien," if bond is not filed where there is a building contract, the claimant who sues first and obtains judgment is entitled to recover up to the limit of the owner's liability, unless other claimants intervene, or, having brought actions, have them consolidated with his.

4. Though a material man, suing the owner of a building for failure to have a bond of the contractor filed, alleges nonpayment of the claim for materials furnished, it is enough for him to prove the debt, and defendant has the burden of proving payment.

5. Under Code Civ. Proc. § 1203, giving action for damages to a laborer or material man against the owner of the property who, in case of a contract to build thereon, does not take a bond for their benefit, and providing that action on the bond, if one is taken, shall not affect the laborer's lien nor any action to foreclose it, except that there shall be but one satisfaction of the claim, action for failure to

Reversed in banc. See 65 Pac. 970, 133 Cal. 373.

take bond is not affected by the bringing of an action to foreclose the lien.

6. A claim under Code Civ. Proc. § 1203, for damages by a laborer against the owner of property who, in case of contract to build thereon, does not take a bond from the contractor, is within Civ. Code, § 1458, declaring "a right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by William H. Gibbs against Mary A. Tally and another. Judgment for plaintiff. Defendants appeal. Modified and affirmed.

Clarence A. Miller, for appellants. T. M. Stewart, for respondent.

CHIPMAN, C. Action to recover damages from the owner of a building for failure to comply with section 1203, Code Civ. Proc., relating to liens of mechanics and others. Plaintiff had judgment, from which defendants appeal on the judgment roll, including a short bill of exceptions.

1. Appellants challenge the constitutionality of the above section of the Code. The question has been recently decided here adversely to appellants' contention. *Carpenter v. Furrey* (Cal.) 61 Pac. 369.

2. Appellants contend that a sufficient bond was filed. A bond did in fact accompany the contract, and was filed with it. This bond was signed by the contractor, Parsons, and by two sureties, but it was given to the owner of the property being improved, "Mrs. Mary A. Tally, legal representatives or assigns," and was "not by its terms made to inure to the benefit of any and all persons who perform labor or furnish materials to the contractor, or any person acting for him or by his authority," as the statute requires. The bond was not such a one as the law prescribes, and was not available to any one except the owner, to whom it was given, and the result, so far as any laborer or material man is concerned, was the same as if no bond at all had been filed. Under section 1203, as it stood when first enacted (St. 1885, p. 147), the bond would have been available to laborers and material men as well as to the owner, but the section was repealed by Act March 15, 1887 (St. 1887, p. 152), and there was no provision of the Code on the subject until the new section was enacted in 1893 as we now have it (St. 1893, p. 202). Plaintiff could not sue the sureties on this bond, for they are liable only so far as they are bound by the terms of the bond, and the bond does not make them liable to any one but the owner, her representatives and assigns. It must follow that there was no such bond as is required by the Code.

3. It is claimed that, if it be conceded that the bond does not comply with the statute, the action cannot be maintained because of the uncertainty as to what is the measure of damages in such a case. When a bond is

filed, the section provides that "any person shall have an action to recover upon said bond, against the principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond," etc. After providing as to filing a bond and its terms, etc., the statute reads as follows: "Any failure to comply with the provisions of this section shall render the owner and contractor jointly and severally liable in damages to any and all material-men, laborers and sub-contractors entitled to liens upon the property affected by said contract."

The statute is plain enough as to the limit of damages where a bond is filed, but is not so plain where it is not filed. It is manifest, however, that the legislature intended that some damages should be recoverable, and the only question is, how much? It would seem reasonable that the damages should not exceed what would be allowed on the bond if filed, namely, 25 per cent. of the contract price, and to this extent, at least, we think the section will sustain the action. The judgment was less than 25 per cent. of the contract price. But appellants claim that it appeared from the findings that there were unpaid claims other than those set forth in plaintiff's complaint, and that it was error to give judgment for plaintiff without prorating with the other claimants. The statute gives the action "to any and all material-men, laborers and sub-contractors entitled to liens." Plaintiff was not bound to bring the action for the benefit of all unpaid claimants. The right of action is several, and the claimant who first sues and obtains judgment is entitled to recover up to the limit of the owner's liability. Possibly other unpaid claimants might intervene and ask to share in the recovery, where the unpaid claims exceed the amount for which the owner is liable. Possibly, too, where several different actions have been begun against the owner under section 1203, these actions might be consolidated in order to give to each claimant his proportionate share of the amount for which the owner is liable. But in the absence of any such situation, brought about by other unpaid lienholders, we see no reason why plaintiff should suffer any diminution of his judgment.

4. Finding 8 is to the effect that Parsons, the contractor, has not paid any part of the judgments mentioned in the complaint, nor any of the claims sued on, and that no part of either of said claims has been paid. Appellants challenge this finding as unsupported by the evidence. Plaintiff sues as assignee of seven different claims of as many different claimants, whose liens had been foreclosed and had gone to judgment, and also on a claim personal to himself, which had also gone to judgment. As to each of these claims plaintiff alleged that the contractor, Parsons, "has not, nor has any other person, paid any part of said judgment," ex-

cept a certain sum stated in the complaint in each instance. The answer denies nonpayment, and alleges payment in full of each and all said claims. The only evidence of nonpayment was the testimony of Parsons, the contractor, who testified that he had not paid any of the claims, and that he had no property out of which payment could have been made, and that he cannot now pay any of the claims. Appellants contend that the burden of proof was on plaintiff to prove nonpayment. Even if that were the law, as has been intimated in a few cases, a sufficient prima facie case of nonpayment was shown. But in *Melone v. Ruffino*, 62 Pac. 93, this court reviewed the authorities in this state on the subject, and showed that the rule here is the same as at common law, and that, "where a plaintiff has proved the existence of a debt,—at least, within the period of statutory limitation,—the burden of proving payment is on the defendant"; and that, although an averment of nonpayment is necessary to make the complaint perfect, yet "a negative allegation is to be proved only when it constitutes a part of the original substantive cause of action upon which the plaintiff relies,"—as in cases, for instance, of malicious prosecution, and where the cause of action is the alleged failure of the defendant to do work in a workmanlike manner.

5. Appellants contend that the several claims set out in the complaint were merged in the judgment against the contractor, Parsons, in the suit for the foreclosure of the liens, and that, the lienholders having elected to obtain and accept judgment against him for their claims, they are bound by their election. The pursuit of the remedy of foreclosure given by the statute, in which a money judgment may be taken against the contractor, and a judgment of foreclosure against the owner, will not operate as an extinguishment by merger of the remedy or right of action given under section 1203. It is expressly provided in the section that the action on the bond referred to "shall not affect his [the laborer's] lien nor any action to foreclose the same, except that there shall be but one satisfaction of his claim," etc. We think the converse would be true, that the action for a failure to comply with the section is not affected by bringing the action to foreclose.

6. The judgment includes five assigned claims which were embraced in the foreclosure suit, and it is now contended that they are not assignable, and should not have been included in the judgment. Section 1203, supra, creates an obligation to enforce which is the purpose of this action. It is such an obligation as is assignable under section 954, Civ. Code. "A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." *Id.* § 1458.

7. Among the claims on which plaintiff sued as assignee was that of one Ware, a subcontractor, for \$182.85; and another of the Los

Angeles Lime Company, for \$30.50, for supplies furnished to said Ware as subcontractor. Plaintiff failed to prove an assignment of the lime company's claim. It appeared that the lime company furnished the material constituting its claim to Ware, and his claim when assigned to plaintiff, and as it figured in the judgment in this action, included the lime company's claim. It is true, as contended by plaintiff, that Ware's claim as subcontractor is distinct from the lime company's claim as a material man, and under some circumstances Ware's claim might be considered independent of the lime company's claim, and judgment be given for it, while defendants would still be liable to the lime company, and thus might possibly be made to pay the same claim twice should the limit of their liability not be otherwise reached. But here plaintiff shows that Ware's claim is made up in part of the lime company's claim, and the complaint alleges, although not sustained by the proof, that the lime company had assigned its claim to plaintiff. It was admitted at the trial that any payments made to the lime company should be credited upon the claim of Ware. It seems to us, in view of the pleadings and the admissions, defendants should not be subjected to the possibility of being called upon twice to pay the lime-company claim. Plaintiff concedes that if it is included in the Ware claim this may happen. In view of all the facts, it seems to us more consonant with justice, as well as in keeping also with the theory on which plaintiff brought action, to disallow this item, and reduce his judgment accordingly. The total judgment, including the lime-company claim, is for \$442.75. The judgment should be modified by reducing it \$30.50, and as thus reduced should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by reducing it \$30.50, and as thus reduced is affirmed.

(131 Cal. 68)

ENOS et al. v. SNYDER et al. (S. F. 1,613.)¹
(Supreme Court of California. Dec. 21, 1900.)

DEAD BODIES—RIGHT TO BURY—WILLS.

1. One has no property in his dead body, so that he can dispose of it by will.

2. In the absence of statute, the custody of the corpse and the right of burial belong to the next of kin, and not to the executor or administrator.

3. Pen. Code, § 292, declaring on whom devolves the duty of burying the body of a deceased person, is to be considered in a civil case as determining who has the right to bury the body, and to have the possession thereof for that purpose.

Department 2. Appeal from superior court, Sonoma county; Albert G. Burnett, Judge.

Action by Susie T. Enos and another against Rachel Jane Snyder and another.

¹ Rehearing denied January 19, 1901.

Judgment for plaintiffs. Defendants appeal. Affirmed.

Lippitt & Lippitt (Myrick & Deering, of counsel), for appellants. Haven & Haven, for respondents.

McFARLAND, J. John S. Enos died in Sonoma county on March 30, 1898. The plaintiff Susie T. Enos is his surviving wife, and the plaintiff Gertrude Willis is his daughter. For several years next before his death the deceased had not lived with his wife, but during that time lived at the residence of the defendant Rachel Jane Snyder, where he died. He left a will which contained a direction that the manner, time, and place of his burial should be "according to the wishes and directions of Mrs. R. J. Snyder," the said defendant. After his death the plaintiffs herein made demand of defendant Snyder for possession of his body for the purpose of burying the same, and the demand was refused. Thereupon this action was commenced against Mrs. Snyder for a judgment declaring that plaintiffs are entitled to the possession of the dead body of the deceased for the purpose of burial, enjoining defendant from proceeding with the burial of said body, and directing her to give to plaintiffs the possession thereof. Defendant Snyder answered, setting up the clause in the will above referred to, and also verbal statements to the same effect made by the deceased before his death. Afterwards E. S. Lippitt, the executor named in the will, was, on his own application, made a party defendant, and he filed an answer averring substantially the things set up in the answer of defendant Snyder. Demurrers to both answers were sustained, and judgment was entered for plaintiffs substantially as prayed for in the complaint. From this judgment, defendants appeal.

It is admitted that the record presents the sole question involved in the case, namely, under the law of this state, did the respondents, as next of kin, have the right to the possession of the body of the deceased for the purpose of burying it, as against the appellants, who claim that right under the will? The general English and American authorities on the subject are not very satisfactory,—at least, as to a contest, like the one here involved, between the next of kin and persons claiming under a will. It is quite well established, however, by those authorities, that, in the absence of statutory provisions, there is no property in a dead body; that it is not part of the estate of the deceased person; and that a man cannot by will dispose of that which after his death will be his corpse. There are some expressions in some of the authorities cited by appellants to the effect that the right of burial is in the next of kin, "in the absence of any testamentary disposition," but they were not cases in which the right of testamentary dis-

position was involved. The case which is most directly in point here is *Williams v. Williams*, 20 Ch. Div. 659. It is a recent case (1882), and expresses the law of England on the subject. In that case the deceased had, by his will, directed that after his death "his body should be given to his friend Eliza Williams, to be dealt with by her in such manner as he had directed to be done in a private letter to her." The body, however, was buried in a certain cemetery "by the direction of his widow and one of his sons"; but afterwards Eliza Williams succeeded in removing it from the cemetery, and, having disposed of it in accordance with the direction of the will, she brought the action against the executors to recover the amount of the expenses which she had incurred in so doing. Kay, J., in his opinion, after referring to certain cases, says: "It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body, it is impossible that by will or any other instrument the body can be disposed of. I asked for any authority in conflict with these cases, but none was produced. I have referred to the books of the greatest authority on the question, and I believe there is no authority in the least degree in conflict with these cases. It follows that the direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void." The current of American authorities, although there is some conflict, is to the same effect. *Griffith v. Railroad Co.*, 23 S. C. 25, 55 Am. Rep. 1, and cases there cited; in re *Wong Yung Quy*, 6 Sawy. 449, 2 Fed. 624; *Guthrie v. Weaver*, 1 Mo. App. 136. In *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388, the point was not involved. But as some one must, of necessity, bury the dead, and must have the temporary possession of the dead body for that purpose, in the few cases where there has been any question on the subject equity has been invoked, and courts of equity have assumed jurisdiction and have given the necessary remedies; and it has been generally declared that the right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin, being present and having the ability to perform the service. *Durell v. Hayward*, 9 Gray, 249; *Fox v. Gordon*, 16 Phila. 185; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471; *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506; in re *Widenling Beekman St.*, 4 Bradf. Sur. 503.

The appellant Lippitt in his answer bases his alleged right on the directions given by the deceased in his will and verbally, and not upon his authority as executor, independent of such directions, and the arguments of counsel for appellants rest mainly

on that basis; but there is in their briefs some shadow of contention that an executor or administrator has, by mere virtue of his office, the right to bury the body, and to the possession of it for that purpose. There are expressions to that effect in the English books and particularly in the older ones, and they may also be found in some American authorities, but the current of American authorities is the other way. Those expressions are found generally in cases where there was no contest between executors and next of kin, as in *Williams v. Williams*, supra, where the body had been buried by the executors by the direction of the next of kin. Of course, it is generally provided by statute, as in this state by section 1643, Code Civ. Proc., that executors or administrators must pay "funeral expenses"; but it has certainly been the custom in this country for the next of kin, and not the executor or administrator, to have the custody of the dead body before the funeral, and to bury it. Indeed, under our probate system, it cannot be determined who the executor or administrator is until after the appropriate time for the funeral has elapsed, and the burial of the dead body is not to be found in the statutory enumeration of the rights and duties of executors and administrators. In 8 Am. & Eng. Enc. Law, p. 837, it is said in the text as follows: "In England it has been held that an executor has the right to the custody and possession of the body of his decedent until it is properly buried, but this doctrine has no support in the United States." And the cases cited support the text. In *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249, the court, after an elaborate discussion of the subject and review of the authorities, say: "Our conclusion is that the custody of the corpse and the right of burial do not belong to the executor or administrator, but to the next of kin, and that the courts of this state possess the power to protect such next of kin in the exercise of such rights."

We have considered the subject as presented in the general authorities because appellants contend that there are no statutory provisions here which are determinative of the question involved, but we think that our statutory law does definitely settle the question against appellants' contention. Section 292 of the Penal Code provides that "the duty of burying the body of the deceased person devolves upon the person hereinafter mentioned." Then follow four subdivisions of the section. Subdivision 1 provides that in the case of the death of a married woman the duty of burial devolves on the husband, and subdivision 2 is as follows: "If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age and within this state, and possessed of sufficient means to defray the necessary ex-

penses." And section 294 provides that "the person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purposes of burying it." It is also provided in another section that, if the person upon whom the duty of burial is imposed neglects to perform it in a reasonable time, he is guilty of a misdemeanor, and is also liable in a civil action to the person who does perform it in treble the expense incurred. These provisions are very clear and explicit, but appellants contend that they should not be considered in a civil action, because they are in the Penal Code. This position is not tenable. We have here a Code system which is, for convenience and partial classification, divided into four Codes, to each of which a name is given; but they are inseparably interwoven with each other, and no one of them is complete in itself, or absolutely confined to a particular subject. Therefore clear enactments of substantive law establishing rights, like section 294, are not to be held inoperative because found in any particular Code. If the provision in one Code were in conflict with a provision on the same subject in another Code, perhaps a consideration of the general purpose of each of the Codes might afford some aid in solving the difficulty; but there is no such difficulty here, for there is no provision in any of the other Codes touching the question here involved. The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives. If the duty and the right had been declared in some other Code, and the Penal Code had merely provided the penalty, there would be, we suppose, no objection to the appropriateness of the legislation; but there is no reason in law why any part of this legislation is invalid because found in the Penal Code instead of one of the others. It would hardly be contended that the provision about liability in a "civil action" is inoperative because found in the Penal Code. The subject is one peculiarly appropriate for legislative direction, and it may be assumed that the legislature has looked upon the provisions of the Code above cited as sufficiently expressive of the legislative intent. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(131 Cal. 45)

TULARE SAV. BANK et al. v. TALBOT
et al. (Sac. 616.)¹

(Supreme Court of California. Dec. 20, 1900.)
CORPORATIONS—LIABILITY ON STOCK—OVER-
ISSUE—SUBSCRIPTION—RELEASE—CON-
TRACT—CONSTRUCTION.

1. Where persons take stock of a corporation from it, pay value therefor, and act in all respect as stockholders during the time debts of the corporation are contracted, it is immaterial, on the question of their liability to creditors for

¹ Rehearing denied January 19, 1901.

any balance due on the par value of the stock, whether they were original subscribers or not.

2. There is not an overissue of stock where there was to be 500 shares of stock, and no more than this was issued, though when the articles of incorporation were drawn, all the stock subscription lists not being at hand, L., the organizer, put himself down in the articles for 183 shares, to make up the full total of 500, he in so doing regarding himself as the agent of the subscribers whose names were not at hand, and the sum of the subscription lists and the amounts set down in the articles exceeded 500 shares, the shares being issued to such subscribers from the amount put down to L., with the acquiescence of him and all the other stockholders.

3. Release of a subscription for stock may be proved as well by the acquiescence of the stockholders, and the fact that the corporation did not regard it as binding, as by the records.

4. In case of ambiguity, an agreement of one taking stock from a corporation to pay \$1 per month, for 34 months, will be held merely to be an arrangement to avoid necessity for calls and assessment, rather than a sale for less than par; the directors not being shown to have authority to so sell.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by the Tulare Savings Bank and others against A. P. Talbot and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Wm. H. Jordan and E. T. Cospers, for appellants. C. L. Russell, W. B. Wallace, Richards & Carrier, R. M. F. Soto, Oliver Ellsworth, Hendrickson & Tam, G. W. Zartman, and E. M. Morgan, for respondents.

HENSHAW, J. This action was brought by plaintiffs and interveners, judgment creditors of the Packwood Vineyard & Fruit Company, an insolvent corporation, to compel payment by the stockholders of that corporation of the unpaid portion of their stock. The defendants Pope, Talbot, and Fagan appeal from the judgment given against them, and in support of their appeal Talbot and Pope urge that they were not original subscribers to the stock of the corporation, that they purchased their stock from the corporation under written contract and at the agreed price of \$58 per share, which they had fully paid, and that this purchase was made with the full knowledge of most of the plaintiffs and interveners, who after that knowledge gave credit to the corporation. They contend still further that plaintiffs and interveners, having elected to treat them as original subscribers, must be refused any relief in this action upon a showing that they were not such; and, finally, they insist that the stock which they purchased was an illegal and void overissue, wherefor they are not liable.

The position of the appellant Fagan differs from that of Pope and Talbot only in this: He admits that he was an original subscriber to shares of stock of the corporation to be formed, but asserts that the full 500 shares of the stock of the corporation was taken before the amount for which he

had subscribed was issued to him, and therefore his stock was an overissue and void.

R. Linder was the owner of a tract of land in Tulare county. He conceived the idea of forming a corporation, and selling to it his land, which was to be planted with trees and vines. In furtherance of his idea, he sought subscriptions to the capital stock of the prospective corporation. This capital stock was to be divided into 500 shares, of the par value of \$200 per share. Several subscription papers were circulated, and to them signatures obtained. The corporation was then organized, and in the articles of incorporation the names of Pope and Talbot were inserted for 40 shares each, and Linder was put down as the owner of 183 shares. Pope's and Talbot's names likewise appeared upon one of the subscription papers. Much discussion is devoted to the question whether or not the names of Pope and Talbot were thus placed upon the subscription list and in the articles of incorporation by their authority; but we think, in the light of what was actually done, the determination of this question becomes immaterial; for it is unquestionably true that Pope and Talbot and Fagan took the stock of the corporation, paid value for it, and acted in all respects as stockholders, before and during the time the debts of the corporation to plaintiffs and interveners came into existence. If, then, these appellants were bona fide stockholders and holders of bona fide stock, it would be immaterial whether they be considered as original subscribers or not. Under section 580 of the Code of Civil Procedure, plaintiffs were entitled to any relief consistent with the case made by the complaint, and embraced within the issues. The averments in the complaint are broad enough to justify a recovery against the defendants as holders of the stock, whether they be original subscribers thereto or not.

The contention that the stock of these appellants was an overissue, and therefore void, is based rather upon figures than upon facts; for in truth there was never issued by the corporation a single share more than the 500 authorized by its articles of incorporation. The argument of appellants here is that the aggregate subscription lists showed more than 500 shares; that Linder, in the articles of incorporation, was down for 183 shares; that the subscribers and incorporators acquired rights to this stock of which they could not be deprived without their consent, and without the unanimous consent of the stockholders; and that, casting up the totals of the subscription lists and the amounts set down in the articles of incorporation, the result is a sum far exceeding 500 shares. The facts appear to be that at the time the articles of incorporation were drawn all the subscription lists were not at hand, and that Linder, the organizer and promoter of the corporation, put his name down for 183 shares to make up the full

total of 500. In so doing he constituted and regarded himself as the self-appointed agent of other subscribers whose names were not at hand, and the fact is that no subscriber was refused the amount of stock which he demanded, but such stock was issued to him directly by the corporation, it being taken in some instances from the amount of Linder's 183 shares. In this there was complete acquiescence upon the part of Linder and the other stockholders. While it is true that a contract of subscription may be modified or annulled only by the unanimous consent of the stockholders, or by the board of directors duly authorized thereto (*Fruit Co. v. Coon*, 107 Cal. 452, 40 Pac. 542), such release may be proved not only by the records, but as well by the acquiescence of the stockholders of the corporation, and by the fact that the corporation itself did not regard it as binding. *Stuart v. Railroad Co.*, 32 Gr. 146; *Cook, Stocks & S.* § 169. Nor is any formal assignment necessary to substitute one stockholder for another. *Weinman v. Railway Co.* (Pa. Sup.) 12 Atl. 288. There is not the slightest suggestion that Linder was acting or attempting to act in fraud of the rights of any one. Before the organization of the corporation, Pope and Talbot had agreed to take stock in it. The amount had not been definitely decided upon. The stock subsequently taken by Pope and Talbot concluded the agreement, and in this subscription for 183 shares Linder may be regarded as having acted as their agent, as well as the agent of others to whom the stock was afterwards issued. *Water Co. v. Beecher*, 101 Cal. 79, 35 Pac. 349; *Burr v. Wilcox*, 22 N. Y. 551; *Terwilliger v. Telegraph Co.*, 59 Ill. 249; *Bates v. Telegraph Co.*, 134 Ill. 536, 25 N. E. 521.

Coming to consider the further contention of appellants that Pope and Talbot were not original subscribers to the stock, but purchased directly from the corporation at an agreed price of \$56 per share, evidenced by a written contract with the corporation, and that Fagan, though an original subscriber, stands in the same position in this regard as do Pope and Talbot, by reason of the fact that his contract of original subscription was waived by the corporation, which entered into a contract identical in its terms with that of Pope and Talbot, the facts bearing upon this contention are the following: At the time of the issuance of the stock, Pope, Talbot, Fagan, and all the other stockholders as well, signed upon the stub of the certificate book of the corporation a receipt for their stock, acknowledging that it was taken subject to the provisions and conditions of the by-laws, and continuing: "I hereby agree and contract to pay to the corporation on the 15th day of February next the sum of one dollar per share of said stock, and thereafter a like sum on the 15th day of each and every month, for thirty-four months." It is insisted by appellants that this was their contract, and

their only contract, with the corporation; that they were to pay and did pay originally \$20 per share for their stock; and that the 34 monthly payments, of \$1 for each share, were the total amount of the purchase price. It would unduly prolong this discussion to detail at length the evidence supporting the conclusion of the trial court that this receipt and agreement was not a contract of purchase between the corporation and the stockholders. It was merely an agreement, not unusual in such corporations, by which the stockholder stipulated to pay to the corporation a certain monthly amount to defray the operating expenses, until such time as it was estimated it would be self-supporting. It was designed to relieve, and was a convenient method of relieving, the corporation from the necessity of making calls and assessments upon the stock. *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123; *Kohler v. Agassiz*, 99 Cal. 14, 33 Pac. 741; *Upton v. Tribblecock*, 91 U. S. 45, 23 L. Ed. 203. Moreover, no authority on the part of the directors of the corporation to sell the stock for less than par is anywhere shown, and, if it should be conceded that the contract in question is ambiguous, in the absence of evidence of authority it would not be presumed that the construction contended for by the appellants was the true one. As the contract in question, therefore, is not to be construed as a contract of purchase between the corporation and the stockholder, it becomes unnecessary to consider whether the plaintiffs and interveners were charged with knowledge of its character. We can perceive no just ground for complaint that the findings are erroneous and conflicting. As has been said, even conceding that Pope and Talbot are not original subscribers, they were still owners and holders of the stock under circumstances entitling these plaintiffs and interveners to the relief prayed for. The judgment appealed from is affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

(131 Cal. 169)

LA SOCIETA ITALIANA DI MUTUA BENEFICENZA v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 1,701.)¹

(Supreme Court of California. Dec. 28, 1900.)

PUBLIC CEMETERY—GRANT TO PRIVATE CORPORATION—POWER OF SUPERVISORS—BURIAL PERMITS.

1. San Francisco city ordinance, known as "Order 800," which was ratified by the legislature (St. 1867-68, p. 379), provided that a certain tract of land set aside as a cemetery should be deemed absolutely dedicated as such. *Held*, that a grant of a portion of such cemetery to the plaintiff, which is an incorporated beneficial association, to be used for cemetery purposes, is not within the power of the supervisors, even though plaintiff cared for certain persons who would otherwise be a public charge.

2. The grant was not rendered valid by the fact that the plaintiff gave a bond to secure the erection of fences and other improvements on the portion of the cemetery granted to it

¹ Rehearing denied January 22, 1901.

and did erect such improvements, as it was bound to know that the supervisors had no power to make such disposition of the land.

3. Pol. Code, § 3035, making it the duty of the health officers of a city to issue a burial permit on receipt of a certificate of the cause of death, does not render an ordinance invalid which prohibits an interment in a certain cemetery as being detrimental to public health, since such statute does not authorize a permit to enter a body in a place prohibited by lawful authority.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Suit by La Società Italiana di Mutua Beneficenza, a corporation, against the city and county of San Francisco and others. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

James A. Devoto and Devoto & De Martin, for appellant. G. W. McEnerney and Jas. L. Gallagher, for respondents.

HAYNES, C. Defendants' demurrer to plaintiff's complaint was sustained, and judgment thereon entered against the plaintiff, who appeals from said judgment. The other defendants are the mayor, the board of supervisors, the board of health, and the individuals composing said boards, and the health officer of the city and county of San Francisco; and the principal question involved is the validity of an ordinance of said city passed by the board of supervisors in June, 1897, and approved by the mayor, and which, with the preamble, is as follows: "Whereas, the burial of the dead within the City Cemetery is dangerous to life and detrimental to public health, therefore the people of the city and county of San Francisco do ordain as follows: Burials within the City Cemetery Prohibited. Section 1. It shall be unlawful for any person, association or corporation from and after the first day of January, 1898, to bury or inter, or cause to be buried or interred, the dead body of any person in the City Cemetery of the city and county of San Francisco." The second section declared a violation of this order to be a misdemeanor, punishable by a fine of not less than \$100 nor more than \$500, or by imprisonment not exceeding six months, or by both fine and imprisonment. The time when this ordinance should take effect was afterwards extended to March 1, 1898.

Briefly stated, the complaint alleges the following facts: That plaintiff is an incorporated benevolent society having for one of its purposes the maintenance and care of the sick who are members of the corporation; that since its incorporation, in the year 1867, a large number of deaths have occurred among its members; that of the members so dying a number, averaging about 25 per year, were poor, and their bodies, by reason of their membership or for other reasons, are cared for and by the plaintiff at its expense; that in January, 1879, the said city and coun-

ty, being the owner of a tract of land designated on the official map of said city and county as the "Golden Gate Cemetery," adopted a resolution (No. 13,244, New Series), and thereby granted to the plaintiff blocks numbered 9 to 21, inclusive,—part of said Golden Gate Cemetery,—for burial purposes, "on condition that plaintiff should construct and maintain such walls or fences and make such improvements as might thereafter be designated or required by said board of supervisors on and around the lots so granted as aforesaid"; that plaintiff accepted the said grant and said conditions; that by a subsequent resolution (No. 13,479), adopted in 1879, plaintiff was required to enter into an agreement whereby it undertook, in the sum of \$500, with two good and sufficient sureties, to perform all the requirements of said first-named resolution, and particularly to construct and maintain said walls or fences and to make such improvements as might be required by said board, and also that plaintiff should pay its pro rata assessment for the improvement of the avenues of said Golden Gate Cemetery; that plaintiff has performed all of said conditions, and has used said land for said burial purposes, and has expended a large amount of money in making said improvements, aggregating not less than \$2,000; and that the Golden Gate Cemetery is now known as the "City Cemetery," and is so designated in said ordinance. The prayer is for the annulment of said ordinance, that plaintiff's title be quieted, for an injunction, and other relief.

Appellant contends (1) that said resolution of the board of supervisors was a grant of said lands to the plaintiff; (2) that, even though it be not a grant, the plaintiff is entitled to the relief demanded; and (3) that said ordinance is in conflict with general laws.

Neither of these contentions can be sustained. The tract of land containing 200 acres, and designated originally as the "Golden Gate Cemetery," and afterwards known as the "City Cemetery," included the lands here in controversy, and the whole tract of 200 acres is a portion of the land referred to in the act of congress of March 8, 1866 (14 Stat. 4). After the passage of this act, the supervisors passed an ordinance known as "Order 800," which was ratified by the legislature by an act approved March 27, 1868 (St. 1867-68, p. 379). By the first section of this ordinance, the board of supervisors were authorized and directed to devise and adopt a plan for the subdivision of the outside lands referred to in said act of congress into blocks and lots, "and to select and set apart for public uses such lots and portions of said land as said board may deem necessary." The second section of said ordinance provided that after the adoption of the plan the board of supervisors should cause a map of the lands to be made according to this plan, "and upon said map shall be designated the lots and por-

tions of land set apart for public uses, and the particular use for which each lot or portion of land shall have been set apart." Section 6 of said ordinance further provided that "the tract or portion of land set apart and designated thereon as a cemetery, and lots for a hospital, * * * shall be deemed absolutely dedicated as such." The alleged grant to the plaintiff was made by ordinance in 1879, and, though not set out in full in the complaint, it may be conceded that it was sufficient in form to vest in the plaintiff the rights and privileges contended for, but the board of supervisors had no power to make the grant.

That the city held said cemetery lands in trust for public uses as a cemetery cannot be questioned, and it is equally clear that the plaintiff is a private corporation, and that a grant to its use is not a grant to a public use, even though the corporation uses it only for burial purposes. The fact that some of its members are buried at the expense of the corporation, who, if they were not members of the corporation, would be buried at the expense of the city, does not affect the question. The grant and use, each, were for and to the corporation. The cases of *California Academy of Sciences v. City and County of San Francisco*, 107 Cal. 334, 40 Pac. 426, and *Home for the Care of the Inebriate v. Same*, 119 Cal. 534, 51 Pac. 95, are in point, and conclusive of this case, unless appellant's second or third point makes those cases inapplicable.

Appellant's second contention is based upon the fact that a contract was entered into and a bond executed to secure the erection of walls or fences and other improvements on the lands described in the complaint. It is sufficient to say in reply that the board of supervisors had no power to devote the land to any other than public uses, and the plaintiff was bound to know that they had no such power. The city and county cannot be bound by the unauthorized acts of its agents. In *Hoadley v. City and County of San Francisco*, 50 Cal. 275, it was said of the property there in controversy: "It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private persons, and is effectually withdrawn from commerce; and, the city having no authority to convey the title, private persons are virtually precluded from acquiring it;" and private corporations are in the same category. The case above cited was approved in *Sawyer v. City and County of San Francisco*, 50 Cal. 375, and in *Hoadley v. Same*, 70 Cal. 320, 12 Pac. 125, which was affirmed by the supreme court of the United States, upon writ of error, in 124 U. S. 646, 8 Sup. Ct. 659, 31 L. Ed. 553. See, also, *City and County of San Francisco v. Itsell*, 80 Cal. 59, 22 Pac. 74.

Lastly, it is said that this ordinance is in conflict with general laws. It is alleged in the complaint that the board of health of said city, in December, 1897, passed an order pro-

viding that, in compliance with said ordinance, no burials should be permitted in said City Cemetery from and after the time specified by the board of supervisors. Appellant's contention is not very clear, but as we understand counsel that, under section 3035 of the Political Code, the health officer must obtain a certificate of the cause of death, and that upon receiving it it is his duty to issue a permit for the interment. Undoubtedly that is true; but it does not follow that the health officer may grant a permit for interment in a place prohibited by the lawful authority of the city. The judgment appealed from should be affirmed.

We concur: SMITH, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(181 Cal. 175)

LAWRENCE v. JOHNSON et al. (L. A. 758.)
(Supreme Court of California. Dec. 28, 1900.)

MORTGAGES—FORECLOSURE—FINDINGS—
SUFFICIENCY—REVIEW.

1. A finding in foreclosure that a cross complainant was not the owner of the mortgage, and had no interest therein, is insufficient, where his cross complaint averred that the mortgage was assigned to him as security for a loan, since the first part of the finding does not negative the fact that the mortgage had been assigned as security, and the latter part is only a conclusion of law therefrom.

2. A finding in foreclosure that there was due a cross complainant a certain sum on a note described in his cross complaint is insufficient, where the facts on which it is based do not appear, as it is merely a conclusion of law.

3. A finding in foreclosure that the allegations of a cross complaint were true is insufficient to establish ownership of the note, where such cross complaint contained no allegation as to ownership.

4. A finding in foreclosure that a cross complainant was not the owner of the mortgage is not supported by the evidence, where there was evidence that the mortgage was assigned to him as security for a loan.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by George W. Lawrence against Isaac Johnson and others. Defendants the Imperial Savings & Loan Society and Henry S. Baldwin by cross complaint sought to foreclose a subsequent mortgage on the same premises executed by defendants Johnson. From a judgment in favor of plaintiff and in favor of defendant the Imperial Savings & Loan Society, Henry S. Baldwin appeals. Judgment as to plaintiff affirmed, and the judgment in favor of said defendant reversed.

E. C. Bower, for appellant. F. W. Burnett, for respondents

SMITH, C. The suit was brought to foreclose a mortgage executed to the plaintiff by the defendants Johnson May 17, 1893, for \$300, etc. The defendant corporation and the

defendant Baldwin filed cross complaints to foreclose a subsequent mortgage on the same premises, executed by the defendants Johnson to the former, and claimed by the latter to have been assigned to him. The mortgagors made default. Judgment was rendered in favor of the plaintiff for the foreclosure of his mortgage, and in favor of the defendant corporation for the foreclosure of the subsequent mortgage. The defendant Baldwin appeals from the judgment. The appeal is from the whole judgment, but no point is made in the brief of appellant as to the validity of the judgment in favor of the plaintiff; which, indeed, is not open to question. The appeal, therefore, involves only the conflicting claims of the defendant corporation and Baldwin to the junior mortgage. On this issue the findings and judgment are in favor of the former, but it is claimed by appellant that the findings are insufficient, and that they are in fact unsupported by the evidence. Both points, I think, must be sustained.

The cross complaint of the appellant alleges that the note and mortgage executed by the Johnsons to the respondent corporation was assigned and delivered to him by the said respondent as a pledge and security for \$500 loaned by him to the corporation. There is no finding on this allegation. It is found "that the defendant * * * Baldwin is not, and never was, the owner of the said mortgage," etc., "and has no interest in or right to said mortgage, or proceeds thereof." But the first part of the finding does not negative the alleged fact that the mortgage had been assigned to him as pledge or security for a loan, and the latter part is but a conclusion of law, apparently based on the fact found. It is also found "that there is due to the Imperial Savings & Loan Society * * * from said defendants Isaac Johnson," etc., "upon the promissory note described in said cross complaint the sum of \$233.50." But this also is a mere conclusion of law, and the facts upon which it is based do not appear. Hayne, New Trials & App. p. 718 et seq., § 239 et seq. Nor does the finding that the allegations of the cross complaint of the defendant corporation are true touch the issue. There is no allegation in the cross complaint as to the ownership of the note. Nor does it seem that the actual findings are sustained by the evidence, which seems to support the claim of the defendant Baldwin that the mortgage was assigned to him as pledge or security for a loan. It appears, indeed, from appellant's brief, that questions were raised as to the power of the officers of the company to make the assignment; but, as it received and retained the consideration, the objection seems to be met by the authorities cited by appellant. Main v. Casserly, 67 Cal. 127, 7 Pac. 426. At least, in the absence of a brief or oral argument on behalf of respondent, we must regard the findings as unsupported by the evidence.

Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872, and cases cited. The judgment in favor of the Imperial Savings & Loan Society should be reversed, and the cause remanded for a new trial of the issues between it and the defendant Baldwin. The judgment in favor of the plaintiff for the foreclosure of his mortgage should be affirmed, both as to the defendants Johnson and the other defendants.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment in favor of the Imperial Savings & Loan Society is reversed, and the cause remanded for a new trial of the issues between it and the defendant Baldwin. The judgment in favor of the plaintiff for the foreclosure of his mortgage is affirmed, both as to the defendants Johnson and the other defendants.

(131 Cal. 125)

STEWART v. CALIFORNIA IMP. CO. et al.
(S. F. 1,544.)¹

(Supreme Court of California. Dec. 27, 1900.)
MASTER AND SERVANT—INJURY TO THIRD
PERSON—RELATION OF PARTIES.

A street-roller outfit, consisting of a roller, engine, and engineer to operate the same, was hired by a city from the defendant, the owner, for a stipulated price per day. The city's agents, the superintendent of streets and his foreman, only directed how and where the streets should be rolled, and neither of them had the control or management of the engine, which was controlled and managed by the engineer, the servant of defendant, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. *Held*, that defendant, and not the city, was liable for injuries to a third person, caused by the engineer's negligence in the management of the engine, since he was an employé of the defendant, and not of the city.

In bank. Judgment in department (61 Pac. 280) reversed, and that of trial court affirmed.

VAN DYKE, J. Action for personal injury. The trial was by the court without a jury. Plaintiff had judgment, from which, and from an order denying their motion for a new trial, defendants appeal.

The court found that defendant Conger was, on the 4th day of March, 1896, employed by the defendant California Improvement Company as engineer to manage a steam roller owned by said company, and used by it in rolling and leveling streets. The said roller was then in the use of the city of Oakland; the same, with the engineer in charge, having been hired by the city of Oakland from the defendant California Improvement Company. At the time that the accident occurred the roller was being used under the direction of the superintendent of streets of the city of Oakland in rolling and leveling Twelfth street where it forms a dam at the lower end of Lake Merritt; and the court petition for rehearing, see 63 Pac. 724.

finds that at that time said Twelfth street was the only safe public highway for the passage of vehicles between the eastern and central parts of Oakland, and that the plaintiff was then driving a well-trained, steady, and reliable horse on said street. "While the defendant Conger was in charge of said engine, and standing thereon, and in control thereof, steam escaped from the engine through the safety valve in front of plaintiff's horse. It had been necessary to generate all the steam which the engine could safely carry, and the defendant Conger had wrongfully and carelessly failed and neglected to give any warning of the said letting off of steam, or that there was any danger of its escape through the safety valve, although he (the said defendant) saw the danger to the plaintiff, and had the opportunity and power to give him warning thereof; and the escaping of the steam so frightened the plaintiff's horse that it became unmanageable, and wheeled short around, and tilted over plaintiff's cart, and the plaintiff, without any fault on his part, was thrown out, and dashed violently upon the ground." The main contention on the part of the defendant company was and is that the injury to the plaintiff was not caused by its negligence, but, if it resulted from any negligence, it was upon the part of the city of Oakland. But the court below found that said defendant California Improvement Company had selected the said engineer, and his services were to be paid by said company, and said company had the right to remove him; that the relation of master and servant existed between said defendant company and the defendant Conger, and not between the city of Oakland and defendant Conger. The testimony supports the finding and conclusion of the court below that the injury to the plaintiff was caused by the negligence of the defendants, and not of the city of Oakland. Mr. Miller (at the time superintendent of streets of the city of Oakland), called as a witness on behalf of the defendants, says: "This roller was in the employ of the city of Oakland the day of this accident. It was hired from the California Improvement Company. Mr. Sherman, my foreman, had charge of the work, together with myself." On cross-examination he was asked: "Did Mr. Sherman assume to have such control over the roller as to affect the engine—affect the movements of the engine?" After an objection to such question had been overruled, the witness answered: "I think not. * * * Nothing was said in the lease of the engine to the city about discharging the engineer. I secured the engine under the authority of the board of public works. We had to have a roller, and this was the most available one. I telephoned to the office of the California Improvement Company that we would like to have their roller upon the Twelfth street dam. They replied that they would have the roller there. We said nothing about any-

body to run it, or about the pay. The understanding was that the machine, with the fuel and engineer, should be supplied at so much per day." And being asked whether, as a matter of fact, the roller, while operating upon the street, was not entirely under the direction of himself or foreman, answered: "Yes, sir. We controlled to the extent of notifying what portion of the street we wanted rolled. I exercised the judgment as to when the road was rolled enough and when it was not. I did not stipulate as to any particular engineer." This is substantially the testimony in reference to the terms of the contract between the superintendent of streets and defendant California Improvement Company. The company was to furnish the roller and engineer and fuel for so much a day, and the superintendent of streets was to control the movements of the roller by directing as to what portion of the street should be rolled, and when sufficiently rolled. Neither the superintendent of streets nor his foreman presumed to direct the engineer in reference to the management of the engine in regard to the pressure of the steam, or how or when it should be applied or shut off, or in reference to the escaping of steam through the safety valve. No one not an engineer, or having some knowledge or experience in reference to the management of an engine, would assume to direct the engineer in reference to such matters. As he was the one to know, and not the superintendent of streets or his foreman, whether there was danger in the escaping of steam through the safety valve, the duty devolved upon him to give people warning in case there was such danger; and for injury resulting from negligence in this respect he, and the owner of the engine, who put him in charge of the same, would be responsible.

One who should hire a hack and driver from a carriage company, and in the use thereof should direct on what streets to drive, where to go, and when to stop, and in fact have the entire control of the movements of the carriage, would not thereby become liable for damages resulting from the negligence of the driver in the management of his team. The driver is hired by the carriage company presumably for his fitness in the line for which he is employed, the same as was the engineer in this case by the California Improvement Company. If damages accrue through his negligence or carelessness, such company is liable, and not the one who may have hired and used the carriage. In *Boswell v. Laird*, 8 Cal. 469, the question here presented was thoroughly discussed, and in the opinion there it is said: "The relation between parties to which responsibility attaches to one for the acts or negligence of the other must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power ex-

ists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior upon the principle "Qui facit per alium facit per se." To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury be in fact that of superior and subordinate, or master and servant." This case was referred to in *Du Pratt v. Lick*, 38 Cal. 691, as laying down the correct rule on this subject. The court there say: "That where there is no power of selection or direction there can be no superior; and that where a man is employed to do the work with his own means, and by his own servants, he has the power of selection and direction; and he, and not the person by whom the work is primarily done, is the superior." In referring to the doctrine as laid down in *Boswell v. Laird*, supra, the court say: "We are entirely satisfied with it, and find no occasion to renew the discussion." In *Blake v. Ferris*, 5 N. Y. 48, the court say: "The rule of respondeat superior, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and to the subjects to which that relation extends, and is coextensive with it, and ceases when the relation itself ceases to exist." In *Coyle v. Pierrepont*, 37 Hun, 379, a stevedore, who was employed to unload a vessel at defendants' docks, hired from the defendants a portable engine, with an engineer to run it, for the purpose of hoisting the cargo from the vessel and lowering it upon the wharf. An employé of the stevedore was injured by the negligence of the engineer, and the court below charged the jury that the defendants, from whom the stevedore had hired the engine, with the engineer to operate it, were responsible for the negligence of such engineer. The appellate court held the instruction correct, and that the defendants were the masters of the engineer, and not the stevedore, in whose employ he was at the time in unloading the vessel. In *Huff v. Ford*, 126 Mass. 24, a wagon and horses and driver were hired by the city from the defendants, and the driver, while thus employed, struck one of the horses a violent blow, causing it to kick a loose shoe through a window. The decision reads: "The driver, employed and paid by the defendants, and who had entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was a servant of the defendants in so driving the horses; and for injuries to third persons by his negligence in these respects the defendants were responsible." The cases cited by appellant do not hold that in a case of this kind, where a person has not the control of the conduct

of the other in the particular matter in question, he is liable for the negligence of such other. The test in all these cases is, who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine. This was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. We think the conclusion of law deduced by the court below from the facts found that the defendants are liable, and not the city of Oakland, is correct. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; TEMPLE, J.; McFARLAND, J.

(131 Cal. 109)

McPIKE et al. v. HEATON. (S. F. 1,463.)
(Supreme Court of California. Dec. 27, 1900.)
COVENANTS—OPERATION — INCUMBRANCES —
TAX LIENS.

A covenant in a deed that the land conveyed is free from tax liens is a personal covenant of the same character as a covenant against any other incumbrances, and does not run with the land, or pass to the covenantee's assignee.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Lillian M. McPike and others against Warren D. Heaton. From a judgment for plaintiffs, defendant appeals. Reversed.

Warren Heaton and Davis & Hill, for appellant. Dunne & McPike, respondents.

HARRISON, J. The defendant was the owner of the undivided half of a certain tract of land in Alameda county on the first Monday of March, 1897, and for many years prior thereto, and on March 24, 1897, he made a grant, bargain, and sale deed of his interest in the land to one Jackson. On the next day Jackson conveyed the land to the plaintiffs by a grant, bargain, and sale deed, and the plaintiffs have since remained the owners thereof. The land was assessed to the defendant for the purposes of revenue for the fiscal year commencing July 1, 1897, and taxes were levied thereon for that year by the city of Oakland and the county of Alameda, and on November 29, 1897, the plaintiffs, for the purpose of removing the lien of these taxes from said land, paid the same to the proper officers, amounting to \$424.83. The present action is

brought to recover from the defendant the amount thus paid. Judgment was rendered in favor of the plaintiffs, and the defendant has appealed.

By section 3718 of the Political Code the taxes which were paid by the plaintiffs were a lien upon the land, and attached thereto as of the first Monday of March of that year, and the covenant implied from the defendant's grant of the land that the estate conveyed by him was at the time of such conveyance free from all incumbrances done, made, or suffered by him (Civ. Code, § 1113) embraces the lien of these taxes. Such covenant was, however, a personal covenant of the same character as would be a covenant against any other incumbrance, and the rule is of ancient authority that a covenant that the land conveyed is free from incumbrances, whether express or implied, does not run with the land, or pass to the assignee. *Lawrence v. Montgomery*, 37 Cal. 183. The plaintiffs had no contractual relation with the defendant, and his covenant with Jackson did not pass to them. They could have protected themselves against these taxes, either by assuming their payment as a part of the consideration for the purchase, or by suitable covenants with Jackson; but they have no right of action therefor against the defendant. *San Gabriel Val. Land & Water Co. v. Witmer Bros. Co.*, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, cited by the respondents, involved a consideration of the relative obligations between a mortgagee and the owner of the land mortgaged by reason of the peculiar provisions of the constitution in reference to assessment and payment of taxes upon these respective interests in the land, and was determined upon the ground that by virtue of these provisions there is a personal obligation upon the mortgagee in favor of the mortgagor for the payment of the taxes assessed upon the mortgage, and that, if these taxes are paid by the owner of the land, he may reimburse himself therefor, either by deducting the amount from the mortgage debt, or in a separate action therefor. There is, however, no personal obligation upon the owner of land for the taxes levied against it, and the payment of these taxes can be enforced only by a sale of the land in the mode prescribed by the statute. The defendant was under no personal liability for the taxes paid by the plaintiffs, and the case cited is not applicable to the present case. The judgment is reversed, and, the appellant having died since the submission of the appeal, the judgment of reversal will be entered nunc pro tunc as of August 24, 1900.

I concur: VAN DYKE, J.

GAROUTTE, J. (concurring). At the oral argument of this case I was impressed with the soundness of respondents' position, but upon further consideration my conclusion has undergone a change. Respondents say: "Sup-

pose Heaton's deed to Jackson had been a mere quitclaim, instead of a bargain and sale, would Jackson's right of recovery, if he had continued to be the owner on the date of the delinquency of the tax, and had then paid it, been lessened in the least?" I am satisfied an affirmative answer to this question must be returned. In the absence of some covenant from Heaton, Jackson, under a quitclaim deed, would take the land just as it was, regardless of the nature of the title, or the number or character of liens resting upon it. If the lien upon the land had been a judgment or mortgage lien, and Heaton had given Jackson a quitclaim deed, Jackson would have had no claim against Heaton; and the fact that the lien here was one for taxes, rather than that of a mortgage, judgment, or attachment lien, cannot affect the principle involved. It seems to be conceded by respondents that they are in no better position than Jackson would be under a quitclaim deed from Heaton; and, as we have seen, Jackson, under those circumstances, would have no recourse against Heaton for liens resting upon the land at the time Heaton gave his quitclaim deed. I concur in the views expressed by Mr. Justice HARRISON, and also in the judgment of reversal.

(181 Cal. 121)

JENKIN v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. (S. F. 1,641.)¹

(Supreme Court of California. Dec. 27, 1900.)

INSURANCE—ACCIDENT—CAUSE OF DEATH—AFFIRMATIVE PROOF—PRIMA FACIE CASE—DECLARATIONS OF INSURED—HEARSAY.

1. Where no one was present when an insured person received a mortal wound, his subsequent statements to a physician and others as to the manner in which he was wounded were properly stricken out on motion of defendant insurance company.

2. Declarations of an insured person tending to show that he contemplated suicide, not accompanying nor explanatory of any act, were not competent evidence in favor of defendant insurance company against the beneficiary and her assignee.

3. Where a witness testified that the death of the insured made quite a sensation, owing to the question whether it was murder or suicide, such evidence was hearsay, and incompetent.

4. An insurance policy provided that the insurance should not cover death resulting from intentional injuries inflicted by the insured or any other person; also that the claimant under the policy should affirmatively show that death resulted from actual accident according to the policy. The holder of such accident policy died of a gunshot wound received in some manner which was not shown by the evidence. *Held*, that such showing made a prima facie case for recovery under the policy, since the courts would not presume murder or suicide, but would presume that the death was accidental, nothing to the contrary being shown.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by John Jenkin against the Pacific Mutual Life Insurance Company of Cali-

¹ Rehearing denied January 24, 1901.

fornia. From an order denying a motion for a new trial, plaintiff appeals. Reversed.

Wilbur G. Zeigler, for appellant. Fox, Kellogg & Gray, for respondent.

GRAY, C. On the trial of this case before the court without a jury the judgment was for defendant, and the plaintiff brings this appeal from an order denying his motion for a new trial.

This action is brought by the assignee of the beneficiary of an accident policy issued by defendant to George Douglas Atcherly Crosbie in the lifetime of said Crosbie. By the terms of the policy the sum of \$10,000 was to be paid to Mrs. Annie Mercer George (grandmother), "after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death within ninety days from the time of the happening of such accident." The agreement under which the policy issued provides that the insurance shall not cover death resulting from "intentional injuries inflicted by the insured or any other person"; also that "the claimant shall establish affirmatively under any claim or proceeding thereunder that the injury or death resulted from actual accident according to the policy." In the specification of particulars in which the evidence is insufficient to support the findings appellant attacks the following finding of the court: "The said George D. A. Crosbie did not, prior to his death, or at the time thereof, receive any accidental injury, and did not die of accidental injury." In his brief, also, appellant's principal contention is directed against this finding. The evidence without conflict shows that the insured died of a gunshot wound some two days after the same was inflicted; that a bullet entered his body from the front between the sixth and seventh ribs, or thereabouts, wounding the pleura and lung. The manner in which the wound was inflicted does not appear from the evidence, except as it may be inferred from the nature and location of said wound. No person is shown to have been present with the insured at the time he received the mortal injury; and his statements to the physician and others as to how he came to be wounded were—properly, we think—stricken out by the court on motion of defendant. Some testimony was elicited on behalf of the defendant to the effect that an indefinite number of days before he was shot insured had made several declarations tending to show that he contemplated suicide. As against the beneficiary and her assignee, these declarations, not accompanying nor explanatory of any act, were not competent evidence, and the court erred in refusing to strike them out on motion of plaintiff. *Yore v. Booth*, 110 Cal. 238, 42 Pac. 808; 2 Bac. Ben. Soc. § 460; *Insurance Co.*

v. Applegate, 7 Ohio St. 292; *Insurance Co. v. Haney*, 10 Kan. 525; *Dial v. Association*, 29 S. O. 560, 8 S. E. 27; *Schwarzbach v. Union*, 25 W. Va. 622; *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113. It is also clear that the testimony of Col. Green that Crosbie's death made quite a sensation, "owing to the question which was brought up as to whether it was suicide or murder," should have been stricken out, as requested by plaintiff. This hearsay and incompetent evidence as to the declarations of the insured, and the gossip concerning the cause of his death, should, therefore, be ignored; and all the evidence left us, then, from which to determine whether the wound on the insured was inflicted accidentally or purposely, is the nature and character of the wound itself. The burden is undoubtedly on the plaintiff by the very terms of the contract to show that the wound was inflicted accidentally, but it is not necessary, for him to make out his case, that he should produce the direct testimony of eyewitnesses. If the circumstances placed in evidence, and the inferences to be drawn therefrom, and the presumptions arising thereon, point clearly to an accidental injury, the plaintiff has made out a prima facie case, and is entitled to a finding in his favor. There is nothing, perhaps, in the character or location of the wound to indicate from a mere inspection of it that it was inflicted accidentally, rather than willfully; but when we consider that it is contrary to the general conduct of sane men to take their own lives, and that all the presumptions are in favor of sanity and against crime, we are impelled to the conclusion that the insured must have received his injury as the result of an accident. In the absence of evidence to that effect, it will not be presumed that the insured purposely took his own life, nor that he was murdered; and, if he did not take his own life willfully, and his life was not taken by another under circumstances making it a crime, then, we think, his death must be attributed to accidental causes. *Richards v. Insurance Co.*, 89 Cal. 170, 26 Pac. 762. That the courts will presume that the death was the result of an accident, when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems to be a rule upheld by the great weight of authority. *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Mallory v. Insurance Co.*, 47 N. Y. 52; *Cronkhite v. Same*, 75 Wis. 116, 43 N. W. 731; *Insurance Co. v. Sheppard*, 85 Ga. 751, 802, 12 S. E. 18; *Same v. Thornton*, 40 C. C. A. 564, 100 Fed. 582, 49 L. R. A. 116; *Stephenson v. Association (Iowa)* 79 N. W. 459; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723; *Jones v. Association*, 92 Iowa, 632, 61 N. W. 485; *Couadeau v. Accident Co.*, 95 Ky. 280, 25 S. W. 6; *Konrad v. Surety Co. (La.)* 21 South. 721; *Guldenkirch v. Association*

(City Ct. Brook.) 5 N. Y. Supp. 423. The finding complained of is contrary to the evidence under the rule, and should have been the other way. We therefore advise that the order be reversed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(131 Cal. 132)

McCLAIN v. HUTTON et al. (Sac. 712.)
CONTINENTAL BLDG. ASS'N v. HOLT
et al.¹

(Supreme Court of California. Dec. 27, 1900.)

MECHANICS' LIENS—STATEMENT—SPECIFICATION OF MATERIAL—VARIANCE—TERMS OF CONTRACT—SPECIFICATION OF ITEMS—LIEN FOR CONSTRUCTING SIDEWALK—TIME OF FURNISHING MATERIAL—HAULING BRICK—RIGHT TO LIEN—STATEMENT OF NAME OF OWNER—DESCRIPTION OF LAND.

1. Under Code Civ. Proc. § 1184, providing "that, where a contract for labor for which a mechanic's lien is claimed is not filed, the labor should be deemed to have been performed at the personal instance of the owner," a lien was not objectionable because it named the owner as the person by whom the claimant was employed instead of the contractor.

2. Where a claim for a mechanic's lien stated that the materials furnished were used on the building, it was not objectionable because it did not specifically set out the kind of material furnished and the price of the several items.

3. A claim for a mechanic's lien stated that the material was to be paid for within 60 days from the time of the purchase of each item, and if not paid for within such time to draw interest at 10 per cent., and the agreed statement of account read in evidence was the same, except that it omitted the reference to the rate of interest, and the court found that the claim attached to the complaint contained a true statement of the demand. *Held*, that the objection that there was a variance between the claim and the evidence and findings cannot be sustained.

4. Where a claim for a mechanic's lien stated that there was no agreement as to price when the claimant began work, but that it was subsequently fixed at four dollars per day, and the written certificate of the foreman read in evidence was to the same effect, the contention that the claim did not truthfully state the contract was without merit.

5. A claim for a mechanic's lien on a building was not objectionable because it included items for material used in building an adjacent sidewalk, since the walk must be considered a part of the building.

6. Claims for mechanics' liens were not objectionable in not stating the time specified in the contract for the payment of material, since in such a case it will be presumed in law that no time was given.

7. Where claims for mechanics' liens stated the making of the contract, the material furnished, the agreed price, the number of days' labor performed, the rate per diem, or that the usual rates were to be paid, such claims contained a sufficient statement of the terms of the contract.

8. A person who was employed by the agent of the owner to haul bricks for the construction of a building was entitled to a mechanic's lien on the building for his services.

9. The fact that a claim for a mechanic's lien

stated that C. H. and F. H. were the names of the owners of the building, while F. H. had no interest in it, did not affect the validity of the lien.

10. Where a claim for a mechanic's lien gave a correct description of the land on which the building was situated, and the land was triangular in form, the fact that the correct description was followed by the further clause, "together with a certain triangular piece deeded to C. H.," etc., did not invalidate the lien, since such clause may have been another description of the same lot, and, if not, should be rejected as repugnant to the rest of the document.

In bank. On rehearing. Modified.

For opinion in department, see 61 Pac. 273.

Coglan & Harvey, W. H. Jordan, Raleigh Barcar, and Hudson Grant, for appellants.
Percy S. King and J. M. Gregory, for respondents.

PER CURIAM. A rehearing of this cause in bank was ordered on the ground, among others, that the work done and materials furnished by the defendants Holt and Chandler were commenced prior to the date of the mortgage of the Continental Building & Loan Association, and not afterwards, as stated in the decision heretofore filed. Hence, assuming the claim of these defendants to be valid, a new trial of the case as to them will be unnecessary. This renders necessary an examination of the validity of these claims, and at the same time we will consider the other claims, omitting that of Waggoner Bros., with reference to which the former opinion will stand.

1. The material objections to the claim of Chandler are, in effect—First, that Mrs. Hutton is named in the claim as the person by whom he was employed, instead of the contractor, Waggoner, with whom the contract was in fact made; second, that an undetermined part of the materials furnished by the claimant were not used on the Hutton Block, but on another building of the owner; third, that "the kind of materials furnished"—whether "iron, stone," etc.—is not stated; fourth, that the claim fails to "state the price at which either lumber or lime was sold," or that the articles were sold at an agreed price; and, finally, fifth, that there was a variance between the claim and the evidence, and between the claim and the finding. None of these objections is well taken. Mrs. Hutton was properly named as the person by whom the claimant was employed. It is expressly provided by the statute that, where the contract is not filed, the labor and materials "shall be deemed to have been done and furnished at the personal instance of the owner" (Code Civ. Proc. § 1184); and there is no objection to the use of this form of statement (Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588). With regard to the materials furnished, the claim unequivocally states that all of them were used on the building, and, from the stipulation read in evidence, this appears to have been the fact. It was unnecessary to state specifically the kind of materials furnished, or the prices

¹ For opinion on motion to modify judgment, see 63 Pac. 622.

of the several items. *Brennan v. Swasey*, 16 Cal. 141; *Seldon v. Meeks*, 17 Cal. 129; *Davis v. Livingston*, 29 Cal. 287; *Jewell v. McKay*, 82 Cal. 150, 23 Pac. 139. The claim is, in effect, a sufficient statement of a special contract to pay for the materials furnished, and would be sufficient as a complaint in *indebitatus assumpsit*, or *debt*. 1 Chit. Pl. 350, notes (f), (g); *Id.* 351, 352. Finally, there is no variance between the claim and the evidence or the finding. In the claim the statement is that the materials were to be paid for "in cash within sixty days from time of purchase of the item, and any item not paid for within that time was to bear interest at the rate of ten per cent. per annum until paid." The agreed account read in evidence agrees accurately with this, and the finding is precisely to the same effect, except that it omits reference to the rate of interest. This, however, is, in effect, found in the finding that the claim—which is attached to the complaint, and the filing of which is not denied—"contained * * * a true statement of [the] demand," etc. The first of the above objections is made also to the claims of Holt, Moore, the Vacaville M. & L. Company, and Dresser, and what is said with reference to it will be understood as applying to those claims. The remaining objections to the claim of Holt are, in effect, that it does not truthfully state the terms of the contract, and that part of the labor was performed, not on the building, but on the adjacent sidewalk. With regard to the former point, the statement of the claim is that at the time of the work there was no agreement as to price, but it was agreed he was to be paid what his labor was reasonably worth, but afterwards the sum of four dollars per day was agreed upon by Holt and Waggoner as a reasonable sum; and the statement is sustained by the written certificate of Waggoner, as foreman, read in evidence. With regard to the other objection, the cement sidewalk must, under the circumstances of the case, be regarded as part of the building. The claims of Holt and Chandler must therefore be regarded as sufficient.

2. The principal objection urged to the other claims is, in effect, that they fail to state, or to state truthfully, "the terms, time given, and conditions of [the] contract." To simplify the question, it may be observed generally that in some of the claims the time of payment is stated; in others, not. In the latter class of cases the presumption of the law is that no time was given. *Hills v. Ohlig*, 63 Cal. 104; *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139. Also it may be stated that in some of the claims it is said that the contract of employment was made with Mrs. Hutton; in others, that it was made with Waggoner, as contractor and agent. But this, as we have held, is to be regarded as immaterial. The question to be considered relates, therefore, to the sufficiency of the

statement of the terms of the contract in other respects.

In this regard all that can be required is the statement of the fact that a contract was entered into and such a statement of its terms as to show the indebtedness claimed. These conditions are sufficiently complied with in all the claims. In each of them the making of the contract, and the labor performed or materials furnished, are stated. In one of them (that of Trower) the labor was to be performed "at the usual rates," which is but another way of saying, "for what it was reasonably worth" (*Reed v. Norton*, 90 Cal. 596, 597, 26 Pac. 767, 27 Pac. 426), and its value was accordingly stated. In all the other claims the agreed price is stated either in the aggregate, or, in the case of labor, the per diem rate, and the number of days. In this respect, therefore, the claims are sufficient. There are, however, some other objections to be considered.

The claim of Trower was for "the hauling of materials used in the construction of [the] building"; and it is objected, on the supposed authority of *Adams v. Burbanks*, 103 Cal. 646, 37 Pac. 640, that he was not entitled to a lien for labor of this kind. The case cited, however, has no application. There the claimant "was employed by the brick men to haul brick for them, and he had no connection with the contractor, who owed him no liability. His position [was] not different from that of the laborers who made the brick." But the claimant here was directly employed by Waggoner, as the agent of Mrs. Hutton, and his labor was performed on the building in the same sense as that of the men who lifted the brick from the ground to the upper parts of the building. *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. 772.

The claim of Harrison and that of Hubert each contains the statement "that Charlotte A. Hutton and Fred Hutton are the names of the owners and reputed owners of said premises," and it is objected that the latter has no interest, and that the claims are therefore invalid. The statute requires the statement of "the name of the owner, or reputed owner, if known." "If the names are not known, the claim is sufficient if it is silent on the subject." *Lumber Co. v. Newkirk*, 80 Cal. 277, 22 Pac. 231. The claimant "may not know the owner, and if he is ignorant of his name he is not required to state it." *Corbett v. Chambers*, 109 Cal. 183, 41 Pac. 873. Still less can the validity of the claim be affected by a mistake in attempting to carry out the requirements of the law.

Finally, it is objected to Frick's claim that it does not describe the property "with sufficient certainty for identification." The claim is "for labor and services in the erection and construction of that certain building * * * now upon that certain lot situate," etc., "and described as follows," etc. Then follows a description of the land on which the building was in fact erected, and then the further

clause, "together with that certain triangular piece deeded to Charlotte Hutton by the trustees of the town of Vacaville, situate on the easterly side of Dobbins street." Possibly the latter clause may be but another description of the land on which the building was erected, which is also "a triangular piece * * * situate on the easterly side of Dobbins street"; otherwise, the clause must be rejected as repugnant to the rest of the document, which unequivocally refers to one building built on one lot, and in fact to the building in question. The objections to the claims of these defendants, so far as they refer to defects, or supposed defects, appearing on their face, must, therefore, be regarded as untenable.

With regard to the costs of appeal, they should be apportioned as follows: The costs should be allotted, one-half to the appeals of Mrs. Hutton, and one-half to those of the building and loan association, but a single memorandum of costs to be filed by appellants. The former half of the costs should be paid by the respondents and the appellant Chandler in amounts proportionate to their respective claims, the latter by the respondents—excluding the appellant Chandler—in the same proportion; and it is so ordered. But as the transcript on appeal is unnecessarily voluminous by at least a third, only two-thirds of the expense of printing will be allowed in the costs. Otherwise than as above indicated, we are satisfied with the former decision, which accordingly will be modified by adding thereto the words, "except as to the issues raised by the cross complaints of the defendants I. H. Holt and F. P. Chandler, as to whom the findings will be allowed to stand," and as thus modified will stand as the decision of this court.

(23 Utah, 52)

MARTI v. AMERICAN SMELTING & REFINING CO.

(Supreme Court of Utah. Dec. 13, 1900.)

ACTION FOR DAMAGES—QUESTION OF FACT—PROVINCE OF JURY—USURPATION BY COURT—PREJUDICIAL ERROR—QUESTION OF LAW.

1. In an action for damages, an instruction which assumes that plaintiff has proven damages is, in effect, a usurpation of the province of the jury by the court, and necessarily prejudicial to the defendant, notwithstanding the fact that another portion of the charge tells the jury that they are the judges of the facts and the credibility of the witnesses.

2. Whether or not there is any evidence to support a verdict is a question of law, within the meaning of section 9, art. 8, Const.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by John Marti against the American Smelting & Refining Company. Judgment for plaintiff, defendant appeals. Reversed.

Dickson, Ellis & Ellis, for appellant. D. H. Wells, for respondent.

PER CURIAM. This action was brought by the plaintiff to recover damages for the alleged flowing of his land by defendant dumping slag into the channel of Little Cottonwood creek at a point below plaintiff's land, so as to partially retard the flow of the water in said creek as it passes over plaintiff's land, and preventing the same from freely passing out in its natural channel. The case was tried before a jury, and a verdict rendered in favor of the plaintiff. Defendant appealed to this court.

The grounds upon which this appeal is taken are: First, that there is absolutely no evidence showing, or tending to show, that the defendant in any way caused, or had anything whatever to do with, the injury to the plaintiff's property, and that, on the contrary, the uncontradicted evidence shows that defendant had nothing whatever to do with the injury, and was not in the remotest degree connected therewith; second, that the court erred in its instructions to the jury.

Among other things, the court instructed the jury as follows: "It is alleged in plaintiff's amendment to his complaint, and the evidence of the plaintiff also shows, that the defendant in this case succeeded to the property on which the said slag dump was placed on June 21, 1899, and also that the damage to the plaintiff's premises for the year 1899 occurred on and after said date of June 21st. You are therefore instructed that, in the consideration of any damages you may find due the plaintiff by reason of said obstruction, you should limit your inquiry to such damages as occurred on and after June 21, 1899." By this instruction the court assumes that the plaintiff had proven his damages since the 21st day of June, 1899, and the jury were only limited in their inquiry as to the amount of such damages from that date. Under such instructions, the jury were left to assess the damages. It is true that in another part of the charge the jury were told that they were the judges of the facts and the credibility of the witnesses, but we cannot presume that the erroneous effect of the former was eliminated from their minds by the latter instruction. The question passed upon by the court was a question of fact for the jury to determine. The defendant must have been prejudiced by the instruction given.

We are also of the opinion that there was no evidence showing that the defendant caused the injury to the plaintiff's property. On the contrary, the uncontradicted evidence shows that the defendant was not responsible for the injuries complained of. So far as appears from the evidence, other causes not connected with the acts of the defendant contributed to the cause of the injury for which a recovery is sought.

Whether or not there is any evidence to support the verdict is a question of law, within the meaning of section 9 of article 8 of the constitution of this state. If there

is no evidence from which to find a verdict for the plaintiff, this court has power to say it was found contrary to law, and was erroneous, and reverse the case for that reason. *Harrington v. Mining Co.*, 17 Utah, 300, 53 Pac. 737; *People v. Jones*, 31 Cal. 566. Because of the errors referred to the case is reversed, with costs, and the cause remanded to the district court, with directions to grant a new trial.

(22 Utah, 457)

POPP v. DAISY GOLD-MIN. CO.

(Supreme Court of Utah. Dec. 6, 1900.)

RECEIVER APPOINTED PENDENTE LITE—BOND—APPOINTMENT NOT FINAL ORDER—"FINAL JUDGMENT" DEFINED—INTERLOCUTORY ORDER—RIGHT OF APPEAL—LAW OF FORUM.

1. Where a receiver is appointed pendente lite, under section 3114, Rev. St. 1898, and a sufficient undertaking is also filed, under the provisions of section 3116, Rev. St. 1898, even although the appointment was made ex parte, the order appointing is not a final order from which an appeal will lie, under section 9, art. 8, Const.

2. A final judgment from which an appeal will lie, under Const. art. 8, § 9, is that adjudication which finally disposes of the subject-matter of the litigation on the merits of the case.¹

3. Technically speaking, every order appointing or denying the application for the appointment of a receiver is interlocutory, and the question of the right to appeal from such an order must be determined by the law of the forum.

(Syllabus by the Court.)

Appeal from district court, Tooele county; A. N. Cherry, Judge.

Action by G. W. Popp against the Daisy Gold-Mining Company. Judgment for plaintiff. Defendant appeals. Dismissed.

Frick & Edwards, for appellant. Patterson & Moyer, for respondent.

MINER, J. This appeal is prosecuted by the defendant from an order pendente lite appointing a receiver to take charge of the property of the defendant, consisting of mining claims, until the further order of the court. The application for the appointment of the receiver was based upon averments in the complaint. An undertaking was filed in accordance with the statute. The appellant filed a demurrer to the complaint, which was overruled, and this appeal was prosecuted.

Subdivision 5 of section 3114, Rev. St. 1898, provides that a receiver may be appointed by a court or judge in cases where a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. Section 3116 provides that where a receiver has been appointed

upon an ex parte application the court may require the applicant to file an undertaking, with sufficient sureties, conditioned that the applicant shall pay to the defendant all damages he may sustain by reason of such appointment, and an additional undertaking may thereafter be required. In this case a sufficient undertaking was filed in accordance with the order. The respondent moves to dismiss the appeal for the reason that the order appealed from is not a final order or judgment, and no appeal can be taken therefrom. The order appealed from continued until the further order of the court, and was effectual only during the pendency of the action, or until it was annulled by the court for any sufficient reason. The appointment of a receiver is largely a matter of sound judicial discretion, and after the trial court has weighed and considered the facts, and appoints or refuses to appoint a receiver, the appellate court will not interfere with the exercise of that discretion. The appointment of a receiver to take charge of property pendente lite is generally considered an interlocutory order, and not appealable. High, Rec. §§ 25, 26. Similar questions have been passed upon by this court both prior to and since the adoption of our constitution, and the rule has been established that a final judgment is that adjudication that disposes of the case as to all the parties, and which finally disposes of the subject-matter of the litigation on the merits of the case. *North Point Consol. Irr. Co. v. Utah & Salt Lake Canal Co.*, 14 Utah, 155, 46 Pac. 824; *Champ v. Kendrick* (Ind. Sup.) 30 N. E. 635. Bouvier defines a final judgment as: "A final judgment is a judgment which ends the controversy between the parties litigant." The general rule recognized by the courts of the United States, and by the courts of most, if not all, of the states, is that no judgment or decree will be regarded as final, within the meaning of most of the statutes in the several states in reference to appeals, unless all issues of law and of fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it. *Freem. Judgm.* § 34. In the case of *North Point Consol. Irr. Co. v. Utah & Salt Lake Canal Co.*, 14 Utah, 155, 46 Pac. 824, this court held that an order, made pendente lite, granting a temporary injunction, was not a final judgment from which an appeal would lie, under section 9, art. 8, of the constitution. In *Eastman v. Gurrey*, 14 Utah, 169, 46 Pac. 828, this court held that the constitution had taken away the right of appeal from an order vacating and setting aside a judgment, and that such an order was not a final judgment from which an appeal would lie. In the case of *White v. Pease*, 15 Utah, 172, 49 Pac. 416, this court held that an order refusing to grant a new trial came within the rule laid down in the above cases, and that such an order is not a final judgment from which an appeal would lie to this court, un-

¹ *North Point Consol. Irr. Co. v. Utah & Salt Lake Canal Co.*, 46 Pac. 824, 14 Utah, 155; *Eastman v. Gurrey*, 46 Pac. 828, 14 Utah, 169; *White v. Pease*, 49 Pac. 416, 15 Utah, 172; *In re Kelsey*, 43 Pac. 106, 12 Utah, 393; *U. S. v. Church of Jesus Christ of Latter-Day Saints*, 16 Pac. 723, 5 Utah, 394; *Nelson v. Southern Pac. Co.*, 49 Pac. 644, 15 Utah, 325; *Ogden City v. Bear Lake & River Waterworks & Irr. Co.*, 52 Pac. 697, 16 Utah, 440, 41 L. R. A. 305, distinguished.

der our constitution. In *Re Kelsey*, 12 Utah, 393, 43 Pac. 106, this court held that an order requiring a party to pay temporary alimony, costs, and counsel fees during the pendency of a suit was not a final judgment from which an appeal would lie. In the well-considered case of *U. S. v. Church of Jesus Christ of Latter-Day Saints*, 5 Utah, 394, 16 Pac. 723, under section 692, Rev. St. U. S., the territorial supreme court held that an order appointing a receiver was not a final decree, and could not be appealed from to the supreme court of the United States. The section referred to provides that appeals shall be allowed from final judgments. In *Nelson v. Southern Pac. Co.*, 15 Utah, 325, 49 Pac. 644, it is held that no appeal lies from an order overruling a motion for a new trial, because the order is not final. Under the practice and procedure of the state of Nevada, it is held that an appeal will not lie from an interlocutory order appointing a receiver, and that the action of the inferior court in such matters can only be revised upon appeal from a final judgment in the case. *Mining Co. v. Dodds*, 6 Nev. 261. In Pennsylvania, where an appeal lies only from a final order or decree, an order granting an injunction and appointing a receiver upon the filing of a bill for the settlement of partnership affairs is not such a final order, within the intent of the statute, and no appeal will lie therefrom; it being a purely interlocutory matter. *Holden's Adm'rs v. McMakin*, 1 Pars. Eq. Cas. 270. In Ohio it is held that an order appointing a receiver is not a final order from which an appeal will lie. *Railroad Co. v. Varnum*, 10 Ohio St. 622. In Illinois, in the absence of legislation, a writ of error will not lie from a purely interlocutory order appointing a receiver; no final decree having been rendered, determining the rights of the parties. *Coates v. Cunningham*, 80 Ill. 467. Since the above decision was rendered, statutes have been passed in Illinois allowing appeals from interlocutory orders for the appointment of receivers. In Tennessee, an order appointing a receiver, being within the discretion of the court for the purpose of preserving the property pendente lite, cannot be appealed from. *Baird v. Turnpike Co.*, 1 Lea, 394; *Bramley v. Tyree*, Id. 531; *Roberson v. Roberson*, 3 Lea, 50. Such an interlocutory order must be reversed or modified by the same court, otherwise it can only be corrected upon appeal after final hearing. *Johnston v. Hanner*, 2 Lea, 8. So, in California, under the statutes regulating appeals, no appeal lies from an order appointing a receiver. *French Bank Case*, 53 Cal. 495; *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418. In Kansas an order appointing a receiver is not a final order involving the merits of the action, but a mere interlocutory order, from which no appeal lies. *Hottenstein v. Conrad*, 5 Kan. 249; *Boyd v. Cook*, 40 Kan. 675, 20 Pac. 477. In Texas the appointment of a receiver upon an interlocutory order, there being no adjudica-

tion upon the merits of the case, is not a final judgment from which an appeal will lie. *Lumber Co. v. Williams*, 71 Tex. 444, 9 S. W. 436. In Mississippi an appeal will not lie from an order vacating the appointment of a receiver. *Hanon v. Well*, 69 Miss. 476, 13 South. 878. Under the statutes of Michigan it is held that in some cases appeals will lie from orders appointing receivers, but the question has been made to turn upon whether the appointment of a receiver is a substantial decision of the merits involved, or whether it is merely ancillary or incidental to the principal relief. In New York an appeal will lie from an order denying a motion for the appointment of a receiver, because under the Code of that state the court may review all orders which affect a substantial right, even though they rest in the discretion of the court. So, in Nebraska, under a statute authorizing appeals from orders which affect a substantial right, an interlocutory order appointing a receiver may be appealed from. As a general rule, appeals will not lie in such cases unless the judgment is final. *High*, Rec. §§ 26, 65; *Beach*, Rec. §§ 109, 111, 113; *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305; *Rolfe v. Burnham* (Mich.) 68 N. W. 980; 3 Pom. Eq. Jur. § 1331; *Ostrander v. Weber*, 114 N. Y. 95, 21 N. E. 112; *Hancock v. McAvoy*, 151 Pa. St. 464, 25 Atl. 47, 18 L. R. A. 781; *Lodge v. Twell*, 135 U. S. 232, 10 Sup. Ct. 745; *Freem. Judgm.* § 34.

Upon an examination of the authorities, it will be found that the question as to whether an appeal can be taken from an order appointing a receiver, or not, depends entirely upon the statute and practice in the jurisdiction where the question arises. In many jurisdictions appeals lie only from final orders or judgments, while in others, under statutory provisions, appeals may be taken from interlocutory orders affecting the rights of the parties. Technically speaking, every order appointing or denying the application for the appointment of a receiver is interlocutory, and the question of the right to appeal from such an order must be determined by the law of the forum. Section 9, art. 8, Const., provides that "from all final judgments of the district court there shall be a right of appeal to the supreme court." Under this provision, as we have seen, this court has uniformly held that no appeal lies to this court, except from a final judgment, and that the judgment, to be final, must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation. The order appointing the receiver in this case was interlocutory. It continued in force until the further order of the court. A bond was executed to the defendant, sufficient to cover any damage that might arise on account of the order. The litigation out of which the order arose was not determined. It was still pending and undetermined as to the parties.

In the case of *Ogden City v. Bear Lake & River Waterworks & Irr. Co.*, 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305, it was held by the then chief justice that such an order was appealable; but this holding was not concurred in by all the members of the court, and the case was dependent upon a different state of facts. In that case, at the time the court denied the application for a writ of certiorari, and permitted, without argument, an appeal to be taken from an order appointing a receiver, the case of *U. S. v. Church of Jesus Christ of Latter-Day Saints*, 5 Utah, 394, 16 Pac. 723, had not been called to the attention of the court. The rule as announced is only decisive of that case.

The legislature, in its wisdom, has required a bond to be given for the protection and indemnity of the party injured by reason of the appointment of a receiver. Undoubtedly cases may arise when an order appointing a receiver could be appealed from, as from a final judgment.

The interlocutory order appointing the receiver pendente lite was within the sound judicial discretion of the district court, and was not a final judgment, within the meaning of our constitution, from which an appeal will lie to this court. The motion to dismiss the appeal is granted, and said appeal is hereby dismissed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

(7 Idaho, 414)

PORTER v. STEELE, Judge.

(Supreme Court of Idaho. Dec. 15, 1900.)

WRIT OF REVIEW—RETURN.

Where the writ of review is asked upon the ground that the judge of the district court had exceeded his jurisdiction in hearing and determining the cause at chambers, and the return to the writ, which return contains a copy of the court record, shows that the cause was heard and determined by the court at a regular term thereof, the writ will be discharged.

(Syllabus by the Court.)

Application by Mary A. Porter against Edgar C. Steele, judge of the district court, for writ of review. Writ discharged.

A. A. Fraser and McFarland & McFarland, for plaintiff. E. O'Neill, for defendant.

HUSTON, C. J. This is an application for a writ of review. On the 14th day of October, 1899, the petitioner was granted by the district court of Nez Perce county, Idaho, a decree of divorce from her then husband, L. A. Porter, in which decree it was, among other things, decreed "that the custody of the minor children, Ray Porter, Neeta Porter, and Harold Porter, be awarded to plaintiff [this petitioner]." On the 12th day of July, 1900, L. A. Porter, the defendant in the divorce suit, filed in the said district court his petition praying for a modification of said decree to the effect that the children of plaintiff and defendant, Neeta and Harold Porter, be permitted to visit the defendant

at all reasonable and proper times, and to come to the home of the defendant, and that the defendant be permitted to visit the said children at reasonable and proper times at the home of the plaintiff and all other places that said children may be; and for a further order that the plaintiff be restrained from estranging the said children from the defendant, and preventing the same from being done by others. To this petition an answer was filed by the plaintiff, and a hearing had before the court of the 11th day of September, 1900, and on the 14th day of September, 1900, the said district court made an order granting the prayer of the petition. It is contended by the petitioner here that said hearing was had and order made by the said judge at chambers, and not by the court, and was, therefore, in excess of the jurisdiction of said judge. This contention is not borne out by the record:

"Sept. Term, 1900, Seventh Judicial Day. September 11th, 1900. Among others, the following proceedings were had (pages 411 and 412 of records of district court): No. 255½. Mary A. Porter, Plaintiff, vs. L. A. Porter, Defendant. On motion of E. O'Neill, Esq., this cause is placed upon the calendar, and now this case comes on regularly on petition of L. A. Porter for order of court granting privilege of said L. A. Porter's children to visit him when they desire. Mary A. Porter, L. H. Sprague, G. C. Goldman, A. McLeod, H. K. Kline, as interpreter, Erzie Todd, R. A. Langford, George Bunn, Robert Smith, and Mrs. Leon Porter are duly sworn and examined against the granting of said petition, and L. A. Porter, Sarah A. Spear, Carrie Evans, and E. S. Kummorly are duly sworn and examined in behalf of said defendant. Their testimony concluded, defendant rests, and the case is submitted to and taken under advisement by the court. Court now adjourns till 9:30 a. m. to-morrow. Edgar C. Steele, Judge."

"September Term, 1900. Tenth Judicial Day. September 14th, 1900 (page 419, records of district court): No. 255½. Mary A. Porter, Plaintiff, vs. L. A. Porter, Defendant. The court at this time grants the petition of defendant L. A. Porter asking that an order be entered granting privilege of having his children visit him; the petition having been heretofore submitted and taken under advisement. Order is to be entered accordingly. Exceptions granted to plaintiff. Edgar C. Steele, Judge."

Another reason why the writ of review will not lie is that the order complained of was an order made after judgment, from which an appeal will lie under our statutes. Any errors that may have been committed in the order or in the granting of it can only be corrected on appeal. Writ dismissed, and proceedings affirmed, with costs to defendant.

QUARLES and SULLIVAN, JJ., concur.

(7 Idaho, 416)

HOLT v. GRIDLEY et al.

(Supreme Court of Idaho. Dec. 15, 1900.)

JURISDICTION — UNWARRANTED POSTPONEMENT OF TRIAL—APPEAL—NEW TRIAL—UNCERTAINTY — VOID JUDGMENT — SEPARATE PROPERTY OF MARRIED WOMAN.

1. The postponement of a trial is in the sound discretion of the court, and, if a postponement is erroneously granted, the court does not lose jurisdiction of the case.

2. Under the provisions of section 4844, Rev. St., upon an appeal from the probate court on questions of law alone the court, upon sufficient showing, may, if necessary and proper, order a new trial in the district court.

3. When the record fails to show the grounds of the necessity for ordering a new trial in the district court when an appeal is taken from a justice or probate court on questions of law alone, the presumption is that such necessity was shown, as the district court is a court of general jurisdiction.

4. Where there are two defendants, and the judgment is against only one, and fails to designate which one, the judgment is void for uncertainty.

5. When it is sought to make the separate property of a married woman liable for debt, it must be alleged and proved that the debt is her own, or incurred for the benefit of her separate property. Her separate property is not liable for the debts of the husband.

(Syllabus by the Court.)

Appeal from district court, Lincoln county; C. O. Stockslager, Judge.

Action by Samuel Holt against Samuel Gridley and wife. Judgment for plaintiff, and Mrs. Gridley appeals. Reversed.

Guy C. Barnum, for appellant. N. M. Ruick, for respondent.

SULLIVAN, J. This action was brought in the probate court of Lincoln county to recover for goods, wares, and merchandise alleged to have been sold to the defendants, who are shown by the record to be husband and wife. The husband failed to appear, but the wife appeared, and demurred to the complaint. The demurrer was overruled, and thereupon she answered, denying the material allegations of the complaint as to herself, and by way of what her counsel terms a cross complaint alleges that \$140 that had been attached in said suit in the hands of one S. C. Frost was a part of her separate estate, and not liable for the payment of the debt sued on. On the return day the plaintiff appeared, and moved for a postponement of the trial, which motion was based on the affidavit of plaintiff. Regardless of the opposition of counsel for said defendant, the court granted said motion. Thereafter such proceedings were had as resulted in a judgment against the defendant, whereupon the defendant Mrs. Samuel Gridley, who is appellant here, appealed to the district court on questions of law alone. On a hearing in the district court the contentions of appellant were sustained, and the judgment of the probate court reversed. The court then entered said case on the calendar for trial. Thereupon appellant moved to dismiss said case on the ground that the court had no jurisdiction

to try the same de novo. Said motion was overruled, and the case, tried by the court without a jury, and judgment was entered against one of the defendants, not designating which one. This appeal is from the judgment.

The first error assigned is that the probate court lost jurisdiction of the case by reason of its unwarranted postponement of the trial, and for that reason the district court had no jurisdiction to try the case de novo. It is contended that the probate court lost jurisdiction to try said case because of its granting a postponement of the trial upon an affidavit that failed to state any legal ground whatever therefor. The affidavit fails to state any statutory ground for a continuance. That being true, we do not think the court lost jurisdiction because of its erroneous ruling on the motion for a continuance. The granting of a continuance is largely in the sound discretion of the court, and, if an error is made, it may be corrected, but the court does not lose jurisdiction of the case.

The second error assigned is that the district court erred in ordering the case placed on the docket for trial. It is contended that, as the appeal from the probate court was on questions of law alone, and as those questions were decided by the district court in favor of appellant, and the jurisdiction of the probate court set aside, that ended the appeal to the district court, and the cause should have been dismissed. By the provisions of section 4844, Rev. St., the court may, upon an appeal on questions of law alone, review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial in the district court. The record shows that the cause came on for hearing in the district court on questions of law alone, and the court sustained the position of appellant, and set aside the judgment of the lower court. There is nothing in the record to show that it was necessary or proper to order a new trial in the district court. When an appeal is taken on questions of law alone, the district court is not authorized to try the case de novo after deciding the questions of law, unless it is made to appear that it is "proper or necessary" to try such case anew. There is nothing in the record to show what the court based its opinion on which led it to the conclusion that a new trial was necessary or proper. The transcript, however, does not purport to contain a copy of all papers filed in the court below, and it will be presumed that a proper showing was made to the district court, as it is a court of record and of general jurisdiction. The judgment entered by the district court is against "said defendant." As a judgment against both defendants was entered in the probate court, and afterwards set aside by the district court, and as the action had not been dismissed as

to either of the defendants, the judgment appealed from is indefinite and uncertain, in that it does not designate which of the defendants the judgment was entered against, and for that reason must be reversed.

It also appears that the defendants are husband and wife, and there is nothing in the record to show that her separate property is liable for the indebtedness sued on herein. Where it is sought to make the separate property of a married woman liable for debt, it must be alleged and proved that the debt is her own, or made on behalf of her separate property. The wife is not personally liable for the debts of her husband, and neither is her separate property. The judgment must be set aside because of its uncertainty, and remanded. Costs of this appeal are awarded to appellant.

HUSTON, C. J., and QUARLES, J., concur.

(7 Idaho, 424)

STICKNEY v. HANRAHAN et al.

(Supreme Court of Idaho. Dec. 20, 1900.)

TRANSCRIPT ON APPEAL—MOTION TO STRIKE—STATEMENT AND BILL OF EXCEPTIONS—FINDINGS—PLEADINGS—CONJUNCTIVE DENIALS—WASTE OF WATERS—APPROPRIATION AND DIVERSION OF WATERS—WATERS TO BE MEASURED AT POINT OF DIVERSION—IMPERFECT DECREE—MODIFICATION OF DECREE.

1. Documentary evidence used upon a trial, to be used upon appeal must be incorporated into a statement or bill of exceptions, and such statement or bill of exceptions duly settled.

2. A motion to strike from the transcript, upon appeal from a judgment, documentary evidence used upon the trial, but which has not been incorporated into a statement or bill of exceptions, as required by sections 4430, 4441, 4442, Rev. St., will be sustained.

3. Judgment was rendered January 2d. Plaintiff perfected his appeal therefrom January 5th, and served his proposed "Statement and Bill of Exceptions on Appeal from Final Judgment," January 26th. Afterwards, and on July 24th, defendants, without serving any proposed amendment upon the plaintiff, presented to the judge proposed amendments to plaintiff's said bill of exceptions, consisting of a number of specifications of insufficiency of the evidence to support certain findings; and the judge allowed said proposed amendment, over the objections of the plaintiff. *Held*, that the allowance of such proposed amendment was error.

4. When the transcript upon appeal only contains a portion of the evidence introduced and used upon the trial, the findings of fact made by the trial court will not be disturbed on the ground that such findings are not supported by the evidence.

5. A finding which is contrary to facts stated in the pleadings, and a decree following such finding, may be modified on appeal.

6. A denial in the answer of several facts pleaded in a verified cross complaint conjunctively, the denial being also general, is bad, under the Code, which requires such denials to be specific.

7. A statute making it a misdemeanor to waste waters by diverting the same from a stream into depressions or dry channels *held* to be in line with a well-defined public policy that existed before the enactment of such statute.

8. Waters that are appropriated for irrigation purposes are to be measured to the several

claimants, under the law, founded on necessity, at the point of diversion.

9. A decree settling the rights of claimants to the waters of a stream, which does not designate the point of diversion as the point at which the water of the several claimants is to be measured, is imperfect, and may, upon appeal, be modified in that particular.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Action by Charles Wade Stickney against James N. Hanrahan and others. Judgment for defendants. Plaintiff appeals. Modified.

Charles Wade Stickney, pro se. John A. Bageley and Angel & Angel, for respondents. L. L. Sullivan, for respondents Hanrahan and H. Taylor.

PER CURIAM. This action was commenced by the appellant, as plaintiff, in the district court of the Fourth judicial district, in and for Blaine county, against the respondent James N. Hanrahan and 17 others, as defendants, to settle the rights and priorities of all the parties to the use of the waters flowing in that certain stream, known as "Antelope Creek." The pleadings are very voluminous, eight of the defendants answering separately and filing cross complaints. The other defendants failed to appear. The cause was tried by the court, findings of fact made, and the decree of the court entered settling the rights of the parties and determining their priority, as follows: The plaintiff, Stickney, 320 inches, his right dating from September 30, 1879. Defendant Warren, 60 inches, dating from September 30, 1879. The defendant Hoalst, 130 inches, dating from September 30, 1879. The defendant Hanrahan, 150 inches, dating from October 15, 1893, to be of equal right and claim with the above-named plaintiff and above-named three defendants. The defendant Kinney, 90 inches, and the defendant Richardson, 70 inches, both dating from May 1, 1880. The defendant Green, 125 inches, dating from November 15, 1883. The defendant Jenkins, 80 inches, dating from August, 1886. The defendant Taylor, 100 inches, dating from May 1, 1888. The said defendants moved for a new trial upon a statement or bill of exceptions proposed by the plaintiff and settled by the court, which motion for new trial was on the 24th day of July, 1900, by the district judge denied. The plaintiff appeals from the judgment to this court. Upon the record brought here upon plaintiff's appeal, the defendants cross-appealed.

The respondents moved to strike from the transcript all that part thereof, which includes exhibits used as evidence upon the trial, commencing at folio 401, on page 116, and ending at folio 557, on page 162, for the reason that said exhibits were not incorporated into a bill of exceptions or statement on motion for a new trial, and therefore not a part of the record upon appeal. This motion must be, and is, sustained. Upon ap-

peal from a final judgment, such as the one appealed from in the case before us, there are only two ways of bringing the evidence before this court for review, viz. by incorporating the same into a bill of exceptions, or by incorporating the same into a statement of the case on motion for a new trial. See Rev. St. §§ 4441, 4442, 4818. It must be kept in mind that this is an appeal from a judgment.

A number of assignments of error are made by both parties to this appeal, nearly all of them being based upon the insufficiency of the evidence. Inasmuch as the record before us, the so-called statement or bill of exceptions, shows that all of the evidence introduced upon the trial of the case is not contained in the record, we feel unauthorized, under established rules of practice and the statutes of this state, to disturb any of the findings of fact made by the lower court upon the ground that such findings are not supported by the evidence. A careful examination of what is designated in the record as "Statement and Bill of Exceptions on Appeal from Final Judgment" convinces us that the appellant intended to incorporate into the same all of the evidence that he deemed necessary to be considered upon appeal. But he clearly failed to do so. No bill of exceptions was proposed or settled on behalf of the defendants. The decree was entered January 2, 1900. On January 5, 1900, the defendant Hanrahan served notice of intention to move for a new trial. On January 6, 1900, the plaintiff, Stickney, served and filed notice of appeal, and caused to be executed and filed an undertaking on appeal from the judgment. Thereafter the appellant, Stickney, proposed the so-called statement and bill of exceptions. On July 24, 1900, said statement or bill of exceptions came before the district judge for settlement. At that time the said defendants proposed an amendment to the plaintiff's bill of exceptions, which amendment consisted of a number of specifications of error touching the sufficiency of the evidence to establish certain facts found by the court in its findings of fact. It appears from the record that this proposed amendment offered by the defendant was accepted by the court, and incorporated into plaintiff's bill of exceptions, over the plaintiff's objections, to which the plaintiff there and then duly excepted, and incorporated such exceptions into a bill of exceptions, which was there and then duly allowed and settled by the district judge; the same being in words and figures as follows, to wit: "At a hearing before the judge of said court for settlement of the statement on appeal and bill of exceptions, defendants applied to the court to insert amendments not hitherto filed nor served, being solely specifications of error as to evidence, and plaintiff moved the court to strike out the same on the ground that the amendments were not served in time; the plaintiff's draft having

been served January 26, 1900, and the defendants' amendments never having been served before the hearing for settlement of statement, July 24, 1900. The court overruled the motion to strike out defendants' amendment, being the defendants' specifications of error as to evidence, whereupon the plaintiff excepted. This bill of exceptions settled and allowed July 24, 1900. C. O. Stockslager, District Judge." This bill of exceptions was served and filed the same day that it was settled. On same day the defendants' motion for new trial was denied.

In our view, the defendants have neither a bill of exceptions nor statement of the case, within the purview of sections 4430, 4441, 4442, 4818, Rev. St.; what is designated as the statement or bill of exceptions being in fact a narration of a considerable portion of the evidence introduced upon the trial, with plaintiff's specifications of particulars wherein the evidence was insufficient. Under the provisions of the said sections named, a draft of a bill of exceptions into which are incorporated exceptions taken at the trial must be proposed and served within 10 days after the entry of judgment, if the action were tried with a jury, or within the same time after receiving notice of the entry of judgment if the action were tried without a jury, or such further time as the court in which the action is pending, or judge thereof, may allow. Then the adverse party must, within 10 days after such service, propose such amendments thereto, if any, as he may desire, and serve the same upon the other party. And, in case of a statement of the case, such statement must be proposed and served within the same time as above designated in the case of a bill of exceptions; and, after service of such statement, proposed amendments to such statement must be served upon the other party within 10 days. We do not understand upon what authority the court permitted plaintiff's bill of exceptions to be amended by a proposed amendment presented by the defendants six months after the trial, into which are incorporated specifications of error on the part of the defendants upon the ground that the evidence was insufficient to establish certain facts found by the court. It has been suggested that said specifications of error contained in defendants' proposed amendments to plaintiff's statement might be regarded and treated as defendants' bill of exceptions. Without determining this point, it is sufficient to say that, if that view should be adopted, then the defendants' bill of exceptions was presented six months after judgment, and nearly six months after the plaintiff had appealed, without service of any proposed draft thereof having been theretofore made. To our minds, the defendants had no bill of exceptions or statement of the case upon which to base a motion for a new trial, and the appeal of the defendants from the order denying a new trial is without merit, as said motion for new trial was properly denied. We do

not wish to be understood as holding that the defendants could not adopt a statement or bill of exceptions proposed by the plaintiff, or avail themselves of any erroneous action of the court shown therein; but what we do hold is that the record before us does not show that the defendants had saved any exceptions, or proposed or served any statement or bill of exceptions, as required by our Code.

What has been said shows that this appeal, or, rather, both appeals, must be determined upon the judgment roll. Both parties appeal from the judgment. Only one inquiry remains for consideration: Do the pleadings support the judgment, and are the findings within the issues raised by the pleadings?

The plaintiff (appellant in the original appeal) contends that the court erred in failing to find that he was entitled to 2,500 inches of water appropriated by him in 1886 by notice posted at a point on one of his ditches. But, for the reasons hereinbefore given, we are not at liberty to review the evidence upon that point. But, if we could do so, we would be compelled to hold that the action of the lower court was correct, under the evidence, for the reason that the plaintiff's own testimony shows that, 14 years after posting his notice claiming this water for power purposes, he had not erected or put into operation the sawmill to run which he made the appropriation. He has not, so far as this claim for water for power purposes, brought himself within the rule laid down by this court in *Conant v. Jones*, 32 Pac. 250, and *Mahoney v. Neiswanger*, 59 Pac. 561, as he has not proceeded with reasonable diligence. Plaintiff stated on the trial as follows: "I knew that for power purposes the water in Antelope was inadequate, and I went up and took out a river ditch." It is agreed by all parties that the parties hereto are located in proximity to Lost river.

The plaintiff complains that the findings of the trial court gave to the respondent Charles R. Hoalst a right to the waters decreed, dating from September 30, 1879, equal in time with the right of the plaintiff, contrary to the pleadings. This contention is well grounded. In his cross complaint said defendant Hoalst, for the fourth paragraph, alleges "that in the month of May, A. D. 1883, the said defendant, by his grantors and predecessors in interest, at a point on said Antelope creek situated about one-quarter of a mile in a westerly direction from the lands above described [his lands], and afterwards changed to a point about two miles from said lands, located, appropriated, and diverted, for the irrigation of the lands hereinbefore described, said 160 inches of water of said Antelope creek, and by means of dams, canals, and ditches diverted and conducted said water to and upon said lands, for the purpose of irrigating the same, as far as the said amount of water would properly irrigate said lands, and that the said 160 inches of water covers and irrigates 160 acres of said lands." Plaintiff, in his answer

to this cross complaint, attempts to deny the allegations of said fourth paragraph, in the following words: "For answer to paragraph 4 of the said cross complaint, the plaintiff says that he has not sufficient knowledge or information to enable him to answer the fourth paragraph of the said complaint, and, basing his denial on that ground, denies all the statements and allegations in said paragraph fourth." This is not such specific denial as is required by our Code to a verified cross complaint, and the record shows that the said cross complaint of the defendant Hoalst was verified. If it can be regarded as a denial, it must be considered as a general conjunctive denial, and for that reason insufficient to raise an issue as to the matters stated in paragraph 4 of the said cross complaint, but it may be that defendant Hoalst waived this question by failing to raise it. We must hold that the finding that the appropriation of the said defendant Hoalst was made in 1879 is not supported by the pleadings, and that said finding should have been that said appropriation was made May 30, 1883. Said finding and decree should be modified accordingly.

The learned counsel for the defendant Hanrahan, who is one of the appellants in the cross appeal, complains that the decree in this case is imperfect, in that it does not specify the point at which the water decreed to the several parties should be measured. We think this contention is well founded. Under the law, water of all claimants must be measured at the point where such water is diverted from the natural channel of the stream from which it is taken. This is matter of necessity, demanded by public policy. It is the policy of the law to prevent the wasting of water. Our legislature has made it a misdemeanor to waste water. By act of February 25, 1899 (Acts 1899, p. 336), it is provided that "any person or persons who shall willfully or wantonly waste any of the waters of any stream * * * or by allowing such water to waste by running into depressions or dry channels so that the same cannot be used for irrigation, nor reach the original channel of the stream from which it has been diverted, is guilty of a misdemeanor." This statute is in line with a well-defined policy that has existed in this jurisdiction from its earliest period. The findings and decree show that the plaintiff and several of the defendants who appear in this court divert their water from Antelope creek into what is called in the findings the Smith & Dixon channel or ditch, and each afterwards takes from said channel or ditch. While we will not review the evidence in the record to see if it supports the findings, for the reasons hereinbefore given, yet we do say that it shows that what is called the Smith & Dixon channel is an old depression or former channel, which spreads out to considerable width at places, and that the evidence shows that much water is wasted by its use, and that such waste

can be prevented by the parties by constructing a ditch.

These two errors—that one relating to the date of the water right of defendant Hoalst, and the omission to designate the point of diversion as the place where said waters allotted the different parties shall be measured—are the only errors, in our opinion, shown by the judgment roll. The cause is remanded to the district court, with instructions to modify its findings and decree in the two particulars hereinbefore designated, and the said judgment is in all other respects affirmed. The plaintiff (appellant) must bear the cost of printing that part of the transcript that has been stricken out. All the other costs of these appeals shall be borne by the parties plaintiff and defendant, severally, in the same proportion as the water allotted to them, severally, bears to the whole amount of water apportioned in and by said decree. But none of the parties to be allowed for cost of printing more than 40 pages of brief, as provided in paragraph 1 of rule 6 of this court (32 Pac. vi.).

On Rehearing.

(Jan. 4, 1901.)

PER CURIAM. The appellant has filed a petition for rehearing, in which it is urged that the original opinion is inconsistent in some particulars. For instance, it is urged that the defendants Kinney and Richardson were, in the findings and decree of the lower court, given water rights dating from 1880, when in their respective pleadings they only claimed from the year 1887. Upon an inspection of the pleadings in this case, we find that this contention is correct. There was no complaint made at the hearing, orally or in the printed briefs, that the findings as to the water rights of said defendants Kinney and Richardson were contrary to the pleadings; hence our attention was not called specifically to that fact. And at this time we would not molest the former decision, were it not for the fact that the modification of the findings and decree ordered as to the defendant Hoalst, changing the priority of his right, make him subsequent in time to the defendants Kinney and Richardson, and thus work a hardship on him, by applying one rule to him, and refusing to apply it to the defendants Kinney and Richardson. Both of said defendants Kinney and Richardson alleged their appropriations to have been made in July, 1887. Hence, under the rule applied to defendant Hoalst, the findings and decree of the lower court must be modified so as to date their appropriations and rights thereunder from July 31, 1887, and it is so ordered.

Appellant also complains that the place of measurement of the waters allotted to the respective parties has been designated as the point of diversion of such waters from the channel of the stream from which

the same is taken. We are unable to recede from the position taken in the original decision in relation to this question. The waters of all streams belong to the public. Rights to the use thereof for beneficial purposes may be, under the constitution and laws of this state, acquired and maintained, but the public is interested in the water and in its beneficial use. It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state, and every act on the part of any individual claimant that tends to waste water is to be discouraged rather than encouraged. The necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him, is apparent. A rehearing is denied.

(7 Idaho, 324)

FEENEY v. CHESTER.

(Supreme Court of Idaho. Nov. 27, 1900.)

EQUITY—DECREE—IRRIGATION—CONTRACT.

1. Where it is apparent from the pleadings that the purpose of the litigation is the settlement of the rights of the parties litigant to the waters of a certain creek or river flowing through a certain ditch, and the rights of the parties to the use of such ditch, it is not error for the trial court, having before it all of the parties interested and having jurisdiction of the subject-matter, to pass upon and decide the entire matter.

2. Where one contemplating the construction of a ditch or canal for the purpose of conducting water from a creek or river to lands owned by him finds that it is necessary to construct the same over and through the lands of another, and makes an agreement with the owner of said lands that, in consideration of a right of way through the same, such owner shall have an interest in said ditch to the extent of a sufficient amount of water therefrom to irrigate his said lands, such agreement is binding upon both the party making the agreement and those holding, or claiming to hold, under him.

(Syllabus by the Court.)

Appeal from district court, Bannock county; J. C. Rich, Judge.

Action by John Feeney against William Chester. Judgment for defendant, and plaintiff appeals. Affirmed.

Arthur Brown and Thos. F. Terrell, for appellant. Winters & Guheen, for respondent.

HUSTON, C. J. Although this case is, as shown by the record, an action to restrain a trespass, still it seems to have been treated by both court and counsel as an action to quiet the title of the parties litigant to the waters of Soda creek, or to a ditch taking water from said creek. Appellant states in his brief that "this is a suit in equity to quiet the title of appellant to a certain ditch, described and set forth in the complaint." In his complaint appellant, after setting forth his title to the ditch and the water

therein flowing, and alleging the acts of defendant in taking water therefrom, prays "that the defendant be required to set up any right he may have or claim in or to the ditch or canal, and the waters flowing therein, belonging to plaintiff, and that any such right or claim be adjudged and decreed to be inferior and subordinate to the rights of the plaintiff, and void as to the ditch or canal owned by the plaintiff"; and then prays that the defendant be perpetually enjoined from interfering with the right of the plaintiff in and to the ditch or canal aforesaid, or the water flowing therein. The complaint also sets forth the ownership by plaintiff of certain lands susceptible of irrigation by means of the waters aforesaid, and avers the right in the plaintiff to the use for irrigating said land of 320 inches of water, measured under a four-inch pressure, of the flow of the waters of said Soda creek. Defendant admits the ownership by plaintiff of the lands described in the complaint, but denies that plaintiff ever used more than 15 inches of said water for irrigating said land, or that plaintiff has more than 15 acres of land that is susceptible of irrigation from said ditch and the water of said Soda creek. Defendant also avers that plaintiff's predecessors in interest, and who constructed said ditch, found it necessary in such construction to run said ditch through two subdivisions, of 40 acres each, of defendant's land, and, in consideration of defendant granting to him the right of way through said lands, plaintiff's grantor (one Horseley) did agree to give to defendant an interest in said ditch for the purpose of using the waters therein; and that the defendant has, for each and every year since the construction of said ditch, used the waters of the said Soda creek through the said ditch for the irrigation of the lands of said defendant, without any hindrance from the plaintiff or his predecessor in interest, until about one year ago, when the plaintiff laid claim to the whole ditch, without regard to the rights of the defendant. None of the evidence appears in the record.

The court finds, *inter alia*, after finding the appropriation (no definite number of inches appearing) of said waters by Horseley, the predecessor of plaintiff, as follows: "After the posting of the notice of appropriation as aforesaid, and prior to the actual commencement of work in the excavation of said ditch, it was ascertained that said ditch would traverse two 40-acre subdivisions of the defendant's (William Chester's) land, and thereupon it was verbally agreed between the said Herbert Horseley and defendant that, as a consideration for crossing said land of the defendant with said ditch, the said defendant should be allowed to run water through, and have an interest in, said ditch or canal; that the supply of water from said Soda creek is abundant for all appropriators, and many hundreds of inches of

said water going to waste each irrigating season; that one inch to the acre is sufficient water for the irrigation of any of the lands of the plaintiff or defendant; that plaintiff and his predecessors in interest have continuously used from said canal water sufficient to irrigate 10 acres of his said land and for domestic purposes; that defendant has continuously, each and every year, used water from said canal for the land mentioned in finding thirteen hereof, as such land has been cleared and cultivated." And as conclusions of law the court finds "that the defendant is entitled to the use of said canal for the purpose of flowing seventeen inches of water through the same from the point of diversion to the land of the defendant, and to the use of seventeen inches of water from said ditch for the purpose of irrigating said land." And the plaintiff is perpetually enjoined and restrained from interfering with the defendant in the use of said amount of water from said ditch.

Appellant presents the following specifications of error: "(1) The court erred in its conclusions of law, and the decree based thereon, awarding respondent the right to use said canal for the purpose of flowing 17 inches of water through the same, and to the use of 17 inches of water from said ditch, under the finding of fact that respondent based his claim for such water upon a verbal contract with one Herbert Horseley, the appellant being an entire stranger to such contract, and a bona fide innocent purchaser of said ditch, for a valuable consideration. (2) The court erred in its conclusions of law that respondent had any right to or interest in said ditch or canal, or the waters flowing therein. (3) The court erred in awarding any specific amount of use or right in said ditch, and in decreeing respondent the right to use 17 inches of water from said ditch. (4) The court erred in assuming to enforce by decree an interest or water right in this ditch based upon a verbal contract. (5) The court erred in granting the injunction against the appellant. (6) The court erred in not determining when, how, and where respondent should have the right to divert such water from said ditch. (7) The court erred in not determining how such ditch should be kept up and maintained. (8) The court erred in granting defendant affirmative relief, when there was no cross complaint. (9) The court erred in granting respondent any relief under his answer for the reason that the same failed to state facts sufficient to constitute a defense or counterclaim to the cause of action set forth in the complaint."

As to the first specification of error: The defendant having paid the consideration by giving the right of way for the ditch through his land, and having received and enjoyed, for some seven or eight years, the use of the ditch and water, it would be inequitable to permit the plaintiff to now deprive him thereof while retaining the benefit of the considera-

tion given by defendant therefor. See *Stowell v. Tucker* (decided at present term) 62 Pac. 1033; also section 6008, Rev. St. Idaho.

As to the second specification: Both the complaint and answer contain a prayer for general relief. Courts will not do equity by halves. Having the parties before it, and having jurisdiction of the subject-matter, the averred purpose of the action being "to quiet the title to the ditch and water," it seems to us eminently proper that the court should, by its decree, settle the whole matter. While, technically, it would have been more in accord with proper practice for the defendant to have set up his claim for affirmative relief by a cross complaint, still we are not inclined to contravene the palpable spirit of the Code, by subjecting a right, clearly established, to the technicalities of a pleading. As to the other specifications of error, we cannot see that they suggest any questions not covered by what we have already passed upon. In fact, the appellant seems to rely upon technical objections entirely. As we have before said, the action was brought to settle the rights of the parties to the waters conveyed by a certain ditch. The court would have been justified in simply dismissing the complaint, and denying the injunction prayed for by complainant; but having the parties before it, and the whole question submitted upon proofs, the court wisely and properly, we think, proceeded to dispose of the whole matter, and in so doing we are satisfied, from a careful inspection of the record, committed no error. The judgment of the district court is affirmed, with costs to respondent.

QUARLES and SULLIVAN, JJ., concur.

On Rehearing.

(Dec. 27, 1900.)

PER CURIAM. A careful consideration of the petition for rehearing fails to convince us that our conclusion, as set forth in the original opinion, is incorrect. It is insisted that the decision in this case is in conflict with the decision in the case of *McGinniss v. Stanfield*, decided by this court, and reported in 55 Pac. 1020, where we held that, "under the statutes of Idaho, a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract." The case at bar is entirely different from the case of *McGinniss v. Stanfield*, supra. In this case, Horseley, the grantor of appellant, entered into a contract with respondent, whereby it was agreed that said Horseley should have the right of way across respondent's land, for and in consideration of the use of water by respondent, which is the subject-matter of this action. This agreement was fully executed by both parties, and soon after its execution the appellant took a mortgage upon certain lands of said Horseley, and upon the canal from which the respondent takes the water in question. The

decision in *McGinniss v. Stanfield* does not apply here. Appellant is not a stranger to said contract, but a privy thereto. Horseley could only mortgage to him the interests in the ditch and waters flowing therein which he owned. Appellant, by virtue of his said mortgage and subsequent purchase under decree of foreclosure thereof, succeeded to the title of Horseley at the date of the execution of the mortgage; nothing more. More than this, the surroundings of the parties, the fact that the ditch flowed over and through the lands of respondent, were such as to put a prudent man upon guard, and appellant should have ascertained by inquiry, if he did not, the status of the parties. Appellant calls our attention to section 4520, Rev. St., relating to the foreclosure of mortgages, but we are unable to see that that section has any application to the questions before us on this appeal. The other questions discussed in the petition for rehearing we think were sufficiently discussed in the original opinion. Petition denied.

(38 Or. 212)

POMEROY v. WOODWARD et al.

(Supreme Court of Oregon. Jan. 7, 1901.)

MORTGAGES—FORECLOSURE—DEFAULT OF INSTALLMENTS.

A provision in a mortgage authorizing foreclosure on default "in the payment of principal or interest," and retention by the mortgagee of the principal and interest out of the proceeds of the sale, does not authorize foreclosure for the whole debt on default of an installment, such provision not amounting to an agreement that the whole debt shall become due on default of an installment.

Appeal from circuit court, Marion county; R. P. Boise, Judge.

Suit by Thomas Pomeroy against F. E. Woodward and others. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit to foreclose a mortgage given to secure the payment of an obligation dated September 15, 1894, whereby the defendants Woodward promised to pay the plaintiff the sum of \$1,500, as follows: "Thirty dollars annually on the 15th day of Sept., 1895, 1896, and 1897, and fifty dollars thereafter on the same date each succeeding year until his death." Other conditions are set out, but these are sufficient for the present purpose. The mortgage was executed at the same time, and contains a condition of this tenor: "Now, if the sum of money due upon said instrument shall be paid according to the agreements therein expressed, this conveyance shall be void; but, in case default is made in the payment of the principal or interest, as above provided, then the party of the second part, his executors, administrators, or assigns, are hereby empowered to sell the premises above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with

the costs and charges of making such sale; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the party of the first part, their heirs or assigns." The suit was instituted May 17, 1890, at which time defendants were in default in the payment of the three installments for 1896, 1897, and 1898; but on the 8th of June following they tendered to the plaintiff the full amount of all such installments, together with interest thereon, and the costs of the suit then accrued, and took the same into court, with the answer, which was filed a few days later; thus keeping the tender good. It was decreed that the amount due upon the three installments and the costs of suit up to the date of the tender be paid to plaintiff, that defendants Woodward recover their costs and disbursements subsequently incurred, and that the suit be dismissed; from which decree the plaintiff appeals.

W. T. Slater, for appellant. B. F. Bonham and C. F. Martin, for respondents.

WOLVERTON, J. (after stating the facts). It is urged that the note and mortgage, having been executed contemporaneously, should be construed together as one instrument, and that, when so construed, the entire obligation became due and payable whenever there was a default or failure to pay any of the stipulated installments, and that a decree of foreclosure should have been entered, notwithstanding the tender of the defaulted payments in the meantime. The reasoning is that the mortgage ingrafted upon the obligation a new condition, in effect that, when an installment became defaulted, it rendered the entire obligation due and payable at once; so that, instead of three installments only being due at the time of the commencement of the suit, the whole debt was then due and collectible, and thus beyond the power of the debtors to relieve themselves of any default so as to prevent a foreclosure. There is no dispute but that a foreclosure may be had upon a default in any installment where an obligation is made payable by that method. The statute has so declared, and this court has interpreted it accordingly. Hill's Ann. Laws Or. § 421; Lumbering Co. v. Ryan, 34 Or. 73, 54 Pac. 1093. The language of the mortgage is that, "in case default is made in the payment of the principal or interest, as above provided, then the party of the second part, his executors * * *, are hereby empowered to sell * * *, and out of the money arising from such sale to retain the said principal and interest," etc. We find nothing in this which may be construed into an agreement between the parties that the whole obligation shall at once become due and payable by reason of a default in meeting any installments thereof. It authorizes foreclosure whenever there is a defaulted payment, but not because the entire sum has

fallen due. While the condition permits the plaintiff to retain the principal out of the proceeds of the sale authorized by the mortgage, the employment of this language was not intended to ingraft upon the principal obligation any new condition, and its effect is to authorize the retention only of such part of the principal as he would be entitled to under the law in case of sale. The parties have apparently used the usual form of mortgage, and the condition referred to has never been held, so far as we are aware, to vary the legal import of the obligation it is given to secure. Having made the tender of all installments due, with costs of suit, and paid the same into court before decree, the defendants are entitled to a dismissal as awarded by the court below. Hill's Ann. Laws Or. § 422.

Another question was presented at the argument here, which arises upon the pleadings, but a decision thereof could have no bearing upon the one discussed; hence we have not undertaken to decide it. The decree of the court below will be affirmed.

(38 Or. 123)

SAUERS v. BEECHLER et al.

(Supreme Court of Oregon. Jan. 7, 1901.)

FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

A., being about to trade for a drug store of B., discovered that B.'s daughter C. had some claim in it, and refused to trade until her interest was adjusted and relinquished. Finally an adjustment was reached, whereby C., in whose name the claim stood on the books, and who was the ostensible owner thereof, accepted notes of B. for her interest, expressed herself as satisfied with the settlement, and as fully understanding it. But, on submitting the notes and agreement to her husband, he refused to abide by it, returned the notes, and at once signified his intention to attach the property about to be exchanged, and did so, but not until after the exchange between A. and B. was consummated, and possession given; and he afterwards recovered judgment as for a loan against B. for the amount of the claim, which had stood in his wife's name. A small debt assumed and paid by A. was the only other indebtedness of B. There was evidence that the properties exchanged were of about equal value. *Held*, that the exchange was not shown to be in fraud of C.'s husband, though the parties were anxious to consummate the exchange, and have the papers executed, before the husband could commence his threatened attachment.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by William M. Sauers against James Beechler and others. From a decree for plaintiff, defendants appeal. Reversed.

L. R. Webster, for appellants. Dell Stuard, for respondent.

BEAN, C. J. This is a suit in the nature of a creditors' bill to set aside the sale and conveyance by the defendants Beechler to their co-defendants, Ingalls, of certain real estate and a stock of drugs and druggist's

fixtures in the city of Sellwood, and to subject such property to the payment of a judgment recovered by the plaintiff against the Beechlers. One or two propositions of law were discussed at the argument that it will not be necessary to consider, as the facts, in our opinion, are insufficient to support the decree. In brief, it appears that in 1894 the defendant G. W. Ingalls and Eliza Ingalls, his wife, who then resided in Arizona, and were the owners there of a possessory title to, and a prior right to purchase, 160 acres of school land, of the probable value of \$2,000 or \$3,000, and a water right appurtenant thereto, valued at \$1,200, learned through a friend in Portland that the defendant James Beechler and Jennie Beechler, his wife, were the owners of two lots and a drug store in Sellwood, which they desired to exchange for Arizona property. The Ingallses thereupon opened a correspondence with the Beechlers, with a view of exchanging their property in Arizona for that of the Beechlers in Sellwood, as a result of which Mr. Ingalls came to Portland in July, 1894, to consummate the trade, if satisfactory terms could be agreed upon. The plaintiff, Sauers, is the son-in-law of the Beechlers, and for some time prior to the arrival of Mr. Ingalls in Oregon had been a bookkeeper and clerk in the drug store, and had invested therein, in the name of his wife, either as a partner or as a loan to the Beechlers, about \$1,000 in money. When Mr. Ingalls arrived in Portland, he met the Beechlers and Mr. and Mrs. Sauers by appointment, and, after learning that Mrs. Sauers had or claimed some interest in the drug store, refused to trade with the Beechlers until her claim should be adjusted and relinquished. After some controversy between the Beechlers and plaintiff, a conference was arranged for July 12th with Mrs. Sauers, in whose name the claim stood on the books, and who was the ostensible owner thereof, at which, after considerable negotiation, they finally agreed upon terms of settlement, by which the Beechlers were to give Mrs. Sauers two promissory notes, covering the interest owned by her in the drug store, and she and her husband were to execute and deliver to them an assignment or relinquishment of all and any interest they might have in the business. Mr. Ingalls was present at the time, and talked the matter over privately with Mrs. Sauers, after the terms of the settlement had been agreed upon, and was assured by her that she fully understood what she was doing, and was satisfied with the settlement. The two promissory notes were thereupon executed by the Beechlers, and delivered to Mrs. Sauers, who executed a release of her interest in the business; but when she returned home, and submitted the notes and agreement to her husband, he refused to abide by the settlement, or to sign the relinquishment, and immediately returned the notes to the Beech-

lers, and started for Portland, for the purpose, as he then declared to them and Ingalls, of commencing an action, and attaching the property which they were about to exchange. The transfer by the Beechlers to the Ingallses was consummated, however, and the possession of the property delivered on the 12th, and the Ingallses transferred and conveyed to them all their right, title, and interest in and to their real estate in Arizona and the improvements thereon. The water right, however, was then in pledge for a loan of \$300, and was not transferred at the time, and never has been, as we understand the testimony. On the next day the plaintiff began an action in his own name against the Beechlers to recover \$1,000, alleged to have been loaned by him to them between the 5th day of May, 1890, and the 20th day of July, 1892, and caused a writ of attachment to be issued, by virtue of which the sheriff attached the real property previously conveyed by the Beechlers to the Ingallses, and the drug store, then in the possession of Mr. Ingalls. Such proceedings were subsequently had in the action that the plaintiff recovered judgment against the Beechlers for \$1,183. This suit was afterwards begun to set aside the sale of the real estate and the drug store on the ground that it was made for the purpose of defrauding the plaintiff, and from a decree in his favor the defendants Ingalls appeal.

At the time of the exchange of property the real estate conveyed by the Beechlers to the Ingallses was subject to a mortgage, given to secure the payment of about \$1,000, which has since been foreclosed, so that the stock of drugs and store fixtures, worth probably \$500, is all that is really now involved in this suit. We have examined the record in vain to find testimony sufficient to support the decree setting aside the transfer and conveyance on the ground that it was made for the purpose of defrauding creditors. Without entering into details, it is sufficient to say that we are impressed with the view that it was a bona fide exchange and transfer, and such a one as the Beechlers could lawfully make and the Ingallses lawfully accept. It is true, the testimony shows that at the time the transfer was made the plaintiff had some kind of a claim against the Beechlers, either as a partner or as an ordinary creditor, the exact nature of which is not made clear by the evidence. He put his right to relief, however, in the law action, as well as in this suit, upon the ground that he was an ordinary creditor, and not a partner; and as he can only recover, if at all, upon that theory, we shall consider the case as he has made it. At the time of the transfer the Beechlers owed a wholesale drug firm in Portland about \$200, which the defendant Ingalls assumed, and has since paid. With this exception, it appears that their only indebtedness was to the plaintiff; and the fact that they were so indebted did

not deprive them of dominion over their property, or the right to sell or dispose of it, so long as they acted in good faith. Nor is the fact that they were anxious to consummate the exchange, and to have the necessary deeds and papers executed and delivered, before plaintiff could commence his threatened action, and seize the property under attachment, sufficient of itself to impeach the transaction. *Bump, Fraud. Conv.* (2d Ed.) 36, 37. Both of these matters are badges of fraud, notwithstanding which the transfer may be shown to be valid, and to have been made in good faith. It is argued that no consideration was paid by Ingalls for the property. But the evidence shows that the Arizona property, which they gave in exchange, was valued at about \$2,000, and was soon afterwards sold by the Beechlers at public auction for \$1,600; and there is no testimony to indicate that the Sellwood property they received in exchange was of any greater value. Indeed, the real estate was covered at the time by the mortgage which subsequently absorbed it, and the stock of drugs and the good will of the business were worth not to exceed \$1,000 or \$1,500; so it seems that an adequate and full consideration was paid by the Ingallses for the property received by them. It follows that the decree of the court below must be reversed, and it is so ordered.

(22 Wash. 470)

NEUFELDER v. THIRD ST. & S. RY.

(Supreme Court of Washington. Dec. 12, 1900.)

FIXTURES — CAPABILITY OF REMOVAL — DISTINCTION AS REALTY OR PERSONALTY.

Machinery in a planing mill and sash and door factory, attached to the floor or frame of the building by means of screws and bolts, and bought and sold by price list, and not specially made or designed for that building, and capable of being moved without material injury to it, is personalty, and may be removed by the owner without incurring liability to any lienor of the realty, though when the mill was built some of this machinery was contemplated; it being built substantially as any other saw mill, and being capable of equipment with other suitable machinery without alteration of the structure.

Appeal from superior court, King county; O. Jacobs, Judge.

Action by E. C. Neufelder against the Third Street & Suburban Railway. From a judgment for defendant, plaintiff appeals. Affirmed.

Morris B. Sachs, John P. Hoyt, and Pierre P. Ferry, for appellant. Bausman, Kelleher & Emory, for respondent.

FULLERTON, J. In 1884 the Western Mill Company, being then the owner of certain real property, mortgaged the same to Myer Lewis to secure a loan made to it on that day by Lewis. The mortgage was in the usual form of a real-estate mortgage, and

the description of the property was ample to cover everything on the mortgaged premises that could properly be said to be a part of the realty, but contained nothing from which it could be inferred that it was intended to cover the personal property then on the premises, or which might thereafter be put thereon by the mortgagor. At the time of the execution of the mortgage there was a saw mill on the land, having a capacity of about 45,000 feet of lumber per day. In 1888 and 1889 the mortgagor erected a new saw-mill building thereon, and fitted it out with machinery in part taken from the old mill, and in part newly purchased, giving the new mill a capacity of about 100,000 feet of lumber per day. The old building was turned into a planing mill and sash and door factory, and was fitted out with the usual machinery used in conducting a business of that character. Subsequent to that time the property was sold and conveyed to the respondent herein. The mortgage was not paid, and in 1895 a suit to foreclose the same was duly commenced by the then owner of the mortgage. While this foreclosure proceeding was pending, respondent removed from the premises certain of the machinery used in the saw mill and sash and door factory. Subsequent thereto the real property was sold under a decree of foreclosure of the mortgage, and purchased by the mortgagee at a sum less than the amount the court found to be due upon the mortgage debt. This is an action brought by the successor in interest of the mortgagee to recover damages alleged to have been suffered because of the removal of the property, the contention being that the property removed was a part of the realty. The trial court found the following facts: "I find that all the machinery in the planing mill and sash and door factory removed by the defendant herein as aforesaid was attached to the building by lag screws, for the purpose of steadying it while in use; that all of this machinery was capable of being moved from the premises without material injury thereto; and that it was in fact removed by the defendant without material injury thereto. I find that all the machinery in the planing mill and sash and door factory, removed as aforesaid by the defendant, was machinery of common sort and description; that it was machinery of a sort bought and sold by price list and sample, according to catalogues, and that it was not specially made or designed for that building or those premises; that it can be used as well in any other premises of like nature; and that like machinery can be purchased and put in use upon these premises for the purposes of a planing mill and sash and door factory without alteration of the premises. As to block A (the saw-mill property), I find that with the exception of one engine, hereinafter referred to, all the machinery and apparatus in the saw mill thereon, removed as aforesaid by defendant, was machinery of common lot

and description, bought and sold in the markets according to price list and sample, and found in catalogues; that it was not more specially adapted to that structure than to any other milling structure; that it can be used in any other mill as well as in that; that when the mill itself was built some of this machinery was contemplated, but that it was built substantially in the manner of any other saw mill; and that it can again be equipped with machinery suitable for its purposes without alteration of the structure. I find, also, that all the machinery on block A so removed was never intended to become a part of the premises; that it was attached to the mill structure only for the purpose of steadying it while in use; that it could be removed from the premises without any material damage or alteration thereof. The machinery in the mill removed by the defendant was in some cases fastened to the floor by screws or lag bolts. In other cases the machinery was fastened to the frame of the building by the use of bolts of various lengths, averaging in size from a half inch in diameter to an inch and one-quarter in diameter. The engines in some instances were placed upon a foundation of timbers of several thicknesses or layers. These timbers were bolted to the framework of the mill in some cases, and were held together with iron bolts extending into or through them so as to hold them solidly in place. The engines were bolted to this foundation of timbers. In most if not all cases the engine could be removed by unscrewing the nuts and lifting it off the bolts." As a conclusion of law therefrom the court found that the property taken (with the exception of the engine mentioned) was personal property, and entered a judgment denying the right of the appellant to recover therefor.

The appellant contends that the property removed was attached to the realty in such a manner as to make it, especially as between a mortgagor and mortgagee, a part thereof, and has brought to our attention many cases, some of which, at least, fully support his contention. This question, however, is no longer an open one in this state. This court has by repeated decisions established the law that property of this character, attached as this was to the realty, is not a part thereof, but is personal property, and may be removed therefrom by its owner without incurring liability to any person who may have a lien on such real property. In *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, the question was whether a planer used in a saw mill, which was bolted to the floor in such a way as to keep it from moving from its place when being used, was a part of the realty or was personal property. In that case the court said: "In ascertaining whether such a machine does become part of the realty, in favor of mortgagees, the rule is that the manner, purpose, and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance

its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening, such as would cause permanent injury if removed. But mere furniture, although some fastening be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there." In *Chase v. Box Co.*, 11 Wash. 377, 39 Pac. 639, the question was whether the machinery of a box factory attached to the land in substantially the same manner as the property in this case was attached was a part of the realty. After an extended review of the decisions of courts of other states, as well as the case of *Cherry v. Arthur*, it was held that the machinery, notwithstanding the manner in which it was affixed to the realty, still retained its character of personalty. In the course of the opinion the court, after quoting from *Cherry v. Arthur* the paragraph above set out, said, "We are entirely satisfied with what is here said upon the subject, and think it best accords with reason and modern authority." In *Bank v. Smith*, 15 Wash. 160, 45 Pac. 736, the machinery in question was, as the record shows, "a planer and matcher, a surfacer and sizer, a gang edger, and a double-block shingle machine." The machines were fastened to the floor of the mill in which they were then being used by means of lag screws and bolts running through the feet of the machines into the floor and timbers of the mill upon which they rested. The contest was one between mortgagor and mortgagee, and one of the questions was whether the machines formed a part of the realty, or were personal property. Passing on that question, the court said: "No general rule can be promulgated under which it can be determined whether a particular piece of machinery is or is not a fixture to the real estate with which it is used. So many considerations enter into the determination of this question that no general rule can be stated which will apply in all cases. Not only can no general rule be adduced from the decisions of the courts which will apply to all cases, but it will appear from an examination of the decisions upon this question that there is a great want of harmony even where the circumstances were identical. There is a class of cases which have adopted a rule which, if applied to the facts shown by the evidence to have existed as to the placing of this machinery in the mill building in which it was used, would require us to hold that such machinery was a fixture, and passed to the mortgagee as a part of the real estate. A leading case of this kind is *Mill Co. v. Hawley*, 44 Iowa, 57. But the learned court which decided it, though apparently well satisfied with the conclusion to which it had come, was forced to admit that a contrary doctrine

had been established by the courts of a majority of the states which had passed upon the question. This machinery was attached to the building in substantially the same manner as was that in controversy in the case of *Chase v. Box Co.*, 11 Wash. 377, 39 Pac. 639, and *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; and under the rule announced in those cases, which rule we believe to be supported by the weight of authority, it must be held to have been personal property, and not such a fixture as to pass to the mortgagee." This case also answers the argument of the appellant to the effect that a different rule applies where the controversy is between a mortgagor and mortgagee than is applicable where the controversy is between the mortgagee and one claiming adversely to the mortgagor. On this question it was said: "If the question as to the nature of this property had arisen between the mortgagee named in said chattel mortgage and the appellant, there could be no doubt but that under the rule heretofore announced by this court it would be held to be personal property, and in our opinion the rule was not changed by the fact that the question was raised between the parties to the real-estate mortgage." Further, on the question what will in this state be considered personal property, see *Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224; *Trust Co. v. Miller*, 20 Wash. 607, 56 Pac. 382, 44 L. R. A. 559.

Concluding, as we do, that the case at bar falls within the rule of these cases, it is unnecessary to discuss the other questions suggested. The judgment is affirmed.

DUNBAR, C. J., and REAVIS and ANDERS, JJ., concur.

(23 Wash. 453)

GRIFFITH et al. v. RUNDLE et al.

(Supreme Court of Washington. Dec. 8, 1900.)

PRINCIPAL AND SURETY—GOVERNMENT CONTRACT—LIABILITY OF SURETIES—PROTECTION OF MATERIAL MEN.

Sureties on the bond of a government contractor, which is executed in accordance with 28 Stat. c. 280, requiring such bonds not only to be conditioned to indemnify the government, but to contain the additional obligation to pay for material used and labor employed in such work, are not relieved from liability for material and labor furnished the contractor by the fact that they performed the contract at a loss of more than the penalty of the bond, after the work was taken away from the contractor by the government, since the provision for the protection of material men and laborers is distinct from that for the protection of the government.

Appeal from superior court, Spokane county; Thomas H. Brents, Judge.

Action on a bond by John H. Griffith and another, co-partners, against Nathan B. Rundle and others. From a judgment in favor of the plaintiffs, defendants appeal. Affirmed.

Henley, Kellam & Lindsley and A. G. Avery, for appellants. Lewis & Lewis, for respondents.

REAVIS, J. In July, 1897, defendant Rundle entered into a contract with the United States for the construction of certain buildings at the army post near Spokane. At the time the contract was executed, a bond was duly executed in accordance with the provisions of the act of congress approved August 13, 1894 (28 Stat. c. 280). The law is entitled "An act for the protection of persons furnishing materials and labor for the construction of public works." Its provisions are substantially that any person entering into a formal contract with the United States for the construction of any public building shall be required, before commencing, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work provided for in the contract; that any persons performing labor or furnishing materials for such work shall be furnished on application with a certified copy of the contract and bond upon which the person supplying labor and materials shall have a right of action, and be authorized to bring suit in the name of the United States against the contractor and sureties, provided that such action shall involve the United States in no expense. The defendants Henley and Snodgrass were sureties upon the bond, the penal sum of which was \$10,000. While the contractor, Rundle, was engaged in the construction of the buildings under his contract, materials were furnished by plaintiffs to the contractor, and used by him in the work of construction. Subsequently, and while the buildings were but partially completed, the United States, in the exercise of the right reserved in the contract, took the work out of the hands of Rundle, and at the same time notified the sureties, Henley and Snodgrass, of its action. Thereupon the sureties took up the work of construction, and completed the buildings according to Rundle's contract, and the United States accepted their work as full performance of the contract. For defense to the action, after some denials, the sureties set up the fact that Rundle did not complete the contract, but the sureties, under its terms, made full performance, which was duly accepted by the United States, and that in their completion of the contract they were necessarily compelled to expend sums in excess of \$10,000, the amount of the penalty in the bond.

1. The several assignments of error made by the appellants may be grouped together, and stated as the refusal of the superior court to admit testimony under the affirmative defense set forth in the answer. The court excluded any evidence with reference to the United States having demanded of the sureties the performance of the contract or the payment of damages. It is maintained by counsel for appellants that the limit of the liability of the sureties was the penalty

tated in the bond, \$10,000; that, if the sureties had not undertaken the performance of the contract of their principal, the entire damages to both the government and the respondents and all of the other claimants for labor and materials would have been liquidated by the payment of \$10,000; that the fact that the sureties necessarily expended more than that sum in the completion of the contract, and over the contract price, relieves them from further liability. It is also maintained that, if the contract had not been completed, the government is a preferred creditor, and its claim would exhaust the penalty, and there would be no funds left for the satisfaction of plaintiffs and other claimants of like character; and counsel maintain that it is necessary to determine the question of priority of rights as between the government and these claimants. In a case involving these facts,—*U. S. v. Rundle*,—in the United States circuit court, judgment was entered in conformity with the contention of counsel here. But the cause was afterwards reversed by the United States circuit court of appeals (40 C. C. A. 450, 100 Fed. 400), and the appellate court observed: "The undisputed facts of the present case are such that it is not necessary to consider the question presented in the court below, and argued here, whether, if the United States had any cause of action upon the bond in suit, its claim should be preferred to that of the laborers and material men; for, as has already been observed, the United States received full performance of the contract, and therefore has no cause of complaint." In the case of *U. S. v. Surety Co.*, 34 C. C. A. 526, 92 Fed. 549, such a bond was under consideration by the court, and it was there adjudged that the bond was intended to perform a double function: First, to secure the faithful performance of the contract to the government; and, second, to protect third persons from whom the contractor might obtain labor or materials in the prosecution of the work. In its second aspect, the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons as to which the agency of the government ceases when the bond is given and approved, and subsequent changes in the contract, agreed upon between the government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability to persons who supply labor or materials thereunder. The court observed of the statute under which the bond is executed: "It is also noticeable that in its title the act professes to be one for the benefit 'of persons furnishing materials and labor,' and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be 'the usual penal bond'; meaning, evidently, such an obliga-

tion for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. * * * Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the government, and the one for the benefit of third persons—are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience." In the case of *Dewey v. State*, 91 Ind. 173, it was substantially held that for any breach of the second condition of such a bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or abridged by any act done by the obligee in the bond after the bond had been taken and approved; and it was ruled that changes made in the contract by the parties thereto—that is, the contractor and the public authorities—after the bonds had been accepted would not deprive material men of their rights to recover against sureties in the bond. To the same effect is *Conn v. State*, 125 Ind. 514, 25 N. E. 443, and the same principle is affirmed in *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302. The practical effect of the statute, and others of similar character in a number of the states, seems to be to confer a special lien in favor of such persons who furnish labor and material, and to substitute the bond in place of the public building as a thing upon which the lien is to be charged. Such liens evidently appear, from an inspection of the current legislation, to be favored, and the courts have usually adopted a liberal rule of construction in their enforcement.

2. It is pertinent to suggest that in the performance of the unfinished contract by the sureties, if they had expended less than the amount to be paid by the government on the completion of the contract, the excess or profit would have belonged to them, and,

if they undertook the completion of the contract, and sustained a loss, it would seem that it should fall upon them. As sureties under the terms of the contract, they might elect to complete it upon default of their principal, but such completion was not the full performance of the contract by the principal himself. It satisfied the sureties' contract with the government, but, as observed by the circuit court of appeals in *U. S. v. Rundle*, supra, the United States is not a claimant here, and the question of priority of claims to the amount due from the sureties under the terms of the bond is not involved in this case. The judgment of the superior court must be affirmed.

DUNBAR, C. J., and FULLERTON and ANDERS, JJ., concur.

(22 Wash. 595)

AUGIR v. FORESMAN.

(Supreme Court of Washington. Dec. 22, 1900.)

ATTACHMENT—ACTION ON NOTE BEFORE DUE —DISSOLUTION OF WRIT—EFFECT AS TO SUBSEQUENT JUDGMENT.

Where suit is brought on a note not yet due, under 2 Hill's Code, § 290, providing that an action may be begun and an attachment had prior to the maturity of a debt, when nothing but time is wanting to fix it absolutely, and when the affidavit for the writ, in addition to that fact, states certain prescribed grounds for attachment, the action is dependent on the attachment, and must fall with it; and hence, if objection is made, a valid judgment cannot be entered therein after the attachment is dissolved, though the note is then due.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by W. B. Augir against C. L. Foresman. From a judgment for defendant, plaintiff appeals. Affirmed.

Byers & Byers, for appellant. E. H. Guile, for respondent.

WHITE, J. This was an action brought by appellant against respondent on October 5, 1899, on a promissory note due October 19, 1899. An affidavit for a writ of attachment was filed in the action, under section 290, 2 Hill's Code, which provides that an action may be commenced and the property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the affidavit, in addition to that fact, states certain grounds,—among others, that the defendant is about to dispose of his property with intent to defraud his creditors. The affidavit for the writ was based on these grounds: A writ of attachment was issued and levied upon lots 1 and 2, block 3, of Boston Heights Supplemental addition to Seattle, the property of respondent. Thereafter respondent served and filed his motion in the superior court

for an order dissolving the writ of attachment for the reason that the grounds for attachment alleged in the affidavit for attachment were not true. The motion was based upon the affidavit for attachment, and the affidavits in support of and against the motion to dissolve the attachment, and the files and records in the cause. The lower court on the 13th day of November, 1899, granted the motion to dissolve, and entered the following order: "This cause coming on to be heard upon the motion of defendant, and the affidavits of plaintiff and defendant, and the files and records herein, for an order discharging the writ of attachment issued herein and levied upon the following described property, to wit, lots one (1) and two (2) in block three (3), Boston Heights Supplemental addition to Seattle, Washington, the plaintiff appearing by his attorneys, Messrs. Byers & Byers, and the defendant appearing by his attorney, E. H. Guile, and it appearing to the court that the facts and grounds set forth in the affidavit for writ of attachment herein are not, and were not at any time, true, it is by the court ordered, considered, and adjudged that said writ of attachment be, and the same hereby is, discharged, vacated, and dissolved." We have examined the affidavits and record on the motion to dissolve, and we think the judgment of the court on the facts set forth in the affidavits was correct, and that the order dissolving the writ of attachment was the proper order in the premises. On the 8th day of January, 1900, the lower court entered an order to the effect that the dissolving of the writ of attachment on the 13th day of November, 1899, operated as and was a dismissal of the action brought by appellant. This order was in effect a dismissal of the action, and amounted to a final judgment. Treating it as such, an appeal will lie to this court, and on such appeal we will review, as we have, the order dissolving the writ.

The complaint stated a cause of action if it set forth the reason for its premature filing, as in the affidavit for the attachment. *Cox v. Dawson*, 2 Wash. St. 381, 26 Pac. 973.

The defendant moved to dissolve the attachment under sections 318-320, 2 Hill's Code, which are as follows:

"Sec. 318. The defendant may at any time after he has appeared in the action, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

"Sec. 319. If the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued.

"Sec. 320. If upon application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged."

The court discharged the writ because it was improperly issued. Did that abate the action? We think it did. It affirmatively appeared from the complaint that the note was not due at the time the action was commenced, and, but for the reasons set forth in the complaint, that the defendant was about to dispose of his property to defraud his creditors, the complaint did not state a cause of action. The action was dependent upon the attachment, and must fall with it. When it was adjudged by the court that the grounds for the writ were untrue, it follows that the action was prematurely brought. The motion to dissolve the attachment was in the nature of a plea in abatement. As was said by the court of appeals of Missouri in *Grier v. Fox*, 4 Mo. App. 522: "Under the law as it formerly stood, where the plea in abatement was found for defendant the whole proceeding was at an end, and plaintiff must commence a new action. Now, the plea in abatement being disposed of, the suit may proceed, but as if commenced by summons alone. If a suit were commenced by summons issued upon a petition which set out no cause of action, judgment upon demurrer must necessarily be for defendant. The question would not be whether the note or other demand sued on was due at the time of joinder in demurrer, but whether it was due at the time of the filing of the petition, which, under our practice, is the foundation of the action. The issue raised by the plea in abatement being out of the way in the case before us, and the case standing as any action commenced by summons, we see no reason why it should not be subjected to the ordinary rules governing such actions, nor why the plaintiff should be allowed any advantage because he has sworn, no matter how conscientiously, to his belief in the existence of a state of facts which is found not to have existed. When a man gives a promissory note, he has a right to suppose that, if by the chances of business and inevitable misfortune he cannot meet it at maturity, no process can issue to subject his property to forced sale to meet the obligation until judgment has been obtained, in due course, upon a suit commenced to the return term next succeeding the maturity of the paper, unless he meanwhile leaves the state, or in some other way brings himself under the provisions of the attachment law. But if the views of the law upon which the judgment in the case before us must be based are to prevail, it is a new premium offered to perjury, and the debtor's position depends upon the degree of regard that his creditor may have for an oath. An unscrupulous creditor may swear out a writ of attachment the day after the execution of the note, and have his suit pending in court and ripe for

judgment and execution on the very day of its maturity; and, if any care be taken as to the character of the levy on the attachment, there is no risk whatever in the proceeding." See, also, *Pierce v. Myers*, 28 Kan. 364; *Cox v. Reinhardt*, 41 Tex. 591; *Wadsworth v. Cheeny*, 10 Iowa, 257; *Wingo v. Purdy*, 87 Va. 472, 12 S. E. 970; *Gowan v. Hanson*, 55 Wis. 341, 13 N. W. 238. The supreme court of Iowa, in *Crew v. McClung*, 4 Greene, 154, said: "Where nothing but time is wanted to fix an absolute indebtedness, an attachment may be issued to secure such indebtedness, under the provisions of Code, § 1852; but it does not follow that a judgment may be rendered against the debtor, without his consent, before the liability is matured. Unless expressly required by law, or justified by the consent of the debtor, a court should not feel authorized to render a judgment so prematurely. That section of the Code was enacted as a protection against fraudulent creditors, and not to authorize abortive judgments. The lien might be created before the indebtedness matured, when a party is attempting to defraud his creditors, but a judgment could not legitimately follow until after there is a default in payment." For the same reason, we do not think a valid judgment can be entered on an action prematurely brought, when objection is made, as in this case, by the defendant. The judgment of the court below is affirmed.

DUNBAR, C. J., and REAVIS and FULLERTON, JJ., concur.

(23 Wash. 547)

STATE v. LEVAN.

(Supreme Court of Washington. Dec. 14, 1900.)

ASSAULT WITH INTENT TO KILL—INDICTMENT—SUFFICIENCY.

2 Ballinger's Ann. Codes & St. § 7055, defines an assault as an attempt, in a rude, insolent, and angry manner, unlawfully to touch, strike, beat, or wound another person, coupled with present ability to do so. Section 7057 provides that an assault with intent to commit murder shall subject the offender to a penalty specified. *Held*, that an indictment for assault with intent to commit murder, which charged that defendant "an assault did make in and upon the person of" another, was not insufficient for failure to charge defendant's present ability to carry his attempt into execution, since the words "an assault did make" include all the elements of the statutory definition of an assault, and the charge of a statutory crime is sufficient if made in the words of the statute.

Appeal from superior court, King county; O. Jacobs, Judge.

A. E. Levan was convicted of assault with intent to kill, and appeals. Affirmed.

Davis & Gilmore, for appellant. James F. McElroy, G. Meade Emory, and William C. Keith, for the State.

WHITE, J. There is but one question to be determined by this court: Is the informa-

tion sufficient? This question was raised by demurrer, motion for new trial, motion to arrest judgment, and objection to judgment and sentence. The information, omitting the formal parts, reads as follows: "He, the said A. E. Levan, in the county of King, state of Washington, on the 12th day of November, A. D. 1899, willfully, unlawfully, purposely, and feloniously, and of his deliberate and premeditated malice, with intent to kill and murder one C. W. Waxhan, an assault did make in and upon the person of the said C. W. Waxhan with a deadly weapon, to wit, a rifle loaded with powder and ball, and then and there held in the hand of the said A. E. Levan, and which he, the said A. E. Levan, aimed at the person of the said C. W. Waxhan, and fired therefrom a ball at the person of the said C. W. Waxhan, with the intent to kill and murder the said C. W. Waxhan, no considerable provocation appearing therefor." The appellant contends that the information does not properly charge an assault, for one of the essential elements of that crime is "a present ability to carry such attempt into execution." He says that phrase, being a part of the statutory definition of the crime, and being an essential element thereof, must be proven, and, if it is necessary to prove the defendant's present ability to carry his threat into execution, it is then necessary to allege such ability. The rules by which the sufficiency of pleadings in criminal actions shall be determined are those prescribed in sections 6839-6861, inclusive, 6800, 2 Ballinger's Ann. Codes & St.: "Words used in an indictment or information must be construed in their usual acceptation in common language, except words and phrases defined by law which are to be construed according to their legal meaning." Section 6848, Id. "The indictment or information must contain, (1) the title of the action specifying the name of the court to which the indictment or information is presented and the names of the parties; (2) a statement of the acts constituting the offense, in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended." Section 6840, Id. The indictment or information is sufficient if it can be understood therefrom: "(1) That it is entitled in a court having authority to receive; (2) that it was found by a grand jury of the county in which the court was held; (3) that the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown; (4) that the crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable therein; (5) that the crime was committed at some time previous to the finding of the indictment, or filing of the information, and within the time limited by law for the commencement of an

action therefor; (6) that the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; (7) that the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case." Section 6850, Id. An assault is an attempt, in a rude, insolent, and angry manner, unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution. Section 7055, Id. The test of the sufficiency of the pleading is to be found in the sections of the law cited. The term "assault" has a well-defined legal meaning, and when used, under section 6848, Id., is to be construed according to that meaning. The statute under which the state proceeded in the case at bar is found at section 7057, Id., and is as follows: "An assault with intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or grand larceny shall subject the offender to imprisonment in the penitentiary for a term of not less than one year nor more than fourteen years." The words "an assault did make," as used in this information, are equivalent to saying that Levan did attempt, in a rude, insolent, and angry manner, unlawfully to touch, strike, beat, and wound Waxhan, coupled with a present ability to carry such attempt into execution, for this is what is embraced within the legal meaning of the term "assault"; and when that term is used in charging a distinct, substantive, and statutory crime, as the one charged in this information, it enables a person of common understanding to know what is intended. The crime charged in this information is a distinct, substantive, and statutory crime, and it is sufficient if the offense is charged substantially in the words defining it; and when so charged, and the term "assault" is used in the charging part, the accused is informed that he will have to defend himself against the simple assault, as well as the greater one of an assault with intent to murder. The lesser offense is necessarily included in the greater. The doing of the acts charged, under the authority of *State v. Ackles*, 8 Wash. 462, 36 Pac. 597, would have constituted murder, either in the first or second degree, if death had resulted therefrom. From this it would seem that ability to carry such attempt into execution is to be presumed from the use of the term "assault." In that case the information charged that the accused "did," etc., "unlawfully, purposely, and of premeditated malice, and with intent to murder, assault," etc. The court says: "He might have been convicted upon this information of an assault with intent to commit murder, or of simple assault, or of assault and battery; for those offenses were sufficiently charged, under the

provisions of the statute." It is true that the information in that case charged a consummated battery, and from that ability to carry the attempt into execution could be inferred. But we think, in charging the commission of a substantive statutory crime, as assault to commit murder, rape, or robbery, etc., it is only necessary to charge the offense in the language of the statute creating the offense. Says the supreme court of Iowa in *State v. Seamons*, 1 G. Greene, 418: "But this is a statutory proceeding, in which the indictment follows with substantial accuracy the language of the act upon which it is framed. When an indictment is thus drawn, employing the very words of the law which defines the offense, its sufficiency cannot well be questioned." *State v. Tidwell*, 43 Ark. 71. The nature of the assault and the ability to commit it are matters of evidence. When the accused is informed, as he was by this indictment, that he had assaulted Waxhan with intent to murder him, the crime was clearly and distinctly charged against him, in ordinary and concise language, in such a manner as to enable a person of common understanding to know what was intended. *State v. Wright*, 9 Wash. 96, 37 Pac. 313. The judgment of the court below is therefore affirmed.

DUNBAR, C. J., and REAVIS and FULLERTON, JJ., concur.

(23 Wash. 535)

SHELL et al. v. POULSON.

(Supreme Court of Washington. Dec. 14, 1900.)

HIGHWAYS — ESTABLISHMENT — PETITION — SUFFICIENCY — PRESCRIPTIVE HIGHWAY — ASSERTION OF OWNERSHIP — GATES ACROSS WAY.

1. The description of a proposed highway, in the petition for its establishment, as commencing at or near the top of H. hill, on W. road, at or near the south line of a certain section, and running northerly, and as near as practicable, along the H. road to said line, and thence in a northeasterly direction, on the nearest and best ground, to a certain point, is too indefinite to support the establishment of a highway.

2. The erection of gates by a landowner across a way over his land which is used by the public as a highway, and the closing of such gates, although they are not locked, is an assertion of his right in such way which will prevent it becoming a highway by prescription.

3. Where a highway attempted to be established by legal proceedings is located several hundred feet from a traveled way, the attempted establishment cannot be urged as tending to show that the latter road became a highway by prescription.

Appeal from superior court, Walla Walla county; Thomas H. Brents, Judge.

Injunction by Louis C. Shell and others against John Poulson. From a decree in favor of defendant, plaintiffs appeal. Reversed.

T. P. & C. C. Gose, for appellants. Pedigo & Cain, for respondent.

DUNBAR, C. J. This is an action brought by the appellants to enjoin the threatened tearing down of the fence surrounding a certain tract of land in Walla Walla county. The respondent was the supervisor of the road district embracing the land in question, and admitted the threatened removal of the fence, but justified it on the ground that the said fence obstructed the public highway. Judgment was rendered in favor of the defendant.

Two pleas were interposed by the respondent: (1) That the road was regularly established by the board of county commissioners of Walla Walla county; and (2) that the said way was a public highway by prescription. The judge who tried the case found that it was a highway by prescription, and dismissed the cause at plaintiffs' cost. A reading of the petition asking for the establishment of this alleged road by the county commissioners is sufficient to dispose of the first contention of the respondent. The description is as follows: "Commencing at or near the top of the Hardman Hill on the lower Waltsburg road, at or near the south line of section eighteen (18), township nine (9) north, range thirty-seven (37) east, W. M., and running northerly, and as near as practicable, along the old Hardman road, down the lane, as near as practicable to said line; thence in a northeasterly direction, on the nearest and best ground, to the north boundary of Walla Walla county, where the old Hardman road strikes the same." Without noticing any subsequent alleged errors, the petition is too indefinite to give the court jurisdiction, or to give notice to the landowner of any attempt on the part of the county to subject his land to a public easement. While courts are inclined to construe liberally the acts of county commissioners in laying out and establishing highways, yet the description in a petition must be sufficiently definite so that a surveyor can at least ascertain from the petition the location of the road. In this case this could not be done.

A more troublesome question is whether or not this alleged highway was dedicated by the owner to the use of the public, or whether the public has obtained a right of way by prescription. The principal evidence of dedication is the actual use of the land as a highway by those who have occasion to use it without objection by the owner. Dedication must originate in the voluntary donation of the owner of the soil, and the intention of the owner to dedicate must be clear, manifest, and unequivocal. *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499; *Riley v. Hammel*, 38 Conn. 574. The dedication need not be in writing, but may originate by any act or declaration of the owner which manifests an intention to devote the property to such public use. Being a voluntary donation, it will not be presumed without the clearest intention to this end. *Steele v. Sullivan*, 70 Ala. 589. From an investigation of the whole rec-

ord, although the testimony is somewhat conflicting, we are convinced that there was no dedication by any special act of the owner. So that the only question is, did a right by prescription attach over this way? The foundation of a right by prescription is uninterrupted enjoyment, which presupposes a previous grant by the owner. It is contended by the respondent that no inflexible rule of law governs the question of prescription or dedication, but that it is a question of fact to be deduced from circumstances offered in evidence. This proposition cannot be gainsaid, but, in our opinion, it is not deducible from the circumstances offered in evidence in this case that there was any intention on the part of the owner to dedicate the land over which this alleged road runs, or that there was such an uninterrupted acquiescence in the use of it by the public as would establish a prescriptive right. We have examined all the authorities cited by the respondent, but do not think they are applicable to this case. Dill. Mun. Corp. (4th Ed.) § 638, simply announces the rule that, where the question is as to an intent on the part of the owner to dedicate, user by the public for a period less than that limiting real actions is important as evidence of such intention, and as one of the facts from which it may be inferred. Section 637 announces the rule as follows: "Such intent will be presumed against the owner where it appears that the easement in the street or property has been used and enjoyed by the public for a period corresponding with the statutory limitation of real actions. But where there is no other evidence against the owner to support the dedication but the mere fact of such user, so that the right claimed by the public is purely prescriptive, it is essential, to maintain it, that the user or enjoyment should be adverse, that it is with claim of right, and uninterrupted and exclusive for the requisite length of time." *Holdane v. Trustees*, 23 Barb. 103, would be in point if it were shown in this case that there had been an unequivocal dedication. But the decision in that case is based upon the announcement of this proposition. *Morse v. Zelze* (Minn.) 24 N. W. 287, simply announces the general rule that what particular conduct on the part of the landowner will make out a dedication is a conclusion of fact to be drawn from all the circumstances of the case. There are no circumstances set forth in that case that shed any light on the case at bar. *Shellhouse v. State* (Ind. Sup.) 11 N. E. 484, seems to be almost parallel with the case at bar. There it was held that, before a highway could be established by prescription, the general public, under a claim of right, and not by mere permission of the owner, must have used some defined way, without interruption or substantial change, for 20 years or more; that a gate erected across the way, and maintained for, and kept closed at certain stated times during, a period of 4 years by the own-

er, evincing an intention to exclude the public from the uninterrupted use thereof, destroys any prescriptive right not already fully accrued. It is true that in the case at bar the gates which were erected across the alleged highway were not kept locked during the nights, but the erection and closing of the gates was an assertion on the part of the owner of the land that the uninterrupted use of the highway was denied to the public, and that their travel along it was simply by his sufferance. The use of the road as a highway was in this degree interrupted and denied, and, as was said by the court in the case just above cited: "When the use is interrupted, prescription is annihilated, and must begin again. * * * A highway, from its very nature, must be open to the public for use day and night, and any unambiguous act by the owner—such as erecting gates or bars over the highway—which evinces his intention to exclude the public from the uninterrupted use of the highway, destroys the prescriptive right, unless it had fully matured before it was interrupted." *Jones v. Davis*, 35 Wis. 376. To establish a highway by prescription, there must be an actual public use, general, uninterrupted, and continuous, for 10 years, under claim of right. *State v. Green*, 41 Iowa, 693. In *Coburn v. San Mateo Co.* (C. C.) 75 Fed. 520, it was held that, to acquire a public right by prescription, the use by the public must be adverse, continuous, and exclusive; that a mere tacit permission or license by the landowner will not suffice. In that case the landowner, for a long period of years, permitted the residents of a neighboring village, and visitors thereto, to pass through his gate, and over his land, to an attractive beach on the seashore. It was held that no prescriptive right to a public road through his land was created by such acts. In *Harper v. State* (Ala.) 19 South. 901, it was held that the use of a private way by the public for 20 years would not make it a public highway unless such use was adverse to the owner of the soil, not merely permissive, and continued uninterruptedly for the prescribed period; that the closing of a private way at night, the erection of gates and bars, or any unambiguous act by the owner, which evinces his intention to exclude the public, destroys any prescriptive right to its use which might be begun in favor of the public. And such, we think, is the voice of authority generally, that, before an easement can be implanted upon land, the property of a citizen, where such right rests upon a prescription, the user by the public must have been uninterrupted, unqualified, and adverse to the rights of the owner of the soil. Of course, the question of the length of time, which in some states is said to be 10 years and some 20, is not in point in this state, where the statute prescribes that "all public roads and highways in this state that have been used as such for a period of not less than seven

years, and are now so used, where the same have been worked and kept up at the expense of the public, are hereby declared to be lawful roads and highways within the meaning and intent of the laws now existing governing public roads and highways in this state." 1 Ballinger's Ann. Codes & St. § 3846. This statute, however, is not available to the respondent, for the testimony does not show either that there was seven years of uninterrupted user, or that the road had been kept up at the public expense that length of time. In fact, the testimony in relation to the expense that the public had been to in the maintenance of the road shows that the expenditure was so meager that it is scarcely worthy of consideration. Neither can the theory of prescriptive right be aided by the fact that there had been an attempt to establish the road by legal proceedings before the county commissioners, for the testimony in this case conclusively shows that the road as surveyed does not touch the traveled road, but that it is from 250 to 400 feet distant from it. We are not unmindful of what was said by this court in *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748, that the character of a road as a public highway established by prescription is not affected by immaterial changes and alterations in the travel over it by the public. That is the universal rule, but such deviation as is shown by the record in this case cannot be said to be slight or immaterial. We also reaffirm the doctrine announced in *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, and fully appreciate the sentiment that the validity of public highways should be recognized by the courts whenever the law has been substantially complied with in the establishment of the same by the proper tribunal, or whenever the public has been in the unquestioned, adverse, and uninterrupted use of the same for the necessary period of time; but the testimony in this case does not, it seems to us, establish either proposition. The judgment is reversed.

ANDERS, REAVIS, and FULLERTON,
JJ., concur.

(23 Wash. 552)

ST. CLAIR v. WILLIAMS.

(Supreme Court of Washington. Dec. 14, 1900.)

HABEAS CORPUS—HOME-FINDING SOCIETY—CUSTODY OF CHILDREN—JUDGMENT—APPEAL.

A father obtained a writ of habeas corpus, directing the superintendent of an incorporated home-finding association to produce relator's children; and on the hearing the court refused to grant relator the custody of the children, and directed the superintendent or his society to make application to the court for leave to dispose of the children, and that pending such application the children remain in the custody of those with whom they then were. *Held*, that the society's appeal from such judgment should be dismissed, since they were not aggrieved by the refusal to change

the custody of the children, and the requirement of an application to the court was not appealable, being merely advisory.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Application by Thomas St. Clair for writ of habeas corpus directing J. W. Williams to produce relator's three children. From an order denying relator's right to the custody of the children, and requiring respondent to apply for leave to make disposition of them, respondent appeals. Dismissed.

F. M. Ellsworth and J. R. Fleming, for appellant.

WHITE, J. On the 2d day of April, 1900, the respondent, Thomas St. Clair, filed in the superior court of Spokane county a petition for writ of habeas corpus, alleging in substance that his daughter Lilly St. Clair, 12 years of age, Florence, 7 years of age, and his son Melvin, 5 years of age, were all unlawfully detained and restrained of their liberty by one J. W. Williams; that the mother of said children had abandoned them and had also abandoned him; that on or about the 6th day of March, 1900, in the city of Spokane, the said J. W. Williams, without his knowledge or consent, while they were returning from school, forcibly, fraudulently, surreptitiously, and clandestinely took said children, and each of them, away from his custody and control, with intent to detain them from him, and that he, as their father, was rightfully entitled to their custody and control; that the said Williams, in violation of the laws of Washington, keeps said children secretly away from him, without any pretense of claim of right whatever. The petition concluded with a prayer for the writ of habeas corpus, directed to said Williams, commanding him to produce the bodies of said children, and that the petitioner be awarded custody and control of said children. On the same day Judge C. H. Neal made an order directing the habeas corpus to issue as prayed for, and directing that the same be heard before him on the 4th day of April, 1900, at the court house in the city of Spokane. The writ of habeas corpus issued and was served on said J. W. Williams on the 4th day of April, 1900. The appellant made answer and return to said writ as follows: That appellant was superintendent of the Northwestern Home-Finding Association, a corporation duly incorporated under the laws of the state of Washington, having its principal office in the city of Spokane; that he denied each and every allegation in said petition, except that he was on or about the time alleged in possession of said children; that on the 1st day of March, 1900, Maria E. St. Clair, the mother of said children, surrendered the same to said home-finding association, alleging and representing that the said Thomas St. Clair, father of said children, had been unable and had neglected for a long time to provide for the maintenance and sup-

port of his said children, and that she was unable to provide for their further maintenance, and requested said association to take charge of them and furnish homes for them in which they could be cared for in a humane and proper manner; that, as superintendent of said association, he did take charge of said children, and had provided homes for them, with people who were able and willing to provide for them; that said Thomas St. Clair, the father of said children, had been for a number of years a helpless invalid, having to depend upon the county and charitable people for his support, having been for the last eight months a charge upon Spokane county, and the county had given notice that said appropriation would be discontinued on the 1st day of April, 1900, and that the said mother, knowing that her children would be left in a destitute condition, with no means of support, surrendered them to the said association; that by reason of inability and neglect of their father to support and care for them, and under and by virtue of the act of the legislature of the state of Washington for the protection and custody of orphan, homeless, neglected, or abused children, approved February 14, 1899, the mother had the legal right to surrender said children, and that appellant was entitled to and was rightfully in control and possession of said children; that eight months prior to the surrender of their children the mother had surrendered three other children of said St. Clair to said association, and good homes had been provided for them by said association. The appellant attached to and made a part of said answer and return copies of the contract of said surrender of said children, executed by their said mother as aforesaid, and prayed that he be discharged from further answer to said writ of habeas corpus, and that the parties in possession of said children be allowed to retain possession of them. On the 3d day of May thereafter the respondent herein filed a demurrer to said return and answer. On the — day of May, 1900, said cause came on to be heard on said demurrer, and said demurrer was sustained and said answer stricken out, to which ruling of the court the defendant excepted, and said cause was continued by the court to hear the evidence. On the 29th of May, 1900, the case came on to be heard, and after hearing the evidence the court made the following order and judgment: "This cause having come on for hearing on the petition of the relator and the answer or return of J. W. Williams, the respondent to the petition, and the court having heard the evidence adduced by the respondent, J. W. Williams, whereupon the relator, by Herman & Kleber, his attorneys herein, moved the court for judgment against the relator, [respondent] for the delivery and surrender to relator of the three children mentioned in the petition and pleadings herein, and after hearing Ellsworth & Fleming, attorneys for respondent, in opposition to said

motion, and the court being fully advised in the premises, it is now here ordered and adjudged that said motion be denied. It is further ordered and adjudged that application be made forthwith by said Williams or the Northwestern Home-Finding Society, under the laws of the state of Washington (Laws 1899, p. 9) respecting the disposition of said children. It is further ordered that pending said application and hearing thereon the children mentioned in the petition shall remain where they now are, and that final disposition of their care and custody be made in such application now here ordered to be made." It will be seen, by this judgment, that the court refused to grant the prayer of the petitioner, and left the children in custody of the persons selected by the appellant to care for them. The appellant cannot complain of this part of the order, and he is not aggrieved thereby. That portion of the order which directs the appellant to make application to the court for the custody of the children under the act relative to the protection and custody of orphan children, approved February 14, 1899, is merely advisory, and is not an appealable order. For these reasons, we think this appeal should be dismissed, and it is so ordered.

DUNBAR, C. J., and FULLERTON and REAVIS, JJ., concur.

(32 Wash. 425)

PACIFIC NAT. BANK OF TACOMA v. SAN FRANCISCO BRIDGE CO.

(Supreme Court of Washington. Dec. 8, 1900.)

EVIDENCE — CONTRADICTING WRITTEN INSTRUMENT—ESCROW AGREEMENT—CONDITIONS—PERFORMANCE.

1. An agreement in writing, which is neither ambiguous nor uncertain, and expresses all the conditions on which a note is held in escrow, cannot be varied or contradicted by proof of a contemporaneous oral agreement, where it is clear that the writing was intended to define and fix the rights and liabilities of the parties.

2. Where a note is held in escrow pending the performance of a condition requiring the payee to deliver property sold to the maker, and the place of delivery is not fixed by any agreement, an offer to deliver it at the place where it was located at the time of sale is a sufficient performance of the condition, if made within a reasonable time.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by the Pacific National Bank of Tacoma, Wash., a corporation, against the San Francisco Bridge Company, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

McClure & McClure and F. S. Blattner, for appellant. Ballinger, Ronald & Battle, for respondent.

FULLERTON, J. This is an action on a promissory note. It appears from the record that on May 18, 1891, one George Roberts sold to the respondent his right in certain

letters patent for a track-laying machine, together with six certain machines manufactured under the patents, reserving to himself a royalty of a certain sum per mile for every mile of railway track laid with the machines then manufactured or thereafter to be manufactured under the patent. The machines transferred were at various places; one being in the possession of Woods, Larson & Co. at or near Missoula, Mont., and was at the time of the sale being used by them in the construction of a railroad known as the Missoula & Idaho Branch of the Northern Pacific. For this machine a bill of sale was given, which, after reciting the sale of the machine for a consideration of \$1,000, contained a warranty on the part of the vendor to the effect that he would warrant and defend the sale of the same against the lawful claims of all persons whomsoever. After the sale was made, the respondent proceeded to locate and obtain possession of the machines, and succeeded in obtaining possession of all of them save the one held by Woods, Larson & Co. Roberts was notified of the failure of the respondent to obtain possession of this one, and thereupon made an effort himself to get it, but without success. The machine was held by Woods, Larson & Co. under a contract with Roberts, by the terms of which they were entitled to its use until the railroad they were then constructing was completed. They also claimed a lien on it for repairs made by themselves in a sum in excess of \$1,800; a sum equaling, if not exceeding, the cost of a new machine. The matter remained in this condition until February 23, 1892, at which time the respondent purchased of Roberts his reserved interests in the letters patent, and as part of the consideration therefor executed the note sued on in this action. The note was placed in escrow with the Puget Sound National Bank of Seattle, the terms of the escrow agreement being evidenced by the following writing: "The within note of \$1,000.00, dated Feby. 23, 1892, made by San Francisco Bridge Co. to the order of George Roberts, and due one year after date, is to be held in escrow by the Puget Sound National Bank of Seattle to be delivered to said George Roberts when a certain Roberts railroad track laying machine now in the possession of Wood, Larson & Co. at Missoula, Montana, but owned by said San Francisco Bridge Co., is delivered to said San Francisco Bridge Co.; and it is further agreed that any expenses which may be sustained by said San Francisco Bridge Co. in obtaining possession of said machine is to be charged to said George Roberts, and credited on the within note before delivery thereof. Dated Feb. 23, '92. San Francisco Bridge Co., by J. D. Corey, Agent. George Roberts." Subsequent to the execution of this agreement neither party made any effort to obtain possession of the machine, it remaining in the possession of Woods, Larson & Co. until as late as 1897,

if not until the commencement of this action. In the meantime Roberts assigned his interests in the note to the Citizens' National Bank of Tacoma, which in turn assigned it to the appellant. No delivery of the note was made, either to Roberts, his assignee, or the appellant, but it remained in the possession of the Puget Sound National Bank until the trial of this action. At the conclusion of the testimony on the trial (which was being had before the court and jury) the appellant moved that the case be taken from the jury, and a judgment entered in its favor. The court thereupon took the case from the jury, but entered judgment for respondent. This appeal is from that judgment.

On the trial the appellant offered oral evidence tending to prove that at the time the escrow agreement was entered into, and as a part of the same transaction, the respondent undertook and promised that it would take all proper and necessary steps to obtain the possession of the track-laying machine from Woods, Larson & Co., cause the amount of expense, if any, it should be put to in obtaining such possession to be credited on the note, and permit the note to be given to Roberts. The trial court rejected this evidence on the ground that the written agreement expressed the entire contract between the parties, and parol evidence was inadmissible to vary its terms. The correctness of this ruling is the principal question here. The contract, it will be observed, does not obligate Roberts to deliver the machine to the respondent, nor does it obligate the respondent to obtain its possession. But it is not, for this reason alone, either ambiguous or uncertain, nor does the fact clearly show that the entire contract between the parties was not expressed in the writing. Viewed in the light of the transactions which preceded it, it is clear that the primary object and intention of the agreement was to fix the amount and settle the liability of Roberts to the respondent incurred by the breach of the warranty contained in the bill of sale. As we have said, the machine was in the possession of Woods, Larson & Co. They were holding it under a contract with Roberts by the terms of which they were entitled to its possession for an indefinite time; and were also claiming a lien thereon in a sum equaling the cost of a new one. True, Roberts claimed to have, and may have had, an offset to this claim, but it was uncertain at that time whether or not possession of the machine could be obtained without a cost greatly in excess of its value. It would seem reasonable, therefore, that neither party would undertake absolutely to obtain possession of the machine, but would rather reserve to himself a right without assuming an obligation so to do. The contract as written has this effect. By its terms Roberts was given the option either to deliver the machine to the respondent, or suffer a forfeiture of his interests in the note; while the respondent was given

the option either to retain the note and forfeit its claim to the machine, or obtain possession of the machine and pay the note, less such reasonable charges as it may have been put to in obtaining such possession. These rights were, of course, interdependent, the rights of the one depending in their finality on the action of the other; but neither Roberts, nor his assignee, without showing that a delivery or tender of the machine was made to the respondent, or that it took it into possession, can maintain an action upon the note. Nor was the evidence admissible on the ground that it tended to prove a separate collateral agreement, independent of the writing, and not at all in conflict with it. It requires no analysis to show that the oral contract would entirely change the scope and meaning of the writing. Aside from this, while it is true it is said (1 Greenl. Ev. § 284) that the rule which forbids parol evidence varying the terms of a written contract has no application where the original contract was verbal and entire, and a part only was reduced to writing, yet this exception to the general rule must not be too broadly or too loosely interpreted. "For," as was said by Finch, J., in *Elghmie v. Taylor*, 98 N. Y. 288, "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If, upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances, in order to its proper understanding and interpretation, it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract." The appellant contends, however, that the rule cited has no application to contracts relating to instruments deposited in escrow, and our attention is called to the cases of *Stanton v. Miller*, 58 N. Y. 203, and *Gaston v. City of Portland*, 16 Or. 255; 19 Pac. 127, as supporting this contention. In the first of these cases the court says: "The condition upon which a deed is delivered in escrow may be expressed in writing or rest in parol, or be partly in writing and in part oral. The rule that an instrument or contract made in writing inter partes must be deemed to contain the entire agreement or understanding has no application." In the latter case this language is repeated. An inspection of these cases will show that this question was not presented by the facts in either of them, and we cannot think the learned judges who delivered the opinions in these cases meant to

assert that in no case could the parties to an agreement depositing an instrument in escrow so frame a writing expressing the conditions upon which the deposit was made as to preclude either of the parties from afterwards showing that this condition was something entirely different from the condition expressed in the writing. But, if this be what was meant, we cannot follow them. The object and purpose of the rule was to prevent a party from being compelled to rest his contract in the uncertain memory of either himself, his co-contractor, or those who may have heard the oral expressions which led up to and terminated in the final written agreement. There is certainly nothing in the nature of this character of contracts that ought to prevent a party thereto from having the benefit of this privilege. On the contrary, there is much reason for believing that this is one of those peculiar contracts where a party entering into it would wish that the terms should be so definitely and irrevocably fixed that he might at all times know the extent of his rights and liabilities thereunder. We agree with the contention of the appellant that it would have been a sufficient compliance with the contract for Roberts to have tendered the machine to the respondent at Missoula, Mont. (2 Schouler, Per. Prop. [3d Ed.] § 385), but we cannot agree that the evidence shows that such tender was made, or that it shows a tender at any time or place prior to 1897, when Woods, Larson & Co. offered to deliver the machine to respondent's agent. This tender, however, as the trial court rightly decided, came too late to render the respondent liable on the note. The judgment is affirmed.

DUNBAR, C. J., and REAVIS and ANDERS, JJ., concur.

(23 Wash. 441)

CITIZENS' NAT. BANK OF DAYTON v. COLUMBIA COUNTY et al.

(Supreme Court of Washington. Dec. 8, 1900.)

TAXATION OF BANK STOCK—FRAUD OF ASSESSOR—ACTION FOR RELIEF—PARTIES—DEFENSES—JUDGMENT—NECESSITY OF PROOF.

1. Under 2 Ballinger's Ann. Codes & St. § 4825, authorizing a trustee of an express trust to bring suit in his own name without joining the person for whose benefit the suit was brought, a national bank may bring suit for relief against an excessive tax on its stock without joining its stockholders, since a trust is imposed on the bank for the payment of such taxes.

2. Under 2 Ballinger's Ann. Codes & St. § 5090, authorizing judgment for plaintiff in default of answer, and authorizing proof or reference when necessary to enable the court to render judgment, a judgment may be rendered in plaintiff's favor without taking proof, in an action against the county by a bank for relief against an excessive tax on its stock, in which the defendant refuses to answer after its demurrer has been overruled.

3. Where an assessor states to the officers of a national bank, when it presents its list of stock to him for taxation, that such stock will be assessed at a certain value, but he assesses

it at a higher value, and the bank is given no notice thereof, it may maintain an action for relief against such excessive valuation, though it does not go before the board of equalization, and ask for a reduction, since the act of the assessor was a fraud on the bank.

Appeal from superior court, Columbia county; M. M. Godman, Judge.

Action by the Citizens' National Bank of Dayton against the county of Columbia and another for relief against an excessive tax. From a judgment in favor of the plaintiff, the defendants appeal. Affirmed.

Will H. Fouts, for appellants. Sturdevant & Brown, for respondent.

DUNBAR, C. J. The respondent is a national bank, and, as plaintiff, filed in the superior court of Columbia county its complaint, alleging, among other things, its corporate existence under the laws of the United States, the names of the various shareholders of the bank, with the shares owned by each shareholder, and the value thereof. The complaint continues: "(5) That plaintiff is the owner, and was so on the 1st day of March, 1898, of real estate in Columbia county, which was valued and assessed by the assessor of said county in the year 1898 at the total value of \$2,870, and which was the aggregate reasonable value of said real estate at the time of making said assessment. (6) That the assessed valuation, assessed upon said shares of stock in the year 1897, was in the aggregate \$29,500, and their fair and full value in money on the 1st day of March, 1897, would not in the aggregate exceed that sum; that at the proper time for the assessing of real and personal property in said county the cashier of plaintiff made and delivered to the assessor of said county in 1898, on or before the 15th day of March in said year, a statement, verified by his oath, showing the name of each shareholder, with his residence, and the number of shares belonging to him at the close of the business day next preceding the 1st day of March, 1898, as the same appeared on the books of said bank (this plaintiff). (7) That at the time of making out of the said statement by the cashier as aforesaid to the said assessor as aforesaid, and at the time the said assessor made the assessment upon the shares of stock as aforesaid, the said assessor informed the plaintiff that the assessment he would make upon said shares of stock would be the same as that made thereon in the year 1897, and that it would not exceed the amount assessed thereon for the year 1897; that plaintiff, relying upon said representation and information as aforesaid that the said assessor would assess said stock at the same valuation as in 1897, or not exceeding that valuation, and having no notice of the valuation placed on said stocks by the said assessor, did not go before the board of equalization and ask for a reduction of said assessment. (8) That the said assessor did not assess the said stock at

\$29,500 in his said assessment of 1898, as he had informed the plaintiff, and as plaintiff believed he would do, but assessed it for a much larger sum, to wit, the sum of \$40,000, that plaintiff did not know of such exorbitant valuation until a long time after said board of equalization had adjourned, to wit, on the 7th day of April, 1899. (9) That full and fair value in money on the 1st day of March, 1898, of said stock, and the shares of stock, in the aggregate would not exceed the sum of \$29,500, after deducting therefrom the value of the real estate then belonging to plaintiff aforesaid." The plaintiff further alleges the tender of the amount of taxes due, on the basis of the valuation agreed upon with the assessor, and brings the same into court as a continuing tender, and prays that the said sum of money so tendered be adjudged the whole sum due and unpaid as taxes on the said shares of stock. A demurrer was interposed to the complaint, and was overruled. A motion was then interposed, which was also overruled. Judgment was entered in accordance with the prayer of the complaint, and an appeal was taken by the county of Columbia.

There are but two questions raised by the record in this case: (1) Did the complaint state a cause of action? and (2) was the court authorized to enter judgment upon the pleadings? It may be here stated that, upon the overruling of the demurrer, the defendants refused to plead, and judgment was entered upon the pleadings. It is the contention of the appellants that, under the provisions of the Code for the bringing of actions by parties in interest, this complaint did not state a cause of action; that the shareholders, and not the bank, were the real parties in interest, and the only parties who could sustain this action. Section 4824, 2 Ballinger's Ann. Codes & St., provides that every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law. Section 4825 provides that an executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. We are satisfied that the bank here had authority to sue under the last section quoted, if, indeed, it did not under the first. A bank is composed of its shareholders, and, while the law assesses the shares to the shareholders, it imposes upon the bank the duty of making out and delivering to the assessor of the county in which the bank is located a statement, verified by the oath of the cashier of said bank, showing the name of each shareholder, with his residence and the number of shares belonging to him. It is also the duty of the bank, under the law, to pay the tax collector the taxes authorized by this assessment when they become due, and the taxes are made a lien upon the real estate of the bank. If the bank is liable for

the payment of the taxes, and the law imposes upon it the duty of paying them, then a trust is imposed upon the bank by the law for the payment of the taxes, and the bank could properly bring the action under section 4825, supra. As a practical fact, the assessor goes to the cashier of the bank to obtain his data. In fact, it frequently occurs that the owners of the shares are non-residents, and the tax could not be collected in any other way.

It is urged by the appellants that the shareholders would have a right to bring this action, and that they would have a right to go before the board of equalization to resist the raising of their assessment. It may be that this is true, but it is not necessary to determine that question in this case. The law certainly has constituted the bank the trustee of the shareholders for the purpose of returning the assessable property to the assessor, and of paying the taxes on the same to the collector.

It is urged by the appellants that, under the provisions of the Code, the court should have taken testimony before entering judgment in favor of the respondent; but we think, under the provisions of section 5090, 2 Ballinger's Ann. Codes & St., the court was justified in entering judgment upon the pleadings.

Some argument seems to be based upon the fact that the respondent did not go before the board of equalization to obtain a reduction of the assessment, but under the allegations of the complaint, which are not controverted, the respondent was misled by the statement of the assessor. When the list was furnished to the assessor, and he stated to the respondent that the property would be assessed at the same value that it was the year before, we think it had a right to rely upon that statement, and a fraud was perpetrated upon it when the assessment was raised. Relying upon the statement of the assessor, it had no notice that the assessment was raised; for the law provides that, when the board of equalization raises the assessment as made by the assessing officer, notice must be given to the taxpayer. In this instance no notice was given, because the assessment was not raised by the board of equalization, and the respondent had no opportunity to review the action of the assessor. The judgment is affirmed.

REAVIS, ANDERS, and WHITE, JJ., concur.

(23 Wash. 432)

DAVIS v. RICHARDS.

(Supreme Court of Washington. Dec. 8, 1900.)

PUBLIC LANDS—PROCEEDINGS IN LAND OFFICE—APPEAL—WAIVER.

One who appeals from an order of the local land office allowing an adverse claimant to make a homestead entry for their joint benefit, and refuses to accept an agreement securing

such benefit tendered by the entryman pending the appeal in pursuance of the order, does not thereby waive or lose any rights which have accrued to him under such order, though the appeal is determined against him.

Appeal from superior court, Kittitas county; John B. Davidson, Judge.

Ejectment by O. S. Davis against David R. Richards. From a judgment for plaintiff, defendant appeals. Reversed.

E. Pruyn, for appellant. Graves & Englehart and H. J. Snively, for respondent.

DUNBAR, C. J. The appellant, respondent, one Sylvis, and one Stewart improved and occupied public lands before their survey. When the lands were surveyed it was discovered that all four of these men had improvements on the 40-acre tract which is the subject of this controversy; the appellant and Sylvis residing on the same, and the respondent and Stewart having improvements and cultivation thereon. After the plat of the survey had been filed in the United States land office at North Yakima, the appellant offered to make homestead entry on said 40-acre tract, with other lands, but his application was denied; and it was held by the local land office that there was a simultaneous application to enter said land by the appellant and respondent,—Sylvis and Stewart making no claim. A hearing was ordered to determine the rights of the parties, and upon appeal to the secretary of the interior it was held that the respondent would be allowed to make final proof of the tract, with other lands, and a patent would be issued to him, upon his tendering to the appellant and Sylvis an agreement in writing to convey to each, respectively, the part of the land occupied by him. It is conceded that in a proper case the plan adopted by the land department was a legal and suitable one. After the respondent had proved up on the land, he brought this action in ejectment. Upon the trial he swore that he tendered a contract to the appellant and Sylvis, as directed by the decision of the secretary, and that the appellant refused to accept the same. The testimony of the appellant was that the respondent presented him a writing, which he did not take, and would not sign without an opportunity to consult an attorney; that it was never presented again; and that no deed for that portion of the 40 which had been assigned to appellant had ever been tendered to him by the respondent. This was substantially all the testimony there was in the case, with the exception of the exhibits filed, which constituted the record of the proceedings in the land department. On the conclusion of the testimony, the judge directed the jury to bring in a verdict for the plaintiff, and judgment was entered accordingly.

Several assignments of error are relied upon by the appellant, among which are errors in relation to the admission and rejec-

tion of testimony; but, with the view we take of the general proposition, it is not necessary to discuss them here, for we think that the court not only erred in instructing the jury to bring in a verdict for the respondent, but that under the undisputed testimony he should have instructed a verdict for the appellant. It never was found by any tribunal in the history of litigation in the land department that the respondent was entitled to the portion of the 40 in dispute which was accredited by the department to the appellant, but an investigation of this case was ordered by the land department, and, upon the testimony produced, it was found that the appellant was entitled to one-fourth of this 40, the respondent to one-fourth, and Sylvis and Stewart to one-fourth each. It was by virtue of that finding of fact that the respondent was allowed to enter the whole tract of land, the rules of the department not allowing an entry of less than a 40-acre subdivision of a section. The department in its order held, in effect, that the respondent should enter this whole tract, in his own right for the portion of it which had been found to belong to him, and as a trustee for the others; and we are at a loss to know upon what theory he can now claim a right to the whole tract, and ask to have the *cestui que trust* ejected from his portion of the tract. The argument seems to be that, because he presented an agreement to the appellant that he would deed him this land when he had perfected title thereto, and the appellant refused to accept the same, the appellant waived his claim to any rights which he may have had under the ruling of the land department allowing the respondent to enter the land for his benefit and the benefit of the other parties mentioned. At the time that this agreement was presented to the appellant, he was prosecuting an appeal from the order of the land department, and he may reasonably have concluded that, if he made himself a party to the agreement which was tendered him by the respondent, it would estop him from pursuing his appeal in the department. But it does not follow, we think, that, because he saw fit to appeal from the ruling of the department in relation to the entry of respondent, the appellant claiming that he was entitled to enter the whole tract, he lost any rights which had accrued to him by reason of the order of the department allowing respondent to make the entry as aforesaid. It might as well be argued that because a party in a civil court appealed from a judgment in his favor with which he was dissatisfied, and the appeal terminated against him, he had waived any rights which he had in the judgment of the lower court. While it is true that the literal command of the department was that respondent should enter into an agreement to convey a portion of this land to the appellant and Sylvis, the real intention evidently was that the agreement was

only to insure the essential act of conveying the land after title had been obtained. It never having been decided by any tribunal that respondent was entitled to the land occupied by the appellant, and a deed to the same never having been tendered to appellant, no cause for ejectment existed. The judgment is reversed.

FULLERTON, REAVIS, and ANDERS, JJ., concur.

(23 Wash. 517)

**TITLE GUARANTEE & TRUST CO. v.
NORTHWESTERN THEATRICAL
ASS'N (SEATTLE THEATER
CO., Garnishee).**

(Supreme Court of Washington. Dec. 13, 1900.)

**GARNISHMENT—JURISDICTION—CHANGE OF
VENUE—WAIVER.**

1. Under Laws 1893, p. 95, § 22, providing that, if the answer of a garnishee is controverted, it shall be tried as other cases, on change of venue of the main action on motion of defendant the garnishment proceedings are properly removed with the main action.

2. 2 Ballinger's Ann. Codes & St. § 4355, providing that actions shall be tried in the county of defendant's residence, does not apply to garnishment proceedings.

3. A garnishee, having answered and waived a jury, cannot object that the proceedings on his answer are not tried in the county of his residence.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by the Title Guarantee & Trust Company against the Northwestern Theatrical Association (Seattle Theater Company, garnishee). From a judgment against the garnishee, it appeals. Affirmed.

H. S. Griggs, R. C. Strudwick, and W. A. Peters, for appellant. W. O. Chapman, for Title Guarantee & Trust Co., plaintiff. T. L. Stiles and J. M. Ashton, for Northwestern Theatrical Ass'n, respondent.

REAVIS, J. Plaintiff commenced an action in King county against defendant, and in such action filed an affidavit for a writ of garnishment, and the garnishee (appellant) was summoned to answer. The defendant appeared and demurred to the complaint, and demanded that the place of trial be changed to Pierce county, whereupon a change of venue for the trial of the action to Pierce county was granted, and the cause was afterwards tried in that county. Thereupon the garnishee (appellant) objected to the jurisdiction of the court to try the controversy involved in the garnishment in Pierce county, because of the residence of the garnishee (appellant) in King county. The merits of the controversy involved the indebtedness of the garnishee (appellant) to the defendant under a written contract with the defendant, a theatrical association, which was an undertaking on the part of the association to furnish the garnishee (appellant), a theater

company, with attractions in theatrical exhibitions in Seattle.

There are substantially two questions presented on appeal. The first is the jurisdiction of the superior court of Pierce county to determine the garnishment proceeding. The garnishment issue was auxiliary and ancillary to the main action, and a part of such action. Under section 22 of the statute relative to garnishments (Laws 1893, p. 95), it is declared that, if the answer of the garnishee is controverted, it shall be tried as other cases: provided, however, no pleadings shall be necessary on such issue, other than the affidavit of the plaintiff and the answer of the garnishee, and the reply controverting such answer. We do not think that section 4855, 2 Ballinger's Ann. Codes & St., relates to garnishments. It is applicable to original or independent actions. See *Sherwood v. Stevenson*, 25 Conn. 437; *Railway Co. v. Reynolds*, 72 Ill. 487, *Miller v. Mason*, 51 Iowa, 239, 1 N. W. 483; *Trust Co. v. Pitner*, 17 Wash. 365, 49 Pac. 505; *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478. But garnishee (appellant) filed an answer and waived a jury in the proceeding. The proceeding was properly heard where the main action was tried.

Upon the merits of the controversy here, the findings of the superior court sustained the judgment. The principal issue was the establishment and construction of the written contract between defendant and garnishee (appellant), and we are satisfied with the construction given the contract. We have examined the evidence in connection with the findings of fact, and they are sufficiently supported to apply the rule that the findings of the trial court will not be disturbed if there is substantial evidence sustaining them. The judgment is affirmed.

DUNBAR, C. J., and FULLERTON, J., concur.

(23 Wash. 520)

KIMBALL v. SCHOOL DIST. NO. 122 OF SPOKANE COUNTY et al.

(Supreme Court of Washington. Dec. 13, 1900.)

SCHOOLS AND SCHOOL DISTRICTS—TEACHER'S CERTIFICATES—COLLATERAL ATTACK—CONTRACTS—ENTIRETY.

1. In an action by a school-teacher against a school district to recover on a contract to teach the public schools of such district, a temporary certificate issued by the superintendent of county schools, entitling the holder to teach therein, was not subject to collateral attack, there being no allegation of fraud, since such officer was presumed to have faithfully discharged his duty, in the issuance thereof.

2. Plaintiff contracted with defendant school district to teach a public school for a term of nine months from September 16th, the contract specifying that she should not be entitled to compensation after expiration of her teacher's certificate. Subsequently she failed to obtain such certificate covering the period contracted for, but was granted a temporary certificate by the superintendent of county schools,

entitling her to teach until the next regular examination, on November 15th. The school district refused to allow her to enter on her duties at the beginning of the term, and plaintiff brought suit for the contract price for the full term. *Held*, that plaintiff could not recover, since her failure to qualify as a teacher for the full term was a breach of a material part of an entire contract, releasing the other party from all obligation thereunder.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by Maud Kimball against school district No. 122 of Spokane county and others. From a judgment for plaintiff, defendants appeal. Reversed.

Danson & Huneke, for appellants. S. G. Allen and Jas. Dawson, for respondent.

WHITE, J. The plaintiff brings this action against school district No. 122 of Spokane county to recover on a contract to teach the public school of said district. She alleges that on the 6th of May, 1895, she entered into a contract with the defendants for that purpose, substantially as follows: "It is hereby agreed by and between the directors of school district No. 122, county of Spokane, state of Washington, and Maud Kimball, the holder of a teacher's certificate, now in force in said county, that said teacher is to teach and govern and conduct the public school of said district," etc., "for a term of nine months, commencing on the 16th day of September, 1895, for the sum of sixty dollars per month, to be paid at the end of each school month," etc., "provided that if said teacher shall be legally dismissed from school, or shall have her certificate lawfully annulled by expiration or otherwise, then said teacher shall not be entitled to compensation from and after such dismissal or annulment," etc. She further alleges that on the 16th day of September, 1895, she was ready, willing, and able to perform the conditions of said contract on her part to be performed, and was so ready, willing, and able to perform the same during said term of nine months commencing on said 16th day of September, 1895; that on said 16th day of September, 1895, and at other days and dates thereafter, during said term, plaintiff offered to perform the same, but the defendant wrongfully and without cause wholly failed and refused to permit her to teach said school, to her damage in the sum of \$540. The answer of the defendants amounts to a general denial of the portion of the complaint above set out, and also denies the damages. It is further set out, as a separate defense, that the plaintiff did not hold a certificate from the county superintendent of the county, or from any other source, licensing her to teach school for the school year commencing September 16, 1895; that the certificate which she had held for the preceding year prior to the 16th of September, 1895, had lapsed and expired, and on said date was of no force and effect; that said plaintiff had

taken an examination prior to said 16th day of September, 1895, but had failed to pass said examination, and failed to obtain from said county superintendent a certificate, said county superintendent refusing to issue her a certificate for the reason that he had found her incompetent by reason of her having failed to successfully pass an examination; that the board of directors refused to allow her to teach, for the reason that she did not have the certificate provided for in said agreement, and for the further reason that she was incompetent. This affirmative defense was denied by the plaintiff.

The proof establishes the making of the contract as alleged. It further appears from the evidence that when the contract was entered into the plaintiff was the holder of a third-grade county certificate, entitling her to teach in Spokane county for one year from the 13th day of August, 1894. It further appeared that in August, 1895, the plaintiff was a resident of Spokane county, and that she appeared before the board of examiners of Spokane county, and took an examination for a teacher's certificate, but she failed to pass, and was refused a certificate. She made no complaint at the time of the examination that she was unwell and unable to take the examination. The court admitted evidence in rebuttal tending to show that the plaintiff was unwell and unable to take the examination. After her failure to take the examination, the county superintendent of schools for Spokane county granted her a temporary certificate, as follows: "Temporary Certificate. Common Schools of the State of Washington. This is to certify that Miss Maud Kimball, having filed in my office evidence of being a person of good moral character and of ability to teach and govern, is hereby granted this temporary certificate, which entitles her to teach in the common schools of Spokane county, state of Washington, until the next regular examination of teachers of said county. This certificate is granted upon the following evidence of ability to teach, viz.: Third grade certificate granted August 18, 1895 [1894]; nine months' experience, district No. 122. Valid until Nov. 15, 1895. Dated at Spokane, this 26th day of August, 1895. Z. Stewart, Superintendent County Schools, Spokane County, Washington." The evidence further tends to show that on September 16, 1895, the plaintiff presented herself with this certificate to the board of directors of the defendant district, at the school house of the district, to carry out her contract; but the directors refused to allow her to teach, and substituted another in her place. The evidence tends to show that the directors knew that she had failed to pass an examination before the board of examiners. No evidence was offered to prove that at any time after August, 1895, the plaintiff had a teacher's certificate other than the temporary certificate above set forth. The jury found a verdict in favor of the

plaintiff for the full amount claimed. A motion was made to set aside the verdict and for a new trial, on the grounds: (1) Insufficiency of the evidence to justify the verdict; (2) that the verdict is against the law; (3) error in law occurring at the trial and excepted to at the time. This motion was overruled, and judgment was entered upon the verdict. Proper exceptions were taken to the rulings of the court and the entry of the judgment.

At the close of the plaintiff's testimony, the defendants moved the court to grant a nonsuit, and to withdraw the case from the jury, and render judgment for the defendants, stating, as a reason, that the plaintiff had wholly failed to prove a sufficient cause for the jury, and the further reason that the testimony of the plaintiff shows that she was not qualified to teach at the time of the alleged breach of the contract. Proper exceptions were taken to the refusal of the court to grant said motions.

The law in force at the time this contract was entered into, and at the time the plaintiff offered to perform its conditions, was as follows:

"No person shall be accounted as a qualified teacher, within the meaning of the school law, who has not first appeared before the board of examiners of the county in which he proposes to teach and received a certificate setting forth his qualifications; or has not a state certificate or a life diploma from the state board of education, or a temporary certificate granted by the county superintendent." 1 Hill's Code, § 802.

"Each county superintendent shall have the power, and it shall be his duty, * * * to appoint, for one year, two persons holding the highest grade certificate in his county, and such persons, with the county superintendent, shall constitute a board of examiners for the examination of teachers. It shall be the duty of the county board of examiners in all counties to be at the county seat on the second Thursday of the months of February, May, August, and November of each year for the purpose of examining teachers. The superintendent shall give ten days' notice of the same by publication in some newspaper of general circulation, published in his county, or if there be no newspaper, then by posting up handbills, or otherwise. Such examination shall be conducted according to the rules prescribed by the state board of education, and no other questions shall be used except those furnished by the said board." Id. § 776.

"* * * Any teacher to whom certificate has been granted by any county board of examiners in this state, or by lawful examiners in any other state or territory, the requirements to obtain which shall not have been less than the requirements to obtain a certificate in this state, or any teacher holding a diploma or certificate of graduation from any state or territorial normal school or univer-

sity, or from the normal department of the university of Washington, may present the same, or a certified copy thereof, to the county superintendent of any county in this state where said teacher desires to teach, and it shall be the duty of said county superintendent, upon such evidence of fitness to teach, to grant to said person a temporary certificate, which shall entitle him to teach in the common schools of the county wherein it is granted until the next examination of teachers: provided, that the provisions of this clause shall apply only to such teachers as were not residents of the county at the time of the last preceding examination, or were unable, by reason of sickness or other unavoidable cause, to attend said examination; and provided, further, that the county superintendent may require of such person a written statement of such facts, verified by affidavit; and provided, further, that the county board may, at their discretion, indorse certificates from other counties in this state for the unexpired term thereof. All applicants for certificates shall be at least seventeen years of age, shall have attended a teachers' institute, and shall be examined in reading, penmanship, orthography, written and mental arithmetic, geography, English grammar, physiology and hygiene, history and constitution of the United States, school law and constitution of the state of Washington, and the theory and art of teaching; but no person shall receive a first-grade certificate who does not pass a satisfactory examination in the additional branches of natural philosophy, English literature, and algebra." *Id.* § 777.

The appellants maintain that temporary certificates can be granted only to persons who were not residents of the county at the last preceding examination, or who were unable, by reason of sickness or other unavoidable cause, to attend said examination; that inasmuch as the plaintiff was a resident of the county, and attended the last examination, and failed to pass, the temporary certificate given to her was void, and that it appeared from the face of it that it was void. A case might arise where a person was taken sick during the examination, and, for that reason, would be unable to take the examination. We have no doubt that under such circumstances the superintendent could grant a temporary certificate until the next examination. It is doubtful, however, whether such certificate can be issued to a person who has taken the examination before the board, and failed, without complaint as to sickness at the time of taking the examination. The respondent, however, contends that it is not necessary to set forth in the temporary certificate the reason for which it is granted; that the presumption is in favor of the superintendent doing his duty, and that he either knew the fact of the sickness of the plaintiff or required the necessary affidavit of that fact; that the responsibility for issuing the certificate is upon the superintendent. She

cites in support of her contention the well-known rule that "the law constantly presumes that public officers charged with the performance of official duty have not neglected the same, but have duly performed it at the proper time and in the proper manner. In the absence of evidence to the contrary, this presumption will prevail, but it is not an indisputable one, and may be overcome by countervailing evidence. Where the rights of the public require it, the presumption in favor of due performance is liberal, and the evidence to overthrow it must be clear. This presumption is in accordance with the established and familiar maxim, '*Omnia præsuntur rite et solemniter esse acta donec probetur in contrarium*,'—everything is presumed to be rightly and duly performed until the contrary is shown. The presumption is constantly indulged in support of all kinds of official action." *Mechem, Pub. Off.* § 579.

The statute does not require the superintendent to set forth in the temporary certificate the reason for which it was given. In no event can he give such temporary certificate unless there is evidence of the fitness of the applicant to teach. The recital in the temporary certificate that "this certificate is granted upon the following evidence of ability to teach, viz.: Third-grade certificate granted August 18, 1895 [1894]; nine months' experience district No. 122,"—simply sets forth the statutory requirement of the evidence of fitness to teach, and not the reason for issuing the temporary certificate. We do not think that this temporary certificate was subject to a collateral attack. We do not mean, however, to hold that it could not be assailed for fraud, but the pleadings in this case contain no allegations of fraud or collusion in obtaining the certificate. *George v. School Dist.*, 20 Vt. 495; *State v. Grosvenor*, 19 Neb. 494, 27 N. W. 728; *School Dist. v. Sterricker*, 86 Ill. 595; *Doyle v. School Directors*, 36 Ill. App. 653.

The appellants claim, however, that it was incumbent upon the respondent to show at the time she offered to teach that she was duly licensed to teach for the full term of nine months from September 16, 1895. This contention, we think, is sound. The respondent contracted to teach for a full term of nine months. This is an entire contract. She sues upon it as an entire contract, and recovers upon it as an entire contract. The respondent by the contract bound herself to render continuous services as a teacher for nine months. She proves ability to teach only two months of that term, and fails to show that she was qualified in any respect to teach the remaining seven months. The board of directors, when she tendered her services with a temporary certificate good for two months only, were not required under the contract to allow her to enter upon her duties as a teacher, and take the chances of her securing a certificate at the November examination. No rule of law is better settled

than that, if a contract is entire, it can be enforced only in its entirety, and a breach as to any material part of an entire contract is a complete discharge, and releases the other party from his obligations to perform. "Where a party fails to comply substantially with an agreement, unless it is apportionable, the rule is well settled that he cannot sue upon the agreement, or recover upon it at all. And under the strict common-law rule he was remediless. But the doctrine has now grown up, based upon equitable principles, that where anything has been done from which the other party has received substantial benefit, and which he has appropriated, a recovery may be had upon a quantum meruit, based on that benefit. And the basis of this recovery is not the original contract, but a new implied agreement, deducible from the delivery and acceptance of some valuable service or thing." *Allen v. McKibbin*, 5 Mich. 449. See also, *Krumb v. Campbell*, 102 Cal. 370, 36 Pac. 664; *Monell v. Burns*, 4 Denlo, 121. If the respondent had been allowed to enter upon the discharge of her contract, and had taught the two months and failed to get a new certificate, she could have recovered for the two months, not on the contract, however, but because an implied contract arose as to the two months. *Hotz v. School Dist. (Colo. App.)* 27 Pac. 15; *Allen v. McKibbin*, supra. As a condition precedent to the plaintiff's right of recovery in this action, she should have shown that when she offered her services to the appellants she was qualified to teach, under the laws of this state, for the full nine months contracted for. Having failed to do this, she was not entitled to recover on the alleged contract. The judgment of the court below is reversed, with instructions to dismiss this action at the cost of the respondent, the appellants to recover their costs on appeal.

DUNBAR, O. J., and FULLERTON and REAVIS, JJ., concur.

(23 Wash. 409)

PALMER et al. v. LABEREE et al.

(Supreme Court of Washington. Dec. 6, 1900.)

JUDGMENTS — REVIVAL — PROCEEDINGS FOR REVIVAL — STATUTES — CONSTITUTIONALITY — INTEREST.

1. Sess. Laws 1897, p. 52, § 1, provides that after six years from the rendition of any judgment it shall cease to be a lien against the estate of the judgment debtor. Section 2 provides that no action shall be had on any judgment to continue the lien in force for any longer period than six years from its entry; and section 4 repeals 2 Hill's Code, §§ 462, 463, relating to the renewal of judgments. *Held*, that the fact that the supreme court had formerly construed section 2 of the act of 1897 unconstitutional as impairing contracts did not preclude a judgment creditor from reviving his judgment under Hill's Code, §§ 462, 463, on the ground that section 4 of the act of 1897, repealing them, was left in force, though section 2 was invalid, since such act does not fall within the class of acts which, though unconstitu-

tional in part, may be enforced as to the remainder, as the legislature intended it to be carried into effect as a whole; and hence, being unconstitutional as a whole, the judgment creditor was left to the remedy provided by such sections of the Code.

2. In an action to revive a judgment under 2 Hill's Code, §§ 462, 463, commenced before the expiration of six years from its rendition, though not tried until after such period had expired, an objection to receiving the judgment in evidence on the ground that Sess. Laws 1897, § 1, provides that after the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate of the judgment debtor, is untenable, since such act is unconstitutional, as impairing the obligation of contracts.

3. Sess. Laws 1893, p. 29, fixes the legal rate of interest at 8 per cent. per annum. Sess. Laws 1895, p. 350, declares that judgments founded on written contracts shall bear the interest specified therein if the rate is specified in the judgment, otherwise such judgments shall bear 7 per cent. interest; and Sess. Laws 1899, p. 129, provides that judgments on written contracts shall bear the interest specified therein, not exceeding 10 per cent., which shall be specified in the judgment, and all other judgments shall bear 6 per cent. interest. Sess. Laws 1895 and 1899 provide that they shall not be construed to affect prior contracts. *Held*, that on reviving a judgment in which no interest was specified, and which was entered in 1894 on a note bearing 12 per cent. interest, the judgment creditor should be allowed interest at 8 per cent. until Sess. Laws 1895 took effect, from then until Sess. Laws 1899 took effect at 7 per cent., and at 6 per cent. under the latter laws until the date of the revival, since the proviso that Sess. Laws 1895 and 1899 were not to affect prior contracts relates only to contracts between parties, and not to rights arising by operation of law.

Appeal from superior court, Okanogan county; C. H. Neal, Judge.

Application by Lillian M. O'Herin, as assignee of John S. Palmer, to revive a judgment in favor of her assignor against O. G. Laberee and others. From an order reviving such judgment, O. G. Laberee appeals. Modified and affirmed.

Graves & Graves, for appellant. Martin & Grant, for respondents.

WHITE, J. Lillian M. O'Herin, the respondent herein, who claims title by bequest from John S. Palmer (who was the plaintiff and judgment creditor) to a judgment rendered in this cause in April, 1894, against the appellant, Laberee, and others, filed a motion to revive the judgment, proceeding under sections 462, 463, 2 Hill's Code, relating to the revival of judgments. The appellant and the defendant Loudon were the only judgment debtors served with notice, and appellant alone appeared and defended. He interposed a demurrer, which was overruled, and then answered, putting in issue the ownership of the judgment and its existence as a demand against him. A trial was had, and an order was made reviving the judgment. From this order the appeal is taken.

The principal contention of appellant is: That proceedings to revive the judgment cannot be prosecuted because the statute pro-

viding for the revival of judgments has been repealed by the act of March 6, 1897, entitled "An act relating to the duration of judgments and repealing sections 462 and 463, volume 2, Hill's Code of Washington." Sess. Laws 1897, p. 52. That, though that act, as originally adopted, was obnoxious to constitutional provisions when applied to judgments founded upon contract obligations incurred prior to the passage of the act, the objection was obviated by the decision in *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815, in which the act was construed, and one section declared unenforceable, and that that decision, in construing the act, entered into and became a part of it. That the remainder of the act, including the repealing clause, is valid, for the court held section 2 of the act, which forbade the prosecution of an action upon a judgment, unenforceable, because to enforce it would deprive the judgment creditor of all remedy; and, if that section is blotted from the act, in cases of this character, by that decision, then the judgment creditor has a remedy, for he may maintain his action upon the judgment as a common-law right. Appellant also contends that, though it be held that the effect of the decision in *Bettman v. Cowley*, supra, was that the judgment creditor could not be deprived of either of the remedies upon his judgment to which he was entitled when the contract was made, sections 1 and 3 yet remain, are enforceable, and forbid the rendition of a judgment or order of revival when more than six years have elapsed since the rendition of the original judgment. The appellant cites many authorities to the effect that a law cannot be assailed by a pre-existing contract creditor merely because it makes a change in the remedy or remedies which he had when the contract was made, nor because it takes away all such remedies, and substitutes another or others in their stead, if it leaves or gives to him a substantial remedy; that he cannot demand an absolute equivalent, but only a sufficient remedy. It may be conceded that this is the law. It must not be forgotten, however, that when the law in question (Sess. Laws 1897, p. 52) emanated from the legislature it left no remedy whatever. The appellant then reasons that, because the court, in passing on the act of 1897 in *Bettman v. Cowley*, supra, held that the legislature could not, as to pre-existing creditors, take away the common-law right of action on a judgment, as contemplated by section 2 of the act, therefore that right still remains, as if the legislature had never attempted to repeal it; and that, being a sufficient remedy, the act is valid as to pre-existing creditors so far as it expressly repeals sections 462 and 463 of 2 Hill's Code. In other words, that the court, by interpretation of the statute, has preserved the common-law remedy, and therefore the same rule applies as if the legislature had expressly

preserved that remedy, and repealed the statutory remedy. This is an ingenious argument, but it ignores the question which we think is decisive of this case. What object did the legislature intend to accomplish by the act of 1897? Two remedies then existed by which a creditor could renew a judgment; one by an action as at common law, the other by statutory proceedings. The legislature intended by the act to take away both these remedies, and to leave no remedy. As was said by Justice Fields in the *Eureka Case*, 4 Sawy. 302, Fed. Cas. No. 4,548, "The inquiry, where any uncertainty exists, always is as to what the legislature intended; and, when that is ascertained, it controls." Courts do not make the laws; they only interpret them for the purpose of ascertaining the legislative intent and adjudging the effect thereof. "The statute itself furnishes the best means of its own exposition; and, if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction. The intention of an act will prevail over the literal sense of its terms." *Suth. St. Const.* § 219. The intent of the act in question can be clearly ascertained from section 2; and, even if section 4 of the act, wherein sections 462 and 463, 2 Hill's Code, were expressly repealed, was not in the act, it is plain by section 2 that not only suits and actions, but all proceedings by which the lien or duration of judgments was to be continued, were abrogated. Section 2 reads "No suit, action, or other proceedings shall ever be had on any judgment," etc. The method of reviving a judgment under the two sections cited from Hill's Code is a "proceeding," and falls within the purview of section 2 of the act of 1897. Courts cannot correct what they deem excesses in legislation; and where it is plain that the legislature intended to repeal all laws on a certain subject, and by apt language expressed that intention, courts cannot say that the intention was accomplished only to a limited extent. "The certainty of the law is next in importance to its justice; and, if the legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction." *Suth. St. Const.* § 236. All the provisions of this act are connected together as one uniform piece of legislation on one subject. It is plain that the legislature intended the act as a whole, and that it was to be carried into effect as a whole. The act does not fall within that class where, at the time of the enactment, it is partly constitutional and partly unconstitutional, and the unconstitutional part may be stricken out, and that remaining may be enforced in accordance with the legislative intent, wholly independent of that which was rejected. Here

the entire act as to a certain class of creditors was unconstitutional, it being the legislative intent that a judgment should not be extended or revived by any method. Because the court has declared this intent of no avail as to one remedy, we are asked to conclude that the legislative intent prevails as to the other remedy. That would make the legislative intent depend upon the decision of the court. This is an absurdity. "The rule is that, if the invalid portions can be separated from the rest, and if, after their exclusion, there remains a complete, intelligible, and valid statute, capable of being executed, and conforming to the general purpose and intent of the legislature, as shown in the act, it will not be adjudged unconstitutional in toto, but sustained to that extent. * * * But when the parts of the statute are so mutually dependent and connected, as conditions, considerations, inducements, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Black, *Interp. Laws*, p. 96.

The judgment sought to be revived was rendered April 10, 1894. On April 3, 1900, the motion to revive was served upon appellant. The case came on for trial in May, 1900. By his answer, appellant put in issue the existence of the judgment. To prove the issue, respondent offered the judgment in evidence in May, 1900. It was received over appellant's objection that it was no longer a charge against him. This objection is based upon the wording of section 1 of the act of 1897, which is as follows: "After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor." The appellant contends that this section of the act, at least, is in force, and that one who sues upon a judgment or revives one must not only commence his action or proceeding within the six years, but must obtain his judgment or order of revival within that time; and that in this case, while the proceedings were commenced within the six years, the revival was not had until the six years had expired, and that the original judgment was improperly received in evidence to establish an existing liability when the judgment itself had ceased to be, and had become as so much waste paper. In commenting on this section, counsel for appellant says: "It does not deal with the remedy to enforce an obligation, but with the obligation itself; declaring that upon the expiration of a certain period it shall cease to exist. Observe in limitation statutes the universal language. In all the provision is that 'actions can only be commenced' or that 'actions must be commenced' within a certain

period. But the commencement of actions is not referred to in this statute. It goes directly to the obligation itself, and destroys it." It seems to us that, if the destruction of the remedy impairs the obligation of a contract, and is, therefore, unconstitutional, the destruction of the thing itself, to which the remedy is but an incident, is also unconstitutional. To say that a judgment shall not be a charge against the estate or person of the debtor destroys the obligation, and amounts to legislative confiscation. In effect, it takes the property of the creditor, and gives it to the debtor without due process of law. Such legislation is obnoxious to all constitutional restriction, and should not be upheld. Section 3 is in the nature of a proviso to section 1, and should be read and considered as part of that section. The court, in *Bettman v. Cowley*, supra, quotes with approval from *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143, as follows: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." This authority holds that it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. In either case it is prohibited by the constitution, and under this decision as to existing judgments growing out of contract sections 1 and 3 must fall with the rest of the act. In *Bettman v. Cowley*, supra, the court also held that the act in question was not a statute of limitation, and this holding, it seems to us, disposes of the second question raised by the appellant. We think that the legislative intent as expressed in this act not only sought to destroy existing judgments, but the act was intended to deny any remedy whereby existing judgments could be extended, and that the act was intended as a whole, and to be carried into effect as such; and, that being the case, so far as it refers to contracts which were in existence at the time the law was enacted it is unconstitutional, and that the respondent had a right to revive his judgment under sections 462 and 463, 2 Hill's Code, or by an action at common law, and to put in evidence the original judgment in the revival proceedings, as if the act in question had never been passed by the legislature. Black, *Interp. Laws*, supra.

As to the amount for which the judgment was revived, we think proper exceptions were taken by the appellant to the first and second findings of fact, wherein the amount to be credited as payment on the original judgment and the amount of interest were found by the court below, and on these exceptions we can review such findings. On the 5th day of November, 1892, at Loomiston, in

Okanogon county, Wash., O. G. Laberee and G. W. Loudon made, executed, and delivered to John S. Palmer their certain promissory note in writing, whereby they promised to pay John S. Palmer the sum of \$6,000, with interest thereon from date at the rate of 1 per cent. per month. The original judgment was upon this note. The law in force when this contract was entered into as to interest on judgments was: "Judgments shall bear the legal rate of interest from date thereof, except when rendered upon an express contract in writing wherein a different rate of interest is agreed upon by the parties, in which case the judgment shall, until paid and satisfied, bear the same rate of interest specified in such written contract." 2 Hill's Code, § 459. "Revived judgments shall bear the same interest and be in all respects similar to original judgments as to lien and enforcement or collection." Id. § 463.

In 1893 the legislature enacted as follows (Sess. Laws 1893, p. 29):

"Section 1. The legal rate of interest shall be eight per cent. per annum."

"Sec. 4. Judgments shall bear the legal rate of interest from date of the entry thereof.

"Sec. 5. All acts or parts of acts in conflict herewith are hereby repealed."

In 1895 the legislature enacted as follows (Sess. Laws 1895, p. 350):

"Sec. 4. Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts: provided, that said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of seven per centum per annum from date of entry thereof."

"Sec. 6. Nothing herein contained shall be construed as affecting any contract or obligation made or entered into prior to the taking effect of this act, nor the rate of interest provided by law for state, municipal or other public bonds."

In 1899 the legislature enacted as follows: (Sess. Laws 1899, p. 129):

"Sec. 6. Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten per cent. per annum: provided, that said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof."

"Sec. 8. Nothing herein contained shall be construed as affecting previous to entry of judgment thereon any contract or obligation made or entered into prior to the taking effect of this act."

Section 9 repeals the act of 1895, "provided, however, that the repeal thereof shall not affect any existing contract."

After allowing certain credits, of which

we will speak further on, the court rendered judgment of revival in favor of respondent for the sum of \$4,577 principal and \$3,344.15 interest, being interest at the rate of 12 per cent. per annum from April 10, 1894, the date of the original judgment, until May 26, 1900, the date of the judgment of revival. The original judgment is "that the plaintiff, John S. Palmer, do have and recover of and from the defendants, O. G. Laberee and G. W. Loudon, the sum of five thousand three hundred fifty two and $\frac{12}{100}$ dollars, together with the costs and disbursements incurred herein, taxed at \$26.05, together with an attorney fee of \$100.00." The respondent claims that the original judgment was on a note given November 5, 1892, due one year after date, bearing interest at 12 per cent. per annum until paid. The record fails to disclose any such state of facts, and discloses the facts to be as heretofore set out. It will be presumed that the note described was sued on after maturity. On the facts disclosed, this contract makes no provision for interest after default. "There is considerable conflict of authority as to the rate of interest recoverable after maturity where the contract, though stipulating for interest, and specifying a rate, makes no provision for interest after default in the payment of the principal sum when due." 16 Am. & Eng. Enc. Law (2d Ed.) p. 1053, and cases cited. "The preponderance of opinion is in favor of the doctrine that the stipulated rate attends the contract until it is satisfied or merged in judgment." *Jefferson Co. v. Lewis*, 20 Fla. 1009; *Pearce v. Hennessy*, 10 R. I. 226; *O'Brien v. Young*, 95 N. Y. 428. In the case of *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301, a case that arose under the statute of the territory of Minnesota which provided that "any rate of interest agreed upon by the parties in contract specifying the same in writing shall be legal and valid," and that, "when no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate," the suit was upon two notes, in one of which interest was reserved at the rate of 25 per cent. per annum, and in the other at the rate of 2 per cent. a month. The supreme court of the territory held that interest was payable on the notes at the stipulated rate after as well as before their maturity. In the supreme court of the United States this decision was reversed, and Chief Justice Taney, in giving judgment, said: "There is no stipulation in relation to interest after the notes become due in case the debtor should fail to pay them; and if the right to interest depended altogether on contract, and was not given by law, the appellee would be entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract." The supreme

court of the United States referred in support of its decision to the case of *Ludwick v. Huntzinger*, 5 Watts & S. 51, in which, the stipulated interest on a bond being less than the legal rate, interest was allowed subsequent to the maturity of the bond at the legal rate. The supreme court of Pennsylvania, in its opinion, said: "Until the bond became payable, the agreement of the parties regulated the allowance of interest and the rate of it, but after that the law interposed, not only to allow, but to regulate, the rate of interest that should be allowed by the defendant or debtor for and on account of his illegal detention of the debt from the plaintiffs."

The respondent claims that section 459, 2 Hill's Code, *supra*, entered into and became a part of the contract when the note was given, that being law relative to interest on judgments at the time; and that to deny interest at the rate mentioned in the note is to impair the obligation of the contract. It will be seen from *Brewster v. Wakefield*, *supra*, and *Ludwick v. Huntzinger*, *supra*, that where a note is entirely silent as to interest after it is due, the creditor is entitled to interest by operation of law; and that until the note became payable the agreement of the parties regulated the allowance and the rate of interest, but after that the law interposed not only to allow, but to regulate, the rate of interest that should be allowed the creditor for and on account of the illegal detention of the debt. When the contract was entered into, the contracting parties knew that this rate was liable to be changed by the legislature, and must be considered as having contracted with knowledge of that fact. In 1 *Suth. Dam.* p. 514, it is said: "A contract for the payment of money at a definite future time, with a stipulation for the payment of interest at a specified rate, stands, if not performed, after the date fixed for the payment of the principal, simply as a chose in action. The contract has then no future. The time has elapsed for performance. There remains but a right of action for damages. There is no continuing contract to pay interest in any other sense than there is a continuing contract to pay the principal. The promise was, as to both, to pay at a day which is past." In the case of *Morley v. Railway Co.*, 146 U. S. 168, 13 *Sup. Ct.* 56, 38 *L. Ed.* 928, the supreme court says: "Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the constitution. But, if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract; and whether, after maturity, and a failure to pay, interest shall accrue, depends wholly on the law of the state as declared by its statutes. If the state

declares that in case of the breach of a contract interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment. After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed, or cease to accrue. Should the statutory damages for nonpayment of a judgment be determined by a state, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe." In the case of *Bank v. Brown*, 61 *Pac.* 465, the supreme court of Wyoming says: "The contract has been merged in the judgment, or, as has been said, it has been extinguished by the judgment, which is a higher security. 'The liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed.' *McDonald v. Dickson*, 87 *N. C.* 404. A familiar principle will serve to clearly illustrate this. It is well settled that a judgment carries only such a rate of interest as may be established by law, notwithstanding that the contract or cause of action on which it was founded may bear a higher rate; and this is so because of the merger of the contract in the judgment, and thereafter the law, and not the parties, prescribes the interest." In 1893, before the original judgment in this action was obtained, the legislature fixed the legal rate of interest at 8 per cent., and provided that judgments should bear the legal rate from the date of entry, and expressly repealed all acts in conflict. In 1895 the legislature declared that judgments founded upon written contracts should bear interest at the rate specified in such contracts, provided said interest rate was set forth in the judgment (in the case at bar no interest rate is set forth in the judgment), and all other judgments should

bear interest at the rate of 7 per cent. There was also a provision in the act of 1895 that nothing therein contained should be construed as affecting any contract or obligation made or entered into prior to the taking effect of the act. This exception, in our opinion, applies only to contracts and obligations between the parties, and not to rights or obligations arising by operation of law. This same objection was made in the case of *O'Brien v. Young*, supra. In that case Earl, J., in delivering the opinion of the court, says: "It is claimed that the provision in section 1 of the act of 1879, which reduced the rate of interest (chapter 538), saves this judgment from the operation of that act. The provision is that 'nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act.' The answer to this claim is that here there was no contract to pay interest at any given rate. The implied contract, as I have shown, was to pay such interest as the law prescribed, and that contract is not affected or interfered with." In *Morley v. Railway Co.*, supra, the court says: "He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe." In 1899 the legislature declared that judgments founded upon written contracts providing for the payment of interest until paid at a specified rate should bear interest until paid at the rate specified, not exceeding 10 per cent., and that said rate should be set forth in the judgment. All other judgments should bear interest at the rate of 6 per cent. per annum from date of entry. A clause similar to the act of 1895, that the act should not be construed as affecting any contract or obligation made on or entered into prior to the taking effect of the act, was included in this act, and it expressly repealed the law of 1895. The judgment in this case was rendered upon the 10th day of April, 1894. We think, from the authorities cited, which state, in our opinion, the law, that computation of interest should be as follows: 8 per cent. per annum on the amount due on the judgment after allowing credit for payments thereon from April 10, 1894, until the law of 1895 (Sess. Laws 1895, p. 349) went into effect, June 13, 1895; and from that time until the law of 1899 (Sess. Laws 1899, p. 128) went into effect, June 8, 1899, at the rate of 7 per cent. per annum; and from the time Laws of 1899 went into effect until May 26, 1900, at the rate of 6 per cent. per annum. The amount of interest computed on this basis from April 10, 1894, to May 26, 1900, the date of the revived judgment, is \$1,974.14, being \$1,370.01 less than that awarded by the court below.

The record shows that the court revived the judgment for the sum of \$4,577 as the principal of the judgment. The original judgment was for \$5,352.12, and, in addition, an

attorney's fee of \$100, and costs amounting to \$26.05. The sheriff sold property on execution on the original judgment for \$928, and incurred \$27.31 costs in so doing. After deducting the attorney fee, and all the costs, and giving credit for the balance realized by the sheriff, this leaves the sum of \$4,577.48 as the principal of the judgment April 10, 1894. The error amounts to only 48 cents, and is against the respondent. The appellant has nothing to complain of in this respect. Inasmuch as the court below erred in allowing interest at 12 per cent. per annum on the revived judgment from April 10, 1894, it is ordered that the court below remit from the judgment on account of interest as of the date of May 26, 1900, the sum of \$1,370.01. In all other respects the judgment of the court below is affirmed. The appellant to recover his costs on this appeal.

DUNBAR, C. J., and ANDERS, J., concur.

(23 Wash. 573.)

STATE ex rel. CALDERWOOD v. SCHOMBER, Justice of the Peace.

(Supreme Court of Washington. Dec. 17, 1900.)

CRIMINAL LAW—VENUE—STATUTES—CONSTRUCTION.

Since Act March 7, 1899 (Laws 1899, p. 53), providing that all actions commenced before a justice of the peace shall be brought in the justice's court of the precinct in which one or more of the defendants resides, is applicable only to civil actions, an accused charged with an offense cognizable by a justice of the peace may be tried in the precinct where the offense is committed, though it is other than that in which he resides.

Appeal from superior court, Thurston county; O. V. Linn, Judge.

Application by the state, on relation of D. F. Calderwood, against Fred Schomber, as justice of the peace for Olympia precinct, Thurston county, for a writ of prohibition restraining the defendant from trying relator for a certain offense. From a judgment granting the writ, defendant appeals. Reversed.

Geo. H. Funk, for appellant. W. I. Agnew, for respondent.

WHITE, J. On the 8th day of June, 1900, there was filed with the appellant here, a duly elected and qualified justice of the peace for Olympia precinct, Thurston county, a written complaint, duly verified as required by law, charging the respondent, D. F. Calderwood, with the offense of "assault and battery," committed against the person of one Frank Warner, a child 13 years of age, the offense being alleged to have been committed in the town of Tenino, Thurston county; that thereupon a warrant was issued, the respondent duly arrested and brought before the court upon the said 8th day of June,

1900, and he entered into a bond conditioned for his appearance upon the 12th day of June, 1900, at which time he appeared and demurred to the complaint for want of jurisdiction over him, which demurrer being overruled, he applied to the superior court of Thurston county for a writ of prohibition restraining the said appellant, as justice, from proceeding to try him for the offense of which he stood accused; that the said superior court on said 12th day of June, 1900, granted an alternative writ of prohibition, returnable on the 14th day of June, 1900, at the hour of 10 o'clock a. m.; that the appellant, in obedience to said alternative writ, appeared before the court upon the date mentioned, and moved the said superior court to quash and dismiss the said alternative writ of prohibition, which motion was denied; that thereupon the said appellant filed his return to the said writ, and the court, after argument, rendered judgment making the said alternative writ of prohibition absolute, and permanently restrained the appellant, as justice, from proceedings to try and punish the said respondent for the offense with which he stood accused. From said judgment the appellant prosecutes this appeal.

The controversy in this cause is the result of a "three-line" indiscretion on the part of the legislature. The act of March 7, 1899 (Laws 1899, p. 53) is as follows: "All actions commenced before a justice of the peace shall be brought in the justice court of the precinct in which one or more of the defendants reside." The lower court held that this act applied to criminal actions as well as to civil actions, and, inasmuch as it appeared that the respondent was accused of an offense cognizable in justice court, he must, under the terms of this act, be tried before the justice of the precinct where he claimed his residence, and could not be tried before the appellant (another justice of the same county) even though, as appears in respondent's return, there was no justice in Tenino precinct. Appellant contends that this act was intended to apply solely to civil actions, and that the court is therefore in error in applying it to criminal actions, and, if this error be not corrected, it will have the effect of very seriously incumbering the administration of the criminal law.

Many definitions of the term "action" have been given by the courts. That by Bouvier seems to us to be the most comprehensive. He defines the term thus: "The formal demand of one's rights from another person or party made and insisted on in a court of justice. In a quite common sense, 'action' includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person or party of another in such court, including an adjudication upon the right, and its enforcement or denial by the court." He defines a civil action to be "those actions which have for their object the recovery of private or civil rights, or of

compensation for their infraction." He defines a criminal action to be "those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of a crime." It will be seen that civil and criminal actions are included within the definition of the term "action." In one instance the demand is made to the court by the individual for an infringement of a private right. In the other the demand is made to the court by the sovereign for the redress of a public injury. The appellant claims that, when the word "action" is used in our statutes, it refers only to a civil proceeding, and in support thereof cites us to sections 4793-4824, inclusive, 2 Ballinger's Ann. Codes & St. These sections, from the context, clearly refer to civil actions. Section 4793 reads, "There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." Here the legislature has used the term "civil" in connection with the term "action." Section 6788 reads, "Except as otherwise specially provided by statute, all criminal actions shall be commenced and tried in the county where the offense was committed." Section 6800 reads, "All the forms of pleadings in criminal actions heretofore existing are abolished. * * *" It would seem from an examination of these statutes that the legislature has, when legislating as to one class, used the term "civil," and when legislating as to the other has used the term "criminal," and has not used the term "action" as applying to civil proceedings alone. There is no doubt that the term "actions," as used in the statute of 1899, is comprehensive enough to include both civil and criminal actions, but should it be given that construction? Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation. But where different statutes bear upon each other, and they would be rendered inconsistent or absurd or unconstitutional by such literal interpretation, a departure from the obvious meaning of the words is justifiable. "A statute should be construed with reference to its spirit and reason, and the courts have power to declare that a case which falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the legislature. This rule was very clearly and positively laid down by the supreme court of the United States in an important case, which involved a construction of the so-called 'Alien Contract Labor Law.' This act of congress prohibits the importation into this country of 'any' foreigners under contract to perform 'labor or service of any kind.' The question arose as to its applicability to a clergyman who came to this country under contract to enter the service

of a church as its rector. The court conceded that the case came within the letter of the law, but, because it was not within the spirit and intent of the law, it was held that the act had no application to the case at bar. 'It is a familiar rule,' said the court, 'that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include the act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.' And speaking to the case at bar: 'The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.'" Black, *Interp. Laws*, p. 48, and cases cited.

If a statute is susceptible of two constructions, one of which would render it constitutional, and the other not, it is to receive the former construction, as presumptively expressing the legislative intent. *Dow v. Norris*, 4 N. H. 16. The venue in civil actions under the General Statutes of the state depends upon the situs of the subject-matter or the residence of the parties, or where they may be found, or where the cause arose. See sections 4852-4855, inclusive, also sections 5499, 5692, 2 Ballinger's Ann. Codes & St. There is no restriction in the constitution as to the power of the legislature to determine the venue in civil actions. In criminal prosecutions it is expressly provided by the constitution that the accused shall "have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." Section 1, art. 22, of the constitution. The constitution and the general legislation of the state (see section 6788, 2 Ballinger's Ann. Codes & St.) recognize the universal law in criminal matters that the place of the commission of the offense charged determines the venue. When the act of 1899 was passed, the law relative to the jurisdiction of justice of the peace was

to the effect that the jurisdiction of a justice of the peace should be co-extensive only with the limits of the county in which he was elected or appointed. They were also given concurrent jurisdiction with the superior courts in affrays, assault and battery, violation of estray laws, obstruction of highways and bridges, charging extra tolls at ferries and bridges, neglect of roads by supervisors, public indecency, having obscene books and pamphlets for exhibition, malicious trespass, petit larceny, and in all misdemeanors where the offense is not punishable by imprisonment or by a fine greater than \$100, and public nuisances, and over all criminal cases coming under any city or town ordinance, where the fine did not exceed \$100. Sections 4683, 4684, Id. Suppose a resident of Pierce county is temporarily in Thurston county, and while there commits a criminal offense within the concurrent jurisdiction of a justice of the peace, as prescribed in section 4683, Id. If the act of 1899 is intended to include criminal actions, then the accused must be tried before the justice of the peace of the precinct in which he resides in Pierce county. When arraigned he demands, as he may, a jury trial. The jurisdiction of the justice to summon a jury is co-extensive only with the limits of the county where he holds his office. The accused is then tried by a jury from other than the county where the offense was committed. In case of conviction he appeals to the superior court. What superior court? Of the county where the justice resides and has his office, or of the county where the offense was committed? While the statute relative to appeals in civil actions says the appeal must be to the superior court of the same county where the judgment was rendered, in criminal actions the statute says the appeal shall be to the superior court. The universal practice has been to appeal in criminal cases to the superior court of the county where the judgment was rendered, as in civil actions, and we have no doubt that this is the meaning of the statute. When the accused is arraigned in the superior court he demands again a jury trial. The jurisdiction of the superior court to call a jury extends only to the limits of the county. The accused is then put upon his trial before a jury other than of the county in which the offense was alleged to have been committed, in clear violation of the constitutional provision. This result happens, or the accused cannot be tried and punished for the offense. Suppose, as it might be, the jurisdiction of the superior court is first invoked. Then the accused, under section 6788, Id., must be prosecuted in the county where the offense was committed. Again, suppose a resident of Tacoma, Pierce county, and a resident of Olympia, Thurston county, jointly commit an offense in Olympia, within the concurrent jurisdiction of a justice of the peace; then they may be tried before a justice of the peace either in Olympia or Taco-

ma, because the act says the action may be brought in the justice court of the precinct in which one or more of the defendants reside, while, if the jurisdiction of the superior court should be first invoked, they could be tried only in Thurston county, where the offense was committed. But suppose the offense committed was one within the sole and exclusive jurisdiction of a justice of the peace, as provoking an assault by word, sign, or gesture; the only place in which the accused could be tried, if the respondent's contention is sound, is the precinct in Pierce county where the accused resided. This construction would in effect repeal, to a limited extent, section 4684, Id., defining the limits of the jurisdiction of a justice of the peace. It is a well-known fact that in many precincts in this state there are no justices of the peace. A person residing in such a precinct, under the construction contended for by the respondent, could not be punished at all for an offense committed by him in another precinct, if within the sole and exclusive jurisdiction of a justice of the peace, such as provoking an assault. Such offenders by the mere accident of residence escape punishment, while others are punished if their residence happens to be in the precinct where the offense was committed, and a justice of the peace has there an office. Section 12 of the bill of rights provides that no law shall be passed, granting to any citizen immunities which shall not equally belong to all citizens. It seems to us, the effect of the act in question is to grant just such prohibited immunities, if the construction contended for by respondent is correct. It is not to be presumed that the legislature intended such inharmonious results as to criminal trials as a strict construction of this law effects. "Statutes should be so construed, if possible, as to give effect to all of their clauses and provisions, and each statute should receive such a construction as will make it harmonize with the pre-existing body of law. Antagonism between the act to be interpreted and the previous laws, whether statutory or unwritten, is to be avoided, unless it was clearly the intention of the legislature that such antagonism should arise. * * * Now, it is always presumed * * * that the legislature does not intend to be inconsistent with itself, that it does not intend to make unnecessary changes in the existing laws, and that statutes are not to be repealed by implication. Hence arises the rule that in case of any doubt or ambiguity a statute is to be so construed as to be consistent with itself throughout its extent, and so as to harmonize with the other laws relating to the same or kindred matters. It was an ancient maxim of the law that 'interpretare et concordare leges legibus est optimus interpretandi modus'; that is, to interpret, and (to do it in such a way as) to harmonize laws with laws, is the best method of interpretation. It is

not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation. And so, where an action is brought under a particular section of a statute, which, considered alone, is in conflict with the constitution, and it appears that such statute, as a whole, is in harmony with the constitution, such construction should be given to the particular section as will harmonize with the statute, when considered in the light of the whole enactment. Again, where two statutes on the same subject or on related subjects are apparently in conflict with each other, they are to be reconciled by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act. Thus, a statutory rule must be construed consistently with the whole system of pleading and practice of which it forms a part. When the power to hear and determine statutory misdemeanors is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the state and the corporation will be construed to be concurrent; but, where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail. Again, of two constructions, either of which is warranted by the words of an amendment to a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. And it has been said that while laws must be construed so as to harmonize, if possible, yet, if two statutes interfere, that should be followed which is recommended by the most beneficial reasons." Black. Interp. Laws. pp. 60-62, and cases cited.

To hold that the act of 1899 applies only to civil actions will harmonize it with the legislation on the same subject, and will not tend in any way to destroy the uniformity of trials under our criminal system. This construction is the one recommended by the most beneficial reasons. It therefore follows that the judgment of the court below in granting the absolute writ of prohibition should be, and the same is, reversed, and the writ quashed; the appellant to recover his costs in the court below and on this appeal.

DUNBAR, C. J., and REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 600)

COLLETT v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. Dec. 26, 1900.)

NEGLIGENCE — RAILROADS — INJURIES — EXCAVATION AT HIGHWAY CROSSING — PLEADING AND PROOF — LIGHT — APPEAL — REVIEW — PRESUMPTION — CONTRIBUTORY NEGLIGENCE — EVIDENCE — EXCLUSION — WAIVER OF ERROR.

1. Where, in an action against a railroad company for negligence, an excavation across a highway is stated as the negligent act causing the injury complained of, it is sufficient, on a general denial, to raise an issue as to whether a light was kept there by defendant at the time of the injury.

2. The rule that every intendment will be brought to bear in aid of the judgment has no application to a case in which a legal error has been committed by the court in ruling out relevant testimony, the error in that case being presumed prejudicial, unless the contrary affirmatively appears from the record.

3. In an action against a railroad company for an injury alleged to be due to negligence in making an excavation across a highway, the question whether or not there was a light at the excavation when plaintiff met with the accident complained of is material to determine contributory negligence, and it cannot be presumed, in aid of a judgment for defendant, that the jury may have found plaintiff guilty of such negligence, where evidence as to whether defendant maintained a light was excluded.

4. In an action against a railroad company for an injury alleged to be due to its negligence in making an excavation across a highway, the complaint, after alleging that plaintiff had no knowledge that the crossing was in an exposed and dangerous condition, and that there was no railing or other protection to guard against falling into the excavation, and that the same was left open and wholly unprotected, also alleged that, relying on the fact that the crossing would be safe for travelers, and the night being so dark that he was unable to discern its unsafe condition, he was, without fault on his part, precipitated, etc. *Held*, that a general denial thereto placed in issue the question of light or darkness at the excavation, and that defendant was sufficiently notified of the defense it would be required to make in that respect.

5. Where testimony offered in plaintiff's behalf was rejected on the ground that it was irrelevant to any issue raised by the pleading, and plaintiff moved to amend, and the court refused to allow the amendment without a continuance, and he thereupon withdrew the motion on the express condition that no rights were lost to him under the exceptions which he had taken to the exclusion of the offered testimony, he is not thereby prevented from questioning the judgment against him on account of the alleged error.

Appeal from superior court, Lewis county; H. S. Elliott, Judge.

Action by Samuel Collett against the Northern Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

M. A. Langhorne, Forney & Ponder, and W. W. Langhorne, for appellant. Crowley & Grosscup and A. G. Avery, for respondent.

DUNBAR, C. J. This was an action brought by the plaintiff (appellant) for the recovery of damages for an injury alleged to have been sustained by falling into an excavation made by the defendant (respondent)

along its line of railway at the intersection of a public highway. On the trial before a jury, plaintiff offered to prove that defendant did not maintain a light at the excavation. Upon objection by the respondent's attorney, the court refused to admit such evidence. Plaintiff then offered to amend by alleging absence of a light, but the court refused to allow the amendment without granting a continuance to defendant upon a representation by its counsel that they were unprepared to meet the charge. Plaintiff then withdrew his motion to amend, and proceeded with the investigation of the case upon the complaint as it was, preserving his exceptions to the ruling of the court in not allowing the introduction of testimony.

Under the allegations of error, it is claimed that the court erred in excluding such evidence from the jury. In order to pass intelligently upon this question, it will be necessary to examine the complaint. After alleging the corporate capacity of the defendant, and that the place where the excavation was made was on a county road, it is alleged as follows: "(4) That theretofore, and at the time of the injuries herein complained of, the said defendant, Northern Pacific Railway Company, was engaged in lowering, and had lowered and cut down, the grade of said railway track in and near the village of Napavine, Lewis county, Washington, and more particularly at a point where said county road intersects and crosses said railway, as set forth in paragraph two of this complaint, to a depth of from three to four feet below the level of said county road, and said defendant took and removed from said crossing all the planks, gravel, and other substance that enabled persons traveling along said county road to cross said railway track, and had dug and removed the dirt from between the ties of said railway track to a depth of from twelve to eighteen inches, and by reason thereof the county road was left from three to four feet above the level of said railway track, and the said crossing was wholly torn up and carried away, leaving the same in a dangerous and exposed condition. (5) That on the 26th day of August, 1899, at or about the hour of eight o'clock p. m., this plaintiff was lawfully traveling along said county road on horseback, and was proceeding with all due care and caution, and had no knowledge that the crossing at said railway track was in an exposed and dangerous condition; that there was no railing or other protection to guard persons against the danger of falling into said excavation; that the same was left open and wholly unprotected; and plaintiff, relying upon the fact that said crossing should be in a safe condition for travelers, and the night being so dark that plaintiff was unable to discern the unsafe condition that the same was in, was, without fault on his part, precipitated and thrown down into said excavation, on and upon the

ties and iron of said railway track, whereby he was greatly injured," etc.

The ground upon which the testimony was rejected was that there was no allegation of negligence by reason of not having a light at the excavation, and that the question of whether or not a light was maintained there was not in issue under the pleadings. It is insisted by the appellant that the allegations of the complaint were sufficient to put in issue any negligent act of the respondent in relation to the excavation, and that the proof should not be confined to the absence of a railing across the road. We are inclined to think that this contention must be sustained, and that the language of the complaint is broad enough to include all circumstances of negligence. It is true that plaintiff did not plead want of the light as a circumstance comprising negligence, but, under the well-established rule, this was not necessary, because to compel him to do so would be, in the language of many of the cases, to compel him to plead his evidence. "The rule is well-nigh universal that, in an action for negligence, the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence." 14 Enc. Pl. & Prac. p. 333, and cases cited. "It is not necessary to set out the facts constituting the negligence complained of. An allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient; but the act of negligence, doing of which caused the injury, must be stated." 2 Thomp. Trials, p. 1247. It will be noticed that the negligent act the doing of which caused the injury is stated in this complaint, viz. the making of the excavation across the county road. In *Oldfield v. Railroad Co.*, 14 N. Y. 310, where the complaint contained but a general averment of negligence on the part of the defendant, evidence to show that there were no guards in front of the cars was held admissible in order to prove negligence, the court saying: "The complaint averred that the death was caused by the negligence and default of the defendants and their agents and servants. This authorized evidence of the defendants' negligence or misconduct tending to produce the injury, without a more particular statement in the pleading." In *George H. Hammond & Co. v. Schweitzer* (Ind. Sup.) 13 N. E. 869, it was held that a complaint containing a general allegation of negligence on the part of the defendant in performing or failing to perform a duty cast upon him by the law, resulting in injury to the plaintiff, without fault on his part, is sufficient to withstand a demurrer; the court citing *Railway Co. v. Wynant*, 100 Ind. 160; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. 202. This is a case where the allegation was that the defendant had operated an elevator in a negligent manner, and the court said: "If the defendant desired the

complaint to specify more particularly wherein the plaintiff claimed the defendant was negligent, a motion to make the complaint more specific would have presented the question." In *Clark v. Railway Co.* (Minn.) 9 N. W. 75, it was held that, in an action for damages, where the complaint alleged that the defendants, by the culpable carelessness, negligence, unskillfulness, and mismanagement of said defendants and their employes, wrongfully ran a locomotive, with a train of cars thereto attached, against plaintiff's horses and wagon, while lawfully traveling along the public highway, on demurrer the complaint was sufficient, although it did not state the specific physical acts constituting the alleged negligence and carelessness. To the same effect is *Lucas v. Wattles* (Mich.) 13 N. W. 782, where it was held that, in suing for damages from negligence, plaintiff must count on the negligence relied on; but, when this was properly averred, he need not set out the facts which go to establish it. And the rule was announced that, when defendant was notified with what negligence he was charged, he was thereby informed that the circumstances which tended to show whether he was wanting in due care would be in issue. See, also, *Ekman v. Railway Co.* (Minn.) 24 N. W. 291; *Clark v. Railway Co.* (C. C.) 15 Fed. 588; *Railroad Co. v. Wolfe*, 80 Ky. 82; *Railroad Co. v. Chester*, 57 Ind. 297; *Grinde v. Railroad Co.*, 42 Iowa, 376. In the last-mentioned case the plaintiff alleged that he was the owner of a certain cow which casually strayed upon the track of defendant's road; that said defendant, by its agents and servants, did run and manage one of its engines in such a careless manner that the same ran over said cow and killed her; and the court refused a motion to make the complaint more specific and certain. In fact, we think this is the almost universal rule.

It is claimed, however, by the respondent, that, even if this rule be conceded, there is another rule in practice which will defeat the appellant's right to a reversal of this case, viz. that, when a pleader does state in detail the specific acts complained of, he is strictly bound to them, and cannot show others; citing *Redford v. Railway Co.*, 9 Wash. 55, 36 Pac. 1085, and *City of Seattle v. Parker*, 13 Wash. 450, 43 Pac. 369. But it does not seem to us that these cases are in point here. The case of *Redford v. Railway Co.* was where there was no general allegation of negligence, and it was held by the court that, in such a case, the plaintiff must be confined to the allegations in his complaint. The writer of this opinion did not concur in the opinion of the court in that case, but as it was rendered we do not think it is applicable to the case at bar, because it is obvious, from an inspection of the complaint in this case, that general negligence is charged. The case of *City of Seattle v. Parker*, supra, was a suit

against the city treasurer for failure to account for moneys due the city, and what we held in that case was that when the plaintiff had furnished a bill of items, on which his complaint was founded, he was confined to the proof of the items set out therein. We hardly see that the case has any bearing on the case at bar.

It is also insisted by the respondent that the general rule contended for by the appellant is modified by the Code, which provides for a statement of facts, but this requirement does not contemplate that the evidentiary matter must be alleged. The complaint in this instance was a concise statement of facts, which would advise the respondent of the character of the defense necessary. If the complaint was so indefinite and uncertain that the respondent could not go to trial with safety, the statute provides a remedy, viz. a motion to make the complaint more definite and certain.

But it is finally insisted by the respondent that, in any event, this judgment should not be reversed, for the reason that it is the duty of the court to presume all possible facts necessary to sustain the judgment of the lower court, and many cases are cited from this court to sustain this contention; the first being *Rathbun v. Thurston Co.*, 2 Wash. 564, 27 Pac. 448. But these cases do not seem to us to have any application to the question involved here. In the *Rathbun Case* it was held that, where the evidence in a case was not made a part of the record on appeal, it will be presumed that the findings of fact by the court below were warranted by the evidence, and all the other cases cited by the respondent are based upon the same principle. It must follow, to sustain the rule first contended for by the respondent, viz. that every intendment will be brought to bear in aid of the judgment, that, where the question at issue is whether or not a certain fact was proven on the trial of the case, in the absence of the record the court will presume that the judge who tried the cause acted upon sufficient evidence. But such cases as that are very different from the case at bar, where it appears that a legal error has been committed by the court. The litigant has a right to have his case tried in a legal manner, and his legal rights protected by the court, and, when a legal right is invaded or denied by the court, the rule which has often been announced by this court, and which we think is universal, is to the effect that, error having been committed, it will be presumed to be prejudicial error, unless it affirmatively appears from the record that it was not prejudicial. But it is said by the respondent that, there having been an allegation of contributory negligence in the answer, the court should conclude, in aid of the judgment, that the jury may have found that the plaintiff was guilty of contributory negligence; that, if that were true, then the testimony in re-

gard to the maintaining of the light at the excavation would be immaterial; and that, in the absence of testimony, it cannot be determined that the question of contributory negligence was not the question upon which the verdict was rendered. But, in addition to this contention not being in harmony with the rule which we have just above announced in this case, the question of whether or not there was a light at the excavation when the plaintiff met with the accident would enter into the question of whether or not the plaintiff was guilty of contributory negligence, and would be one of the circumstances upon which the jury might base its conclusion in that regard; for it may well be understood that, if a light was maintained at the excavation which would sufficiently notify a person of common prudence, observation, and understanding of the danger, and he still proceeded, he would be guilty of contributory negligence, but that if, on the other hand, there was no light there, his action in advancing might not contain any of the elements of negligence.

In addition to this, the complaint in this cause raises the question of lights. In paragraph 5 the plaintiff, after alleging that he had no knowledge that the crossing of said railroad track was in an exposed and dangerous condition, and that there was no railing or other protection to guard persons against the danger of falling into said excavation, and that the same was left open and wholly unprotected, alleges that, relying upon the fact that said crossing should be in a safe condition for travelers, and the night being so dark that he was unable to discern the unsafe condition that the same was in, he was, without fault on his part, precipitated, etc. Certainly, the defendant was notified by this paragraph of the complaint that it was on account of the darkness at that excavation that this accident happened. "Darkness" is sometimes defined as an absence of light, and, under this allegation, it would have been competent for the defense, under a plea of general denial, to have introduced testimony showing that a light was maintained at this excavation, or, under the allegations of the complaint, the answer could have set up the fact that a light was maintained there. But, in any event, the question of light or darkness at the excavation was placed in issue by the complaint and the general denial, and the defendant was notified of the defense that it would be required to make in that respect.

It is insisted that the plaintiff waived his right to question the judgment when he withdrew his motion to amend upon the announcement by the court that the motion to amend would be permitted only on the condition that a continuation was granted to defendant. The statement of facts, as certified, shows that the motion to amend was waived on the express condition that no rights were lost to the plaintiff under the

exceptions which he had taken to the ruling of the court in excluding the testimony offered. If he had a right to introduce this testimony,—which we think he had,—he had a right to introduce it uncoupled with conditions. He may not have been in a position to have submitted to a continuance, and we do not think that the question of continuance can be entered into in the discussion of the error alleged.

The conclusion we have reached in this respect renders unnecessary a discussion of the other error assigned, as it will not probably occur upon retrial, but for the reasons alleged the judgment will be reversed.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 529)

W. W. KIMBALL CO. v. COCKRELL.

(Supreme Court of Washington. Dec. 14, 1900.)

CONTRACTS — GUARANTY — EVIDENCE — EXCLUSION — HARMLESS ERROR — CONSIDERATION — QUESTION FOR JURY — ASSIGNED CONTRACT — DISPOSITION OF NOTES — BURDEN OF PROOF.

1. Where, in an action on a guaranty of a contract for the sale of a piano, assigned to plaintiff, the particular contract assigned and guarantied was admitted in evidence, the exclusion of a general contract, in which defendant agreed to guaranty all contracts taken in the sale of plaintiff's pianos in consideration of the exclusive right to sell them within a certain town, was harmless error.

2. Defendant sold a piano shipped to him by plaintiff on time, and assigned the contract to plaintiff, and guarantied payment. Plaintiff, on receipt of the guarantied contract, credited defendant on its books with the amount of the contract. *Held*, in an action on the guaranty, that it was error to take the case from the jury on the ground that no consideration was shown for the guaranty, since the credit to plaintiff on defendant's books was sufficient evidence of consideration to be submitted to the jury.

3. Defendant sold a piano shipped to him by plaintiff on time, and assigned the contract to plaintiff, and executed an absolute guaranty of payment without notice of nonpayment, demand, or protest, and there was no evidence that any notes executed in pursuance of the contract were ever in plaintiff's possession. *Held*, that it was not incumbent on plaintiff, in an action on the guaranty, to show what disposition had been made of the notes.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by the W. W. Kimball Company against H. N. Cockrell, doing business as H. N. Cockrell & Co. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Reversed.

Jerry E. Bronaugh, for appellant.

ANDERS, J. This is an action on a guaranty. The plaintiff, in its complaint, alleges that on or about November 3, 1893, one T. O. Griffiths executed and delivered to defendant (respondent here) a certain contract in writing, wherein and whereby said Griffiths

promised to pay the defendant the sum of \$400 in certain installments, payable at certain times, with interest thereon from maturity at the rate of 10 per cent. per annum; that for value received the defendant, H. N. Cockrell, doing business as H. N. Cockrell & Co., assigned said contract to the plaintiff (appellant), and by indorsement on the back of said contract in writing guarantied the payment of the obligations therein set out when due, with interest, waiving notice of nonpayment, demand, and protest, and suit against the signer. It is further alleged that only a certain designated part of said sum so promised in said contract was paid, and plaintiff demands judgment against said Cockrell by reason of said guaranty, for the sum alleged to be due and unpaid. The defendant, in his answer, denies the execution of the contract by Griffiths, its indorsement by himself, and that there is anything due thereon; and by way of first affirmative defense alleges that the guaranty mentioned in the complaint was and is wholly without consideration, illegal, and void. And for a further affirmative defense the defendant sets forth a copy of the contract mentioned in the complaint, and alleges, in effect, that the plaintiff herein sued the said T. O. Griffiths upon said contract, and attempted to foreclose the same upon his piano therein mentioned, and such proceedings were had that final judgment was rendered in the superior court in favor of said Griffiths and against said plaintiff, and that said judgment was never appealed from by said plaintiff, and remained in full force and effect, and all of the questions involved in said obligation and contract were finally determined and adjudged in favor of the said Griffiths and against said defendant. The plaintiff, in its reply, denies each and every allegation of the defendant's first affirmative defense, and alleges affirmatively that plaintiff took said guaranty from the defendant in payment of the purchase price of the piano described in the contract in defendant's answer, which piano was sold by plaintiff to defendant; and for a further reply the plaintiff denies generally the allegations of the second paragraph of defendant's second affirmative defense. This latter denial controverts only that part of defendant's second affirmative defense which relates to the alleged suit by plaintiff against Griffiths. Upon the issues raised by the pleadings the cause proceeded to trial, and at the close of the plaintiff's evidence the defendant, pursuant to section 4904, Ballinger's Ann. Codes & St., challenged the sufficiency of the evidence, which challenge the court sustained, and thereupon discharged the jury. A motion for a new trial was denied, and the court, over the objection of plaintiff, entered judgment that the plaintiff take nothing by said suit, and that defendant do have and recover from plaintiff his costs, taxed at \$23. From this judgment the plaintiff has appealed.

We have not had the benefit of an argument on behalf of the respondent, as he has filed no brief in this court. Upon the trial the appellant offered in evidence the deposition of one Charles C. Dunbar, taken by a notary public in the city of Chicago, in pursuance of a commission granted by the superior court in and for Spokane county. This deposition was taken upon written interrogatories attached to the commission. Error is assigned on the refusal of the court to admit interrogatories numbered 4, 5, 6, and 7, and the answers thereto, in evidence. Interrogatories numbered 1, 2, and 3, and the answers given by the witness, were admitted in evidence, and in response to the questions therein propounded to the witness he testified that he resided in Chicago, and was bookkeeper for the W. W. Kimball Company, and had been in their employ 16 years, and had general charge of their accounts and contracts; that on or about November 3, 1893, the W. W. Kimball Company had a contract with the defendant for the sale of said W. W. Kimball Company's merchandise in Spokane, and that said contract was in writing. The appellant then offered interrogatory No. 4, with the answer thereto, which were as follows: "Int. 4. If written, attach said contract to your deposition. Answer. I have done so, marking the same 'Exhibit B.'" This interrogatory was objected to by the respondent as incompetent, irrelevant, and immaterial, and the objection was sustained, and an exception allowed. The same objection was made to interrogatories No. 5, 6, and 7, respectively, and sustained by the court. It appears from those interrogatories that appellant sought to prove, by the witness to whom they were propounded: (1) The period of time over which the contract mentioned in the answer to interrogatory No. 2 extended; (2) that under the terms of said contract said Kimball Company consigned to the respondent a certain Hallett & Davis piano, style 31, No. 37,838; and (3) that under the terms of said contract the appellant company received from the respondent the guaranteed contract between the respondent and Griffiths, which was admitted in evidence. Of course, it was necessary for the appellant, in order to maintain its action against the respondent, to prove that the latter had guaranteed the payment of the money agreed to be paid by Griffiths in his contract with the respondent; and the object which appellant had in view, if we understand it, in offering in evidence the contract between appellant and the respondent, which was attached to the deposition and rejected by the court, was to show that at the time of the alleged guaranty there was an agreement between the appellant and the respondent whereby the appellant agreed to ship its goods to the respondent, and permit him to sell the same on time, when deemed desirable, taking from the purchasers written contracts to pay, which contracts were to be indorsed by the

respondent, and payment of the same guaranteed, in consideration of respondent's having the exclusive right to sell appellant's goods (pianos) in Spokane, and at a higher price than that paid therefor. The fact that the respondent had agreed with the appellant to sell the merchandise shipped to him by appellant and guaranty the payment of all contracts taken from his purchasers would, if established, have tended, to some extent at least, to prove that the respondent guaranteed the particular contract in question in the case at bar. Proof of this general contract would have at least shown a probability that the respondent acted under it in dealing with the particular contract alleged to have been guaranteed by him. And, if this view is correct, it follows that the agreement offered in evidence should not have been rejected on the ground of irrelevancy, whatever other objections might have been urged against it. But, be that as it may, the error of the court, if such it was, in rejecting the contract and the interrogatories relating thereto, above mentioned, worked no substantial prejudice to the appellant. The execution by the respondent of the guaranty sued on was shown by direct evidence, and the contract between Griffiths and the respondent, upon the back of which the assignment and guaranty were written, was admitted in evidence. In fact, it was set forth in respondent's answer, and its execution was thereby admitted.

According to the certified statement of facts, the learned trial court took the case from the jury for the alleged reasons: (1) That no consideration had been shown for the alleged guaranty; and (2) that it was incumbent upon the plaintiff (appellant), in order to make out a case, to show what disposition had been made of the notes referred to in the contract, payment of which the defendant (respondent) is alleged to have guaranteed. As to the first proposition, we are clearly of the opinion that there was sufficient evidence of consideration to require the submission of the question to the jury. The witness Dunbar positively testified that the consideration for the guaranty on the contract marked "Exhibit A" (the contract admitted in evidence) was a credit given by the Kimball Company upon the respondent's unpaid account, giving the amount of the same, and stating that the piano described in interrogatory No. 5 (which is the piano mentioned in the guaranteed contract) was "invoiced" to the respondent on April 11, 1891; and the respondent, by challenging the legal sufficiency of this evidence, necessarily admitted it to be true. The conclusion of the learned trial court that it was incumbent upon the appellant, in order to make out a case, to show what disposition had been made of the notes mentioned in the contract alleged to have been guaranteed, was, in our judgment, also erroneous. In the first place, there is no evidence in the record that any such notes were ever in the possession of the

appellant; and, in the second place, the guaranty was absolute in terms, and imposed no such obligation upon the appellant as that indicated by the court. The respondent, according to the evidence, not only guaranteed the payment of the contract assigned to the appellant, but expressly waived "notice of nonpayment, demand, and protest, and suit against the signer." For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and REAVIS, J., concur.

(23 Wash. 568)

STRINGHAM v. DAVIS et al.

(Supreme Court of Washington. Dec. 17, 1900.)

CONTRACTS FOR LABOR—LIEN—ACTION FOR BREACH—DEMAND BEFORE SUIT—EVIDENCE—APPEAL—FINDINGS—CONCLUSIVENESS.

1. Under 2 Ballinger's Ann. Codes & St. § 5902, giving any person who clears realty at the owner's request a lien thereon for the labor performed, a party who clears land under contract with the owner has a lien thereon for the work performed, if he has not waived it, though no lien was referred to in the agreement.

2. In an action to recover under a contract whereby the work was to be paid for in specific personalty, evidence that plaintiff and another, by defendant's direction, went for the personalty before suit, is sufficient to establish a demand for performance of the contract.

3. In an action to recover under a contract for work performed, which was to be paid for as soon as the work was completed, proof of demand before suit is not essential to plaintiff's cause of action.

4. In an action to recover under a written contract for work performed, which was to be paid for in cows, plaintiff may show by parol the kind of cows alleged to have been tendered to him by defendant, and the kind defendant stated were called for by the contract.

5. A finding on conflicting evidence will not be disturbed.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by Thomas W. Stringham against George H. Davis and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Geo. C. Hatch, for appellants. A. A. Richardson, for respondent.

ANDERS, J. This action was brought by the respondent to recover from the appellant George H. Davis a balance alleged to be due respondent for services performed in clearing land, and to foreclose a lien on the land for the amount due. It is alleged in the complaint that the plaintiff (respondent) and defendant (appellant) entered into a written agreement, which was as follows: "Memorandum of agreement made this 25th day of June, 1896, between G. H. Davis, of the first, and T. W. Stringham, of the second, part, witnesseth that the party of the second part agrees to clear, fit for the plow, on or before the first day of January, 1896, ten and one-half acres of land, to be well picked up and

burned, and all cedar that the party of the first part may designate to be cut into ten-foot lengths for rails, and any cedar not so designated to be burned; and the party of the first agrees to pay, as soon as the land is so cleared, twenty (\$20.00) per acre in cows at \$50.00 per head, and one mare called Nellie, at sixty (\$60.00) dollars. Geo. H. Davis. T. W. Stringham." It is further alleged in the complaint that the land was cleared according to the agreement; that the respondent requested the appellant to perform his part of the agreement, and pay respondent according to the terms thereof, but appellant refused to pay respondent according to the terms of said contract, or at all, for the work and labor performed upon said real estate; and that respondent filed a notice of lien in the office of the county auditor, a copy of which is set out in the complaint. The appellants in their answer admit the making of the contract, and the clearing of the land by the respondent in accordance with the terms thereof, but deny the alleged demand for payment, and allege affirmatively that, upon completion of the work, they delivered the mare Nellie to the respondent, and then and there tendered to respondent three cows, as set forth in said contract, which the respondent refused to accept. The respondent, replying, denies the alleged tender of the cows. The cause was tried by the court without a jury, and the court, having made and filed its findings of fact and conclusions of law, rendered judgment for the respondent.

It is claimed by the appellants that the trial court erred in admitting the respondent's lien notice in evidence, for the reasons (1) that there is no provision of law giving contractors a lien for clearing land for farming purposes; and (2) that the contract between these parties shows on its face that no lien was contemplated. Section 3, p. 33, Laws 1893 (2 Ballinger's Ann. Codes & St. § 5902), provides that "any person who, at the request of the owner of any real property, his agent, contractor, or subcontractor, clears * * * the same, * * * has a lien upon such real property for the labor performed * * * for such purpose." And section 12 of the same act (Id. § 5911) provides that: "In every case in which different liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien, or class of liens, which shall be in the following order: (1) All persons performing labor; (2) all persons furnishing material; (3) the subcontractors; (4) the original contractors." "And the proceeds of the sale of the property must be applied to such lien, or class of liens, in the order of its rank," etc. From these provisions of the statute it seems quite clear that contractors are entitled to liens, under certain circumstances, upon real property, even in cases where different liens are claimed against the same property. But in this case but one lien is claimed, and the right to it is asserted by one who, at the request

of the owner of real property, cleared and improved the same, and we see no means of escaping from the conclusion that he "has a lien," under the statute, "upon the property" for the labor so performed. But it is asserted in the brief of appellants that, before a person can have a lien upon land for work, it must appear that it was the mutual understanding of the parties that a lien was contemplated. If it is meant by this statement to convey the idea that at the time the agreement for the work is made the parties must have "in immediate view the right of lien," we are unable to assent to the proposition. See *Phil. Mech. Liens* (2d Ed.) § 122. If the work actually done upon the land is of such a character as to entitle the laborer to a lien under the law, his right of lien is not lost simply by reason of the fact that he did not have it in mind at the time he agreed to perform the labor. Of course, the right of lien may be waived, but we see no evidence of a waiver in this instance.

It is further claimed by appellants that the court erred in holding that under the contract respondent had made sufficient demand for the cows before bringing his action. But we are of the opinion that the evidence clearly justifies the conclusion of the court in that regard. The fact that the respondent, accompanied by one Schrum, went to the place of residence of A. W. Davis (where appellants' cows then were), by the direction of the appellant George H. Davis, for the express purpose of getting the cows, is clearly established by the evidence in the record. And A. W. Davis, the father of the appellant George H. Davis, testified at the trial, in the court below, that "plaintiff said he came after the three cows." From these facts it plainly appears that a demand for the cows was duly made by the respondent. Having determined that a legal demand was made for the cows, it becomes unnecessary to discuss at length the proposition urged by the respondent, that, under the contract in question, proof of a demand was not essential to his cause of action, and we will therefore simply observe that his position is not unsupported by authority. See *Morford v. Mastin*, 17 Am. Dec. 168, 6 T. B. Mon. 609; *Mitchell v. Gregory*, 4 Am. Dec. 655, 1 Bibb, 449; *Rector v. Purdy*, 13 Am. Dec. 494, 1 Mo. 186; *Wait, Act. & Def.* p. 368.

It is contended by the appellants that the court erred in permitting the respondent to show by parol evidence the kind of cows contracted for. The record discloses that one portion of the evidence to which appellants object was introduced to show the kind of cows alleged to have been tendered to the respondent, and the other to show by the declarations made by appellant George H. Davis what kind of cows he himself deemed called for by the contract. We think the evidence was properly admitted. The trial court found as a fact, upon the issue of tender, that the appellants did not tender to the re-

spondent any such cows as the contract required, and this finding is assigned for error. Counsel for both parties agree that ordinary merchantable cows were contemplated by the contract, and the learned trial court seems to have been of the same opinion. There is a conflict in the evidence upon that question, and this court has repeatedly held that a finding of fact will not be disturbed in such cases unless the weight of the evidence is clearly against it, which does not appear in this case. See *Hamar v. Peterson*, 9 Wash. 152, 37 Pac. 309; *Knapp v. Crawford*, 16 Wash. 524, 48 Pac. 261; *Skeel v. Christenson*, 17 Wash. 649, 50 Pac. 466; *Improvement Co. v. Partidge*, 19 Wash. 62, 52 Pac. 523. The conclusions of law being fully supported by the findings, the judgment is affirmed.

DUNBAR, C. J., and FULLERTON and REAVIS, JJ., concur.

(23 Wash. 446)

TAYLOR v. HORST et al.

(Supreme Court of Washington. Dec. 8, 1900.)

WILLS—PAROL EVIDENCE—LATENT AMBIGUITY.

Where a will gives to S., by metes and bounds, land in township 16, which is half of ranch T., the other half being in township 15, testimony of the scrivener, that testator directed him to give to S., by the will, such ranch, and that by mistake he put in description of only part of it, is not admissible, as this would change the will, not merely explain the testator's intent; there being neither a conclusive presumption, because this was the only property of testator not disposed of by the will, that he intended to dispose of it, nor a latent ambiguity.

Appeal from superior court, Thurston county; O. V. Linn, Judge.

Action by Sarah Taylor against Nellie Horst and others. Judgment for defendants. Plaintiff appeals. Affirmed.

W. I. Agnew, for appellant. J. W. Robinson, Troy & Falknor, and A. E. Rice, for respondents.

DUNBAR, C. J. This appeal involves the construction of a will, and is from the order of the court refusing to allow the admission of testimony offered to assist the court in construing the will, and from the order dismissing the suit for want of jurisdiction. The decedent, Ignatius Colvin, conveyed, by his last will and testament, to the appellant, Sarah Taylor, a life interest in a certain tract of land. Colvin, it is alleged, was an ignorant man, unable to read and write. The scrivener (J. R. Mitchell) who drew the will was ready to testify that Colvin employed him to draw the will, and that he directed Mitchell to convey to the appellant what was known as the "Taylor Ranch." One half of this ranch, which is known as the "Mize Donation Claim," is in township 16, and the other half in township 15. According to the testimony offered, Mitchell prepared the de-

scription from an old plat of Colvin's, which showed simply township 16; and in accordance with that plat the will was drawn, conveying to the appellant a life interest in that portion of the claim north of the township line, or that portion which is in township 16. It is claimed that the description intended to be in the will contained the part south of the township line, or that part which is in township 15, and that the will was executed on the supposition that that portion of the ranch which is included in township 15 was included. The respondents objected to this testimony on the ground that it was the introduction of parol testimony to vary or dispute the terms of a written instrument, and the objection to its admission was sustained by the court, which is alleged as error here. We think the objection was correctly sustained. Primarily, the rule of law is that parol testimony cannot be introduced for the purpose of changing the provisions of a will. But another doctrine is equally well authenticated, viz. that extrinsic evidence may be introduced in order to explain the intent of a writing, and the true meaning of the same, when there is any patent or latent ambiguity in the writing. Of course, the policy of the law is to reach the intention of the writer as expressed in the writing, and the expressions may be explained when they are indefinite and inaccurate. But this must always be done in consonance with the settled rules of evidence. It is claimed by the appellant that she is brought within the rule allowing one to introduce extrinsic evidence to arrive at the intention of the testator and to correct the inaccuracy of the description, from the fact that the will clearly shows that the testator intended to dispose of all the property he had and should die possessed of; and it is urged that the policy of the law is strongly against partial intestacy. It is doubtless true that under the authorities it is a favored presumption that the testator intended to make disposition of the entire estate, in the will executed, but it is not conclusive; for it may well happen that a person will desire to make definite disposition of a portion of his estate, and be willing to leave the disposition of the remainder to the direction of the law.

It is also insisted by the appellant that if, as a matter of fact, the testator dies possessed of lands which have not been conveyed by the will, such fact raises a latent ambiguity, which warrants the introduction of extrinsic testimony to explain. If this were true, it would terminate this case in favor of the appellant; for it is conceded that Colvin was the owner of that portion of the Taylor ranch which was situated in township 15, and that such land was not devised. But an examination of the cases cited by appellant convinces us that the proposition is not sustained. *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860, holds that a latent ambiguity in a will, which may be

removed by extrinsic evidence, may arise (1) either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. It is also held that when a careful study of the testator's language, applied to the circumstances by which he was surrounded, discloses an inadvertency or mistake in a description of persons or things in a will, which can be corrected without adding to the testator's language, and thus make a different will from that left by him, the correction should be made. But in the case at bar there is no confusion between the persons or things named. Neither is there any one person or thing named which is not in existence. Neither could this will be corrected in accordance with the testimony offered without adding to the testator's language, and making a different will from that left by him. His language would have to be added to before additional land could be incorporated in the will. When that was done it would make a different will from the one he executed, for the will he executed conveyed a life estate to the appellant to land situated in township 16 only. In the case above referred to the language of the decedent was as follows: "I give, devise, and dispose of the same in the following manner." He devised certain specific lots, with the buildings thereon, respectively, to each of his near relations, and, among others, to his brother H. a lot described as "lot numbered 6 in square 403, together with the improvements thereon erected." He then devised to his infant son as follows: "The balance of my real estate, believed to be and to consist in lots numbered 6, 8, and 9," etc. (describing a number of lots, but not describing lot No. 3 in square 406). Held, that the testator intended to dispose of all his real estate, and thought he had done so; that in the devise to H. he believed he was giving him one of his own lots, and that evidence might properly be received to show that the testator did not own, and never had owned, lot No. 6 in square 403, which had no improvements thereon, but did own lot No. 3 in square 406, which had a house thereon, occupied by his tenants; and that this raised a latent ambiguity. The court, in commenting upon the case, said: "It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind,—whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will.

and with part of the description of the lot, and rendered the devise effective, or lot 6, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective." Altogether a different proposition from the one at bar. There is no question here but that the land which was conveyed by the will was the land of the testator. It was conveyed by metes and bounds, the description being perfect. And the devise is effective under the will as it appears of record. It is not a question of effectiveness which is raised by the appellant, but the claim is simply that not as much land was devised to her as she thinks it was the intention of the testator to devise. In *Hawkins v. Young*, 52 N. J. Eq. 508, 28 Atl. 511, it was held that under a testatrix's direction to her executor to sell her house and lot in N., and out of the proceeds to pay certain legacies, he was empowered, in the light of evidence that she owned no realty except a house and lot in B., a suburb of N., to sell and make title to the property in B. As in the other case just above cited, a strict and literal construction of the will would render it ineffective, for the reason that the testator was not the owner of the property devised. In *Skinner v. Harrison Tp.*, 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137, it was held that where a testator devised property "to Harrison township," and it was made to appear by evidence that there were many townships by that name in the state, it was competent, in order to remove the obscurity in the testator's intention caused by the extraneous circumstances, to show by extrinsic evidence that the testator resided in Harrison township, in a certain county, and that he sustained a relation to that township different from all others of like name. This, it will readily be seen, is easily distinguished from the case at bar, and falls within the rule laid down in *Patch v. White*, supra. And so, without further specific mention, with all the other cases cited by the appellant. None of them hold that where the will is certain in its terms as to the property devised, the character of the devise, and the person of the devisee, extrinsic evidence can be introduced to change or vary its terms. In this case the will was definite and certain as to the property devised, as to the character of the devise, and as to the person of the devisee, and it will be seen how uncertain wills would be if oral testimony were allowed to be introduced in a case of this kind to change their positive and expressed conditions. There is nothing in the circumstances of this will, as shown upon its face, to indicate that it was the intention of the testator to have devised the land in dispute here to this devisee in preference to other devisees. The mere fact that the land was contiguous to the land devised to the appellant would not be a circumstance pointing in that direction.

We think that the will is not subject to construction, that the court properly sus-

tained objections to the introduction of the extraneous testimony, and that the case was properly dismissed. The judgment is affirmed.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 369)

GRAY'S HARBOR CO. v. CHEHALIS COUNTY et al.

(Supreme Court of Washington. Dec. 3, 1900.)
TAXATION—IMPROVEMENTS ON LAND HELD UNDER CONTRACT FROM THE STATE.

A wharf and warehouse on tide lands held by plaintiff under contract of purchase from the state are taxable as part of the land, under Revenue Law 1897, p. 136, § 2, providing for assessment of the improvements together with the land, and not separately; Laws 1893, p. 323, § 3, declaring personal property, for the purposes of taxation, shall embrace and include all improvements on lands the fee of which is still vested in the state; and section 26, p. 335, providing that property held under a contract for the purchase thereof, belonging to the state, shall be considered, for all purposes of taxation, as the property of the person so holding it.

Appeal from superior court, Chehalis county; Charles W. Hodgdon, Judge.

Suit by the Gray's Harbor Company against Chehalis county and another. Judgment for defendants. Plaintiff appeals. Reversed.

Sidney Moor Heath, for appellant. W. H. Abel, for respondents.

REAVIS, J. Suit to enjoin the collection of a tax levied in the year 1898 against a dock or wharf and warehouse situated upon tide lands held by plaintiff (appellant) under a contract of purchase from the state. The dock or wharf and warehouse were placed upon the tide lands in March, 1890. The contract between plaintiff and the state was made on the 8th of May, 1896. The revenue law of 1897 (page 136, § 2) provides for the assessment of the improvements together with land, and not separately. Counsel for respondents contends that the assessment of the dock or wharf and warehouse as personal property is authorized by section 3, p. 323, Laws 1893, which declares, "Personal property for the purposes of taxation shall be construed to embrace and include * * * all improvements upon lands, the fee of which is still vested in the United States, or in the state of Washington," and in support of such construction refers to the case of *Percival v. Thurston Co.*, 14 Wash. 586, 45 Pac. 159. It appears that in that case no contract for the purchase of the tide lands had been executed. Application for a contract had been made, but it had not been acted upon by the board of land commissioners having jurisdiction thereof. In the same statute, however (page 335, § 26), it was enacted: "Property held under a contract for the purchase thereof, belonging to the

state, county or municipality, and school and other state lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same." Section 27 directs the assessment of improvements on public lands as personal property until the settler has made final proof and certificate is issued, and thereafter the land itself must be assessed. In the case of *Washington Iron-Works Co. v. King Co.*, 20 Wash. 150, 54 Pac. 1004, section 26 of the act of 1893, supra, was under consideration, and it was there adjudged that lands held under contract to purchase from the state are considered property of the purchaser, and the lands as well as the improvements thereon are subject to taxation. The superior court found that the plaintiff neglected and refused to list the dock or wharf and warehouse for taxation as personal or real property. Plaintiff requested a finding that the wharf and warehouse were assessed as personal property, and not as improvements upon real property, and that at the time the plaintiff had an executory contract, being the ordinary tide-land contract, for the purchase of the tide lands upon which the wharf and warehouse were situated. Some testimony was adduced at the trial tending to show that the tide lands included in plaintiff's contract, and upon which the wharf and warehouse were situated, were assessed to plaintiff. The record shows that the tide lands upon which the wharf and warehouse were situated were in the possession of plaintiff under a valid contract of purchase from the state. It is apparent, therefore, that the dock and warehouse were improvements upon the tide lands, and, under the construction of the revenue law given in *Washington Iron-Works Co. v. King Co.*, supra, they should have been included in the assessment of the tide lands. This showing that the tide lands were held by plaintiff under a valid existing contract of purchase from the state is sufficient in itself to point out the method of assessment and taxation, and that the listing of the dock and warehouse separately as personal property was improper. It would be, to the extent of the assessment of the personal property, a double tax upon the owner of the tide lands, which is not in the contemplation of the statute. The judgment must be reversed, with direction to enter a decree enjoining the collection of the tax levied upon the dock or wharf and warehouse.

DUNBAR, C. J., and FULLERTON and ANDERS, JJ., concur.

(23 Wash. 340)

FOGG v. TOWN OF HOQUIAM.

(Supreme Court of Washington. Dec. 3, 1900.)
STREET IMPROVEMENTS—ASSESSMENTS—RE-ASSESSMENTS—RES JUDICATA—LIMITATIONS.

1. Judgment for plaintiff, in action to enjoin collection of an assessment for street improve-

ments, is not res judicata on suit by him to annul a reassessment, under Act March 9, 1893 (Laws 1893, p. 226), for the improvement, on the question of the validity of the contract for the improvement as being beyond the constitutional limit of indebtedness of the town; it not appearing in the record of the first case that the town rendered itself liable by contract for any portion of the cost of the improvement, and the question of debt limitation not being presented by any issue, or alluded to in the findings and decree of the court, although mentioned in its opinion.

2. The statute of limitations begins to run only from time a valid assessment for street improvements has been made; so that there being an invalid assessment, and then a reassessment, it runs only from the date of the latter.

Appeal from superior court, Chehalis county; O. V. Linn, Judge.

Proceeding by Charles S. Fogg against the town of Hoquiam, contesting a reassessment for street improvement. Judgment for plaintiff. Defendant appeals. Reversed.

James H. Parker, for appellant. Greene & Griffiths, for respondent.

REAVIS, J. In 1890 the town of Hoquiam, assuming to act under authority of a general act of the legislature of the state (1 Ballinger's Ann. Codes & St. § 1016), improved certain streets, and constituted an assessment district, and assessed the cost of the improvement against lots fronting on the street, including the lots of the respondent. Before any proceedings were taken to enforce the payment of the assessment so levied, an action was commenced by the respondent in the superior court to enjoin the collection of the assessment. Judgment was entered by the superior court on the 6th day of January, 1893. The court found, generally, "that the equities of this case are with the plaintiff [respondent], and that he is entitled to the relief therein prayed for. The court further finds that the affirmative defense, counterclaim, or cross bill of defendant [town] filed herein is not supported by the evidence." And the decree was that the assessment complained of, levied upon respondent's lots, be, and the same is hereby, set aside and decreed to be invalid, illegal, and void, and the town of Hoquiam is enjoined from taking any further steps towards enforcing the collection of the said assessment, or in any wise treating the same as valid or subsisting claims or liens against said lots, or any part thereof. The prayer of respondent's complaint was for an injunction restraining the town from taking further steps towards the collection of the assessment, and that the assessment be decreed illegal and void, and set aside, and the town be restrained from attempting to enforce any assessment, levy, or claim whatsoever upon respondent's property for the improvement made by the town. The complaint, for cause of action, set out various irregularities in the procedure leading up to the assessment; that the contract for the improvement was not let according to law

or to the lowest bidder; that the contract was not performed according to its terms; and that the assessment was not made according to benefits conferred upon the property improved; and also set out the last general assessment roll of the town of Hoquiam, and that the improvement contracts exceeded the debt limit of the town. Under the reassessment act of March 9, 1893 (Laws 1893, p. 226), the town made a reassessment of the cost and expense of the improvement. Respondent duly appeared before the council, and made his objection to the reassessment. The reassessment was confirmed by the council, and the respondent appealed to the superior court, and a trial was had. The superior court, after the hearing, found as follows: "In this cause, after considering the evidence and argument of counsel, the court is of the opinion that the judgment in the former case of Fogg v. The Town of Hoquiam is decisive of the questions and rights of the parties in issue in this case. The question of the validity of the contract on account of the town being beyond the constitutional limit of indebtedness was an issue in that action, and the court in its opinion says that the contention of the plaintiff was sustained, and supplements this by entering a decree enjoining the town from collecting the assessment, and that the contract was void. In view of these facts, this court cannot go into the examination of the correctness of that opinion and decree, and, as no appeal was taken from that decree, it is binding upon the parties. As this opinion is decisive of the rights of the parties in this proceeding, it will be unnecessary to consider the other questions presented by argument of counsel." And as conclusions of law: "That the judgment in the former case of Fogg v. The Town of Hoquiam, cause No. 214, is decisive and res judicata of the question and rights of the parties in issue in this case, and that the question of the validity of its said contract on account of the town of Hoquiam being beyond the constitutional limit of indebtedness was an issue in that action; and the court further finds that plaintiff is entitled to a decree annulling the said reassessment proceedings and for costs."

1. It is apparent that the judgment of the superior court was founded upon its view of the conclusiveness of the former adjudication of the validity of the original assessment. The appellant town in the reassessment proceeded under the act of 1893, *supra*. The act, in section 1, substantially declares that whenever an assessment which has heretofore been made has been or may be decreed void, and its enforcement refused by the court, or for any cause has been set aside, annulled, or declared void, by any court, either directly or by virtue of any decree of such court, the council shall order a new assessment or reassessment upon the property benefited by the improvement, and the reassessment shall be based upon the actual value at the time

of the completion of the work, and new assessment rolls shall be made in an equitable manner, with reference to the benefits received. It is further provided in section 6 that the fact that the contract has been let, or such improvement made, shall not prevent the assessment, nor shall the omission or failure of any officer to comply with the provisions of the law as to notice, resolution to improve, estimates, surveys, diagrams, manner of letting contract, or execution of work, or any other matter whatsoever connected with the improvement, or the first assessment thereof, operate to invalidate, or in any way affect, the making of the reassessment charging the property benefited with the expense thereof. But the new assessment shall not exceed the actual cost and value of the improvement. And it is also declared the intention of the law to make the cost and expense of local improvements payable by the real estate benefited by such improvements by a reassessment thereof, notwithstanding that the proceedings of the council or its officers may be found irregular or defective, whether jurisdictional or otherwise. It is also provided, in section 10, that a town or city may proceed to make a reassessment under its charter or under the provisions of the law of 1893. The controlling consideration in assessments for local improvements is that the benefits conferred upon the property be a continuing and altogether sufficient consideration for the imposition of the tax by reassessment. The reassessment proceedings do not affect the decree of the court in the original assessment. It does not seem clear how the question of the debt limit of the town of Hoquiam could have been in issue in the former adjudication. It is true there is an allegation in the complaint of the value of the property as shown by the town assessment roll, and that the cost of the local assessments was more than $1\frac{1}{2}$ per cent. of the value of the property shown on the assessment roll. There is no allegation that the town of Hoquiam rendered itself liable by contract for any portion of the cost of the local improvement. The court, in its findings and decree, does not allude to the question of debt limitation. It is, however, mentioned in an opinion filed by the superior court; but it does not appear in the record of the former trial what the contract was between the town and the contractors who did the work,—in fact, it does not appear that any issue was presented which necessarily rendered the claim for the cost and value of the local improvements invalid. It is concluded that the plea of former adjudication in the suit enjoining the original assessment cannot be sustained.

2. The town elected to proceed under the statute of 1893 in the reassessment. It has been heretofore determined that the statute of 1893 provides for an assessment in local improvements with reference to the benefits to the property improved, and the property must

be equitably and proportionately assessed, and that the sum assessed against any particular lot or parcel of property cannot, in any event, exceed the special benefits received by such property from the public improvement made. These questions must be determined by the proper assessing officer, and examined and equalized by the council. Notice of hearing must be given to the owner of the real property affected by the assessment, and he may appear, and must be heard upon the fairness, justice, and amount of the assessment. See *Annie Wright Seminary v. City of Tacoma* (Wash.) 62 Pac. 444, recently determined. In the trial in the superior court, the evidence adduced by appellant, which is uncontradicted by the respondent, showed that the reassessment was made according to the benefits, and that each particular parcel of property was specially benefited beyond the tax levied by the assessment.

3. The statute of limitations is pleaded by respondent. It is claimed that more than two years had elapsed since the accrual of the cause of action for the amount due for making the improvement, but the statute only begins to run from the time a valid assessment is made. The original assessment was adjudicated invalid on the 6th day of January, 1893, the reassessment statute was enacted on the 9th day of March, 1893, and the reassessment proceedings commenced on the 18th day of July, 1893. *State v. City of Ballard*, 16 Wash. 418, 47 Pac. 970; *Bowman v. City of Colfax*, 17 Wash. 344, 49 Pac. 551. The cause is reversed and remanded, with directions to enter judgment for the defendant confirming the reassessment.

DUNBAR, C. J., and FULLERTON and ANDERS, JJ., concur.

(23 Wash. 459)

MORRIS & WHITEHEAD v. WILLIAMS
et al.

(Supreme Court of Washington. Dec. 10,
1900.)

MANDAMUS—TO COUNTY COMMISSIONERS—
CONTRACTUAL OBLIGATION.

Mandamus will not lie to county commissioners to compel issuance of county bonds, under a contract of sale and issuance, for funding of the warrant debt, providing that validity of the warrants should be passed on before execution of the contract, and making necessary the ratification of the warrant debt by the voters at an election to be held for that purpose; there not only being discretion of the commissioners involved, but the obligation being under a mere executory contract.

Appeal from superior court, Pacific county; A. L. Miller, Judge.

Mandamus by Morris & Whitehead, bankers, a corporation, against W. R. Williams and others, members of the board of county commissioners of Pacific county. Writ denied, and plaintiff appeals. Affirmed.

R. E. Moody and Hewen & Stratton, for appellant. John T. Welsh and F. S. Thorp, for respondents.

DUNBAR, C. J. At a special session of the board of county commissioners of Pacific county, in August, 1898, said commissioners entered into a contract with Morris & Whitehead, bankers, appellant herein, whereby they agreed to issue and deliver to appellant the bonds of the county of Pacific in the sum of \$44,000, or so much thereof as should be necessary to fund the existing general fund warrant indebtedness of said county as evidenced by certain warrants. It is insisted by the respondents that this contract was entered into by the commissioners while sitting as a board of equalization, but we have not found it necessary to enter into an examination of that question. It was provided in said contract that the bonds were to be dated the 1st of September, on which date, or as soon thereafter as possible, they were to be ready for delivery. They were to be due in 20 years from date, and were to draw interest at the rate of 5 per cent. per annum. Among other provisions in the contract, the following appears: "The party of the first part [respondents] shall cause all of said warrants to be funded to be called for payment; provided, however, that no such call shall be made until the party of the second part [appellant] has notified the party of the first part as hereinafter set forth. That said bonds are a valid and legal obligation to the satisfaction of the party of the second part, and has designated to the party of the first part what warrants are valid and can legally be funded. The bonds shall be a legal and valid obligation to the satisfaction of the attorney of the party of the second part. The party of the second part shall be allowed a reasonable time to obtain the opinion of its attorney on the validity of the said bonds, and, when said opinion is obtained, shall immediately notify the party of the first part of the purpose of such opinion. The party of the second part shall pay the holders of the warrants the full value thereof, and thereafter present such warrants to the county treasurer for cancellation, and an equal amount of bonds shall then be delivered to the party of the second part." On October 5, 1898, the board of county commissioners sent the following telegram to appellant: "South Bend, Wash., Oct. 5, 1898. Morris & Whitehead, Bankers, Portland, Oregon: When will bonds be ready? Board in session. Answer. A. P. Leonard, County Auditor and Clerk of Board of County Commissioners." To this telegram the following answer was received on October 1st: "Moody promises answer to-morrow. He has just returned from New York." On the following day the commissioners received the following telegram: "Portland, Oregon, Oct. 7, 1898. It will be necessary to

validate warrant debt. Have commissioners meet immediately,—to-day, if possible,—and pass resolution in manner provided in act on page 44 of Session Laws of 1895, and then, if resolution is passed, give notice provided in said act by publication, and submit at general election. Eastern authorities hold that this must be done. Morris & Whitehead, Bankers." Acting on this direction, the board of county commissioners submitted the question of the validation of the warrants to the voters of Pacific county, and the voters refused to validate the same. Nothing further was done in the premises until the 16th of January, 1899, when the appellant tendered the board of commissioners blank bonds, and demanded that they be executed; but did not tender any money to take up the warrants, and did not take up or pay any of them. The commissioners refused to sign or execute the bonds, whereupon appellant filed a petition in the superior court of the state of Washington for Pacific county for a writ of mandamus to compel said commissioners to issue and deliver to appellant said bonds. A demurrer to the petition was interposed by the respondents, which was overruled. Respondents filed an answer. The case was tried, and judgment was rendered in favor of the county, refusing the writ. From this judgment an appeal was taken to this court.

Respondents urge several reasons why the judgment of the court should be affirmed, but there is one reason lying at the threshold of the case, which, if sustained, will render a discussion of the others unnecessary. It is insisted by the respondents that an action in mandamus will not lie in this kind of a case. It may be stated primarily that the writ of mandamus is most commonly invoked as a remedy for the misconduct or inaction of public officers, and is granted to set in motion and compel action on the part of public officers charged with the performance of duties of a public nature. It is doubtless well settled that, when the law imposes upon a public officer the performance of a specific act or duty, such performance may, in the absence of other adequate remedy, be enforced by mandamus; or, in other words, the writ will issue to compel the performance of purely ministerial duties made incumbent upon the officers by operation of law. But the rule is otherwise when the officer is invested with discretion, and the functions are not ministerial. In such cases the writ will not issue to control the discretion of the officer. It is equally well settled that the writ will not issue in aid of the enforcement of private contractual rights. These general principles, we think, are so universally recognized that citation of authority is not called for. The trouble is to make their application to the multifarious groups of facts presented in the adjudicated cases. Several cases have been cited by appellant to sustain the contention that the

writ should issue in this case. The first is *Smalley v. Yates* (Kan. Sup.) 13 Pac. 845, where it was held that mandamus lies in all cases where the plaintiff has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and no other adequate, specific remedy exists. The city, through its mayor and council, had entered into an agreement to execute and deliver to a lawful purchaser thereof certain waterworks bonds of the city, which had been duly carried by a vote of the electors of the city, and the purchaser of such bonds had fully complied with all the terms of the agreement on his part, but the mayor and council refused to comply with their official duty in that respect. The court held that mandamus would lie to compel the mayor and council to execute and deliver the bonds to the purchaser of the same according to the terms of agreement between the parties. This is the strongest case presented in the authorities cited by the appellant, but we do not think that it reaches the case under discussion, even if the general principles which it announces can be sustained by authority, which, we think, is doubtful. But in this case, after a vote of the electors of the city, the action of the mayor and council in delivering the bonds to the purchaser became purely ministerial. The law directed them to execute and deliver these bonds when a certain condition had been performed, which condition had been performed, viz. a vote of the electors of the city. But in the case at bar there is no ministerial duty devolving upon the commissioners to sell the bonds of the county to this appellant. The appellant's claim here is based upon a contractual agreement; and, whether the bonds were to have been issued under the act of 1890 or under the act of 1895, as seems to have been indicated by the direction of the appellant to the board of county commissioners in its telegram of October 8th, discretion is vested in the county commissioners. If under the former, the board was simply authorized to negotiate the bonds under their general supervisory powers over the business of the county, but there is no mandate of the law compelling or directing them to do so; if under the latter, the board has the right to reject all bids which are offered.

Appellant's citation from High, Extr. Rem. § 333, is as follows: "Mandamus will lie to prevent a municipal officer from setting at naught the will of the corporation by refusing to carry out its instructions." The instance is given that when a city has, through its common council, directed the purchase of certain lands, and that payment therefor be made in bonds of the corporation, but the officer whose duty it is to deliver the bonds refuses so to do, sufficient cause is presented for relief by mandamus. This merely falls within the general proposition above stated that mandamus will lie to compel the per-

formance of a ministerial duty. Another example given by the author is that, when it is the duty of the mayor and council of a city to execute and deliver to a purchaser bonds of the city which have been authorized for the construction of waterworks, the performance of this duty may be required by mandamus; citing *Smalley v. Yates*, just above discussed. The next citation of appellant, viz. *People v. Brennan*, 39 Barb. 522, is the case upon which is based the first announcement made by High in section 333, supra. This is the case in which it was announced that, where an officer of a municipal corporation undertakes to set at naught the corporate will by refusing to execute or deliver the bonds of the corporation in payment of the price of lands purchased by the corporation, a mandamus is the appropriate and proper remedy. The controller of the city was directed by resolution of the common council of the city of New York to issue corporate bonds for the purchase money of some lands, which he refused to do. Of course, his duty was purely ministerial. The city had acted in the premises, and directed him what to do. He was an officer without any discretion, and his duty was to comply with the mandate of the city council. Refusing so to do, under all authority mandate would lie to compel him. The other cases cited by the appellant, without specifically reviewing them, are of the same character. The following announcement of the law is made by High on Extraordinary Legal Remedies (section 34): "An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act, or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner. But as to the former class of cases, where mandamus is sought to compel the performance of a plain and unqualified duty, concerning which the officer is vested with no discretion, a specific act or duty being by law required of him, the writ will command the doing of the very act itself." In section 43, in further discussion, it is said: "* * * And when the official duty involves the necessity upon the part of the officer of making some investigation, and of examining evidence and forming his judgment thereon, a proper case is presented for the application of the rule. Thus, when the question involved was whether the relator, a printer to the senate of the United States, was entitled to receive from the superintendent of public printing and to print certain public documents, and in deter-

mining the question of relator's right it was necessary for the superintendent to investigate the usages and practice of congress upon the subject, and to examine evidence before forming his ultimate judgment, it was held that the duty was so far judicial in its nature that its performance could not be controlled by mandamus." Section 48 reads: "* * * So when a board of state officers are intrusted by law with the letting of contracts for the public printing of the state, and are vested with certain discretionary powers in determining what bids shall be accepted, the courts will not interpose by mandamus to control such discretion." It would seem that under the statutes of this state in relation to the sale of bonds the commissioners were granted fully as much discretion as were the officers mentioned by Mr. High. That author also, in section 25, says: "From the nature of the remedy, as thus far disclosed, it is obvious that it relates only to the enforcement of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, cannot be enforced by mandamus. A contrary doctrine would necessarily have the effect of substituting the writ of mandamus in place of a decree for specific performance, and the courts have therefore steadily refused to extend the jurisdiction into the domain of contract rights."

Appellant does not claim any right here under the statute, but, if it has any rights at all, they grow out of the contract which it alleges it made with the commissioners in relation to these bonds. So far as it is concerned, it is a contract right of a private and personal nature; a right accruing to it not by reason of any of the provisions of the law, but by reason of a special contract which it made with the commissioners. If an individual takes to an auditor or other filing officer a deed or other instrument which, under the law, he is entitled to have recorded, and such filing officer refuses to record the same when the applicant has complied with the law by the payment of fees or otherwise, the applicant has a right, not by virtue of any contract with the officer, but by virtue of the law, to have the instrument recorded, and mandamus will lie to compel the performance of that public duty on the part of the recording officer. Instances of this kind can be multiplied indefinitely, and in all such cases the remedy is by mandamus. But such is not the case here. It is true that the commissioners have a right, under certain circumstances, to sell these bonds. They also have a right, under their general supervisory powers, to contract with individuals for supplies for fuel and stationery; but if, after having entered into a contract of that kind, they re-

fuse to pay for such supplies, it would not be maintained that mandamus was the proper remedy for the enforcement of the contract. We know of no good reason why a contract in relation to the sale of bonds should be excepted from the general rule in relation to contracts made by the commissioners. This contract is still further removed from the operation of the rule invoked by the appellant for the reason that it is plainly an executory contract which was entered into. Something remained to be done or ascertained. In the first place, the validity of the warrants was to be passed upon before the contract could be executed. In the second place, by direction of the appellant itself, ratification of the voters at an election held for that purpose was necessary. We think there is no authority which would sustain the issuance of the writ on a contract of this kind. The case of *State v. Bridge Co.*, 20 Kan. 404, where it was held that an obligation arising upon contract merely could not be enforced by mandamus, indicates that the court of that state did not intend in the case of *Smalley v. Yates*, supra, to hold that the relator in that instance was entitled to the writ of mandamus because of a contract that he had entered into, but because the action of the mayor and council had become ministerial after the direction by the voters of the city.

A case which, it seems to us, corresponds almost exactly with the one under discussion, is *State v. Howard County Court*, 39 Mo. 375. Under the statute counties were authorized to pay bounties to volunteers enlisting in the military service, and it was held that where, in pursuance of the act, a county offered bounties to parties volunteering to fill the quota, a contract existed between the county and such volunteers, which could be enforced by action; and that the courts will not undertake by writ of mandamus to enforce simple common-law rights between individuals. In that case the petitioner enlisted as a volunteer in pursuance of an order of the county court of said county appropriating money for the purpose of paying bounties to volunteers. The county court refused to pay a portion of the money due the petitioner, whereupon he prayed for a writ of mandamus to compel the court to proceed in the business of selling bonds which had been provided for the purpose of paying these bounties, and to pay him the remainder of his bounty. After holding, upon the merits of the case, that the petitioner was entitled to his pay, the court, of its own motion, raised the question under discussion here, and said: "But there is another question, which we cannot pass over, and that is whether a mandamus is the proper remedy. According to the views above stated, there was a binding contract between the county and the petitioner. The courts will not undertake to enforce by mandamus simple common-law rights between individuals,—as to compel the

payment of money,—nor where there is another specific legal remedy;" and the writ was refused. In *Parrott v. City of Bridgeport*, 44 Conn. 180, which involved a contractual relation between the petitioner and the city of Bridgeport, it was held that the case involved the enforcement of contract rights, of a private nature, and the writ would not lie. See, also, *Florida C. & P. R. Co. v. State* (Fla.) 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; *Merrill*, Mand. § 16, and authorities cited and instances mentioned.

It is insisted by the appellant that the writ ought to issue in this case because it would be difficult to determine the damages which the appellant would be entitled to by reason of the breach of contract. The proof of damages is always attended with more or less difficulty, but that furnishes no reason for reversing the well-established rule that the writ will not lie for the enforcement of a contract right. The conclusion that we have reached on this proposition renders unnecessary an investigation of the other defenses interposed to the action. The judgment is affirmed.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 347)

GRIFFITH et ux. v. HOLMAN.

(Supreme Court of Washington. Dec. 3, 1900.)
NONNAVIGABLE STREAMS—RIGHTS OF RIPARIAN OWNER—FISHERIES—PUBLIC NUISANCE—ABATEMENT.

1. A public nuisance can be abated only by a public officer, except in case of a person having some special interest in the abatement different from and greater than the interest of the community.

2. A fresh-water unmeandered stream of the average width of 40 feet, and the depths of 4 feet at high water and of 2 feet at low water, and in some places only 6 inches deep, which is never used as a floatable stream, or for transportation except in small rowboats, from which persons fish for pleasure, is nonnavigable.

3. In nonnavigable streams the right of fishery is in the riparian owners.

4. One through whose land a nonnavigable stream flows may maintain a fence across it.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by Thomas S. Griffith and wife against F. J. Holman. Judgment for plaintiffs. Defendant appeals. Affirmed.

R. L. Edmiston, for appellant. A. E. Gallagher, for respondents.

DUNBAR, C. J. This action is brought by the respondents to recover of appellant \$250 as damages which respondents sustained by reason of the appellant cutting a wire fence on the land of respondents in Spokane county, where such wire crossed the stream known as the "Little Spokane River," which flows through the land of respondents; and also to recover of the appellant the sum of \$250, the value of certain trout fish which appellant caught in said Little Spokane river while in a

boat on said river on respondents' land where said river runs across the land of respondents, and which said fish appellant took and converted to his own use. A demurrer interposed to the amended complaint was overruled. Defendant (appellant) refusing to plead further, the court made findings of fact and conclusions of law in accordance with the allegations of the amended complaint, and gave judgment in favor of plaintiffs (respondents) and against defendant for \$500 and costs.

The findings of fact following substantially the allegations of the complaint, it is necessary to examine only the allegations of the complaint, under the first assignment of error, that the court erred in overruling the demurrer of defendant to the amended complaint, although assignments of error are based upon the conclusions of law. It is conceded by the appellant that only two propositions are involved, viz.: (1) Did the respondents have a legal right to place on their land the barbed-wire fence in question across the stream, so as to prevent the passage of row boats? and (2) did the appellant have a right to catch fish in the stream on respondents' land, he being in a rowboat, as alleged in the amended complaint? The complaint alleges in the usual manner the trespass and the catching of the fish, the ownership of the land, and that said stream had never been meandered, and gives the following description of the stream: "That said Little Spokane river, where the same runs through, over, and across the premises described, and for ten miles up said river from said premises, and down said river from said premises to the mouth of said Little Spokane river, during high water in said river, the water therein is of an average width of forty feet, and on an average during said time of four feet in depth; that high water continues at various stages in height in said river for about three months during each year, and the water in said river at said premises and up and down said river from said premises for the distance above stated during the rest of each year for the last twenty years has been about forty feet in width and two feet in depth; that the depth and width of the water in said river for the distance above mentioned varies at different places in said river at all seasons of the year, the water in said river at places becoming wider than as above stated, and at places as low as six inches in depth; that said river from a point about ten miles above the premises above described to its mouth carries at all seasons of the year sufficient water in width and depth so as to permit the running of rowboats of the usual size up and down said river; that no part of said river has ever been used as a navigable stream or highway for any purpose whatever, except that said river has been used to a limited extent for the purpose of pleasure by the running of rowboats up and down said river by persons desiring to fish for pleasure in

said river." It alleges the maintenance by the plaintiffs of the barbed-wire fence above mentioned, the catching of the fish by the defendant without any authority, and the appropriation of the same to defendant's use. It is contended by the appellant that the stream was a navigable stream, and that, therefore, the defendant had a right to navigate the stream, and to fish therein; and that the respondents had no right to put a fence of any kind across it which would interfere with the right of the public to use it for all purposes for which nature made it applicable,—citing in support of this contention section 7303, Ballinger's Ann. Codes & St., which is a statute to prevent the obstruction of navigable waters in this state; and that, the fence being a public nuisance, the appellant had a right to abate it. But, even conceding, for the purpose of the discussion, that the stream was a navigable one, the principle of law is well established that a public nuisance can be abated only by a public officer, except where the party who desires to abate it has some special interest in the abatement which is different from and greater than the interest of the community. The cases which the appellant cites from this court to sustain his contention are squarely opposed to him. Thus, in *Carl v. Improvement Co.*, 13 Wash. 616, 43 Pac. 890, the right to abate the nuisance was founded upon a special interest; the court in that case saying: "Under this assignment of error it is further contended that the obstruction was a public one; but, even if it was, the plaintiffs showed that they were so situated that they had a special private interest in having it removed, so that they could pass their logs down the river, and for that reason were entitled to maintain their action for that purpose." Even this case was where there was an action to abate the nuisance, and not an attempt by the party to abate it himself. The citation from *Gould, Waters*, § 42, does not seem to us to affect the question in any way. That special damages must be shown, see *Jones v. Railway Co.*, 16 Wash. 25, 47 Pac. 226; *Stufflebeam v. Montgomery* (Idaho) 26 Pac. 125; *Esson v. Wattler* (Or.) 34 Pac. 756; *Wood, Nuis.* (3d Ed.) § 646, and cases cited in note 4. But we are of the opinion from the allegations of the complaint that the river was nonnavigable. Hence it becomes necessary to ascertain the rights of riparian owners. The title to the land under all the navigable waters of this state passed from the sovereignty of the United States to the sovereignty of the state upon the admission of the state to the Union; but, under the well-established law of the land, the title to the land under the nonnavigable waters passes from the United States to the grantee of the upland bounding on such non-navigable waters as an incident to such grant; and, although at the common law the test of the navigability is the ebb and flow of the tide, yet, especially in this country, it is held that the rivers and streams above the ebb and

flow of the tide, which have sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public possesses in navigable waters. But we are clearly of the opinion that the stream under consideration is a nonnavigable stream. Many of the authorities which we will cite in support of this contention support also the other propositions indicated above, and they will, therefore, be cited indiscriminately.

"A stream is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property." Gould, Waters, § 107. "If the stream is not always navigable, it must be capable of floatage, as the result of natural causes, at periods ordinarily recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway. The mere possibility of occasional use during brief or extraordinary freshets does not give it a public character. A similar principle applies in the case of small tidal creeks, in which, although prima facie they are public and navigable, private property may be maintained. It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high tide which is deemed subject to public use, but, in order to have a public character, it must be navigable for some purpose useful to business or pleasure." *Id.* § 109. "But, while the common law only regarded those streams in which the tide ebbed and flowed to the extent of such flow and reflux as navigable, yet there was another class of streams, called 'fresh-water streams,' which, if susceptible of navigation by 'boats and lighters,' or, as it would seem, for any beneficial public purpose, and were navigable in fact, were regarded as highways over which the public had free access for the purposes of trade and commerce. The only real distinction between the two classes of streams arose from the distinction as to the ownership of the alveus of the stream, and the rights of riparian owners therein. In all salt-water streams subject to the action of the tides the king not only owned the alveus, but had exclusive title in and jurisdiction over the stream for all purposes not inconsistent with navigation; while in fresh-water streams the riparian owner had certain special privileges of which the king could not deprive him. He had the exclusive right of fishery, the benefit of alluvial deposits or accretion, the right to erect wharves which did not impede navigation, and to take tolls for the use of them; and, in fact, a right to make any use of the water or the bed of the stream that his tastes or interests dictated that did not interfere with the public right of passage. Therefore, when it is said that by the common law no stream is regarded as navigable except those in which the tide ebbs and flows, it is not meant that no other streams are burdened with a public easement of passage, but that

in law, and irrespective of the question of fact, all such streams are navigable whether they are so in fact or not, and that the title thereto, with all privileges, vests in the king; and that all other streams navigable in fact are highways for the passage of boats, but the title to which, with all special privileges, outside of the public easement, vests in the owner of the banks." 1 Wood, Nuis. (3d Ed.) § 452. So that it would seem in this case that, even conceding that the stream, which is a fresh-water stream, be a navigable or public river, yet the right of fishing remained in the owner of the banks, the public having only an easement over the land, and the taking of the fish therefrom would be a trespass for which the owner would be entitled to damages. It is true, the fact that a stream is not meandered does not establish the fact that it is a nonnavigable stream, but probably indicates that in the minds of the officers ordering the survey it was not a navigable stream. It is well established that, except in salt-water streams, the question of navigability is one of fact that must be established by those who seek to use it as such; and it is also well established that the stream must be navigable in its natural state, unaided by artificial means or devices. This proposition was announced by this court in *Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001, where it was said: "It is well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway;" citing many cases to sustain the proposition. In *Rowe v. Bridge Corp.*, 21 Pick. 344, Chief Justice Shaw, delivering the opinion of the court, said: "Nor is it every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but, in order to have this character, it must be navigable for some purpose useful to trade or agriculture." In *Nutter v. Gallagher* (Or.) 24 Pac. 250,—a case which is cited by appellant,—it is held that a stream or water course, in order to be navigable, must be of sufficient extent and capacity to enable the community at large to utilize it in the navigation of boats and other water craft thereon for the transportation of products and other merchandise, or for the purpose of floating logs and timber from forests to market. In the case of *The Montello*, 20 Wall. 430, 22 L. Ed. 391, where the language of Chief Justice Shaw, *supra*, was repeated and indorsed, it was said that "the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." It was held in *Haines v. Hall* (Or.) 20 Pac. 831, that a stream which has floatable capacity at certain periods recurring with regularity, and continuing for a sufficient length of time to make it useful as a highway for floating logs, is navigable; but to be navigable in

this sense it must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce. It was further said: "If its location is such, and its length and capacity so limited, that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." To the same effect is *Burroughs v. Whitwam* (Mich.) 26 N. W. 491. The court, in *Wethersfield v. Humphrey*, 20 Conn. 218, in passing upon the question of whether certain waters were navigable, after reciting the fact that at times a fish boat, or skiff, or Indian canoe might have been pushed through the waters, said: "But this is not navigation. That only is such, and those only are navigable waters, where the public pass and re-pass upon them, with vessels or boats, in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable,"—citing Lord Hale's remarks in his treatise *De Jure Maris*: "There be some streams or rivers that are private, not only in property and ownership, but also in use; as little streams and rivers that are not a common passage for the king's property." To the same effect is *Water Co. v. Amsden*, 6 Cal. 443. In that case it was held: "A river beyond the ebb and flow of the tide may be navigable when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers, and this has been extended to its capacity to float rafts of lumber. To go beyond this, and declare a stream navigable which can float a log, would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression." "It should be understood that, except in salt-water streams, so far as the tide ebbs and flows, the question of navigability is one of fact, and must be established by those who seek to use it as such; and also that the stream must be navigable in its natural state, unaided by artificial means or devices. If a stream is not susceptible of valuable use to the public as a navigable or floatable stream, without the erection of dams, it is not a navigable stream, even though it might be applied to that use after dams are erected." 1 Wood, Nuls. (3d Ed.) § 463. There is no claim here that the stream under discussion was ever used as a floatable stream, or that any transportation has been carried on over it except in small boats, from which persons fished for pleasure.

The legislature of this state has provided that the common law, so far as it is not inconsistent with the laws of the United States, or of the state of Washington, or incompatible with the institutions and condition of society of this state, shall be the rule of de-

cision in all the courts of this state. The common-law rule having been adopted, it must be held that the title to the beds of nonnavigable streams is in the adjacent riparian proprietors to the center of the stream. This holding is not inconsistent nor incompatible with the institutions and condition of society in this state, nor with the constitution and laws of the United States or of the state of Washington. It was held by this court in *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, that the common-law doctrine declaratory of riparian rights is not inconsistent with the constitution and laws of the United States or of this state, or incompatible with the conditions of society in this state, "unless," said the court, "it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition." The statute law and the decisions of this court, then, having made the common law the arbitrator of the rights of the riparian proprietors, the decisions of the courts declaring the rights of riparian proprietors under the common law become important. In *Hooker v. Cummings*, 20 Johns. 90, it was said: "In the case of *People v. Platt*, 17 Johns. 195, * * * we recognized the principles of the common law to be that in case of a private river—that is, where it is a fresh-water river—in which the tide does not ebb and flow, and is not, therefore, an arm of the sea, he who owns the soil has, *prima facie*, the right of fishing; and, if the soil on both sides be owned by an individual, he has the sole and exclusive right." See, also, *Palmer v. Mulligan*, 3 Caines, 307. In *Adams v. Pease*, 2 Conn. 481, it was held that: "The owners of land adjoining Connecticut river above the flowing and ebbing of the tide have an exclusive right of fishery, opposite to their land, to the middle of the river; and the public have an easement in the river as a highway for passing and re-passing with any kind of water craft." "The bed and banks of a fresh-water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement." *Bridge Co. v. Paige*, 83 N. Y. 178 (Syl.). In *Attorney General v. Evart Booming Co.*, 34 Mich. 462, among other things, it was said, in substance, by Judge Cooley, who rendered the decision of the court, that the Muskegon river was not a navigable stream, and the public had no rights whatever in the soil under it; that it was only a small stream, whose value to the public consisted in the use that could be made of it for the purpose of floating logs and lumber; and it was held that the property taken in such a case was private property, and the owner of the bank could maintain trespass or ejectment against the taker. See *June v. Purcell*, 36 Ohio St. 396. In *Mc-*

Farlin v. Essex Co., 10 Cush. 304, it was said by Chief Justice Shaw, speaking for the supreme court of Massachusetts, that it was well established as law of the commonwealth that in all waters not navigable in the common-law sense of the term the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of the soil is in the owner of the land bounding upon it; citing *Waters v. Lilley*, 4 Pick. 145, and *Com. v. Chapin*, 5 Pick. 190. In *Lincoln v. Davis* (Mich.) 19 N. W. 103, it was held by the supreme court of Michigan that the law was well settled that riparian proprietors upon fresh-water streams had the exclusive right of fishing in the water opposite their land; citing *Gould, Waters*, § 182, and cases cited in note 1; *Ang. Water Courses*, § 61; *Hart v. Hill*, 1 Whart. 123; *Beckman v. Kremer*, 43 Ill. 447. The citation from *Gould, Waters*, § 182, is as follows: "Riparian proprietors upon the fresh-water streams have the exclusive right of fishing in the water opposite their lands, and this right extends to navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property. Riparian proprietors upon all such streams, whose title extends *ad flum aquæ*, can maintain an action of trespass against those who draw a seine between the center of the stream and the bank of his land." It is true that the legislature of the state has passed laws regulating fishing, has made close seasons, and provided a penalty for persons killing fish by use of dynamite or other explosives. It is also true that fish are *feræ naturæ*, and that their habitat is not entirely local; hence it might be thought that no property in fish could vest in the owner of the land. But it is ownership subject to the rights of the public, and must be exercised with due consideration for the nature of the property, and exercised only when the fish are upon the land of the owner. In accordance with this view, it was held in *State v. Roberts*, 59 N. H. 256, that, while the right of fishery in waters not navigable was limited to the riparian owner of the soil, and belonged exclusively to him, yet this right in the owner of the land must be regarded as qualified to a certain extent by the universal principle that all property is held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it was subject to legislative control; that it is a well-established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a right upon their lands

upon the stream above and below. But, subject to these qualifications, the right of fishery to the riparian owner is absolute. To the same effect are *Beach v. Morgan* (N. H.) 41 Atl. 349; *Trustees v. Strong*, 60 N. Y. 56; *Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133; *Sterling v. Jackson* (Mich.) 37 N. W. 845; *Ice Co. v. Shortall*, 101 Ill. 46; *Braxton v. Bressler*, 64 Ill. 488; *Cobb v. Davenport*, 33 N. J. Law, 223; *Club v. Mather* (Vt.) 35 Atl. 323; *Norcross v. Griffiths* (Wis.) 27 N. W. 606.

It appearing from the record in the case that the river from which these fish were taken was nonnavigable, that the owners had a right to maintain a fence over the same, and that they had the exclusive right of fishery in the waters flowing over the land, and no proper exceptions having been taken to the finding in relation to the amount of damages, the judgment will be affirmed.

ANDERS and FULLERTON, JJ., concur.
REAVIS, J., concurs in result.

(23 Wash. 310)

VAN ALSTINE v. VAN ALSTINE et al.

(Supreme Court of Washington. Nov. 24, 1900.)

DIVORCE—JURISDICTION—RESIDENCE—EVIDENCE.

1. Residence in the state for a year, required by 2 Ballinger's Ann. Codes & St. § 5118, to give jurisdiction of an action for divorce, is not shown by testimony of plaintiff that in December, 1897, she was a resident of California; that she went from there to Alaska, to engage in business; that while returning on a voyage to Seattle she became acquainted with defendant; that they stopped temporarily at a hotel at Seattle, and a few days after were married, and shortly thereafter went to California, remained there some weeks; then returned to Seattle; remained a few days at a hotel, when defendant returned to Alaska, to remain some months, on business, the understanding being that she should remain at a hotel in Seattle, or go to California, and thence to Seattle; and that about the time of their marriage it was their intention to travel extensively for one or two years, and then to make their home somewhere, the location of which was entirely undetermined.

2. Affidavit of plaintiff in divorce, used on motion for suit, stating, in general terms, that she was a resident of the state for more than a year, cannot have force against the facts as to her residence detailed in her testimony.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by Lou Van Alstine against Con Van Alstine. Defendant filed cross complaint, and on his application Emma Norton, Melvin G. Winstock, and A. B. Noyes were made defendants by order of the court. Judgment for cross complaint. Plaintiff and defendants Norton and Winstock appeal. Reversed.

John F. Dore and Charles E. Shepard, for appellants. R. Winsor and Ballinger, Ronald & Battle, for respondent.

REAVIS, J. Plaintiff commenced an action in the superior court of King county for divorce from defendant Con Van Alstine. The alleged ground for divorce was cruelty. The husband appeared and answered, denying the allegations of the complaint, and filing his cross complaint, praying for an annulment of the marriage for fraud in the contract thereof. Appellants Norton, Winstock, and Noyes were made parties to the action by order of the court, on the application of the defendant, upon allegations in the cross complaint that such defendants had conspired with the plaintiff to procure the alleged fraudulent marriage between plaintiff and defendant for the purpose of defrauding the husband and obtaining from him large sums of money. After issue joined in the action, a motion for suit money and alimony was made by plaintiff, and a number of affidavits were filed by the respective parties upon the hearing of the motion, and also oral testimony was heard by the court. The motion does not appear to have been finally determined. The complaint was withdrawn, and before the trial came on plaintiff's counsel moved the dismissal of the action on the ground that the withdrawal of her complaint carried with it the dismissal of the cross complaint. The court overruled the motion to dismiss, and proceeded with the trial. Counsel for plaintiff refused to further appear in the action, and the court directed the prosecuting attorney to appear as in an undefended action for divorce or annulment of marriage. The marriage was adjudged fraudulent and decreed void, and relief was given the cross complainant (defendant) against the other defendants and plaintiff, in the nature of a money judgment for large sums of money fraudulently received by the plaintiff from the cross complainant. Plaintiff and defendants Norton and Winstock have appealed. Noyes did not appear.

Many exceptions are taken by the appellants, and assignments of error made thereon, and the record brought here is an extensive one. After a careful examination, it is concluded that the objection to the jurisdiction of the superior court to try the action is determinative of the case. The superior court found that plaintiff was a resident of the state for one year immediately prior to the commencement of the action. To this finding of fact exception was duly taken. The jurisdiction to entertain a suit for divorce and for annulment of marriage is founded upon residence in the state. The statute (section 5718, 2 Ballinger's Ann. Codes & St.) is as follows: "Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases." Section 5720, *Id.*, provides: "The defendant may, in

addition to his or her answer, file a cross complaint for divorce, and the court may, in such case, grant a divorce, if any, in favor of either party, or as on application of both." It was adjudged in *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21, that in an action for divorce plaintiff must affirmatively plead and satisfactorily prove prior residence in the state for the period of a year or more; and section 5730, 2 Ballinger's Ann. Codes & St., requires: "In all instances where the superior court shall grant a divorce, it shall be for cause distinctly stated in the complaint, and proved, and found by the court, and the court shall state the facts found upon which the decree is rendered." Section 5719 declares: "When the defendant does not answer, or, answering, admits the allegations in the complaint, the court shall require proof before granting a divorce or a decree of nullity." In *Luce v. Luce*, *supra*, it was said: "He [plaintiff] testified that he left the East for the purpose of finding a new location in which to do business; that he came to the state of Washington in January or February, 1894, and stopped at the cities of Seattle and Tacoma; that thereafter he went to the state of California, in further pursuit of the object which induced him to leave the East; that he returned to the state of Washington, and went into business in the city of Everett, about the month of June, 1894. This testimony satisfies us that he was not a resident of the state of Washington until his return thereto from the state of California, when he located in business at the city of Everett. It might be inferred from this testimony that plaintiff lost his residence in the East when he left there, but even this does not clearly appear. And there is nothing therein which tends to show that he had any intention as to any definite location until he reached Everett upon his return from California. This being so, the plaintiff failed to prove the fact necessary to entitle him to any relief."

In the case under consideration it is apparent that the allegation of plaintiff's residence in her complaint was not evidence of such fact. But, on the hearing of the motion for suit money and alimony, plaintiff submitted affidavits in which, in general words, it was stated that she was a resident of King county for more than one year. On the trial of the merits she was called as a witness for the cross complainant, and testified that she was a resident of the state of California in December, 1897. She was interrogated, "Where did you go from San Francisco?" She answered that she went to Alaska direct, and en route remained one day in Seattle; that she went to Ft. Wrangle, Alaska, to engage in business, and there contracted for a lodging house, which was to be completed for her; that while returning from Ft. Wrangle, on a voyage to Seattle, she became acquainted with the cross complainant, and together they came to Se-

attle, and temporarily remained at a hotel; that a few days thereafter they were married, and shortly thereafter departed for San Francisco; remained for some weeks in California, and then returned to Seattle; remaining a few days together at a hotel, when cross complainant returned to Alaska to remain there some months upon his business affairs. The understanding between them was that plaintiff should remain at a hotel in Seattle, or return to San Francisco, and thence to Seattle. It also appears from the testimony of both plaintiff and cross complainant that about the time of their marriage it was their intention to travel extensively for a year or two, and then to make their home somewhere, the location of which home was entirely undetermined. It is not assumed that the cross complainant was a resident of this state. There appears to be not only a failure of satisfactory proof of the residence of plaintiff in this state, but it is fairly inferred, from all the evidence adduced at the trial, that plaintiff was not such resident for one year prior to the suit. Plaintiff's affidavit referred to is in its statement of residence a mere conclusion, and, if considered upon the trial as evidence at all, cannot have force against the facts which are detailed by plaintiff, and also other inferences that must be legitimately drawn from her wandering life. Counsel for cross complainant have cited the case of *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431, where a decree of divorce was granted the wife on her cross complaint, and three years afterwards she made application to set aside the decree on the ground that her husband was not a resident of the state at the time the action was commenced, she herself being a nonresident. In that case the grounds for divorce were amicably arranged between the husband and wife, large property interests were settled, each spouse had become possessed of individual shares of the property, and the wife had transferred nearly all of hers. The court observed of the trial: "No one was deceived or defrauded in this, unless it be the court; and now the same court is asked to set aside the decree thus rendered at the suit of one who is responsible for the imposition effected, after more than three years of acquiescence and enjoyment of the fruits of the action." It was held that the wife was estopped from questioning the validity of the decree, even though there was fraud upon the jurisdiction of the court. We do not think the authority is applicable here. We have now a direct appeal on exception to the jurisdiction of the superior court. We are satisfied the exception is well taken. The judgment and decree is reversed, with directions for entry of a judgment dismissing the action.

DUNBAR, C. J., and FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 372)

WATKINSON et ux. v. MCCOY et al.

(Supreme Court of Washington. Dec. 5, 1900.)

NAVIGABLE RIVERS—BOOMING LOGS—DAM-AGES.

1. The right to raft and float logs in a navigable river gives no right to boom them, so that damages to a riparian owner from booming are recoverable without regard to negligence.

2. It is no defense to action by riparian owner for damages from the booming of logs and for injunction that defendant has made large expenditures in improving the river.

3. That logs to be floated cannot be well handled without their being boomed and rafted at the place where they are boomed is no defense to action by riparian owner for damages from the booming.

Appeal from superior court, Skagit county; J. P. Houser, Judge.

Action by M. Watkinson and wife against Pat McCoy and others, co-partners as Mossberger & Butler. Judgment for plaintiffs. Defendants appeal. Affirmed.

E. C. Millon, for appellants. McBride & Joiner, for respondents.

DUNBAR, C. J. This was an action in the superior court of Skagit county, brought by respondents to recover damages from appellants on account of using the Samish river for storing and holding logs, and asking a permanent injunction against the future use of the river for storing and holding logs. Respondents recovered judgment for \$175 damages, and obtained an injunction prohibiting the use of the Samish river for holding, handling, assorting, or booming logs. A demurrer was interposed to the complaint for the reason that it failed to allege that the injury was caused by negligence or want of care on the part of appellants. The demurrer was overruled, and the order of the court overruling the demurrer is made the first assignment of error by appellants.

The complaint alleged that appellants allowed logs to accumulate and remain in large quantities, thereby forming a jam, and obstructing the river, thus causing the water to rise and flood their lands, wash away their dikes, and damage them. We think this was a sufficient allegation. We are not able to see that the cases cited by appellants are in point. They simply establish the doctrine that the public may use navigable or floatable streams for rafting or floating logs, and the law is that if, without negligence or want of proper care on the part of persons floating logs in such streams, damage is sustained, there can be no recovery. But we think that all the authorities agree that the right to float logs down a stream does not carry with it the right to boom logs in said stream, or to obstruct it in any way so that it will either interfere with the rights of other navigators or cause damage to the riparian proprietors. The appellants, then, having been engaged in a business which they had no legal right to

engage in, viz. obstructing the stream by booming and rafting logs, are responsible to the riparian owners for such damages as accrue from such illegal acts, whether the appellants were guilty of negligence or not. Hence it is not necessary to allege negligence or want of care in the complaint. The cases cited by respondents on this proposition are exactly in point. In *Weaver v. Boom Co.* (Minn.) 11 N. W. 114, it was held that the action of a party in booming logs in a river where damages accrued impaired the usefulness of the land of the riparian owner, and constituted a taking of the property, and not a mere consequential injury; that the defendant had no right to take plaintiff's property without his consent, without first paying compensation therefor; and that, not having paid plaintiff compensation, the fact that defendant had constructed and maintained its booms with proper care and skill would be no defense to an action by the landowner for the injury to the property. In *Hueston v. Same* (Minn.) 79 N. W. 92, where certain works erected and maintained by the defendant in the Mississippi river caused a log jam which raised the water of the river so as to overflow and damage the plaintiff's premises, it was held that the ground of defendant's liability was, not that it was negligent in the construction or operation of its works, but that it had no right to thus injure or take the plaintiff's property without first acquiring the right by purchase or condemnation. In *Lorman v. Benson*, 8 Mich. 18, the rule was announced that the right to raft logs down a stream did not involve the right of booming them upon private property for safe-keeping and storage. The rights and responsibilities of drivers of logs on navigable rivers is discussed at great length and with great logical clearness by Judge Christiancy, of the supreme court of Michigan, in *Booming Co. v. Jarvis*, 30 Mich. 308, where it was held that persons exercising the public right of navigating a stream by running logs down it, or collecting, dividing, and storing them, are bound to do it with due regard to the concurrent rights of riparian owners to the use of their lands; and they cannot, for the sake of rendering the business of thus navigating the stream more safe, convenient, and profitable to themselves, raise the water so as to flow the lands of such owners, and damage thus caused to the lands of the riparian proprietors cannot be treated as consequential merely, and *damnum absque injuria*. To the same effect is *Rogers v. Driving Co.* (W. Va.) 23 S. E. 919, and *Wooden v. Manufacturing Co.* (Mich.) 64 N. W. 329.

The appellants offered an affirmative defense to the effect that they had expended a large amount of money in straightening the channel, removing snags, and otherwise improving the river, making it navigable and fit for floating logs; that by so doing they had greatly improved and increased the drainage of the adjoining lands; that they had

thousands of dollars invested in timber lands and apparatus for logging the same; and that by using said river for floating logs the same would be more valuable for drainage. To this affirmative defense the respondents interposed a demurrer, which was sustained, and the court's action in so doing constitutes the second alleged error. No authorities are cited by appellants in support of this contention, nor do we think any can be found. The fact that the appellants may have expended many thousand dollars in the clearing of this river would be of little consolation to the respondents, if the appellants were allowed to damage or destroy the lands of the respondents by choking the river with booms of logs. In this state, where the right of eminent domain is available, benefits cannot be urged and set off against damages sustained.

The third alleged error is that upon the trial appellants filed an amended answer containing an affirmative defense in which it was alleged that, if any damage was suffered by respondents, it was caused through no fault or negligence of appellants, but while they were using ordinary care, diligence, and skill in handling the logs. In response to a motion of the respondents, this defense was stricken, for the reason that the same was irrelevant and redundant. What has been said under the first assignment of error in relation to the sufficiency of the complaint applies to this assignment. The motion was properly sustained.

The fourth allegation of error is an objection to the fifth finding of fact, which was to the effect that the respondents sustained damages to the amount of \$175. We think there was sufficient testimony to sustain this finding.

The fifth allegation is that the court erred in holding appellants liable for any damages which respondents sustained. This assignment is covered by what has been said under the first and second assignments of error.

The sixth assignment is that the court erred in refusing to permit the appellants to show that the logs could not be handled, sorted, and boomed below the drawbridge. It is contended that, if this is true, the loggers should have the use of the river, and, if the riparian owner is thereby inconvenienced, it is his misfortune in owning property along such stream, and is a damage incident to such property. We think this testimony was properly excluded. If, as we have seen, the rights of the appellants extended only to rafting logs down the river, it would make no difference whether or not it was inconvenient for them to raft below the drawbridge, and the objection is aptly met by counsel for respondents in his brief, when he uses the argument of counsel for appellants in the following language: "If that condition is true, and there is no other place in the Samish river where logs can be boomed, etc., without injury to the property of riparian owners, and by reason of such con-

dition loggers are put to some inconvenience and expense in constructing a place for handling and booming their logs, then, to use the expression of counsel, it is their misfortune in choosing a location, as the inconvenience and expense are incidents to logging upon the Samish river."

The seventh allegation of error is substantially the same as the third.

The eighth allegation is that the court exceeded its authority in attempting to control the use of the river perpetually by injunction. Under all the circumstances as shown by the testimony of this case, we think the damages were such that a perpetual injunction was necessary to protect the rights of the respondents.

The last assignment of error, and the one which the appellants urge most strenuously, is that finding No. 9, which is to the effect that, if the appellants are permitted to use the Samish river at any place between certain points mentioned, such use of such portion of the river will interfere with the drainage of the respondents' land to their injury, from which finding the court concludes as a proposition of law that respondents are entitled to perpetual injunctive relief, is not sustained by the testimony. It would be profitless to go into an analysis of the testimony. It is sufficient to say that we have examined the record, and, in our judgment, the testimony amply sustains the finding made by the court. No error appearing of record, the judgment will be affirmed.

REAVIS, FULLERTON, ANDERS, and WHITE, JJ., concur.

(23 Wash. 360)

YOUNG, State Treasurer, v. UNION SAV. BANK & TRUST CO. et al.

(Supreme Court of Washington. Dec. 3, 1900.)

BONDS—EXECUTION—DELIVERY—AGENCY.

1. Though a person whose name appears in the body of a bond does not sign, it is good against the others; they not having signed in reliance on his signing, but simply because they were asked to sign.

2. Where an agent to obtain a loan of Y., and give the security required, offers a bond which Y. considers insufficient, because the bondsmen are not good enough, and thereafter offers a second, to which the same objection is made, he may deliver both, Y. being satisfied with the two.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by C. W. Young, as treasurer of the state of Washington, against the Union Savings Bank & Trust Company and others. Judgment for plaintiff for less than claimed, and plaintiff and some of the defendants appeal. Reversed on plaintiff's appeal.

Black & Edwards, for appellant Swalwell. Pritchard & Haight, for appellant Young. Boyle & Richardson and Frank H. Kelly, for appellants Thorne and Gower.

DUNBAR, C. J. The plaintiff is now, and was at the time of the transactions herein-after related, treasurer of the state of Washington. Early in the year 1897 the defendant the Union Savings Bank & Trust Company of Tacoma applied to him to receive a deposit of a portion of the state's money, and was informed by the plaintiff that such deposit would be made on condition that the bank gave him satisfactory security. Undertaking to comply with said demand, the bank offered to plaintiff a bond conditioned that it would well and truly pay on demand the money so deposited, or which might thereafter be deposited, by said C. W. Young as treasurer. The bond was in the sum of \$75,000, and was executed by the bank as principal, and by defendants Nicol, Thorne, Sprague, Reed, Gower, Swalwell, and Westland as sureties. Nicol, Thorne, Sprague, and Reed were trustees of the bank, Nicol was cashier, and Thorne vice president. This bond not being satisfactory to the plaintiff, for the reason that the wives of the married sureties had failed to sign the same, it was returned to the bank for the purpose of securing such signatures. Thereafter the bank, through its cashier, Nicol, presented to the plaintiff a second bond, conditioned like the first, signed by all the signers of the first bond, except Swalwell, and also further signed by Minnie E. Nicol, wife of A. R. Nicol, Harriet N. Reed, wife of G. H. Reed, and M. S. Sprague, wife of Otis Sprague. This last bond was not signed by Swalwell or his wife. An objection to it for that reason was made by the plaintiff. After some talk about the sufficiency of the bonds, Mr. Nicol produced both the first and second and delivered them to the plaintiff, saying: "I will deliver them both to you as security for the expected deposit. This is the best we can do." The treasurer retained them both, and, as he testifies, in consideration thereof, and on the faith of both the bonds, made the deposit of \$20,000 of said funds with the bank. No portion of this deposit was withdrawn, and the whole was still with the bank when it failed, June 29, 1897, and no part of the deposit has since been paid. This action was commenced by the plaintiff to recover against the bondsmen the amount signed by them as sureties on both bonds. The bank and Mr. and Mrs. Reed defaulted. Afterwards A. R. Nicol consented that judgment be entered against him in the sum of \$20,000, the amount of his obligation on both bonds. General denials were interposed by Mr. and Mrs. Sprague. Swalwell admitted the execution of the first bond, and denied that it was delivered, except for examination. Westland admitted the signing of both bonds, but denied that they were delivered, except for examination. He further alleged that he signed the second bond at the request of the bank on the understanding that the first bond was not to be used, and that without

his knowledge or consent the bank delivered both bonds to plaintiff, but that this delivery was simply to enable plaintiff to select one of them, and no selection had been made. Thorne denies generally the execution and delivery of the bonds, and, as an affirmative defense, alleges that he signed the first bond conditionally with other sureties, assuming liabilities in the amount set opposite their respective names; that the acceptance of said bond was refused by the treasurer, and that he never authorized the delivery of it; further, that he consented to execute the second bond on the condition that the sureties thereon should be bound in the full sum of \$75,000; that William G. Swalwell and — Swalwell, his wife, whose names appeared in the body of the bond, should be bound as sureties thereon in the sum of \$12,500; and that it was signed with the express understanding and agreement that it should not be delivered until the same should be signed by said Swalwell and wife. Gower's answer was identical with Thorne's. Replies to the affirmative defenses were tendered. The court gave judgment upon the first bond for the amount qualified in by the different sureties thereon, but held that the second bond was illegal and void for the reason that Swalwell had not signed the same. Both parties have appealed from the judgment of the court; the appeal of Otis Sprague and wife having been heretofore, on motion, dismissed.

The defendants maintain that the second bond was void for the reason announced by the court, that Swalwell and his wife, sureties in the body of the bond, and upon whose signing they relied, had not signed the bond, and that the erasure of their names was sufficient notice to put the treasurer upon inquiry; that the first bond was void and of no effect as to them because it had been rejected by the treasurer; and that after such rejection they had not authorized its redelivery to the treasurer. The contention of the treasurer is that judgment should have been given against the sureties on both the bonds in the amount justified to therein, for the reason that both bonds were tendered to the treasurer as security for the loan, and were accepted as such by him. We think the court erred in holding the second bond illegal. It is undoubtedly the law that, if parties sign a bond with the express or implied agreement that it is to be signed by somebody else, and they rely upon the signing of that other person, whose name appears in the body of the bond, and who afterwards fails to sign the bond, they will be exonerated, if there is sufficient on the face of the bond to put the obligee of the bond upon inquiry. But that case does not arise here. While that issue is raised by the answers of Thorne and Gower, there is no evidence whatever to sustain it. Thorne does not undertake to testify to any such fact; and Nicol, the cashier of the bank, who acted for the

bank and for Thorne, testifies that there was no such understanding. Thorne, it must be remembered, was one of the trustees and vice president of the bank, which had no president, and was in reality the president of the bank. They were undertaking to get this loan for the benefit of the bank, and Thorne must, from his position, have been cognizant of the circumstances leading up to the obtaining of the loan. Mr. Nicol's testimony was, "We all naturally signed and executed the bond, by reason of our interest." He testifies also that he consulted with Mr. Thorne about the matter, and told him everything that it was necessary for him to know in the premises. Gower, it is stipulated, would have testified as did Thorne, but what little testimony he did give shows conclusively that he did not rely upon the signing by Swalwell or any one else. An excerpt from his testimony will show this conclusively: "Well, I have not seen this bond since it was executed, until this moment, and it has rather gone out of my mind lately. I can't fix any date about it. I recollect the signing of it perfectly, but, beyond that, I don't know whether I signed before or after. I can't seem to think— There were two bonds, and both were signed at the same place. Both of them have got the same number of names, and at this distance it seems to be a matter— Nothing to fix it by, you know, that I can now recall, whether I signed my name after the other names, or whether they were all blanks, all but my name." And in conclusion he says: "I can't remember. I have had conversation on this matter at various times, on this Union Savings Bank matter a good many times, with Mr. Thorne and Mr. Nicol and Mr. Bogle, Judge Crowley, and various other people,—Mr. Reed and various other people,—and I can't say who it was presented the bond to me. I do not know whether it was Mr. Thorne or Mr. Nicol, or both of them together, but I know I signed them, but the matter is not distinct enough in my mind to be able to testify to it." From a reading of the whole record, we have no doubt that all the sureties signed, just as Mr. Gower did, simply because they were asked to, to obtain the loan for the bank, and that the reliance upon Swalwell and his wife signing was an afterthought, suggested after the action was brought, when it appeared that the name of Swalwell had been erased; for Mr. Thorne testifies that he did not know that Swalwell and wife had not signed the bond until he noticed the erasure in the copy of the complaint which had been served upon him.

Upon the question of the validity of the first bond, it is insisted that Nicol had no authority from the sureties to redeliver, or to deliver again, that bond to the treasurer. This depends entirely upon the law of agency. It is insisted by counsel for appellant Thorne, in his brief, that, Nicol's agency being limited, it will be held to be more restricted than

the power of a general agent. That is true, without question. But we think his power as a special agent is not shown by the testimony in this case to have been restricted or in any manner revoked. The simple fact that the bond was not accepted by the treasurer as full security for the loan does not constitute a rejection of the bond, and even if it had been rejected absolutely when it was presented, and afterwards the agent had delivered it to Young, and it had been accepted, the delivery would have been the act of the sureties. Nicol was not the agent of the treasurer. He was the agent of the sureties. The interest of the sureties was not only not identical with the interest of the treasurer, but it was antagonistic to his interest. If an agent is empowered by his principal to make a contract with a stranger, and in accordance with such authority the agent makes the offer agreed upon, and it is refused, but afterwards, and before the authority of the agent is revoked, the stranger is again approached, and the same proposition is submitted to him, which he accepts, it cannot be pleaded that there was want of authority on the part of the agent to enter into a contract. Agency does not rest upon so frail a tenure, and there is no substantial testimony in this case that Nicol was in any way divested of his authority in this matter. He was absolutely intrusted with the business in hand, which was to obtain this loan, and to furnish such security for the purpose of obtaining it as was required by the treasurer. The first bond was a complete bond. It was good for all it purported to be good for, but it was thought by the treasurer not to be sufficient, not because there was anything wrong with the bond itself, but because the bondsmen were not good enough, in his opinion, to warrant the deposit. Subsequently the same objection was raised by him to the second bond. But, taking the two together, he thought that he would be amply secured for the loan; and Mr. Nicol, the agent of these parties who had executed both of these bonds, and placed them in his care for the purpose of obtaining this loan, offered them both as security, to satisfy the treasurer. The treasurer accepted them as such, and the contract was complete. It must be borne in mind that the first bond had never been returned to the sureties, and had never been called for by them, but had, during all the time of these negotiations, been left in the hands of the agent. These bonds are complete on their face. The sureties have made themselves responsible on the face of the bonds for the amounts set opposite their names, and the burden is upon them to show that they were not delivered to the treasurer for the purposes for which they purported to be delivered. Having signed, executed, and delivered these bonds, and having signally failed to show any reasons why their contract should not be enforced, the judgment will be reversed, and the cause remanded,

with instructions to the lower court to enter a judgment in accordance with the prayer of the complaint.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 556)

LONG et al. v. EISENBEIS et al.

(Supreme Court of Washington. Dec. 15, 1900.)

EQUITY — BREACH OF CONTRACT — RECOVERY OF LAND — COMPLAINT — SUFFICIENCY — AMENDMENT — PROPER ALLOWANCE — NECESSARY PARTIES — JUDGMENT OF STATE COURT — FOLLOWING BY UNITED STATES COURT — OBJECTION ON APPEAL.

1. Plaintiff purchased certain land, and agreed to hold and sell it jointly with defendant, if defendant would furnish the purchase price and money to plat the land and put it on the market; and to equally divide the profits from sales with defendant. In pursuance of such agreement, the land was deeded to defendant. All of the land was sold, and the proceeds divided, but 84 acres, which defendant refused to sell or to recognize plaintiff's interest therein. *Held*, that plaintiff was entitled to maintain a suit in equity to recover a one-half interest in the 84-acre tract.

2. Plaintiff agreed to hold land and sell it jointly with defendant, if the latter would furnish money to plat and put it on the market, and in pursuance thereof deeded it to defendant, and, on refusal of defendant to sell a part of it or to recognize his interest therein, plaintiff filed a bill to recover one-half of the unsold land. Subsequent to filing the original complaint, the land was condemned by the United States government, and one-half the proceeds held in the registry of the federal court pending the action. *Held*, that it was proper to allow plaintiff to amend his complaint by setting up such condemnation and a prayer for judgment for the money held by the register.

3. Where land was condemned by the United States government pending an action between plaintiff and defendant for a one-half interest therein, and one-half of the money was retained in the registry of the federal court pending the action, and plaintiff's complaint was amended by setting up such condemnation, and by praying for a judgment for the money held by the register, the United States government was not a necessary party to the action.

4. While an action was pending between plaintiff and defendant for the ownership of land, it was condemned by the United States, and the money was held by the register of the federal court awaiting the result of the suit, and the condemnation proceedings were set up in plaintiff's amended complaint, and judgment asked for the money. *Held*, that the contention that a judgment for plaintiff should be reversed because the United States courts might not respect the judgment of the state court was without merit, since the refusal of the United States courts to respect the judgment would not injure defendant.

Appeal from superior court, Jefferson county; James G. McClinton, Judge.

Action by B. M. Long and another against Charles Eisenbeis and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

A. R. Coleman, for appellants. T. J. Humes, Allen Weir, and A. W. Buddress, for respondents.

DUNBAR, C. J. The history of this case is a long one. One Henry Bash purchased from Mary Fowler and others, in August, 1888, certain land situated in Jefferson county, known as the "Fowler Tract," containing 237.85 acres. Bash had previously, in the same month, obtained a contract of sale of the land from the grantors, and a deed of conveyance pursuant to the contract was obtained. About that time Bash entered into a written contract with Eisenbeis, whereby they agreed to acquire, hold, sell, and dispose of the land jointly, Eisenbeis to furnish the money for purchasing and platting the land, and to hold the title in his own name, and to reimburse himself from the proceeds of sales, the net balance of all moneys received from sales to be divided equally between them. This agreement was subsequently modified orally to cover an increased purchase price demanded by the grantors as to a part of the tract. On the 31st of August, 1888, Bash and wife conveyed all the land by deed to defendant Eisenbeis, pursuant to their contract. Eisenbeis entered into possession, and subsequently sold a greater portion of the land. He received all the money, and reimbursed himself for all outlay, and divided the net proceeds with respondent Bash. The parties, however, disagreed upon their accounting, and upon the ownership of the unsold land, and in September, 1893, Bash and wife instituted a suit against the defendants, setting out substantially the foregoing facts, asking that the contract be rescinded, and an accounting had of all the affairs of the trust, and that the lands remaining unsold be divided in accordance with the rights of the parties. Upon the trial of that action specific findings of fact were made by the court. It appears that all the land had been platted except 84.61 acres. The court in that suit found that the unsold land should be equally divided, but the decree omitted any mention of the unplatted land, viz, the 84.61 acres. The plaintiffs brought an action to vacate such judgment. Upon appeal to this court, the cause was decided against the plaintiffs, for the reason that the petition to vacate the decree did not exhibit the entire record upon which the decree was based, and, if there were any seeming inconsistencies between the portions of the record pleaded, they must be presumed to be explained by that portion of the record which was not shown. *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061. Upon the decision of that case, this action was brought against the defendants, plaintiffs alleging that they were owners in fee simple of an undivided one-half interest in 84.61 acres of land; that defendants wrongfully held possession and claimed ownership of the same; and asking for relief and for damages. The defendants answered, denying the material allegations of the complaint, and pleaded the former judgment of the court as an estoppel. The plaintiffs demurred to the

affirmative matter, alleging the estoppel, which demurrer was overruled, and, upon appeal to this court (*Long v. Eisenbeis*, 21 Wash. 23, 56 Pac. 933), the cause was reversed; it being there held that the record of the former judgment pleaded as an estoppel affirmatively showed that the land in controversy, viz. the 84.61 acres, was not an issue determined in the former suit. The case was remitted to the superior court, with directions to sustain the demurrer of plaintiffs to the plea of *res adjudicata* set up in defendants' answer, and for further proceedings not inconsistent with the opinion in that case.

It must have been determined by this court that one-half of the land in dispute had been found by the findings of fact in the prior case to belong to Eisenbeis, and that Eisenbeis was a trustee of Bash, holding said lands for his benefit; for, if it had not so appeared, it would have been a vain thing for the court to have remanded the case for trial upon its merits, the complaint being the same which is now demurred to, with the exception of the supplemental portion thereof. Upon the return of the case a supplemental complaint was filed by the plaintiffs, alleging, in brief, that since the commencement of the action the lands in dispute have been condemned by the United States government; that one half the value of the same has been turned over by the government authorities to Eisenbeis; and that the other half is held in the registry of the United States court, awaiting a determination by the state court of the question of who was entitled to the same. To this complaint the defendants interposed a demurrer, which embraced the following assignments of error: (1) The court below erred in permitting the plaintiffs to file their supplemental and amended complaint in this cause over the objections and exceptions of defendants; (2) the court erred in overruling the demurrer of defendants to said supplemental and amended complaint filed by plaintiffs; (3) the court erred in retaining jurisdiction of this cause after the filing of said supplemental and amended complaint, and in refusing to dismiss this cause for want of jurisdiction; (4) the court erred in refusing to dismiss this cause after it was shown at the hearing of said demurrer that there were necessary and indispensable parties, who had not been made parties to this cause, and without whom no decree would be rendered which would determine the whole question involved; (5) the court erred in refusing to sustain said demurrer to said supplemental and amended complaint upon the ground that said supplemental and amended complaint did not state facts sufficient to constitute a cause of action; (6) the court erred in refusing to sustain said demurrer upon the ground that this cause was barred by the statute of limitations; (7) the court erred in rendering judgment for plaintiffs; (8) the court erred

in refusing to render judgment for defendants.

Outside of any question of res adjudicata in the case, we are satisfied, from all the records, that Bash was entitled to one-half of the 84.61 acres. This amount, added to 153.24 acres, land which was platted into lots and blocks, makes the amount of 237.85 acres, the land deeded by Bash to Eisenbels, and the amount which was the subject of the written contract. We are also very firmly of the opinion that the complaint stated a cause of action, and that it would be a narrow and illiberal construction of the contract to hold that Bash would not be entitled to an equitable division of the property upon the refusal or inability of Eisenbels to sell the same. He was entitled to have the property sold in accordance with the contract, and, upon the failure of Eisenbels to do this, he was entitled to his equitable relief, viz. a restoration of his portion of the property, and a decree restoring the legal title to him. The case is not different from thousands of adjudicated cases where the contract was substantially as the contract in this case. This disposes of the seventh assignment, that the court erred in refusing to sustain the said demurrer upon the ground that the cause was barred by the statute of limitations; for it is conceded that, if the action was an action in relation to interest in real estate or to remove the cloud from title, the six-year statute does not apply.

The first, second, third, and fourth assignments of error are based upon the amended complaint. We do not think the court erred in permitting the plaintiffs to file their supplemental and amended complaint. Our Code provides for a liberal allowance of amended pleadings, and it is a matter that is, of necessity, so largely discretionary with the trial court that its action in this respect will not be reversed unless it is manifest that the discretion is abused. We do not think there was any abuse of discretion in this case. The defendants were not taken by surprise, nor was any injury done them by the supplemental matter alleged. Nor do we think any new cause of action was stated. A recovery on the original complaint would have barred recovery on the supplemental complaint, if it stated the facts, and the demurrer concedes that the supplemental complaint was necessary to bring to the attention of the court material matters and things which had transpired subsequent to the filing of the original complaint, and which could not have been brought to its attention in any other way. Nor was it necessary, under the averments of the complaint, to make the United States in any manner a party to this action. The lower court has entered judgment in favor of plaintiffs, declaring, among other things, their ownership of the money in the federal court registry. The appellants urge this court to reverse that judgment, and the logic of their reasoning

is that the federal court may not respect the judgment of this court, and may refuse to disburse the money pursuant to such judgment. The answer to this is twofold: (1) The defendants will not be injured if the United States should refuse to pay the money over upon the determination of the cause by the state court; and (2) the complaint alleges, and the demurrer admits, that the United States will distribute the money pursuant to judgment in this case. There appearing to be no error committed by the court, and substantial justice demanding that the plaintiffs be awarded the relief prayed for, the judgment will be affirmed.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 315)

McALMOND v. BEVINGTON et al.

(Supreme Court of Washington. Nov. 24, 1900.)

MONEY DEPOSITED AS BAIL—GARNISHMENT.

1. Where F. deposits with a justice of the peace money in lieu of bail for appearance of B., and the justice receipts therefor to F., the presumption in garnishment by B.'s creditors is that it is F.'s money.

2. Where a justice of the peace, without statutory authority, accepts money in lieu of bail for appearance of B., the money belonging to F., and being deposited by him, and the justice receipting to him therefor, F., on discharge of B., is entitled to the money free from any right of B.'s creditors to subject it to garnishment.

Appeal from superior court, King county: O. Jacobs, Judge.

Garnishment proceedings by Henry McAlmond against T. H. Cann and another as garnishees of Robert Bevington. G. W. Feazell appeared as claimant. Judgment for claimant. Plaintiff appeals. Affirmed.

Morris B. Sachs and Julius F. Hale, for appellant. John W. Carson, for respondents.

WHITE, J. On the 28th day of January, 1899, Henry McAlmond, the appellant, who was the plaintiff in the garnishee proceedings in the court below, recovered a judgment in the superior court of King county in cause No. 26,125—Hugh Barbour, Plaintiff, against E. H. McAlmond et al., Defendants—against Robert Bevington, who was one of the defendants in the action, in which judgment was recovered for the sum of \$500, with interest, etc. The said judgment remained unsatisfied, and on the 21st day of September, 1899, the said Henry McAlmond filed in said court and in said cause in which judgment was recovered an affidavit for garnishment, and thereupon a writ of garnishment was issued out of said court in said cause, and on said day was duly served upon J. Dal Roberts, the garnishee mentioned in the affidavit; and on the 22d day of September, 1899, an affidavit for garnishment was filed in said cause, and on said day a

writ of garnishment was duly issued therein, and was duly served upon said T. H. Cann, the garnishee named in said writ. Answers were duly served by the garnishees, J. Dal Roberts and T. H. Cann, in which said answers the said garnishees deny that at the time of the services of the writ of garnishment they were indebted to the defendant Robert Bevington in any sum whatever, and allege that at that time no effects of any kind, nature, or description whatsoever were in their possession or under their control belonging to the said defendant Robert Bevington; and further alleging that since said time they have not become indebted to the said Robert Bevington, nor since said time have they had in their possession or under their control any effects whatever belonging to the said Robert Bevington. Afterwards the judgment creditor, Henry McAlmond, the appellant, filed and served replies to said answers, alleging that at and before the service of the writ of garnishment herein upon said garnishee, to wit, the 22d day of September, 1899, and prior thereto, and ever since said day, said garnishee T. H. Cann was indebted to said Robert Bevington, and is now indebted to said Robert Bevington, in the sum of \$1,000, being the amount of money deposited with the said garnishee on about the 22d day of September, 1899, as cash bail for said Robert Bevington in the case of the state of Washington against Robert Bevington and others, defendants, then pending in the justice court, Seattle precinct, King county, Wash., before T. H. Cann, justice of the peace; that since the service of the writ of garnishment upon said garnishee the said justice court, by an order duly made in said court in said cause in which the state of Washington was plaintiff and Robert Bevington and others were defendants, being the same cause in which the said sum of \$1,000 was deposited by said Robert Bevington with said garnishee as cash bail, did dismiss said cause, and discharge said defendants therein. These replies were duly served and filed on or about the 27th day of September, 1899, on which day the above-named garnishee defendant, T. H. Cann, deposited with the clerk of the superior court of King county, Wash., and paid into the registry of said court, the sum of \$1,000 in response to the garnishment hereinbefore referred to. Afterwards, on the 3d day of October, 1899, one G. W. Feazell filed in said cause in said court an affidavit styling himself plaintiff and claimant, in which affidavit the said Feazell states that the \$1,000 levied upon in the above-entitled cause as the property of the defendant Robert Bevington has been at all times herein mentioned, and now is, the property of the claimant, G. W. Feazell, and that the same is of value of \$1,000, and that said claimant, Feazell, is entitled and has the right to the immediate possession thereof. The affi-

davit and claim of said Feazell were duly controverted by the appellant. A jury was in open court waived by all parties to the cause, and the same was, on the 13th day of November, 1899, tried before the court. Thereupon the court made and filed in the cause findings of fact and conclusions of law as follows: "(1) I find that on the 28th day of January, 1899, Henry McAlmond, plaintiff herein, recovered a judgment in the superior court against Robert Bevington for the sum of five hundred dollars, with interest thereon at the rate of seven per cent. per annum from April 27, 1898, and costs of suit, taxed at \$12. (2) I find that on September 15, 1899, said Robert Bevington and one A. B. Mason were charged on a written complaint sworn to by John J. Jones with the crime of obtaining money under false pretenses on or about August 7, 1899, in King county, state of Washington. I find that a warrant was issued by the justice before whom the complaint was made, and that they were arrested, and brought into court September 15, 1899. I find that the complaint could not be heard on that day, and it was continued until September 20th. The bail was fixed by the court at one thousand dollars each. On the 15th day of September Bevington was not able to give bail for his appearance from time to time until the examination could be concluded by the justice. (3) I find that G. W. Feazell, intervener herein, was a friend of Mr. Bevington, and that he, without the request and knowledge of Bevington, put into the hands of the justice a thousand dollars of his own money, in cash, as security for the appearance of Bevington whenever his appearance should be required by the justice during the progress of the preliminary examination. (4) I find that T. H. Cann, the justice of the peace, received it and receipted for it as said G. W. Feazell's money. (5) I find that the preliminary hearing was not completed on the 20th, and was continued until the 21st at two o'clock p. m., and thence continued to September 22d at ten o'clock a. m.; that late on the afternoon of the 22d day the charge against both defendants was dismissed by the justice of the peace. (6) I find that about eight o'clock in the morning of the 22d garnishee process was served upon T. H. Cann, claiming the money deposited in the court by Mr. Feazell to be the money of Robert Bevington, and the object of such garnishment proceedings was to secure the application of said money, or as much thereof as might be necessary, for the satisfaction of the judgment obtained by McAlmond against Bevington, above alluded to. (7) I find that T. H. Cann, justice of the peace, deposited said money in the registry of this court to bide its order herein. (8) I find that G. W. Feazell intervened in the garnishment proceedings herein, and claimed the money as his own. I find as a conclusion of law from the above facts that the money

was the property and is the property of G. W. Feazell, intervenor herein, and that he is entitled to the possession of the same." Prior to the making and filing of the aforesaid findings of fact and conclusions of law the appellant asked the court to make the following conclusions of law: "That the claimant and intervenor, Feazell, having deposited the funds in question with the garnishee defendant, T. H. Cann, for the use and benefit of defendant Robert Bevington, such funds then became, and ever since have been, the property of said Robert Bevington, and are subject to garnishment by the judgment creditor, Henry McAlmond, and that, consequently, said money, which was in the hands and under the control of garnishee defendant, T. H. Cann, and afterwards deposited by him in the registry of this court, or so much thereof as may be necessary to satisfy the judgment of said defendant, Henry McAlmond, should be appropriated to the payment of said judgment." Thereupon the appellant excepted to the third finding of fact and the conclusions of law made and entered by the court, and the refusal by the court to make the conclusions of law submitted by the appellant. On the 24th day of November, 1899, the court made and entered a decree authorizing the claimant and intervenor, G. W. Feazell, to withdraw from the registry of the court the \$1,000 therein deposited by the garnishee defendant, T. H. Cann, and giving and granting a judgment in favor of said claimant and intervenor and said garnishee defendants, and each of them, and against the said Henry McAlmond, for costs and disbursements; and thereupon the said appellant applied to the court for an order fixing the amount of the appeal and supersedeas bonds in said cause in order that he might appeal the said case to the supreme court of the state of Washington, and supersede said judgment and decree; and the court thereupon fixed the bond aforesaid at \$500. Thereupon the appellant duly gave notice of appeal, as required by law, and filed an appeal and supersedeas bond in the sum of \$500, as fixed by the order of the court; and thereafter the court made and entered an order which recited that, judgment in the cause having been rendered in favor of the claimant, G. W. Feazell, and the court having made an order fixing the supersedeas bond at \$500 on application of William and Jacobs, attorneys for claimant, and which ordered that said claimant be permitted to withdraw from the registry of the court the \$1,000 deposited by said T. H. Cann upon giving a bond, to be approved by the court, to Henry McAlmond, in the sum of \$1,000, conditioned to pay all costs and damages he may sustain by reason of such withdrawal; to which said Henry McAlmond excepted. On the 28th day of November, 1899, the court made the following order: "Upon approving and filing bond herein it is ordered that \$500 of the money

deposited herein be delivered to G. W. Feazell, or his attorney, Solon T. Williams." Thereafter there was filed in court a bond in the sum of \$250, which was approved by the judge, and thereupon the said claimant withdrew from the registry of said court, and of the \$1,000 deposited by said T. H. Cann, garnishee herein, the sum of \$500, and this case comes to this court upon the appeal of said Henry McAlmond from the judgment and decree and the orders of the superior court of King county.

The findings of fact, except the third, are not questioned. The statement of facts recites that, "subsequent to Bevington's commitment to jail, but prior to his said preliminary examination, G. W. Feazell, the above-named intervenor or claimant, deposited with said justice of the peace, Cann, the sum of \$1,000 in cash, in lieu of bail, as security for the appearance of said Bevington before said justice of the peace for his preliminary examination." This is the only matter in the statement justifying the third finding of fact. From the fact that the money was deposited by Feazell the court found that it was Feazell's money, and that he was a friend of Bevington. The difference between the third finding of fact and the statement is immaterial. The fourth finding of fact is to the effect that the justice of the peace received the money from Feazell, and receipted to him for it. Until the contrary is shown, the presumption, under such circumstances, is that it was Feazell's money that was deposited.

The second assignment of error is based upon the conclusion of law made by the court, and the third assignment upon the refusal of the court to find the conclusions of law requested by the appellant. We will consider them together. The appellant takes the position that, because the money was deposited as security for Bevington's appearance, it became, for all purposes, Bevington's money, and became subject to garnishment for his debts. From the undisputed findings this money was deposited by the respondent for a special purpose. There is no evidence showing or tending to show that, prior to its deposit, Bevington had any interest whatever in it. The justice receipted to the respondent for it, not as the money of Bevington, but as the money of the respondent. Had the respondent entered into a recognizance for Bevington's appearance, no one doubts but that on the discharge of Bevington the recognizance would be *functus officio*, and the respondent's liability at an end. The money took the place of a recognizance entered into by the respondent for Bevington's appearance, and was accepted by the justice of the peace in lieu thereof; and when it had answered the purpose for which it was placed in the hands of the justice, and he had no longer a right thereto for the purpose for which it was deposited, why should it not be returned to the respondent? Certainly, Bevington could not maintain an ac-

tion against the justice for the recovery or conversion of the money, unless he was able to show that when it was deposited it was his money, and the respondent was only his agent. Why, then, should the judgment creditor of Bevington acquire any greater right to the money than that possessed by Bevington? As was said by this court in *Merwin v. Fowler*, 20 Wash. 587, 56 Pac. 374: "The material question is, to whom did the money belong that was paid into court?"

* * * When the decree which was the basis of the transaction failed, intervenor became at once entitled to the money. * * * If it was security merely, then the failure of the security before the application of the money could be made would, upon well-understood equitable principles, entitle the intervenor to its return. That this would be the rule between the intervenor and Fowler (for whose benefit the deposit was made) cannot well be doubted, and the plaintiff in garnishment can claim no greater right to the fund than could his own debtor." And in *Boom Co. v. Brisobols*, 14 Wash. 173, 44 Pac. 153, this court says: "The garnisher can get no better right to the debt garnished than his debtor has; and, if the latter has no right in or to the debt, the former acquires none by his garnishment." The principle announced in these cases should be applied to the case under consideration, and is decisive against the contention of the appellant.

The case of *People v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910, relied upon by appellant, can be distinguished from the case at bar. In that case one Nye was arrested in the city of New York on the charge of assault, and was held to bail in the sum of \$300 for his appearance for trial at the court of special sessions. Gilbert, for Nye, deposited with the justice \$300 in lieu of bail. Nye was convicted, and sentenced to pay a fine of \$250. The fine was ordered to be paid from the money on deposit. The money deposited was Gilbert's. There was also a statute providing "that, when money has been deposited, if it remain on deposit and forfeited at the time of judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and after satisfying the fine, must refund the surplus, if any, to the defendant." The court held that the section quoted must be read in connection with the section authorizing a money deposit in lieu of bail; that Gilbert, when he deposited the money, must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them; that, if he was deprived of his money in the payment of the fine, it was by his voluntary act and implied assent. It was not held in that case that the money was impounded for all purposes, and that creditors could seize it as the money of Nye. The case of *Salter v. Weiner*, 6 Abb. Prac. 191, does hold, however, that the money deposited

by another for bail of the defendant was loaned to the defendant, and that loaned money is the property of the loanee, and was, therefore, subject to attachment. But in that case the money was ordered by the court to be turned over to the defendant before the attachment was levied. The opinion takes up four lines of the report, and no reasons further than we have quoted are given for so holding. We think the rule established in *Merwin v. Fowler*, supra, is more logical, equitable, and just than that announced by the New York court. There is no statute in this state authorizing a justice of the peace on a preliminary examination to accept a deposit of cash in lieu of bail. It is not necessary in this case to decide whether he may or may not do so. The statute (section 6878, 2 Ballinger's Ann. Codes & St.) allowing defendant to deposit with the clerk of the court money in lieu of bail applies only to criminal proceedings in the superior court. In this case the justice, without statutory authority, received the money of the respondent as surety for the appearance of Bevington in place of a recognizance entered into by respondent for Bevington's appearance. When the purpose for which the money had been deposited was served, so far as ownership is concerned, it is as if the money had never passed from the possession of the owner. His right to recover it immediately attaches. The title to the money was never for a moment in Bevington for any purpose.

The assignment to the effect that the court, in allowing respondent to withdraw a portion of the fund, erred, requires no consideration. As we have held that the money on deposit was the money of the respondent, the ruling of the court, even if erroneous, would not be injurious to the appellant. The judgment of the lower court is affirmed, with costs to respondent.

DUNBAR, C. J., and REAVIS, ANDERS, and FULLERTON, JJ., concur.

(23 Wash. 239)

PAYETTE v. WILLIS.

(Supreme Court of Washington. Nov. 20, 1900.)

ATTORNEYS—CHANGE—PAYMENT—EXCEPTIONS.

1. A mere general exception to all the findings, some of which are manifestly correct, is insufficient to authorize the review of any question of fact on which they are based.

2. Though the court, in proceedings for change of attorney, under 2 Ballinger's Ann. Codes & St. § 4769, providing that "no such change can be made till the charges of such attorney have been paid," does not find that there was a special contract for attorney's fees, either in the sum claimed by the client or in that claimed by the attorney, but merely that the services were worth an amount between such sums, this does not establish the unfaithfulness of the attorney in having refused to proceed further with the case till compensation was paid him according to the agree-

ment as claimed by him, so as to require that he be discharged without his first being paid the reasonable value of his services.

Appeal from superior court, Lewis county; A. L. Miller, Judge.

Proceeding by Joseph Payette against J. E. Willis under 2 Ballinger's Ann. Codes & St. § 4769. Judgment for defendant. Plaintiff appeals. Affirmed.

Edward F. Hunter and A. E. Rice, for appellant. J. E. Willis and C. H. Forney, for respondent.

WHITE, J. A motion has been made by the respondent to dismiss this appeal, but, from the view we take of the case, it is unnecessary to pass upon the same. This is in the nature of a special proceeding, and the complaint, stripped of abounding verbiage, amounts to this: That the respondent is a practicing attorney; that prior to the 16th of December, 1896, the appellant employed the respondent to represent him as an attorney in a suit to set aside a deed (Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629), and to reinvest title in the land mentioned in the deed in appellant; that prior to the bringing of said action it was agreed between respondent and appellant that, in case appellant was restored to the land in litigation by the courts of the state, appellant was to pay respondent for his services in the matter \$100, and all costs and expenses advanced by the respondent in the action; that a trial of the cause, conducted by the respondent, was had in the superior court of Lewis county, a decision rendered against the appellant, and the case appealed to the supreme court; that the supreme court decided the case in favor of the appellant, and reversed the lower court; that appellant has paid to respondent the sum of \$20 on account of costs; that respondent, since the decision of the supreme court, refuses to proceed further in said action, or to withdraw from the same and allow appellant to employ other counsel, unless the appellant deed to respondent one-half the land in controversy in said action; that appellant has been ready and willing to pay the respondent the amount contracted to be paid when he is restored to the possession of the property in litigation. The prayer of the complaint is that the court find whether or not the appellant is indebted to the respondent, and, if so, the amount of such indebtedness; that for such indebtedness, if any be found, the court make such order as the nature of the case demands. The answer denies the payment of the \$20 and the contract as to compensation pleaded by the appellant. The services performed are affirmatively pleaded in the answer; also, that \$125 was expended by respondent in the expense of litigation, and that \$15, and no more, of that sum has been repaid; that a verbal agreement was made between appellant and respondent in March, 1898, that if respondent obtained a favorable decision from the su-

preme court in said action, reversing the judgment of the lower court, then appellant would convey to respondent an undivided one-half of the land in controversy; and that such favorable decision was subsequently obtained. The respondent further pleads that the entire tract of land was worth \$3,000; that his services in connection with the litigation were of the reasonable value of \$1,500; that appellant refuses to execute and deliver a deed for one-half of the land to respondent; that respondent is willing to do all things remaining to be done by an attorney to put appellant in possession of said land, if appellant will make such conveyance. The prayer of the answer is that appellant be adjudged to convey to respondent half of said land, or, if the court shall decide to remove him as attorney, that the court shall determine and fix a fair and reasonable compensation for his services, and not permit any substitution of attorneys until such compensation be paid; that such compensation be fixed so as to be equal to one-half the value of the land, and that respondent be paid also his costs expended for appellant, less said \$15. The reply denies the contract set out by the respondent's answer, the value of his services, and most of the other allegations in the answer. The complaint and reply in this case abound in verbiage and immaterial allegations and conclusions of law. The answer, also, is more prolix than necessary. The foregoing, however, is a summary of the pleadings. Both appellant and respondent, without demanding a jury, submitted to a trial of the issues by the court. The court made its findings and conclusions as follows: "(1) That the said J. E. Willis now is, and was during all the time herein mentioned, a regularly admitted and practicing attorney in the courts of this state. (2) That on or about the 1st day of July, 1894, the plaintiff employed defendant to act as attorney for him in a certain matter then pending between the plaintiff and one J. R. Jacobus and others, which said employment resulted in the commencement of an action in the superior court of Lewis county, Washington, wherein Joseph Payette was plaintiff and J. W. Ferrier, administrator of the estate of Jacob Patton and Ida Patton, was defendant, and being No. 1,378, and that subsequently another action between the same parties, affecting the same subject-matter, was instituted by plaintiff, and being No. 1,737; that said matter was litigated in the superior court of Lewis county, and later from thence to the supreme court of the state, and that defendant was employed to attend to said matters in said courts; and that in pursuance of such employment he did attend to said matters in said courts. (3) That no contract or agreement was entered into between plaintiff and defendant fixing or determining the amount of defendant's compensation for such services. (4) That \$300 is a reasonable compensation to be allowed defendant as full

compensation for said services. (5) That defendant expended in behalf of plaintiff the sum of \$75, advanced costs, no part of which has been paid, except the sum of \$15. (6) That plaintiff now desires to discharge defendant from further employment as attorney in said matter. As a conclusion of law, the court concludes that plaintiff may discharge defendant from said employment upon payment to him of the sum of \$300, attorney's fees, and the sum of \$60, as advanced costs."

The appellant excepted, as follows: "The plaintiff excepts to the findings of fact and conclusion of law, and the conclusion of the court that the plaintiff may discharge the defendant from said employment upon payment to him of the sum of \$300, attorney's fees, and the sum of \$60, as advanced costs." As to the facts found, this exception is too general to constitute the exception provided for by law. Some of the findings are manifestly correct, and a general objection to the whole thereof is clearly insufficient, and this court is precluded from reviewing any questions of fact upon which such findings were based. *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636; *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935; *Schoonover v. Condon*, 12 Wash. 475, 41 Pac. 195..

The appellant tendered 22 findings of fact, to be substituted for the findings made by the court. The court refused to substitute the findings so tendered, and a general exception to the refusal of the court was noted. Many of the proposed findings were outside of the issues in the case, and were recitals of evidentiary matter, merely, and they were properly rejected by the court. The facts found by the court substantially cover all the issues raised by the pleadings. The appellant offered to show that while the respondent was employed in the case he bought in tax titles on the land in litigation; that the land had been sold for taxes; that the respondent paid the taxes to a certain extent without the knowledge of appellant; and that appellant had to borrow \$400 to repay the taxes, penalties, and interest. The court ruled against the offer, and an exception was noted. The respondent claimed that he had a contract with the appellant for an undivided one-half interest in the land. The appellant neglected to pay his taxes. The respondent had a right to purchase the tax titles in order to protect his interest in the land. Aside from this, we are at a loss to understand how the duty of attorney to client was in any manner violated by the attorney's buying in the tax titles. Any one, under the law, had a right to buy the tax titles. The appellant was not required to pay the respondent on redemption any more than he would have had to pay a stranger.

The pleadings and evidence in this case disclose the fact that the relation of client and attorney existed between appellant and respondent. A dispute arose between them as to the compensation to be paid to the at-

torney for his services; the appellant claiming that the sum to be paid was \$100; the respondent claiming that he was to be compensated by the conveyance to him by appellant of a one-half interest in a certain tract of land, and a payment to him of costs and expenses advanced in the litigated action. The appellant thereupon desired to change his attorneys by substituting Edward F. Hunter, Esq., or by associating Mr. Hunter with the respondent in the further management of the case. The respondent refused to consent to the substitution of Mr. Hunter, or to allow Mr. Hunter to be associated with him in the management of the case. The appellant then commenced this proceeding, and, by his prayer therein, asked the court to find the amount in which he was indebted to the respondent for his services as attorney, and to make such order in the premises as the nature of the case demanded. The respondent, in his answer, set up a contract of employment different from that alleged by appellant, and also pleaded, in effect, that his services were reasonably worth \$1,500. He prayed the court that, if it was deemed advisable to remove him as attorney, the court would fix a fair and reasonable compensation, etc., and not to permit his removal as attorney until the same and costs advanced by him had been paid. The special contract set up in the answer and the reasonableness of services were denied by appellant. Section 4760, 2 Ballinger's Ann. Codes & St., is as follows: "The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows: (1) Upon his own consent, filed with the clerk or entered upon the minutes; or (2) upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made." The proceedings instituted by the appellant were under this section, and, as an incident, the court was called upon to determine whether any special contract of employment existed between appellant and respondent, and, if so, what that contract was. The court, by its findings, necessarily determined that no special contract existed, and properly found that the respondent was entitled to what his services were reasonably worth, and fixed that amount at \$300, together with the costs advanced by the respondent in the action which he prosecuted for appellant. The issue was fairly joined as to the value of the services, and the appellant cross-examined the witnesses called by respondent as to the services rendered, and as to the value of the land in controversy in the suit of *Payette v. Ferrier*, supra, and also called witnesses in his own behalf as to the value of the land in such suit. The only exception properly taken, and which the court is called upon to consider in this case, is the conclusion of the court, from the facts found, that

"the plaintiff may discharge the defendant from said employment upon payment to him of the sum of \$300, attorney's fees, and the sum of \$60, as advanced costs." No rights guaranteed to appellant under the federal or state constitution are violated by the judgment of the court on these findings, and the contention of the appellant in this respect is without merit. The effect of this judgment is simply to require the payment of compensation to an officer of the court for services rendered, before another shall be substituted. The statutes of this state (2 Ballinger's Ann. Codes & St. § 4771) give to an attorney, to the extent and value of the services performed by him in the action, a lien upon any judgment recovered therein. The supreme court of Idaho, in passing on a similar question, says: "It is further contended that the attorney is simply the agent of his client. To a certain extent this is true, but he is more than an agent. He is also an officer of the court, and within his sphere and in the line of his special powers he is as independent as the judge of the court, and has not only his duties and obligations to the court and to his client, but he has rights and powers entirely different from and superior to an ordinary agent. An agent receives his orders from, and is directed absolutely and wholly by, his principal, in the management of his business. On the other hand, the business of the client which is submitted to his attorney is managed entirely by the attorney, and the client is advised and directed by him. As to the business committed to his care, the attorney is the sole manager and director. Hence his responsibilities are much greater than those of an ordinary agent. His reputation and his abilities are at stake, to some extent, in every case he undertakes. Hence the law says the client shall not discharge him arbitrarily in the midst of the performance of his duties. But, if you desire to change attorneys, you may do so, with the consent of the court, in a proper proceeding. As in this case the court examines into the reasons for said change, and when he ascertains that the attorney has prosecuted his client's business to the best of his ability, and with fidelity to the trust imposed upon him, he so finds. Then, if the substitution is made, there is no reflection upon the ability or faithfulness of the attorney. As to his right to fees or security for the same, as a condition precedent to his discharge, the law says—and this court is in accord with this view—"that a party has no right arbitrarily to change his attorney without paying or securing fees earned, and the original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his just demands is ascertained by a court or referee, and paid or secured." Weeks, Attys. §§ 250, 267, and cases there cited; Mechem, Ag. § 856; In re Herman (D. C.) 50 Fed. 517; Ronald v. Association (C. C.) 30 Fed. 228; Butchers' Union Slaughter-House & Live-

Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co. (La.) 6 South. 509; Gardiner v. Tyler, 36 How. Prac. 63. The substitution, however, of attorneys is a matter largely in the discretion of the court, and we do not say that there may not be a case in which attorneys may be discharged without paying or securing fees already earned. We do say that the rule of law is that fees or commissions already earned must be paid or secured before substitution can be had. If this is impossible in any given case, this fact must be shown by the party moving the discharge and substitution, and then it should appear that justice to the client or attorney demands the change. We do not say that there does not exist in this case such a state of facts as renders a change necessary and proper, and therefore do not condemn the judgment of the court below; but this change should not be made without first paying or securing the fees earned, unless, as is stated, the court below should deem this impossible or impracticable." Curtis v. Richards (Idaho) 40 Pac. 57; Sloo v. Law, 4 Blatchf. 268, Fed. Cas. No. 12,958. In the last case cited the court says: "It is the duty of the court to protect solicitors and other officers of the court, when they have faithfully performed their trust, and that duty should be faithfully executed."

The appellant, however, insists that, inasmuch as the court failed to find that the respondent was entitled to one-half of the land, the refusal to proceed with the case unless he received a deed for one-half establishes his unfaithfulness to his client, and for that reason he should have been summarily removed. It must be remembered that the court failed also to find that the contract claimed by the appellant was the true contract between appellant and respondent. The mere fact that the appellant and respondent differed as to the kind or amount of compensation to be paid for services rendered in no way proves that the respondent was unfaithful to his client in the discharge of his duties as attorney. Inasmuch as this is in the nature of a special proceeding, and as the conduct and charges for the services of an officer of the court are involved, we have disregarded the fact that no proper exceptions have been taken to the findings, and have examined the evidence. If we were called upon to review the findings, we would be inclined to increase, rather than diminish, the compensation awarded to respondent. Through his efforts a tract of land valued at \$1,800 and \$2,200 by the witnesses of appellant, and much higher by witnesses for respondent, and probably worth \$3,000, was saved to the appellant. The services rendered involved a trial in the superior court, where the judgment was adverse to the appellant, and an appeal to this court, wherein the judgment of the court below was reversed and the appellant was awarded his land. The respondent has, with zeal, ability, and faith-

fulness, attended to the duties imposed upon him, and common honesty requires that he should be paid for his services. The judgment of the court below is therefore affirmed, with costs to respondent.

DUNBAR, C. J., and REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 239)

STATE v. HAWKINS.

(Supreme Court of Washington. Nov. 19, 1900.)

MURDER—MALICE—INTOXICATION—INSANITY
—INSTRUCTIONS—CHANGE OF VENUE.

1. 2 Ballinger's Ann. Codes & St. § 6794, provides: "The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against defendant in the county, * * * and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence; nor in any case unless the judge is satisfied the ground on which the application is made does exist." Section 6795 provides: "When the affidavit is founded on prejudice of the judge, the court may, in its discretion, grant a change of venue to some other county, or may continue the cause until such time as it can be tried by another judge in the same county; if the affidavit is founded on excitement or prejudice in the county against the defendant, the court may, in its discretion, grant a change of venue to the most convenient county." Held that, where application for change of venue is based on prejudice of the judge, the discretion of the court is not limited simply to the choice of granting it, or holding the case for trial by another judge.

2. On a trial for murder, opportunity for deliberation is allowed by an instruction on malice that: "No particular length of time need elapse before there can be deliberation or premeditation in an act. A single moment may be enough. It is sufficient if you find, * * * beyond a reasonable doubt, that any length of time elapsed, no matter how short, sufficient to allow a design to * * * be deliberated on and meditated over before carrying into effect."

3. Where the court is not talking about the testimony, but is simply pointing out the distinctions which the law makes, so far as responsibility is concerned, between the different degrees of intoxication, it does not indicate to the jury that in its opinion the crime was committed when defendant was capable of forming a specific intent to take life, and that it has no right to discuss the testimony in that regard, by a statement: "I charge you that voluntary drunkenness is not an excuse for crime, but, as you must determine the degree of the crime, * * * it becomes necessary for you to inquire as to the state of mind under which he acted; and in the prosecution of such inquiry his condition, as drunk or sober, is proper to be considered, * * * in order to justly determine the question whether his mind was capable of that deliberation or premeditation or purpose which, according as they are absent or present, determine the degree of the crime, or the guilt or innocence of the defendant. But I charge you * * * that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crimes when they are in-

flamed by intoxicating drink. You must discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent to take life, and such a prostration of the faculties as renders a man incapable of forming the intent or of deliberation or premeditation. If an intoxicated person has the capacity to form an intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it or to conceive it more suddenly by reason of his intoxication."

4. Where it was claimed that defendant at the time of the homicide was under the influence of drugs administered by another and was intoxicated, and the court had charged as to law of such matters, the giving of instructions as to insanity, as to which there was no issue or evidence, is prejudicial error; the record not affirmatively showing that no prejudice resulted.

5. That some witnesses testified that at the time of the killing defendant was intoxicated, and others that he was sober, does not entitle defendant to an instruction that "it is a rule of evidence that ordinarily a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what may have actually occurred, while it is impossible to remember what never existed."

Appeal from superior court, Skagit county; J. P. Houser, Judge.

Alfred Hawkins, informed against as Alfred Hamilton, was convicted of murder, and appeals. Reversed.

J. B. Wright and R. H. Lindsay, for appellant. M. P. Hurd and McBride & Joiner, for the State.

DUNBAR, C. J. The appellant was convicted of the crime of murder and sentenced to death, and judgment of death was pronounced upon him. This is an appeal from said judgment. A minute statement of the case is unnecessary, as the killing is conceded, and that it was ruthless and unprovoked. The principal defense was that the appellant was irresponsible, by reason of his having been under the influence of intoxicating drinks and drugs which had been administered to him.

The first assignment of error challenges the correctness of the overruling by the court of appellant's motion for a change of venue. The law on that subject is as follows: "The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence; nor in any case unless the judge is satisfied the ground upon which the application is made does exist. When the affidavit is founded on prejudice of the judge, the court may, in its discretion, grant a change of venue to some other coun-

ty, or may continue the cause until such time as it can be tried by another judge in the same county; if the affidavit is founded upon excitement or prejudice in the county against the defendant, the court may, in its discretion, grant a change of venue to the most convenient county. * * * 2 Ballinger's Ann. Codes & St. §§ 6794, 6795. The construction placed upon this statute by the appellant is to the effect that, because it provides that when the application is based on the ground of excitement or prejudice other than prejudice of the judge the application shall not be granted unless the affidavit be supported by other evidence, but that when it is upon the ground of the prejudice of the judge no supporting affidavit is necessary, it follows that it was the intention of the law that no discretion be left with the judge when the application is based upon his prejudice, and that the language of section 6795, viz. "When the affidavit is founded on prejudice of the judge, the court may, in its discretion, grant a change of venue to some other county, or may continue the cause until such time as it can be tried by another judge in the same county," confers discretion simply as to the choice of either removing the case to some other county, or holding it for trial by another judge in the same county; and the argument is based upon the presumption that a judge is not capable of passing upon the question of his own prejudice. However this may be, we are called upon to construe the statute as it has been enacted, and, so construed, we are unable to conclude that the discretion is taken from the judge in one case more than in the other. In fact, such a conclusion is necessarily excluded by the very provisions of the statute itself, viz. the concluding clause of section 6794, that the application shall not be granted "in any case unless the judge is satisfied the ground upon which the application is made does exist." Neither do we think, from an examination of the record, that the judge abused his discretion in refusing the motion either on the ground of his own prejudice, or that of prejudice of the community.

Error is alleged in the giving of instruction No. 6, which is as follows: "No particular length of time need elapse before there can be deliberation or premeditation in an act. A single moment may be enough. It is sufficient if you find from the evidence, and beyond a reasonable doubt, that any length of time elapsed, no matter how short, sufficient to allow a design to be formed in the mind, and that design to be deliberated upon and meditated over before carrying into effect." It is insisted that this instruction is contrary to the ruling of this court in *State v. Rutten*, 13 Wash. 203, 43 Pac. 80; *Same v. Straub*, 16 Wash. 111, 47 Pac. 227; and *Same v. Moody*, 18 Wash. 165, 51 Pac. 356. The language criticised by this court in *State v. Rutten*, *supra*, and which was held to oblit-

erate the statutory distinction between murder in the first and second degrees, was as follows: "There need not be any appreciable space of time between the formation of intention to kill and killing. They may be as instantaneous as successive thoughts." Practically the same language was used by the court in *State v. Moody*, *supra*. The instruction in the *Rutten* Case was noticed by this court in *State v. Straub*, *supra*, and was distinguished from the instruction alleged as error in the latter case, which was as follows: "Malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when the motive or consideration moving to his act has been to any extent mentally weighed. Premeditation may be as quick as thought in the mind of man." This instruction, without going into an analysis of it as we did in that case, was held to be good. The instruction in this case not only does not fall within the criticism passed upon the instruction in the *Rutten* Case, but makes a wider distinction between murder in the first and murder in the second degree than does the instruction in the *Straub* Case, just noticed. The objection to the instruction in the *Rutten* Case was that it informed the jury that no appreciable space of time was necessary, and hence no opportunity for deliberation, but the instruction under consideration is not subject to this construction.

Objection is also made to the eighth instruction of the court, which was as follows: "I instruct you that voluntary drunkenness is not an excuse for crime, but as you must determine the degree of the crime of which the defendant is guilty, if he is guilty at all, it becomes necessary for you to inquire as to the state of mind under which he acted; and in the prosecution of such inquiry his condition, as drunk or sober, is proper to be considered, inasmuch as the degree of the offense, if any has been committed, depends upon the question whether the killing was willful, deliberate, and premeditated; and upon that question it is proper for you to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time that the act was committed must be inquired after in order to justly determine the question whether his mind was capable of that deliberation or premeditation or purpose which, according as they are absent or present, determine the degree of the crime, or the guilt or innocence of the defendant. But I charge you, gentlemen, that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are inflamed by intoxicating drink. You must discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent to take life, and such a prostration of the

faculties as renders a man incapable of forming the intent, or of deliberation or premeditation. If an intoxicated person has the capacity to form an intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or to conceive it more suddenly, by reason of his intoxication." It is to the "cautionary" part of this instruction, as it is termed by the appellant, that he objects; and it is insisted that the court indicated to the jury by such instruction that in its opinion the crime was committed when the appellant was capable of forming a specific intent to take life, and that it had no right to discuss the testimony in that regard. We do not think that appellant's contention is justified by the language of the instruction. The court was not talking about the testimony in the case, was not discussing the probabilities of the truthfulness or untruthfulness of any testimony, but was simply pointing out to the jury the distinctions which the law makes, so far as responsibility is concerned, between the different degrees of intoxication.

A more troublesome question, however, is involved in the next assignment, viz. that the court erred in giving instructions numbered 10 and 11, which were as follows: "No. 10. The defense of insanity has been interposed. The law presumes every man to be sane, yet, where evidence has been introduced bearing upon the question of sanity or insanity, it is incumbent upon the state to establish the sanity of the defendant beyond a reasonable doubt. The term 'insanity' means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will (by which I mean the governing power of his mind), has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control. No. 11. The plea of insanity is either a complete defense or no defense at all. It cannot be considered for the purpose of reducing the grade of the crime charged. If defendant was insane at the time of killing Woodbury, he should be acquitted; but, if he was not insane then, any evidence that may have been introduced bearing upon the question of insanity cannot be considered for the purpose of reducing the grade of the crime charged." It is not contended by the appellant that these instructions are violative of any principles of abstract law, but the contention is that there was no issue of insanity presented in the trial of the cause, and that the jury was confused by such instructions, and was liable to confuse the instruction in relation to insanity with that in relation to intoxication, and con-

clude that, if the defendant were found to be intoxicated to such an extent that he was unable to deliberate, such fact would not warrant it in finding for any less offense than the offense of murder in the first degree. It is asserted by the respondent that this apprehension is more fanciful than real, and that the issue of insanity was made in the case. In support of that contention an additional or supplementary statement of facts is brought to this court, wherein it is shown that counsel for the defense in his opening statement admitted the killing of Woodbury by the defendant at the date and place alleged in the information, and claimed that the defendant would be able to satisfy the jury that at the time of such killing he (defendant) was so under the influence of intoxicating drinks and noxious drugs administered to him, by persons unknown to the defendant, for the purpose of robbing him, that he was wholly incapable of premeditation or deliberation in the act of killing, and that in fact, at the time of said killing, said defendant, by reason of the using of such noxious drugs, was wholly unconscious, and other expressions to the same effect. But instruction No. 9 covers this claim of defendant. It was as follows: "If, after a careful consideration of all testimony in the case,—that of the state as well as that of the defense,—your minds are left in reasonable doubt as to whether or not at the time of the killing of the deceased by the defendant, if you find that defendant killed him, the defendant was so far under the influence of noxious drugs administered to him by others than himself, and without his knowledge, that his mental condition was such that he was incapable of distinguishing between right and wrong, and that the acts then committed by him, so far as he was concerned, were involuntary and unconscious acts, you will acquit the defendant." The court had also instructed in No. 8 that his condition, as drunk or sober, was proper to be considered, inasmuch as the degree of the offense, if any had been committed, depended upon the question whether the killing was willful, deliberate, and premeditated, and that upon that question it was proper for the jury to consider evidence of intoxication, upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to determine the question whether his mind was capable of that deliberation or premeditation of purpose which, according as those qualities of mind were absent or present, determined the degree of the crime or the guilt or innocence of the defendant. So that the law governing every phase of the case, outside of the question of pure insanity, had been given to the jury by the court; and while it is true that "insanity" is a comprehensive word, and includes within it the definition of many mental disorders, delusions, and manias, we have not been able to find, from an investigation or

any available work on medical jurisprudence or psychology, a warrant for using the word "insanity" in the sense in which it was used in the charge in this case, with reference to intoxication either by intoxicating liquors or stimulating drugs. We think the jury, considering all the instructions of the court, could rightly conclude that the judge used the word "insanity" in this case in a distinguishing sense. That he did so use it is shown by the fact that he explicitly instructed in relation to intoxication, and the effects upon the mind of the use of drugs. It is claimed by the respondent that there was no prejudice resulting from this error, if it be conceded to be error; but this court has often announced the rule—and the announcement is in consonance with the uniform rulings of courts—that, where an erroneous instruction has been given, or conflicting instructions, prejudice will be presumed, unless the record shows affirmatively that no prejudice resulted. We are unable to gather from the record any affirmative evidence that the jury would not have been warranted in concluding that the condition of mind which was attempted to be shown by the defendant was the condition of mind referred to by the judge in instructions 10 and 11; and it might reasonably conclude from the instruction that, unless insanity of the defendant was established, there could be no other degree of punishment inflicted, but that he must be found guilty of murder in the first degree. It is a dangerous thing for a court to interject into a cause, by an instruction, an issue which was not raised by the pleadings or by the testimony in the case, and we have searched this record in vain for any testimony bearing upon the question of insanity.

We see no objection to instruction No. 12. Nor was there any error of the court in refusing the instructions asked for. All of the instructions which properly stated the law had been given, in substance, in the direct charge.

Appellant earnestly urges that the court should have given instruction No. 6, which is as follows: "It is a rule of evidence that ordinarily a witness who testifies to an affirmation is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what may have actually occurred, while it is impossible to remember what never existed." This instruction was intended to bear on the question of the intoxication of the defendant; some of the witnesses having testified that defendant at the time of the killing was under the influence of liquor, while others testified that at such time he was sober. We do not think there is any merit in the contention that those who testified that defendant was sober were testifying to a negative, while those who testified that he was under the influence were testifying to an affirmative. Neither condition could be said to be either an affirmative or a negative condition. For the error dis-

cussed, however, by the giving of instructions 10 and 11, the judgment must be reversed, and a new trial awarded.

REAVIS, FULLERTON, ANDERS, and WHITE, JJ., concur.

(23 Wash. 436)

RIDPATH et al. v. SPOKANE COUNTY
et al.

(Supreme Court of Washington. Dec. 8, 1900.)

TAXATION—SHARES OF STOCK.

Ballinger's Ann. Codes & St. § 1676, provides that the officers of a corporation shall give to the assessor a statement of its property, setting forth its real property, and the matters and value of its personal property; that the property of such corporation shall be assessed as other real and personal property; and that in case of failure or refusal of the corporation to make a return it shall be the assessor's duty to do so. Section 1684 requires every resident to list his property, including bonds or stocks, "when the property of such company is not assessed in the state," and that the property of the corporation shall be listed by its proper officer. Section 1671 provides that no person listing property shall be required to list any share or portion of the capital stock, or any of the property of a corporation, which he may hold, where such company, being required so to do, has listed its capital stock and property as required under the laws. *Held*, that in case of a domestic corporation owning property within the state as well as out of it, a stockholder was not to be assessed for his shares therein, though all its property was not returned by it, it being in such case the duty of the assessor to obtain the necessary information.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by W. M. Ridpath and others against Spokane county and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

James Z. Moore, Miles Polindexter, and Horace Kimball, for appellants. Graves & Graves, for respondents.

REAVIS, J. Suit to enjoin the collection of a tax levied upon shares of stock in the Le Roi Mining Company. The mining company is a corporation created, organized, and existing under the laws of Washington, having its principal place of business at the city of Spokane. The respondents severally owned shares of the capital stock in such corporation, and, with one exception, were residents of the county of Spokane. The mining company owned and operated a valuable mine in the province of British Columbia. It also owned real estate and a smelter situated in Stevens county, together with personal property consisting of ore and other chattels, and likewise of personal property necessary to the carrying on of its corporate business in Spokane, consisting of office supplies, furniture, and material, and certain moneys in its possession. The corporation was assessed on personal property in Spokane county in the sum of \$1,550, assessed in Ste-

vens county on personal property in the value of \$31,150, and upon realty in the value of \$23,050. The assessor of Spokane county, during the assessment year of 1898, requested each of the respondents for a list of his property, real and personal, situated and taxable in Spokane county, and was furnished with such list by each of them, which list included all the real and personal property of each except the shares of capital stock in the said corporation; and thereafter, without the knowledge of the respondents, the assessor added to the list of each the capital stock of the corporation owned by him, for the purpose of assessment. Respondents appeared before the board of equalization at its regular session, and demanded that the shares of stock be stricken from the assessment roll, claiming that they were not properly assessable to the respondents. The above statement is taken from the complaint. There are other causes for relief alleged in the complaint, but those mentioned are sufficient for the consideration of the cause. A general demurrer was interposed to the complaint, and overruled by the court. Appellants standing upon their demurrer, judgment was entered for respondents, from which appellants have appealed.

Section 1676, 1 Ballinger's Ann. Codes & St. provides that: "The president, secretary or principal accounting officer or agent of any company or association, whether incorporated or unincorporated, except as otherwise provided for in this chapter, shall make out and deliver to the assessor a sworn statement of its property, setting forth particularly,—First: The name and location of the company or association; second: the real property of the company or association and where situated; third: the nature and value of its personal property." The section further provides that the real and personal property of such corporation shall be assessed the same as other real and personal property, and in case of failure or refusal of the corporation to make a return it shall be the duty of the assessor to make such return or statement from the best information he can obtain. The Le Roi Mining Company is a domestic corporation, and its property must be assessed under the above section. Section 1664, *Id.*, directs the manner of listing personalty, and requires that every competent resident of the state shall list all his property, including bonds or stocks and shares of stock of joint-stock or other companies, when the property of such company is not assessed in the state; and also that the property of the body politic or corporate shall be listed by the president or proper agent or officer thereof. Section 1671 prescribes that no person listing property shall be required to list for taxation in his statement to the assessor any share or portion of the capital stock or of any of the property of any corporation which such person may hold in whole or in part, where such com-

pany, being required so to do, has listed for assessment and taxation its capital stock and property with the auditor of state, or as otherwise required under the laws of the state. It would seem that the revenue law, as shown from the three sections, *supra*, prescribes a rule for the assessment of all corporate property owned by domestic corporations such as under consideration here. Included in the corporate property are both the tangible and intangible property. It was determined in *Power Co. v. Judson*, 21 Wash. 49, 56 Pac. 829, that, under the provisions of the revenue law that all the real and personal property in the state should be subject to taxation, a corporate franchise was assessable. There can be no question but that the property of a domestic corporation of every nature in this state, such as this, is assessable to the corporation. This includes both tangible and intangible property. The tangible property may be valued in connection with its use with the intangible. In the instance before us, in so far as the property situated in the state is connected with and enhanced in value by the business of the corporation in British Columbia or elsewhere, the taxable property here is valuable. *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *Same v. Com.*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; *Henderson Bridge Co. v. Com.*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953; *Id.* (Ky.) 31 S. W. 490. It was the duty of the assessor to list all the tangible and intangible property of the corporation, and to estimate its value in connection with the tangible property in the state. It is maintained by counsel for appellants that only the tangible property of the corporation was assessed. If so, there was an incorrect assessment. It has been seen that it is the duty of the proper officer of the corporation under oath to return a list of all property to the assessor. If such information is not furnished the assessor, it is his duty to procure the necessary information to make a complete assessment. The statute seems to imply that, when corporate property is assessed in this state, the shareholders are not required to list the shares owned by them. It seems quite clear that the statute does not contemplate the assessment of shares owned by the shareholders in domestic corporations; that is, it cannot be inferred that the individual shareholders should, in each instance, be advised of the performance of the duty of the officers of the corporation, as well as the assessor. To this question the case of *Whitaker v. Brooks* (Ky.) 13 S. W. 355, is pertinent. The court observes: "It is unnecessary, however, to decide what portion of its property, if any, which is employed in its business in Ohio, can, by proper steps against it as a home corporation, be reached for taxation here. * * * The grant of exemption to the shareholder has not been made to depend upon this being done. If it cannot be done

under existing law, then resort must be had to additional legislation, instead of a court attempting to annul a plain legislative grant of exemption to one because another has failed to perform what is perhaps a legal duty." Counsel for appellants contend that the case of *Pacific Nat. Bank of Tacoma v. Pierce Co.*, 20 Wash. 675, 56 Pac. 936, supports their case; that, because the bank in that case was not allowed to deduct shares held by it in domestic corporations already taxed, it was adjudged that double taxation was not unconstitutional in this state. That is true. But the taxes assessed to the bank under the statute were specified, and, besides, the assessment on bank shares is an excise tax. The methods of taxation of banks and of domestic corporations such as this mining company are different. The classification of property for assessment, where uniformity and equality exist in the classes, is a matter of legislative policy. In the taxation of banks the legislature has chosen to have the assessment on the shares of the capital stock; in that of corporations, as this, it has directed the assessment of all the property to the corporation. While the legislature may so adjust the revenue system as to occasion double taxation, such taxation will not be inferred unless necessarily imposed in carrying out the law. From the foregoing considerations it is concluded that the judgment must be affirmed.

DUNBAR, C. J., and FULLERTON and ANDERS, JJ., concur.

(23 Wash. 542)

GRANT v. COLE, Sheriff, et al.

(Supreme Court of Washington. Dec. 14, 1900.)

EXECUTION—WRONGFUL LEVY—INJUNCTION—JUDGMENT ON JUSTICE'S TRANSCRIPT—EXECUTION THEREON.

1. Where an execution is issued and wrongfully levied on personal property, an injunction will lie to restrain further proceedings under such execution.

2. Under 2 Ballinger's Ann. Codes & St. § 5136, authorizing the filing of transcripts of justices' judgments in the superior court, and providing that such judgments shall become judgments of the superior court; and section 5192, authorizing the issuance of executions on such judgments,—execution thereon may be issued and enforced against the personal estate of a judgment debtor, though such sections were re-enacted from the chapter of the law of 1893 which related to the lien of judgments on real estate.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Injunction by H. F. Grant against C. A. Cole, as sheriff, and another, to restrain proceedings under execution and to set aside a judgment. From a decree in favor of the plaintiff, the defendants appeal. Reversed.

Buck & Craven, for appellants. Harris Baldwin, for respondent.

REAVIS, J. In June, 1894, appellant (defendant) Jordan recovered judgment before a justice of the peace against respondent (plaintiff) in the sum of \$76.45. In April, 1899, a certified transcript thereof was filed in the office of the clerk of the superior court. Appellant thereafter had such judgment revived in the superior court. Upon the revived judgment execution was issued in October, 1899, and under such execution the sheriff levied upon certain personal property belonging to respondent. Respondent thereafter brought this suit to restrain the sheriff and Jordan from proceeding further under the execution, and prayed that the judgment and the revival thereof in the superior court be adjudged void. The complaint alleged irregularities in the filing of the certified transcript of the judgment in the superior court, and also that the judgment against him in the justice's court was obtained without notice to plaintiff; further, that the personal property levied upon by the sheriff was the property of the community consisting of plaintiff and his wife, and that the debt upon which the judgment was founded was the separate debt of plaintiff. It was also alleged that plaintiff was a farmer, and had duly listed all his property for the information of the sheriff, and claimed the property levied upon was exempt from execution. The material allegations of the complaint were put in issue by the answer. The record brought here consists of the pleadings, findings of fact, and conclusions of law, and decree. The findings of fact recite that there was documentary evidence offered and admitted on the part of the plaintiff; that no evidence was offered by defendants. The court found that the judgment in the justice's court was a valid one; that a duly-certified transcript thereof was filed with the clerk of the superior court; that the judgment was afterwards duly revived, and the lien thereon continued; that execution was issued upon the judgment from the superior court, and certain personal property levied upon by the sheriff thereunder. Upon the facts thus stated, the superior court found, as conclusions of law, that that court had no jurisdiction to grant an execution upon the judgment against personal property, and that the execution was void to the extent that it warranted the sheriff in levying upon the personal property of the plaintiff; and the decree restrained the sheriff from levying upon the personal property.

1. Appellants maintain that injunctive relief cannot be obtained in this suit; that respondent did not seek the proper remedy,—that he should have instituted an action at law, or by motion to quash the execution. There is no doubt but that execution irregularly or improvidently issued, or issued upon a void judgment, may be reached by motion to quash, made in the court where issued (8 Enc. Pl. & Prac. 459, and authorities cited); and for a wrongful levy doubtless

replevin or conversion will lie. But upon the issues raised in the pleadings here the more adequate and speedy remedy has been pursued. This court has followed a liberal rule in determining upon their merits suits of this character. In *Powell v. Pugh*, 13 Wash. 577, 43 Pac. 879, a suit by husband and wife to enjoin a levy upon community personal property was determined upon its merits. In *Phelan v. Smith* (Wash.) 61 Pac. 31, an equitable action was heard to enjoin the treasurer of Spokane county from selling personal property for the satisfaction of personal property taxes levied thereon. It was said in that case, referring to the remedy, passing some minor technical objections to the form of the complaint: " * * * The appellant's first contention is that the complaint does not state facts sufficient to constitute a cause of action, for the reason that equity will not interfere in such case by injunction, but will leave the party to his rights, if he have any, under the law. Without going into an analysis of the cases on this proposition, we think, under modern authority, the facts stated in the complaint bring it within equitable jurisdiction. Incompleteness and inadequacy of the legal remedy are what determine the right to the equitable remedy of injunction; and we do not think, conceding the allegation of the complaint to be true, that respondent could obtain complete and adequate relief by law. Nor would any good purpose be subserved by allowing this property to be wrested from the possession of the respondent, and relegating him to an action for damages. * * * This point was also raised by the county in its brief in *Mills v. Thurston Co.*, 16 Wash. 378, 47 Pac. 759, and, while not noticed in the opinion, this court tacitly acknowledged the jurisdiction by deciding the case upon its merits." Equitable relief was granted against the collection of a tax in the case of *Ridpath v. Spokane Co.* (decided Dec. 8, 1900) 63 Pac. 261. Some of the issues stated in the complaint in this cause seem to be appropriately referred to equity.

2. The superior court did not find upon all the issues presented in the pleadings. The findings go no further than the validity of the judgment in the justice's court, and its proper certification to the superior court, and the conclusions of law were confined to these facts. The court concluded that the judgment of the justice of the peace, when certified and filed with the clerk of the superior court, affected only real estate; that the purpose of the statute was to effect a lien upon the realty of the defendant, and that execution could not issue upon the judgment against personal property. The transcript from the justice's court was certified and filed in accordance with section 5136, 2 *Ballinger's Ann. Codes & St.* It will be observed that the statute declares that "upon such filing said judgment shall become to all intents and purposes a judgment of said

superior court of said county." Sections 5137-5139 direct the record of the proper entries in the superior court, and section 5140 directs where the entry of satisfaction of such judgment shall be made. Section 5192 declares that execution may issue on any judgment given or entered in any court of record. It is not disclosed in the record whether execution had issued from the justice's court upon the judgment entered there, so there is presented no question of that nature, as argued by counsel. The above sections of *Ballinger* are taken from the statute of 1893 (Laws 1893, p. 65). In the act of 1893 there is an express repeal of section 455, 2 *Hill's Code*. The section in *Hill's Code* provided that any party having a judgment upon a justice's docket, upon which an execution has been returned unsatisfied, and "No property found," might have a transcript of such judgment and return filed in the superior court. Considering the later statute together with the repeal of section 455, *supra*, there is some implication that the requirement of first issuing an execution from the justice's court was intentionally omitted. The objection of counsel for respondent that the title to the law of 1893, which is, "Relating to liens of judgments on real estate," is too narrow to include the subject-matter of the filing of the transcript provided for in the body of the act, loses much force when it is considered that the act of 1893 specially refers to and legislates upon the same subject-matter, and repeals section 455 and other sections of *Hill's Code* relating to judgments in courts of record. It is noted that some of the authorities cited by counsel for respondent are from states where it was required that an execution first issue from the justice's court, and be returned unsatisfied before the transcript could be filed in the superior court. In other states, instead of issuing an execution out of the justice's court, and having it returned nulla bona, an affidavit is required that the judgment has not been paid. But the statute of 1893 omits such requirements, and declares the judgment in the superior court when the transcript is filed. We are satisfied that upon the proper filing of the certified transcript from the justice's court, and its entry by the clerk of the superior court, under the plain language of the statute, the judgment of the justice's court then becomes to all intents and purposes the judgment of the superior court, and execution may thereafter issue from the superior court as in the case of executions upon other judgments. It would seem apparent that, upon the filing of the certified copy from the justice of the peace, the powers of the justice's court are ended, and any further proceedings in the cause must be taken in the superior court. These considerations are conclusive of the case, and, for the error determining the execution void and the want of jurisdiction of the court to issue the writ against personal property, the judgment is reversed, and

remanded for further proceedings in accordance with this opinion.

DUNBAR, C. J., and FULLERTON and ANDERS, JJ., concur.

(23 Wash. 538)

STATE v. CITY OF PULLMAN.

(Supreme Court of Washington. Dec. 18, 1900.)

MUNICIPAL CORPORATIONS—POWER OF CITY COUNCIL—CONTRACT—RATIFICATION—PLEA OF ULTRA VIRES—ESTOPPEL.

1. 1 Hill's Code, § 683, provides that, when the erection of any public works or improvements requires an expenditure of more than \$100, it shall be done by contract, and let to the lowest responsible bidder after due notice; and sections 696 and 697 prohibit a city from contracting for the extension of its water system without approval of its citizens, and, in case an indebtedness was incurred, require the assent of three-fifths of the voters of the town. A city, without submitting the question to the voters, contracted to buy a part of the water system and pipe lines constructed by the state, after the expiration of a certain time, and to supply the State Agricultural College with water, but refused to carry out the agreement to purchase. *Held*, that the agreement was ultra vires and void.

2. Where a city contracted to use a water system a certain number of years, and to buy it at the end of the term, without submitting the question to the voters of the city, as required by 1 Hill's Code, § 696, the city was not estopped, by accepting the benefits of the contract, from setting up a plea of ultra vires, in an action for its breach, since the contract was void ab initio, and incapable of ratification.

Appeal from superior court, Whitman county; William McDonald, Judge.

Action by the state against the city of Pullman. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

P. H. Winston, T. M. Vance, and Alex. M. Winston, for appellant. V. E. Bull, for respondent.

DUNBAR, C. J. This action was brought to recover the sum of \$2,171.36, for damages alleged to have been sustained by plaintiff, the state of Washington, by reason of the failure of the defendant, the city of Pullman, to purchase certain pipe in accordance with the contract set up in the amended complaint. The regents of the Agricultural College, Experiment Station, and School of Science of the state of Washington entered into a contract with the city of Pullman, through its mayor, that the college or the state would construct a reservoir on a point of land in the rear of the college, of 250,000 gallons capacity, lay a six-inch main therefrom to connect with the town pump of the city of Pullman, give to the town the use of said reservoir and pipe, and also give to the town the right to buy the said main at actual cost of laying the same, a certain monthly stipend for pumping the water for the use of the college, and a certain number of cents per gallon for

water used for irrigation. At the end of the term for which the contract ran, the city refused to buy the plant, and this action was brought by the state to recover the value thereof, which was alleged to be \$2,171.36. Demurrer was interposed, which was overruled, and the city answered, pleading want of consideration, that the contract was ultra vires, and other defenses. With the view we take of the question of whether or not the city exceeded its power in entering into this contract, it will not be necessary to enter into a discussion of the question of whether the regents had a right to bind the state or bring this action in its behalf.

The contract is too long to set forth at length in this opinion, but, in substance, it was a promise on the part of the city to supply the college with water at a specified rate, and a promise to buy from the state a portion of the water system or pipe lines from the west line of the state lands to connect with the town water system, to enable the town to supply water to persons without the limits of the town. Section 683, 1 Hill's Code, provides that in the erection, improvement, and repair of all public buildings, works, etc., when the expenditure required for the same exceeds the sum of \$100, the same shall be done by contract, and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance. If this transaction was simply a commercial transaction, it was beyond the power of the city authorities to enter into the contract, under the provisions of the section just quoted. There was no power in the regents of the college, as agents of the state, to make a contract to erect a water system and sell it to the town. Neither did the town of Pullman have any authority to enter into a contract to supply water to any person or corporation beyond its limits, or to construct a water system for the benefit of any other person than itself or its inhabitants. Under the provisions of sections 696, 697, Id., the law which was in force at the date of the contract, the town was prohibited from contracting for the extension of its water system without the approval of its citizens; and, where the extension or addition created an indebtedness,—and in this case an indebtedness was contracted for,—it required the assent of three-fifths of the voters of the town. So that there can be no question but that the action of the town authority in entering into this contract was beyond the powers given it by law. In such case it is well settled that the plea of ultra vires may be interposed.

In the discussion of this question, the distinction which is made between the application of the law to private corporations and its application to municipal corporations must be kept in mind, and this will eliminate from the discussion the most of the authorities cited by the appellant. This distinction is wisely maintained, for the authority of a private agent is known only to the agent and

the principal, but the authority of the officers of a municipal corporation is a matter of public record, which is available to every one. The scope of their authority is embraced either in their charters or in the statutes of the state, and the limitation upon their powers is equally available to every one who desires to deal with them. Hence, if one, knowing their powers and limitations, sees fit to enter into illegal contracts, contracts which the law has forbidden for the protection of the taxpayers of the municipality, he has no right to complain when he is estopped from enforcing his illegal contract by a plea of *ultra vires* by the citizens of a municipality. If he knew the law and contracted in the face of that knowledge, he certainly ought not to recover. If he did not know the law as matter of fact, he is subject to no greater hardship than has always been imposed upon the citizen, viz. the denial of the right to plead ignorance of the law on the theory that it was his duty to know it.

It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of *ultra vires*, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract. The most of the cases cited by the appellant, as we indicated before, were cases of private corporations. The appellant cites *Hitchcock v. Galveston*, 96 U. S. 349, 24 L. Ed. 661, in support of its contention. This is a case which falls within the rule announced above, and the city was proceeding within its powers, but in an irregular manner. In speaking of the claim that the city had exceeded its power, the supreme court of the United States in its opinion says: "Another objection to the validity of the contract urged by the city is founded upon a provision of the charter that the council shall not borrow for general purposes more than \$50,000; and it is said the contract, if valid, creates a liability of the city exceeding that sum. This, however, does not appear in the contract itself, and this, perhaps, is a sufficient answer to the objection. But the limitation is upon the power to borrow money, and to borrow it for general purposes. It implies that there may be lawful purposes which are not gen-

eral in the sense in which that word is used in the charter. An examination of the whole instrument, and of the numerous and large powers conferred upon the council, as well as duties imposed, makes it evident that the provision could not have been intended to prohibit incurring an indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city." There are some remarks in this opinion that give color to the contention of the appellant; but that the supreme court of the United States did not intend to lay down the rule that, when a city exceeded its powers in a contract made by the authorities, the plea of *ultra vires* could not be successfully interposed, is made evident by a subsequent case from the same court, viz. *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, wherein is pointed out the distinction between actions arising on contracts made by a corporation in excess of its corporate powers and actions against corporations for injuries caused by tortious acts done by its agents in the course of its business and of their employment in excess of its powers. In that case it was held that the city could not escape taxes due on its property, whether acquired legally or illegally, and could not make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business. And, in answer to the contention of appellant in that respect, the court said: "It remains to be observed that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practiced on him. The powers of these corporations are matters of public law, open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong,—cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*." It is true that the court, continuing, says: "But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use,"—citing *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Louisiana v. Wood*, 102 U. S. 204, 26 L. Ed. 153; *Chapman v. Douglass County*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378. But an examination of those cases shows that the general rule announced by the court above had not been impinged upon.

The law is announced by Mr. Dillon, in his

work on Municipal Corporations, § 457 (4th Ed.), in a manner so concise and explicit that we cannot do better than to give it room in this opinion. It is as follows: "The general principle of law is settled, beyond controversy, that the agents, officers, or even city council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that contracts not authorized by the charter or by other legislative act—that is, not within the scope of the powers of the corporation under any circumstances—are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract,"—citing authorities too numerous to reproduce. And if anything were wanting to elucidate the wisdom of the text announced, or to show the pernicious results of tolerating the practice indulged in by municipal authorities to exceed their legal powers, the history of the cities of the Pacific Coast furnishes the instance, where, under the stimulus of rivalry in the growth of cities, obligations have been incurred which have bankrupted the cities and impoverished the inhabitants by excessive taxation rendered necessary to meet such obligations.

In *Brady v. City of New York*, 16 How. Prac. 432, it was held that, where the contract under which work was done was void because entered into in violation of the charter, the contractor could not recover for the work in any form, neither under the contract nor as upon a quantum meruit, and that the subsequent ratification of the contract by the common council, whether before or after the work was done, did not make it binding on

the corporation. It was further held that, where the officers of a corporation do an act in excess of the corporate power, the corporation is not bound, and, when the statute under which the corporation acts restricts its action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed. This is a very instructive and well-considered case. In *Mayor, etc., of Baltimore v. Reynolds*, 83 Am. Dec. 535, it was held that a person dealing with agents who act under special or express authority, whether written or verbal, is bound at his peril to know what the power of the agent is, and to understand its legal effect, and, if the agent exceeds the boundary of his legal powers, the act, as far as it concerns the principal, is void. The authorities are collated and distinguished in this case, and, in answer to the plea of hardship, the court quotes from *Lee v. Munroe*, 7 Oranch, 370, 3 L. Ed. 374, where it is said: "It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it would be very difficult for the public to protect itself." In fact, the rule is so universal that it seems unnecessary to cite further authority.

But we are not without precedent in our own decisions. In *Arnott v. City of Spokane*, 6 Wash. 442, 33 Pac. 1063, it was held, in common with universal authority, that, wherever a person enters into a contract with an agent of a municipal corporation, he must, at his peril, ascertain the extent of such agent's authority, and, if he fails to do so, he alone must suffer the consequences. It was also said: "The power to ratify a particular contract presupposes the power to make it in the first instance, and, if it is such that it could not be made originally except in a certain prescribed mode, where that mode is disregarded the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation,"—citing *Zottman v. City and County of San Francisco*, 20 Cal. 97; *Pavement Co. v. Painter*, 35 Cal. 704; *McPherson v. Foster*, 43 Iowa, 48; *City of Bryan v. Page*, 51 Tex. 532. In *Chehalis County v. Hutcheson*, 21 Wash. 82, 57 Pac. 341, a case where a great hardship was worked upon the appellant by the application of this rule, where the appellant was a school superintendent for Chehalis county, and had visited schools under a statute which allowed a certain compensation therefor, but which statute was afterwards pronounced unconstitutional by this court, it was held that the county would not be estopped from disputing the validity of the warrants which had been issued in payment of such claims, for the reason that the contract would be void *ab initio* by vir-

tue of the original lack of authority upon the part of the commissioners. The court announced, as the reason of the rule which governs the decision in this case, that the acts of the officers were unauthorized and void, and that one dealing with them was bound to take notice of the extent of their powers; citing 2 Herm. Estop. p. 1365, to the effect that "the true principle in such case is well settled that one cannot do indirectly what cannot be done directly, and where there is no power or authority vested by law in officers or agents no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts." In the case at bar there was no power on the part of the municipality to enter into this contract. The power was conferred upon the voters. The city had authority only to put the machinery in motion which would elicit and determine the will of the voters. The discretion and authority were conferred upon the voters, and not upon the officers of the city. Affirmed.

REAVIS, FULLERTON, ANDERS, and WHITE, JJ., concur.

(23 Wash. 379)

DANE v. DANIEL et al.

(Supreme Court of Washington. Dec. 6, 1900.)

MORTGAGES—FORECLOSURE—HUSBAND AND WIFE—COMMUNITY PROPERTY—PARTIES—ESTOPPEL.

1. An owner of realty, after mortgaging it, conveyed part of it to a husband without including his wife, and another part to the wife of another without including her husband, and subsequently a foreclosure suit was begun in which such grantees alone were made parties, and the realty was sold to a purchaser. *Held*, that the conveyance under the foreclosure did not divest the community interests of the wife of the first grantee nor the husband of the second grantee, since the husband and wife are both necessary parties to an action to foreclose a mortgage on their community real property.

2. Under Ballinger's Ann. Codes & St. § 4545, providing that a husband or wife having a community interest in realty may protect it by filing a claim in the auditor's office of the county in which the realty is situated a wife failing to file such claim is not estopped from claiming a community interest in realty where the party purchasing it by diligence could have ascertained that she claimed such community interest, since the act of which such section is a part is intended to protect only actual bona fide purchasers of community real property, and such as could not obtain knowledge of the existence of the material relation by reasonable diligence.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by Zerviah B. Dane against Melissa K. Daniel and another for an accounting as to certain mortgage premises, and, in default of payment, that defendants be barred of all right of redemption. From a judgment in

favor of complainant, defendants appeal. Reversed.

R. L. Edmiston and A. E. Gallagher, for appellants. Domer & Estep and Happy, Hindman & Langford, for respondent.

FULLERTON, J. The respondent, in her complaint, alleged: That on November 15, 1890, George E. Spoor and Bella H. Spoor, his wife, being then the owners of certain real property situated in the county of Spokane, mortgaged the same to the Lombard Investment Company to secure the payment of their certain joint and several negotiable real estate first mortgage coupon bond for the sum of \$5,000 and interest, given by them to evidence a loan made to them on that day by the Lombard Investment Company; that on the 29th day of November, 1890, the said Lombard Investment Company sold the bond and assigned the mortgage to the respondent; that Spoor and wife defaulted in the payment of the principal and interest due on the bond, and that on the 27th day of April, 1897, the respondent began a suit in the superior court of Spokane county to foreclose the mortgage, making parties defendant, among others, one P. M. Daniel and one Lelia A. Dyer; that such proceedings were had in such foreclosure suit as to result in a foreclosure of the mortgage and the sale of the mortgaged premises to the plaintiff, which sale was afterwards in all respects duly confirmed by the court. The complaint then continues as follows: "(6) That under said foreclosure and sale and the said certificate of sale from the said sheriff, executed in pursuance of said judgment, the plaintiff entered into possession of said mortgaged premises, and the receipts of the rents and profits thereof, and has since continued, and still is, in possession thereof. That she then believed she had acquired under said foreclosure a perfect title to the said mortgaged premises, free from all liens and incumbrances and rights of redemption other than the statutes of the state of Washington would give said defendants; but that she has since been informed and believes that the defendants Melissa K. Daniel and E. J. Dyer have, or claim to have, an interest in and to the said premises by virtue of the said Melissa K. Daniel claiming to be the wife of the said P. M. Daniel, and E. J. Dyer claiming to be the husband of the said Lelia A. Dyer, which rights, if any, are inferior and subsequent to the lien of the mortgage under which said foreclosure sale was made; the said P. M. Daniel and Lelia A. Dyer, being grantees of the said premises from the said Spoors subsequent to the execution of the mortgage aforesaid to the Lombard Investment Company. (7) This plaintiff was already the owner of the said mortgage under which said sale was had, and she is advised that by the said sale she has acquired the rights which the Anglo-American Land, Mortgage and

Agency Company, Henry Hardy, P. M. Daniel, Lella A. Dyer, and Powers Dry-Goods Company, who were defendants in said action, had to redeem from the mortgage held or claimed by the plaintiff, other than the statutory rights given defendants to redeem the premises from the foreclosure sale. (8) That the amount which was due and owing to the plaintiff in said action on the said mortgage at the time of the entry of said decree of foreclosure and sale, exclusive of the costs and expense of said action and of said sale, was the sum of \$5,966.06, and interest thereon from the 11th day of January, 1898, no part of which has been paid, except as it was paid by the proceeds of said sale under which this plaintiff claims. (9) That the rents and profits received by this plaintiff from said premises have not been so great in amount as the annual interest on said mortgage under which said foreclosure was had, and have not amounted to more than the sum of \$175; that the plaintiff claims that the amounts paid by her for taxes, repairs, and so forth, should be allowed to her, and added to the said mortgage and interest thereon; and that there is now due and owing to her thereon the sum of \$6,350. (10) That the plaintiff has applied to said defendants Melissa K. Daniel and E. J. Dyer, and requested them to pay the plaintiff the said sum so due on the said mortgage held by the plaintiff, or to come to an accounting with her thereon, and, after the proper charges and credits, to pay to said plaintiff what should appear to be due her on said mortgage, or, in default thereof, to release their rights and equity of redemption in said mortgaged premises; but that the said defendants have hitherto refused and still refuse so to do, or to comply with any part of plaintiff's request. (11) The plaintiff further says that the said premises are not near equal in value to the amount due this plaintiff under said mortgage, the said premises not exceeding in value the sum of \$4,500. Wherefore the plaintiff demands judgment that an account may be taken of what is due and owing to the plaintiff for principal and interest on said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by the plaintiff, and also of the expenditures of the plaintiff for repairs, taxes, and so forth; that the said defendants pay to this plaintiff what may be due her on taking the said account, with the costs of this action, within a time to be appointed by the court for that purpose, or, in default thereof, that the said defendants and all persons claiming under them be absolutely barred and foreclosed of and from all right, title, and equity of redemption in and to the said mortgaged premises, and each and every part thereof; and that the plaintiff have such other and further relief as in the premises may be just and equitable." The appellants appeared separately, and demurred to the

complaint on the ground that it did not state facts sufficient to constitute a cause of action. On their demurrers being overruled, they answered separately. The answers were, in substance, the same, and admitted the execution of the mortgage, the proceedings taken to foreclose the same, and that P. M. Daniel and Lella A. Dyer were grantees of the Spoors. They denied there was anything due or owing on the mortgage, the allegation of want of knowledge on the part of respondent of their interest in the property, and all of the allegations contained in paragraphs 9 and 11 of the complaint. They then pleaded affirmatively the foreclosure proceedings had by respondent, averring that the mortgage indebtedness was satisfied thereby, and that such satisfaction was entered by respondent on the records of the court. Further answering, they alleged that Melissa K. Daniel was the wife of P. M. Daniel, and that E. J. Dyer was the husband of Lella A. Dyer; that all that part of the mortgaged property conveyed by the Spoors to P. M. Daniel became and now is the community property of himself and wife; that all that part of the property conveyed by the Spoors to Lella A. Dyer became and now is the community property of herself and husband,--all of which was well known to the respondent and her attorney at the time the foreclosure proceedings were had. The court sustained a general demurrer to the new matter contained in the answers, and thereafter a trial was had on the issues made by the denials to the allegations of the complaint.

The evidence introduced at the trial was very meager. Two witnesses testified as to the marketable and rental value of the mortgage premises, and the attorney for respondent as to the reason why the appellants were not made parties to the original foreclosure suit. His testimony we quote in full: "Q. Mr. Domer, were you the attorney for plaintiff in the original foreclosure proceedings on the mortgage referred to in this action? A. Yes, I was. Q. You may state to the court why Melissa K. Daniel and E. J. Dyer were not made parties to that action. A. The plaintiff furnished me an abstract of the title to the property, and their names did not occur as ever having any interest in the property. The names of P. M. Daniel and Lella A. Dyer appearing as subsequent grantees of the mortgagors, and relying upon the abstract, I did not make these parties to that action. Q. Did you know at the time that P. M. Daniel was a married man, or that Lella A. Dyer was a married woman? A. No, I did not. Q. When did you learn that they were married? A. About the time of the sale under the first foreclosure. Q. Was there any notice of record from Melissa K. Daniel or E. J. Dyer claiming any community interest in this property? A. No, there was not. Q. Mr. Domer, you were familiar, were you not, with the statute of this state requiring wives who claimed a community

interest in real estate to place on record a declaration to that effect? A. Yes, sir." Cross-examination: "Q. Mr. Dyer, did the abstract of said property which you examined show that Mr. P. M. Daniel was a single man? A. No, it did not. Q. Did you make any effort or inquiry at all other than examining said abstract to ascertain if P. M. Daniel was a married man, or that Lella A. Dyer was a married woman? A. No, I did not, except to see that no notice of claims of a community interest in the property described in the complaint had been filed with the county auditor of Spokane county. Q. You expected and relied upon said abstract to show whether or not such a community claim had been filed, did you not? A. Yes, sir; I did." One witness was sworn on the part of the respondent, who testified as follows: "I have known defendants Melissa K. Daniel and her husband, P. M. Daniel, for about nine years. They purchased the property described in the complaint herein in 1890, for about fourteen thousand dollars. They occupied the same as a family residence during the years 1890, 1891, and 1892. Since 1892 I have acted as agent and attorney for them, and know that they are now, and during the ten years last past have resided together as, husband and wife. That the house on said property cost about nine thousand dollars, and that it is now reasonably worth seven thousand dollars, judging from sales recently made in this city. That the records in the auditor's office in Spokane county show various transfers of property made by P. M. Daniel and Melissa K. Daniel, his wife. That up to and some time before the commencement of the first suit of foreclosure I was renting the house on this property for forty dollars per month net. That rents are higher now than they were then. That, after the said suit was entered, there was change of tenants, and, owing to the pending suit, I was unable to rent the house for more than thirty dollars per month net, which obtained until tenant vacated because of being disturbed by the agents of plaintiff herein, in March. That defendant E. J. Dyer and the said Lella A. Dyer are husband and wife, and for ten years last past have resided together as such in the city and county of Spokane, Washington. That said property is, and for a long time prior to said attempted foreclosure was, the community property of P. M. Daniel and Melissa K. Daniel, to wit, lots 1 and 2, block 59, of Second addition to Railroad addition, and the west half of lot 3, block 59, Second addition to Railroad addition, is and was the community property of E. J. Dyer and Lella A. Dyer. That P. M. Daniel and Melissa K. Daniel are not residents of Spokane, nor of the state of Washington, but now reside, and have for a number of years prior to the former foreclosure suit, at Los Angeles, California." The court thereupon made findings of fact and conclusions of law, holding that

by the original foreclosure suit and the sale thereunder the respondent acquired all the rights the defendants in that action had in the premises described in the mortgage, except the statutory right to redeem from the foreclosure sale; that the omission of the appellants from the original foreclosure suit was an "excusable mistake and neglect" on the part of the respondent's attorney, and that the respondent was entitled to a decree requiring the appellants to redeem the premises from the lien of the mortgage within one year by paying the plaintiff the sum of \$6,450 and the costs of this proceeding; and "that, in case of their failure so to do, that they, and each of them, and all persons claiming under them or either of them, shall be forever barred and foreclosed of all right, title, or interest in said premises, or any part thereof," and entered a decree in accordance therewith.

Under the statutes of this state a mortgage of real property does not convey to the mortgagee the title to the mortgaged premises, either before or after condition broken. A mortgage is a lien simply, a mere security for the payment of money, and is satisfied and extinguished by the payment of the money for which it is given to secure at any time before the sale of the mortgaged premises under a judgment or decree of foreclosure. After condition broken, the statutes confer on the mortgagee the right to have the amount due him by reason of the broken condition determined by a judgment or decree of a court, the mortgage foreclosed, and the mortgaged property sold at public auction, and the proceeds of the sale applied in satisfaction of the amount found due. As the legal title does not pass by the execution of a mortgage, there can be no such thing as an equity of redemption in a mortgagor, or a subsequent grantee of a mortgagor, as that phrase is understood and defined by the courts in those jurisdictions where a mortgage is held to convey the legal title to the mortgaged premises. Here the right to redeem is a statutory right, arising by virtue of the statute at the time of the sale, and expiring at the end of the statutory period. No suit or other proceeding is necessary to cut it off. The power which created it fixed its limitation, and beyond that it cannot extend. *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958; *Hays v. Bank*, 14 Wash. 192, 44 Pac. 137. As was said by Mr. Justice Turner in *Parker v. Dacres*, 2 Wash. T. 439, 7 Pac. 893: "The proceeding to foreclose such a mortgage is entirely different from that to foreclose the equity of redemption, which, to meet the hardships of the common-law conception of a mortgage, was a creation of the courts of equity. Under our theory of a mortgage, there is no such thing as an equity of redemption in the mortgagor. The legal title has never passed from him. The equity is in the mortgagee, and consists in his right to have the mortgaged property sold to secure the

payment of the mortgage debt." This being so, a suit in strict foreclosure, where the mortgagee is proceeding against the owner of the fee, whether such owner be the mortgagor or a subsequent purchaser of the mortgagor, is unauthorized and unwarranted either by the statute or the nature of a mortgage under the statute. While a strict foreclosure may be the natural remedy where a mortgage is regarded as a conditional sale of the land mortgaged, it has no place under a system like ours, where the title remains in the mortgagor, and the mortgagee has only a lien. *Stevens v. Ferry* (C. C.) 48 Fed. 7. Now, the interests of the appellants in the lands in question were those of owners of the fee. The deed of the Spoors to P. M. Daniel conveyed the legal title to that part of the land described therein to him and his wife, making it their community property. So, likewise, the deed to Lella A. Dyer made the property described in it the community property of herself and husband. The appellants, then, having an interest in the property as owners, could not be foreclosed of such interests by a proceeding in strict foreclosure, and the decree entered by the trial court is erroneous if it is to be construed as passing the title the appellants had in the mortgaged property to the respondent. The principle reliance of the respondent, however, is upon the contention that the title of the appellants passed by the original foreclosure proceedings and sale thereunder, leaving in them, if anything more than their statutory right to redeem, the right only to their day in court to contest the liability of the property to be sold for the satisfaction of the mortgage debt; and, she argues, the present suit was proper, as giving them their day in court, and the opportunity to make such contest. In other words, the contention is that both of the spouses are not necessary parties to a suit brought to foreclose a mortgage covering their community real property. While the precise question here suggested seems not to have been determined by this court, the principle involved has received frequent consideration. *Manufacturing Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035, was a suit brought to foreclose a mechanic's lien upon community real property. The contract for the improvement out of which the lien arose was made by the husband, and he was made the sole defendant in the proceeding brought to foreclose the lien. It was objected that the suit could not be maintained because of the nonjoinder of the wife. This objection, although overruled by the trial court, was sustained here, and the judgment reversed on this ground alone. Scott, J., who delivered the opinion of the court, said: "Notwithstanding the fact, however, that the husband individually can incur the debt, in all suits to foreclose liens upon community real estate the wife is a necessary party defendant. She has at least as much right to contest the facts making the same a charge against the com-

munity as the husband has. There can be no sale of the husband's or wife's interest in the community property separately during the existence of the community. Section 1959 of the Code, authorizing the interest of a party owning less than a fee simple to be sold, does not apply to such a case." So, also, in *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744, it was held that the wife was a necessary party to a suit brought to foreclose a mechanic's lien upon community real estate. In *City of Seattle v. Baxter*, 20 Wash. 714, 55 Pac. 320, the question was whether a wife was a necessary party to a suit brought to foreclose an assessment lien upon community real property. There it was said: "The affirmative of this question is too well settled in this state to admit of present discussion." In *Parke v. City of Seattle*, 8 Wash. 78, 35 Pac. 594, it was held that the wife was a necessary party plaintiff with the husband in an action to recover damages for the wrongful taking of community real property; and in the late case of *Lownsdale v. Boom Co.*, 21 Wash. 542, 58 Pac. 663, it was held that in an action to recover the possession and the rents and profits of community real property the wife was a necessary party plaintiff with the husband. Chief Justice Gordon, in announcing the opinion of the court, after reviewing the case of *Parke v. City of Seattle*, 8 Wash. 78, 35 Pac. 594, used the following language: "We are satisfied with the reasoning and conclusion arrived at in that case, and think that it controls the question in the present case, notwithstanding that in the present case the recovery was limited to the possession of the property and to the value of the rents and profits. It seems to us that, if the husband can maintain the action for rents and profits of community real property, he can do so only upon the theory that he has power in the first instance to make a lawful lease of it. A lease is an incumbrance, and, under section 4491, Ballinger's Ann. Codes & St., the husband, while having the management and control of the community real property, is expressly prohibited from conveying or incumbering it, unless the wife joins with him. We think that every objection which can be urged against the maintenance of an action by the husband alone to recover damages for the appropriation of community real property applies to an action brought by him for the recovery of rents and profits of community real property, and applies with even greater force to an action brought to recover its possession. As is well said in the *Parke Case*, if he can maintain the action, he can compromise it. The effect of that compromise might be to effectually dispossess the community of the land, or, at least, to seriously incumber it. It violates the spirit, and, we think, the letter, of section 4491, supra, and is not to be tolerated." It would seem to be hard to distinguish the principle of these cases from that of a case brought to foreclose a mort-

gage lien. But the respondent contends that the latter falls within the principle of another line of decisions announced by this court, represented by the cases of *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070; *Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101; *Bryant v. Mill Co.*, 13 Wash. 692, 43 Pac. 931; and their kindred cases,—in which we held that under a judgment rendered upon a community debt against the husband alone the community real property of the husband and wife may be sold, and that the entire interest of the community will pass to the purchaser at such sale. It will be noticed that the court does not, in any of the cases cited, hold that the husband is without power as the managing and controlling agent of the community real property to create a debt for which the community property may be sold. The distinction is that in the one line of cases it is held that the wife must be made a party, and given an opportunity to defend, before the community property can be sold to satisfy the debt; while in the other it is held that the property may be sold without her being joined in any of the proceedings prior to the sale, but that the sale is open to contest by her. In my opinion, it would have been the better rule to have required the wife to be joined in all cases where the community property is sought to be sold for a community debt, and leave the judgment of no force as a lien thereon when she is not a party. By permitting the sale to be first made, and afterwards contested, uncertainty is introduced where the utmost certainty obtainable should be required. However this may be, the rule, as applied to the facts of the given cases, has become so firmly established by the decisions of this court that it is not now to be overturned. But we will not extend it beyond the point to which it has already gone, or hold it applicable to cases not strictly within the facts of the cases in which it has been applied. We conclude, therefore, that the husband and wife are both necessary parties to an action to foreclose a mortgage upon their community real property. In so concluding, it is proper to add, we have not overlooked the cases of *Turner v. Manufacturing Co.*, 9 Wash. 484, 37 Pac. 674, and *Leggett v. Ross*, 14 Wash. 41, 44 Pac. 111.

The evidence does not bring the case within the principle announced in *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030, or *Nuhn v. Miller*, 5 Wash. 405, 31 Pac. 1031, 34 Pac. 152. The rule announced in *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074, is more nearly in point. Nor is a husband or wife estopped from claiming an interest in community real property by failing to file the claim provided for in section 4545 of the Code (Ballinger's). The act, of which that section is a part, is intended to protect "actual bona fide purchasers" of community real property; that is, such persons as purchase without knowledge of the existence of the marriage relation, or who could not, with reasonable diligence,

have obtained such knowledge. The evidence of the attorney is not sufficient to establish a claim of this kind in the present case. The judgment is reversed and remanded, with instructions to dismiss the action.

DUNBAR, C. J., and REAVIS and ANDERS, JJ., concur.

(10 Kan. App. 181)

BARRATT v. GRIMES et al.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

APPEAL BOND—VALIDITY—DAMAGES.

1. Defendants in error appealed from an order of the probate court appointing plaintiff in error administrator of the estate of Susan Grimes. The case was heard upon the appeal in the district court, and the judgment of the probate court sustained against the contention of the plaintiff in error that the district court had not jurisdiction of the cause because no appeal was allowed in such cases. *Held*, that there was sufficient consideration for the appeal bond, and that the defendants were estopped from denying its validity.

2. In an action upon such bond the administrator cannot recover the value of his time and expense in attending to such cause upon appeal, nor for his counsel fees therein, nor for damages to the assets of the estate, but such recovery is limited to costs occasioned by the appeal, and taxed therein.

(Syllabus by the Court.)

Error from district court, Atchison county; W. T. Bland, Judge.

Action by Norman Barratt, administrator of Susan Grimes, against Howard Grimes and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Guthrie & Guthrie, for plaintiff in error. B. F. Hudson, S. D. Walker, and J. L. Berry, for defendants in error.

MAHAN, P. J. Barratt, as administrator, sued the defendants in error upon an appeal bond given by them in the probate court of Atchison county for the purpose of effecting an appeal from an order of that court appointing Norman Barratt administrator of the estate of Susan Grimes. Upon a trial to the court there was judgment for the defendants, and the plaintiff prosecutes error therefrom.

The defendants move a dismissal of the petition in error, and assign seven reasons why the motion to dismiss should be sustained. The substance of the motion is, as a whole, that the case-made is not sufficient to enable this court to review the errors complained of. This is true as to some of the assignments, but not as to all. The motion will be denied.

The plaintiff assigns eight rulings of the court as error. The first is that the judgment is not sustained by the findings of fact, and that the plaintiff's motion for judgment thereon ought to have been sustained. The second and third relate to the admission of evidence, and in this counsel omit to conform

to the rule practice of this court requiring the evidence to be set out in the brief as a part of the assignment of error. Indeed, the evidence excluded is not contained in the brief at all. We are referred to the record therefor. We decline to investigate the record for this purpose.

The fourth assignment of error is that the findings of fact are not sustained by the evidence. This we cannot consider for the reason that the evidence is not all contained in the record.

The fifth assignment of error is, in effect, the same as the first.

The sixth assignment of error is that the court denied the plaintiff's motion for a new trial. In the condition the record is in, we cannot consider that assignment.

The seventh and eighth assignments of error are substantially the same as the first. So the only real question for us to consider is, was the plaintiff entitled to judgment upon the findings of fact? It appears therefrom that the bond sued on was made and approved in the probate court, as we heretofore said, for the purpose of effecting an appeal to the district court from an order of the probate court appointing Barratt administrator. The supreme court has decided in *Grimes v. Barratt*, 60 Kan. 259, 56 Pac. 472, that no appeal lies from an order appointing an administrator. However, the appeal was allowed, the case certified to the district court, the motion to dismiss the appeal for want of jurisdiction was resisted by the defendants and overruled, the case considered upon its merits upon the appeal, and the judgment of the probate court affirmed. The damages sought to be recovered, and which it is claimed plaintiff was entitled to recover under the findings of fact of the court, are four dollars for publishing notice of appointment, time and expense of the administrator in attending suit upon appeal, and attorney's fees expended in defending the appeal, and damages to the property of the estate which occurred during the appeal. The condition of the bond is according to the requirement of the statute in such cases (section 206, c. 107, p. 551, 2 Gen. St. 1897). It is contended by the defendants in error that, inasmuch as no appeal is provided for by statute in such cases, the bond is without consideration and void. It was given voluntarily. The defendants obtained thereby everything which they sought to obtain, and would have obtained had the statute provided for the appeal. We are determined in this case to adopt that rule of law laid down in 1 Enc. Pl. & Prac. p. 1019, par. 21, as being the rule of law more in consonance with equity and justice in such cases; that is, that by voluntarily giving a bond and obtaining the benefits of an appeal the appellant and his sureties are estopped from questioning the jurisdiction of the court to which the appeal was taken.

The only remaining question to be decided

63 P.—18

is, are the items sought to be recovered within the contemplation of the bond? We must answer this in the negative from the very terms thereof. Indeed, it cannot be said that the sureties would be liable for anything which the appellant would not be obligated to pay by the rules of law. The bond itself created no new or additional obligation. The costs of the appeal were paid. The cost of the publication of the notice of appointment pertains to the administration, and was not occasioned by the appeal. There is no rule of law by which a party to litigation can hold his adversary for the loss or value of his time expended in looking after litigation, or for his ordinary expenses in connection therewith. Nor can he hold his adversary for his attorney's fees. Counsel for plaintiff cite us to *Tyler v. Safford*, 31 Kan. 608, 3 Pac. 333; *Sanford v. Willetts*, 29 Kan. 647. These were actions upon attachment bonds, which is quite a different thing, and the conditions of the bonds required by the statute are very different. The only contemplation of the condition of the appeal bond is that the appellant will pay that which he is adjudged to pay in the cause upon the appeal, and that liability in such a case as this is limited to the costs, in our view. Had there been a money judgment, it would have covered the payment of such judgment and interest accrued pending the appeal. If the appellants had the possession or management of any property belonging to the estate, they did not obtain the same by virtue of the appeal, or any proceeding in the probate court; and it is not in the contemplation of the law or of the bond that any liability by reason thereof should be covered by the bond. That would be an independent personal liability of the custodians of the property. We are of the opinion that the judgment of the court was correct, that the plaintiff was not entitled to judgment by reason of the findings of the court respecting the items of damages claimed by the plaintiff. The judgment is affirmed.

CITY OF TOPEKA v. MYERS.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS.

An instruction, in an action against a city for injuries received through its negligence, that, if it is found that the plaintiff is entitled to recover but for her own contributory negligence, then the burden of showing her contributory negligence is on defendant, is not misleading, since it does not convey the impression that all the evidence of contributory negligence to be considered must be offered by the defendant, or that the plaintiff's testimony is to be disregarded in such respect.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Elizabeth Myers against the city of Topeka. From a judgment in favor of the

plaintiff, and from an order denying a motion for a new trial, the defendant brings error. Affirmed.

W. A. S. Bird, for plaintiff in error. D. C. Tillotson, for defendant in error.

PER CURIAM. This action was brought by Elizabeth Myers in the district court of Shawnee county against the city of Topeka for the recovery of damages for personal injuries. The plaintiff alleged that on the 1st day of January, 1896, while in the exercise of due care and caution, she was injured upon one of the sidewalks of the city of Topeka; that the sidewalk where the injury was received was in an unsafe and dangerous condition; that, by stepping upon the walk, on account of its defective, dangerous condition she received the injuries of which she complains. The answer was a general denial and contributory negligence. The reply was a general denial.

The trial resulted in a verdict and judgment for plaintiff. The defendant city moved for a new trial, and presents the record to this court for review. The plaintiff in error, for a reversal of the judgment, alleges error in the proceedings of the trial court—First, that the court erred in the admission of incompetent testimony; second, in rejecting competent testimony; third, in its instructions to the jury; fourth, in overruling its motion for a new trial.

That portion of the instruction complained of reads: "If you find from the evidence that plaintiff would be entitled to recover, but for her own contributory negligence, then I instruct you that the burden of proof is upon defendant to establish the contributory negligence of plaintiff, and this must be determined, the same as all other questions at issue, from the facts and circumstances proven in the case." The plaintiff in error in support of its contention relies upon *Railway Co. v. Merrill*, 61 Kan. 682, 60 Pac. 819, and *Railroad Co. v. Burrows* (Kan. Sup.) 61 Pac. 442. The instruction under consideration was not misleading in the same respect as the instructions were in these cases. In the *Merrill* Case the court says: "This direction left the impression that, unless the defendants below by their evidence established contributory negligence, the defense of such contributory negligence must fall. If the testimony introduced on behalf of *Merrill* showed that the injury was the result of his own negligence, then there could be no recovery, even if the opposite party introduced no evidence upon that subject." In the *Burrows* Case the court says: "By this direction the jury might have been misled into the belief that if the plaintiff, by testimony offered in his behalf, had shown contributory negligence upon his part, the same could not avail the defendant, because the fact of such contributory negligence was not established by the company." In the case under consideration the

instruction was not open to either of these objections. The court expressly told the jury, "and this must be determined, the same as all other questions at issue, from the facts and circumstances proven in the case." This left no room for quibble. The court specifically informed the jury that the question of contributory negligence must be determined from all the facts and circumstances proven. The court committed no error in the giving of this instruction. There are no errors argued under the fourth assignment of error which entitle the city to a new trial. The judgment will be affirmed.

(10 Kan. App. 217)

BRANNER v. WEBB.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

RECEIVER—APPOINTMENT—PROPERTY CONTROLLED.

1. In an action by a tenant in common to recover from a co-tenant an undivided interest in land, the court has no power to appoint a receiver over other lands of the defendant, not involved in the suit.

2. Such other lands do not become involved in the suit, so as to empower the court to appoint a receiver therefor after judgment, by reason of an execution being issued on the judgment for rents, and being levied on the other lands, and such other lands being sold thereunder to the plaintiff.

3. After the plaintiff has recovered judgment in such action for her interest in the land and for her share of the rents, and after her interest in the land has been discharged from the custody of the receiver, and she put in possession thereof, and after levy of execution upon other property of the defendant sufficient to satisfy the judgment, it is error for the court to refuse to discharge the defendant's share of the property upon his motion.

(Syllabus by the Court.)

Error from district court, Jackson county; Marshall Gephart, Judge.

Action by Josie Webb against John S. Branner. From an order refusing to discharge certain property from the custody of a receiver, Branner brings error. Reversed.

W. R. Hazen and Isenhardt & Alexander, for plaintiff in error. Keeler & Hite, for defendant in error.

MAHAN, P. J. The plaintiff in error seeks by this proceeding to reverse an order of the district court of Jackson county denying his motion to discharge from the custody of a receiver in the case certain real estate. He first assigns for error that the district court refused to hear testimony upon the motion, and refused to consider any question except the jurisdiction of the court to make the appointment in the first instance; and, second, in denying his motion to release that part of the real estate which was not the subject-matter of the suit; and, third, in denying the motion to set aside the original order appointing a receiver, for want of jurisdiction. There are two other formal assignments, but they cover the same ground.

The main action to which this proceeding is auxiliary was in the nature of ejectment by Josie Webb, as a tenant in common with John S. Branner, to recover an undivided one-fourth interest of certain real estate in the city of Topeka, the possession of which was in Branner; he denying the co-tenancy, and his conduct amounting to an exclusion of the plaintiff as co-tenant. The appointment of a receiver was made in the first instance without notice to the defendant, Branner, but by his conduct since he has acquiesced in the ex parte appointment, so far as to preclude him from questioning the appointment for this reason. The order appointing the receiver, however, directed him to take possession of considerable other property, as well as the entire property in controversy, upon which the plaintiff had levied an execution, and which had been sold to pay the judgment for rents rendered in favor of the plaintiff and against the defendant in this cause. So the appointment of the receiver was made after judgment, pending an appeal. In this judgment the plaintiff, Josie Webb, had prevailed, recovering her one-fourth interest and \$4,500 for rents. The sale had not been confirmed at the time the receiver was appointed, and was subsequently set aside. The primary question in the case, under this proceeding in error, is, had the district judge jurisdiction, under the statute, to appoint the receiver for property other than that in controversy in the case, merely because an execution had been issued and levied thereon, and the land sold thereunder? It was not in any sense a supplementary proceeding in aid of execution, under the statute. The power to appoint a receiver in actions under the Code is clearly defined and restricted by the provisions of the Code, and under none of them had the district court jurisdiction to appoint a receiver under the circumstances and conditions of this case. The power to do so is not conferred by law. The supposed exigency making it necessary to appoint a receiver was that some time would elapse before a confirmation of the sale could be had; that rents had accrued before the sale, and were accruing after the sale, and the tenants did not know to whom to pay them. After the sale was set aside no such exigency existed. Josie Webb could make no claim to other property of the defendant, except as purchaser under her own writ. So whether the rent was paid to Branner or another person, or at all, did not concern her. At the time this motion was made and heard, the sale had been set aside; and, even though the power existed in the district court to appoint a receiver, the reason therefor had ceased to exist, and the court ought to have sustained the motion upon that ground, if not for a want of authority to make it in the first instance. Under the circumstances the court had undoubted authority to appoint a receiver to collect the rents and profits of the entire

property in controversy,—not only the interest of the plaintiff from which she was excluded, but the interest of the defendant as well. But at the time this motion was made to discharge the property from the custody of the receiver the plaintiff, Josie Webb, had been put in possession of her interest in the property, whereby she was enabled to collect the rents and profits therefor herself, without the aid of a receiver. The judgment had been carried into effect, except that part of it which adjudged the defendant to pay rent for money collected theretofore,—a mere personal judgment against Branner. So there existed at the time the motion was made and heard no reason for continuing the property in controversy in the custody of a receiver; that is, the interest of the defendant, Branner. The interest of the plaintiff had been, upon her application, discharged from the custody of the receiver theretofore.

There are several objections made by the defendant in error to a review of the case by this court. The first is that the record discloses that more than \$2,000 is in controversy, which would be affected by the order discharging the property from the custody of the receiver. We are of the opinion that the record does not sustain this contention. The second objection is that this proceeding in error was not begun within the time allowed by law. The basis of this contention is that there had been a prior motion made to set aside the order appointing the receiver, and to discharge the property, upon the ground that the court had no jurisdiction to make the appointment. To this, we answer, first, that if the order, so far as it affected the property not in controversy in the case, was without the jurisdiction of the district court, it was a void order, and a motion could be made to vacate it at any time under the provisions of the Code, and the making of a prior motion and the denial by the court did not infuse into the order a vitality that it had not before. A second answer is that the conditions with respect to the property had changed. The grounds for retaining the property in the custody of the receiver, if any there were, no longer existed. If the rule prevailed that, because at one time a motion to discharge property from the custody of a receiver was denied, such order was conclusive, *res judicata*, and barred any other motion looking to the same result, though based on different conditions, property might never be discharged from the custody of a receiver, when once put in his hands.

The motion to discharge the property from the custody of the receiver ought to have been sustained. The motion to set aside the order making an appointment in the first instance, so far as it affected the property not in controversy in the cause, ought to have been sustained. The order denying these motions is reversed, and the case remanded, with directions to the court to sustain the

motion to vacate the order appointing the receiver in the first instance, so far as it affected the property of the defendant, Branner, not in controversy in the cause, and to sustain the motion to discharge the defendant Branner's interest in the property in controversy.

(16 Kan. App. 177)

MINNICK v. MATCHETT et al.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

SUMMONS—SERVICE—VALIDITY.

An action was brought in the court of common pleas of Wyandotte county against M. as maker and H. as guarantor of two certain promissory notes. Personal service of summons was had upon H. in Wyandotte county, and upon M. in Franklin county, where they respectively resided. Neither defendant answered. Judgment was rendered upon default against M. alone, which judgment was afterwards, during the same term of court, set aside upon his motion. During the next term of court judgment was rendered against both of said defendants, without any appearance of either. At the next succeeding term M. moved to vacate said judgment as to him for want of jurisdiction, which motion was by the court overruled. *Held* not error.

Mahan, P. J., dissenting.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; William G. Holt, Judge.

Action by David F. Matchett against J. M. Minnick and Clark J. Hanks. Judgment for plaintiff, and defendant Minnick brings error. Affirmed.

E. H. Gamble, for plaintiff in error. Sutton & Maher, for defendants in error.

WELLS, J. This action was brought in the court of common pleas of Wyandotte county by David F. Matchett against J. M. Minnick and Clark J. Hanks upon certain promissory notes executed by said Minnick to the Plano Manufacturing Company. Said notes were purported to be guaranteed by Clark J. Hanks and transferred to the plaintiff. A summons of service was made in Wyandotte county on Hanks, and upon Minnick in Franklin county, where he resides; and on March 7, 1899, judgment was rendered therein against said J. M. Minnick alone. On March 31, 1899, Minnick filed a motion to set aside said judgment, alleging want of jurisdiction, in this: that he was the only defendant liable on said notes; that the said Hanks was employed by said plaintiff to indorse them solely as an excuse to bring the action in a county other than where said defendant resides, which was in Franklin county; and that defendant did not appear at the time of trial through a mistake of his attorneys as to dates. On May 1, 1899, this motion was sustained, and said judgment set aside. At the September, 1899, term of said court another judgment was rendered in said cause; this time against both of said defendants, J. M. Minnick and Clark J. Hanks. On

the 14th of February, 1900, said Minnick filed a motion to set aside said last-rendered judgment, and to correct the journal entry of the action of the court on May 1, 1899, so as to show the dismissal of the case, which motion was on February 17, 1900, overruled, and the case brought here for review.

There are two assignments of error made by the plaintiff in error: "(1) The court erred in rendering the second judgment against the defendant Minnick, because it had no jurisdiction over his person; (2) the court erred in overruling the motion of the defendant Minnick to set aside the second judgment rendered against him, because said judgment was void." These raise but the one question of the jurisdiction of the court over the defendant, the plaintiff in error here. We think the court had jurisdiction. The defendant Hanks appears from the petition to have been a proper defendant. Personal service was had upon him in the county where the action was pending, and this gave prima facie authority for the service upon the plaintiff in error. The good faith of the suit against Hanks was questioned by the motion to set aside the first judgment, and said judgment was vacated, presumably, to give the plaintiff in error an opportunity to try the issues involved. This he failed to do, and at the next term judgment was taken against both of the defendants. So far as this case, in its present condition, is concerned, we must presume that the action was rightly brought in Wyandotte county. The theory of the plaintiff in error seems to be that the taking of a judgment against him and not against Hanks was equivalent to a dismissal as to Hanks, or perhaps as a finding in his favor, and therefore removed the foundation upon which the jurisdiction of the plaintiff in error was predicated. The fallacy of this proposition is in the premises. The validity of the claim against Hanks was the basis of the service upon the plaintiff in error, and when that was disputed the court properly vacated the judgment already rendered, and placed the parties in a position to try that issue. This they failed to do, and upon this failure there was nothing for the court but to render judgment upon the pleadings filed. The judgment of the court of common pleas is affirmed.

McELROY, J., concurring.

MAHAN, P. J. (dissenting). In the first instance the court rendered judgment against the plaintiff in error without jurisdiction acquired as prescribed by law. The judgment was a void one for that reason. The plaintiff in error treated it as a void judgment, and moved the court to vacate it as such, under the provisions of section 575 of the Code (Gen. St. 1889). The ground of the motion was that the court was without jurisdiction. There were some statements in the motion by way of excuse for the delay, or for fail-

ing to object in the first instance to the rendition of the judgment,—mere surplusage. The court sustained the motion, and entered an order setting aside and vacating the judgment, and adjudged that it be held for naught. At the next term of court, without any step being taken to give the court jurisdiction to render judgment against the defendant, another judgment was rendered against him and a co-defendant, who was originally named in the petition, who had been served with summons, but against whom no judgment had been taken. The facts charged in motion to vacate the first judgment were that the plaintiff and this co-defendant had fraudulently colluded together for the purpose of imposing upon the court and giving it an apparent jurisdiction of the plaintiff in error, and to further that design the co-defendant had put his name on the back of the note sued upon as guarantor, not in good faith; that no liability was assumed thereby, but, on the contrary, it was agreed that no judgment should be taken against him; and that in fact none was taken. The judgment of the court sustaining this motion is in effect a finding that the grounds of the motion are true, and that the court was without jurisdiction to render a judgment against the defendant. No further steps having been taken to confer jurisdiction upon the court to render the subsequent judgment against him, it was likewise without jurisdiction and void, and the motion to vacate it should have been sustained. There was nothing left of the cause pending in the court, and no issue left to be tried. The court on the first motion did not award a new trial in any sense, under any of the provisions of the Code. It vacated a fraudulent, void final judgment, and that terminated the cause.

(10 Kan. App. 194)

HARRISON v. McCABE, Judge, et al.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

MANDAMUS—APPROVAL OF APPEAL BOND—
AMENDED BOND.

1. An action of mandamus will not lie to compel an inferior court to approve an appeal bond that materially misdescribes a judgment from which the appeal is sought to be taken.

2. Where an appeal bond, reciting a judgment materially different from the judgment actually rendered, was presented to the trial court, and the party presenting the same was given a reasonable opportunity to file a bond properly describing the judgment therein, but refused to do so, mandamus will not lie to compel the granting of an appeal upon such defective bond.

3. The district court, upon the trial of the issues in the proceeding in mandamus, was without authority to permit the filing of a good sufficient bond in that court as a basis for an order of mandamus in an action pending. It is only where an appeal has been perfected upon an imperfect or informal bond, and after the appellate court acquires jurisdiction, that an amended or sufficient bond may be substituted.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Application of T. W. Harrison for a writ of mandamus to A. J. McCabe, judge, and others. From a judgment denying the writ, plaintiff brings error. Affirmed.

T. W. Harrison, pro se. John V. Abrahams, J. B. Larimer, F. H. Foster, and L. H. Greenwood, for defendants in error.

WELLS, J. This is a proceeding originally instituted in the district court of Shawnee county to compel A. J. McCabe, judge, and E. L. Good, clerk, of the court of Topeka, to certify to said district court for trial the case of John V. Abrahams against T. W. Harrison, then in judgment in said court of Topeka. Upon the issues therein formulated a trial was had, and the peremptory writ denied. This judgment is brought here for review.

John V. Abrahams, as assignee of Margaret A. Shaffer, brought suit in the city court of Topeka against T. W. Harrison for the use and occupation of certain real estate in said county. Harrison attempted to make one Harvey Henderson, executor, and others, parties to said suit, but his motion therefor was denied, and said case was tried, and judgment rendered in favor of said John V. Abrahams and against said T. W. Harrison. From the judgment so rendered an appeal was sought to be taken. Upon the forenoon of the last day upon which an appeal bond could be filed, Harrison presented to the judge and clerk, who were then engaged in other business, what purported to be an appeal bond in said case, and they, without examining it further than to see that the amount was sufficient, and the security good, signed their names to the approval thereof. In the afternoon of the same day they examined said bond more fully, and found that it purported to be an appeal from a judgment rendered by said court against T. W. Harrison and Harvey Henderson, executor. Harrison was notified that the bond would not do, and requested to file a correct bond, which he declined to do, and threatened mandamus proceedings if the appeal was not allowed on the bond already filed: and thereafter these proceedings were instituted. It does not seem to us that the plaintiff in error has any just ground for complaint. The bond he filed did not purport to be an effort to appeal from the judgment rendered against him in the case pending. He was given ample opportunity to save his appeal if he desired to do so. This he refused. It is quite probable that, if his attention had not been called to the error, and no opportunity had been given him to rectify it, the court would have allowed a new bond to be filed, and the appeal proceeded with; but, after the opportunity had been offered and refused in the court charged with the duty of seeing that the provisions of the statute were substantially complied with, he stood squarely upon the suffi-

ciency of the bond relied on, and must stand or fall with that alone. The judgment of the district court is affirmed.

10 Kan. App. 222)

WOLFE v. ROBBINS et al.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

LIEN—DEATH OF JUDGMENT DEBTOR—ALLOWANCE OF CLAIM.

The fourth subdivision of section 80, c. 107, Gen. St. 1897, is construed to mean that judgments which are liens upon real estate of the deceased, where the estate is insolvent, shall, to the extent of the lien, be paid, without reference to classification, with the exception therein stated, but the deficiency shall only be paid as other judgments rendered against the deceased in his lifetime are paid.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Petition of Louise D. Wolfe, administratrix of Eugene Wolfe, deceased, against A. D. Robbins, administrator of Charles Dunn, deceased, and others, for the allowance of a claim. From the judgment of the district court on appeal from the probate court, petitioner brings error. Affirmed.

Isenhardt & Alexander, for plaintiff in error. Edwin A. Austin, Jetmore & Jetmore, and F. C. Downey, for defendants in error.

WELLS, J. On the 28th day of September, 1891, E. A. M. Smith recovered a judgment in the circuit court of Shawnee county against Charles Dunn in the sum of \$3,614.85, upon foreclosure proceedings therein, and an order of sale thereon was stayed for a period of six months. On February 10, 1892, Charles Dunn died. On February 25, 1892, E. B. Guild was duly appointed and qualified as administrator of his estate. On April 4, 1892, said E. A. M. Smith filed his motion in said circuit court to have said judgment revived; and on June 18, 1892, said judgment was revived in the name of E. B. Guild, administrator of the estate of Charles Dunn, deceased, and issue of an order of sale thereon stayed for six months from said date. In December, 1892, the clerk of the circuit court certified said judgment to the district court of said county. The estate of Charles Dunn was insolvent. The personal property belonging thereto was sold under order of the probate court for \$1,500, which said sum constituted all the assets of said estate; the interest in the real estate having been previously sold for the sum of \$1,500, and said sum applied to the partial payment of said plaintiff in error's judgment. In October, 1894, E. B. Guild resigned as administrator of the estate, and A. D. Robbins became his successor; and in May, 1895, the aforesaid judgment against Charles Dunn was revived in the district court against the said A. D. Robbins, administrator of his estate. Claims were allowed in the probate

court against said estate to the amount of over \$10,000, and no part thereof has been paid. On May 11, 1897, Eugene Wolfe, the present owner of the judgment rendered in favor of E. A. M. Smith, filed in the probate court of Shawnee county his petition praying for the apportionment of the sum arising from said sale of personal property among the creditors of the estate, and that he be adjudged to be entitled to payment, without reference to classification, except that the demands for the funeral expenses, wages of servants, and the demands for medicine and medical attendance during the last sickness, and the legitimate and proper expenses of administration, may have precedence thereof. Upon the hearing of the petition on June 16, 1897, the probate court reclassified said demand of Eugene Wolfe, and reclassified said claim as a claim of the sixth class, and directed the administrator to apportion the money in his hands among the creditors of the estate according to the classification aforesaid. From this order an appeal was taken to the district court, wherein said court held, as conclusions of law, (1) that the demand and claim of the appellant is not such as to entitle him to payment thereof out of the funds now in the hands of the administrator, without reference to classification, except the class of demands mentioned in the first and second subdivisions of section 80 of the executors' and administrators' act, of the law of this state; (2) that the original allowance and classification of said judgment and claims by the probate court as a claim of the fifth class is a final adjudication with respect to the amount and order of payment of said claim. The matter is brought here, on a petition in error, for review.

The contention of the plaintiff in error is that the probate and the district courts erred in refusing the application of said Eugene Wolfe to have his judgment claim paid, without reference to classification; the contention being that under the fourth subdivision of section 80, c. 107, Gen. St. 1897, said plaintiff in error was entitled to have her judgment paid, without reference to classification, except that the class of demands mentioned in the first and second subdivisions of said section shall have precedence of said judgment. The defendants in error contend first that the district court had no jurisdiction to hear the case, from the fact that no bond was given. The district court found otherwise. Complaint is also made that no bill of exceptions was filed in the case so as to become a part of the record thereof. This was not necessary. There is sufficient in the record to enable this court to decide upon the correctness of the conclusion of law of the trial court.

The first question is, was the original allowance and classification of said judgment claim by the probate court as a claim of the fifth class a final adjudication with respect

to the order of the payment thereof? This seems to be answered in the affirmative by the supreme court of this state in *Wolfley v. McPherson*, 59 Pac. 1054. But it is claimed that, under the fourth subdivision of section 80, c. 107, Gen. St. 1897, this judgment should be paid without reference to classification, except as to the first and second class claims. Said subdivision reads as follows: "Fourth. Judgments rendered against the deceased in his lifetime; but if any such judgments shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid without reference to classification except the classes of demands mentioned in the first and second subdivisions of this section shall have precedence of such judgments." It seems to us that this must be construed to mean that, where a judgment is a lien upon real estate, to the extent of such lien it may be paid, without reference to classification. It was held in *Mendenhall v. Burnette*, 58 Kan. 355, 49 Pac. 93, that after revivor an execution could be issued on such a judgment against the lands bound by the lien, without resort to the probate court, but that execution could not be levied on personalty, nor on lands not subject to judgment lien. The legislature evidently intended to give to the judgment creditor the same rights through the probate court as he has without resorting to that court, in the enforcement of his lien, and the same rights as other judgment creditors for the recovery of the deficiency. The judgment of the district court is affirmed.

SCHUSTER v. GRAY.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

On rehearing. Dismissed.

For former opinion, see 61 Pac. 819.

PER CURIAM. This case has been previously before us twice. Upon the first time the action of the district court in refusing to allow an amended complaint to be filed was reversed. 55 Pac. 489. Upon its second appearance the cause was dismissed because there was no petition in error attached to the record. 61 Pac. 819. Afterwards a petition in error was found in the files of the "case," and attached to the case-made, and thereupon a petition for a rehearing was granted, and it is again before us. An examination of the record shows that the judgment complained of was rendered on February 27, 1899, a motion for a new trial overruled, and 30 days given to make and serve a "case" on the same date. The record then shows: "And afterwards, and on March 23, 1899, the time for making and serving a case-made herein was duly extended by the judge of said court at chambers; the order extending

the said time being in words and figures as follows, to wit." Then follows the certificate of the attorneys for the plaintiff in error as to what the case-made contains, an acknowledgment of the attorneys for the defendant in error of service on the 4th day of May, 1899, and the certificate of the judge settling the same. No order of extension of time appears, and no statement of how long the time was extended. From this record it does not appear that the "case" was served within the time allowed therefor. An examination of the record, however, shows that there is no merit in the assignments of error presented and argued by plaintiff in error. This proceeding in error is dismissed.

(10 Kan. App. 196)

MANHATTAN LIFE INS. CO. v. OLMSTED.
(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

LIFE INSURANCE—PAID-UP POLICY.

Where a life policy provided for a paid-up policy on surrender of the original policy, where the insured lived in Colorado and the insurance company was in New York, and he offered to surrender the policy by delivering the same to a bank in Colorado, but the company also required assured to execute assignments of the original policy on forms sent by them, his offer to surrender to the bank, which was not objected to by the company, was a substantial compliance with the policy, though he did not make the assignments as demanded.

Wells, J., dissenting.

Error from district court, Douglas county; Samuel A. Riggs, Judge.

Action by Philip Olmsted against the Manhattan Life Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. W. Nevison, for plaintiff in error. Lewis G. Ferrel, for defendant in error.

MAHAN, P. J. This is a suit upon a contract of life insurance, to recover the value of a paid-up policy, which the insurance company avoided issuing at the time it was demanded under the terms of the original policy by an attempt to inject therein conditions not expressed thereby. The one contingency upon which it was agreed that the amount of the paid-up policy should be paid had transpired; that is, the assured had attained the age of 60 years. There are no assignments of error. The argument of counsel for plaintiff in error is devoted to the well-settled rule that time is material in the performance of the promises on the part of the assured. The election of the plaintiff to discontinue payment of premiums under the original policy, and to take a paid-up policy under its conditions, was made in ample time; and he offered to surrender the policy by delivering the same to a bank at Greeley, Colo., where he was then. This manner of surrendering the policy was not objected to specifically, but the company requested the assured to execute and send them assignments of the original

policy on forms sent by it for that purpose. This request was not complied with. The ordinary rules of law governing contracting parties apply to insurance companies' contracts. The obligation to write and deliver to the assured, upon his election, the paid-up policy, was mutual and dependent with the assured's obligation to deliver up the original. The company was in New York. He was in Colorado. He proposed to leave the policy for the company with a bank at Greeley, and did so, and so advised them. The company acknowledged notice thereof, and made no objection thereto, but insisted on the assignments, and refused to issue the paid-up policy until the assignments were executed and sent them. The assured made a substantial compliance with this provision of the contract. The company had timely notice of his action, and he was entitled to the paid-up policy, and in this action, under our Code, was entitled to recover as though it had been made according to the terms of the original policy. The judgment of the district court is in accord with our views, and is affirmed.

WELLS, J., dissenting.

(10 Kan. App. 160)

LONG et al. v. STEELE.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

MORTGAGE—CONSIDERATION.

In an action brought to foreclose a mortgage and render judgment on the notes thereby secured, it appeared that the notes and mortgages sued on had been procured of the defendant by the plaintiff upon the representation that they were needed to tide him over a temporary financial embarrassment, and an agreement on his part to cancel and return them to the maker as soon as they had served that temporary purpose. *Held* that, as between the parties to such transaction, said notes and mortgage could not form the basis for the recovery of a judgment therein.

(Syllabus by the Court.)

Error from district court, Doniphan county; R. M. Emery, Judge.

Action by John S. Long against Marie E. Steele. On the death of plaintiff, Anna E. Long and Oscar S. Long, personal representatives, were substituted. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. D. Webb, for plaintiffs in error. S. L. Ryan, Chas. W. Reeder, and O. W. Ryan, for defendant in error.

WELLS, J. This action was originally instituted by John S. Long in his lifetime against the defendant in error to recover a judgment upon three certain promissory notes for \$500 each, and for foreclosure of the mortgage securing the same. The defendant filed an answer to the petition, being: First, a general denial; second, allegations that said notes and mortgage were given without consideration, as an accommodation to the payee thereof, for the purpose of tiding over a tem-

porary embarrassment of a bank of which said payee was the principal owner, and upon the agreement upon his part that said notes should be returned to her without payment, and said mortgage canceled; third, pleading the five-years statute of limitations. To this answer a reply was filed denying the allegations in said answer, and asserting that said notes and mortgage were given for full consideration of the purchase of the lands covered by said mortgage; that the first note mentioned in said mortgage was given up and surrendered without payment, as a gift to said defendant in error herein. Upon these pleadings the case was tried to a jury, who found a general verdict for the defendant, and also answered certain special questions of fact submitted to them. Upon this verdict and finding judgment was rendered for the defendant, and the case brought here upon a petition in error attached to a case-made. Afterwards the action was revived in the names of the executor and executrix of said John S. Long upon the showing of his death and their appointment.

The first important question raised by the pleadings in this case is: Did John S. Long procure the execution and delivery of the mortgage and notes in controversy upon the representation that the bank of which he was the principal owner was temporarily embarrassed, and needed them to tide it over such embarrassment, and that, when such object was accomplished, they should be canceled, and returned without payment? If this question is answered in the affirmative, it makes but little difference in this case what the facts as to the original purchase of the land were. This cause stands or falls upon the validity or nonvalidity of these notes and this mortgage, and, if they were procured as claimed by the defendant, then, as between the parties thereto, they have no validity, and can form the basis of no rights. This question was submitted to the jury, and by them decided adversely to the claims of the plaintiff. There was sufficient evidence to sustain this finding, and there is no error pointed out that could reasonably change it. The other findings of fact are not antagonistic thereto. The judgment of the district court must be affirmed.

(10 Kan. App. 173)

PARK et al. v. ENSIGN.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

ACTION AGAINST LANDLORD—REFUSAL TO FENCE—DAMAGES—WITNESS—COMPETENCY.

1. Where a landlord, whose fences are down, refuses to rebuild the same, or to permit his tenant to do so, he cannot insist, in an action for damages by the tenant, that his liability is to be limited to the amount required to rebuild the fence.

2. Section 322 of the Code of Civil Procedure does not prohibit a party to an action pending between himself and the executor of an estate of a deceased person from testifying as to any matter relevant to the issues therein, except as

to transactions or communications had personally with the deceased.

3. A person who is jointly liable upon the obligation sued on, and has a separate suit pending to determine the extent thereof, cannot testify in relation to conversations had by him with the deceased in relation to the matter in controversy.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by Daniel Ensign against D. H. Park and S. R. Park. On the death of Daniel Ensign, his executor, Dewey Ensign, was substituted. Judgment for plaintiff, and defendants bring error. Reversed.

H. L. Burgess, for plaintiffs in error. I. O. Pickering, for defendant in error.

WELLS, J. Daniel Ensign brought suit against the plaintiffs in error, D. H. Park and S. R. Park, for the sum of \$232.10, as a balance due on a promissory note given for rent of land. In their answer the defendants admitted the execution of the note, but alleged lack of consideration, and damage by reason of the fences around said rented land having been torn down by the road overseer, and said Daniel Ensign refused to rebuild or allow them to be rebuilt, and prayed judgment in their favor for \$600. The plaintiff filed a general denial in reply. Pending this suit, and before the trial thereof, Daniel Ensign died, and the action was revived in the name of Dewey Ensign, as the executor of the estate of Daniel Ensign, deceased. Upon the trial the jury returned a verdict for the plaintiff against the defendants for the sum of \$176.37, and judgment was rendered accordingly. To reverse this the cause is brought here for review.

The first allegation of error is in the exclusion of testimony. One of the defendants was put upon the stand in his own behalf and on behalf of his co-defendant, and was asked in relation to the amount of live stock he had, what arrangements he had made for pasturing live stock on the rented land during the term of the lease, and the reasonable value of the pasture land on the rented farm. The questions were objected to by the plaintiff as incompetent, irrelevant, and immaterial, and because the witness is incompetent, which objection was, by the court, sustained. Afterwards the same witness was recalled by the defendants, and he was not allowed to testify to anything in the case, each question being objected to as incompetent, irrelevant, and immaterial, and that the witness was incompetent in this case for any purpose; and the objection was, by the court, sustained. The evidence seems to have been excluded on the grounds that the witness was incompetent to testify in this case under section 322 of the Code, the court remarking: "If this is a transaction between this party and the deceased, I think the witness is disqualified." This was erroneous.

See McKean v. Massey, 9 Kan. 602; Clary v. Smith, 20 Kan. 83. Most of the questions excluded were relevant, competent, and material to the issues raised by the pleadings. One of these questions was as to the amount of the damages sustained by the defendants by reason of the condition of the fence, if any such damage was sustained; and several of the questions excluded tended directly towards that issue. The jury found that there was no damage sustained, but yet it seems that they must have allowed some in making their general verdict, as we see no other reason for not allowing plaintiff his full claim.

As to the questions asked George B. Strother, to which objection was sustained by the court, we think the court committed no error. The witness was directly interested in the result of the suit, and the questions called for a personal communication between himself and the deceased, and we think that, under the authority of Wills v. Wood, 28 Kan. 400, this was properly excluded.

The defendants pleaded, and the jury found, that the original plaintiff refused to rebuild said fence, or to permit the defendants to rebuild the same, and yet the court instructed the jury, in substance, that, if the defendants took possession of the land with the fences down, it was their right and duty to rebuild said fences, and that the full extent of their damage could not exceed the necessary cost of rebuilding the same. This would probably be the correct rule in most cases, but the question that arises in this case is, can a man forbid the doing of a thing, and then insist that his rights are to be predicated upon the result of a disregard of his instruction? We think not. There was reversible error in the trial, and the judgment will be reversed, and a new trial directed.

(10 Kan. App. 198)

HARGADINE-McKITTRICK DRY-GOODS CO. v. SWOFFORD BROS. DRY-GOODS CO.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

CONTRACT—RESCISSION—FRAUD—RETAINING BENEFITS.

1. Where a mercantile company, in consideration of the surrender to it of large valuable property rights, upon a part of which it has a mortgage, assumes and agrees to pay the mercantile indebtedness of the mortgagor, the mercantile company cannot have and hold all of the benefits and property accruing to it in consequence of the transaction, and repudiate its agreement to pay mercantile creditors on account of the alleged fraud of the assignor in concealing the true amount of his indebtedness.

2. The mercantile company, upon discovering the fraud, had two remedies,—it could have repudiated the whole transaction, restored the status quo, and be relieved of all of the obligations of the contract; or the mercantile company could have affirmed the contract, and bore the obligations imposed, and have recourse up-

on the mortgagor for damages sustained on account of his fraud and deceit.

Mahan, P. J., dissenting.

(Syllabus by the Court.)

Error from district court, Douglas county; Samuel A. Riggs, Judge.

Action by the Swofford Bros. Dry-Goods Company against the Hargadine-McKittrick Dry-Goods Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Rossington, Smith & Histed, for plaintiff in error. Ellis, Cook & Ellis, for defendant in error.

MCELROY, J. This action was brought by defendant in error, Swofford Bros. Dry-Goods Company, against Hargadine-McKittrick Dry-Goods Company, for the recovery of the amount due upon account for merchandise sold to A. R. Kramer, doing business under the firm name of A. R. Kramer & Co., the payment of which indebtedness was alleged to have been assumed by the Hargadine Company as a part consideration for the purchase of a stock of goods, fixtures, and appliances of trade. The defendant answered: (1) A general denial; (2) admitted the corporate existence of the plaintiff and of the defendant; (3) alleged that no consideration whatever was received by defendant for making any agreement, or for the assumption of payment of the amount due plaintiff by Kramer & Co.; and (4) alleged that whatever promises were made for the payment of the mercantile indebtedness of Kramer & Co. by defendant were induced through the fraud of Kramer & Co., and were made in ignorance of the existence of any such indebtedness due to plaintiff. The plaintiff's reply was a general denial. A trial was had to the court and jury, resulting in a verdict for plaintiff in the sum of \$1,078.05. A motion for a new trial was overruled, and judgment rendered upon the verdict. The defendant, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court—First, that the court erred in excluding competent evidence; second, that the court erred in giving instructions to the jury, and in refusing to give instructions requested.

The record shows that A. R. Kramer was engaged in the mercantile business at Galena, Kan., under the firm name of A. R. Kramer & Co.; that the Hargadine-McKittrick Company is a wholesale mercantile company at St. Louis, Mo.; that Swofford Bros. is a wholesale mercantile house at Kansas City, Mo.; and that the Hargadine-McKittrick Company and A. R. Kramer, on March 2, 1896, entered into the following agreement: "This agreement, made this 2d day of March, 1896, between the Hargadine-McKittrick Dry-Goods Company, of St. Louis, Missouri, and A. R. Kramer, of Galena, Kansas, witnesseth, that it is hereby understood and agreed that the stock of goods contained in the storehouse

known as the 'Gill Prehm Block,' situated in the city of Galena, Cherokee county, Kansas, and run under the firm style of A. R. Kramer & Company (same being composed of A. R. Kramer, individually), is the sole property of said Hargadine-McKittrick Dry-Goods Company, and to remain so until the following indebtedness, amounting to * * * \$14,935.27, is paid. Same is evidenced by three promissory notes, one due January 1, 1897, for \$5,000.00, bearing interest at 6% per annum from date; one note dated March 2, 1896, and due one day after date, for \$8,431.24, without interest; one note dated March 2, 1896, and due one day after date, for \$1,504.03, with interest at the rate of 6% per annum,—all of said notes to be indorsed by Mrs. Lottie Kramer, wife of said A. R. Kramer. It is further agreed that the said A. R. Kramer has the privilege of paying at any time whatever cash he may raise on account of the note due January 1, 1897, for \$5,000.00. It is also agreed that the note for \$8,431.24, dated March 2, 1896, and due one day after date, is to be paid off out of the proceeds of the sales, after deducting expenses, etc., and, after invoicing the stock at the expiration of every six months, any balance that may remain to the credit of A. R. Kramer & Company is to be applied to the payment of said note. It is further agreed that the note for \$1,504.03, dated March 2, 1896, and due one day after date, is to run one year, with privilege of renewing, but the interest on same is to be paid annually. It is further agreed that the said A. R. Kramer is to draw a salary not to exceed sixty-five dollars (\$65.00) per month, and that the gross expense for conducting the business is not to exceed at any one time \$300.00 per month, or \$3,600.00 per year. The said A. R. Kramer is to make a weekly report to said Hargadine-McKittrick Dry-Goods Company, showing amount of sales, cash on hand, expenditures for the week, and daily deposits of money received (all such deposits being the property of said Hargadine-McKittrick Dry-Goods Company until the foregoing sums named are paid), and to make remittances weekly. The stock of merchandise is to be invoiced every six (6) months, same to be taken at actual cost. It is also further agreed that the said Hargadine-McKittrick Dry-Goods Company is to grant the said A. R. Kramer & Company a line of credit not to exceed \$2,000.00, as follows: \$1,500.00 in dry goods, and \$500.00 purchases made from other houses. No purchases are to be made or debt created without the authority of said Hargadine-McKittrick Dry-Goods Company. All cash is to be remitted to the said Hargadine-McKittrick Company, and all bills to be paid through them. It is also further agreed that, on the final payment of all said notes as mentioned in this agreement, the stock of merchandise is to be turned over to the said A. R. Kramer as his property. The said A. R. Kramer shall at any time have the privilege of tak-

ing up the entire debt due the said Hargadine-McKittrick Dry-Goods Company. It is also agreed that the said Hargadine-McKittrick Dry-Goods Company, through their representatives, is to have full access to the books, and everything connected with the business, at any time without notice, and the expense incurred for such investigation to be defrayed by the said A. R. Kramer & Company. Upon the failure of said A. R. Kramer to carry out any part of the above agreement, it is hereby agreed that the said Hargadine-McKittrick Dry-Goods Company can at any time take possession of said stock of goods without notice. In witness whereof we have hereunto set our hands and seal this 7th day of March, 1896." That, pursuant to the agreement, Kramer managed the business, submitted weekly and other reports, remitted money, and at semiannual periods submitted what purported to be invoices, with trial balances, showing in detail the condition of the business, the amount of stock on hand, with a list of creditors. The last of such semiannual statements submitted was on August 1, 1898. The business was unsatisfactory. In December, 1898, the mercantile company determined to close out the business, and with that end in view wrote A. R. Kramer the following letter: "St. Louis, Mo., December 3, 1898. A. R. Kramer, Esq., Galena, Kan.—Dear Sir: We regret to say that we feel it is necessary for the protection of our interest that we should take possession of the stock of merchandise which we have been running under the agreement made March 2, 1896, in your name. You can readily see for yourself that the business is going behind every day, and will not support the expense of keeping it going. The expense lately appeared to be thirty-five or forty per cent. of the total sales, and, of course, you cannot begin to make that much profit, and the whole thing is daily getting worse. Mr. E. S. Purdy, one of our confidential employes, will be in Galena Monday morning, and you will be kind enough to turn the stock of goods to him. We have arranged to have the same packed up and shipped without delay. It is necessary for us to do this on rather short notice, as we have disposed of the goods, and made arrangements to deliver them in time for the holiday trade. We feel that you have worked hard and faithfully to bring this unfortunate deal to a more satisfactory close, and are very sorry, indeed, that it has not turned out better. We do not, however, consider that you are responsible for the failure. We are willing to give you a clean receipt in full for all of your indebtedness to us on delivery of the stock of goods, and will, of course, return you all of your notes, which, I think, is all that you could expect, under the circumstances. I regret that Mr. Davis was not able to go down to attend to this matter, as he has been familiar with it for so long; but his physician orders him not to go out of town for several days, and this matter will

not keep. Mr. Davis, however, will be in Galena by the end of the week or the first of the following week, and settle up the whole matter with you. Mr. Purdy is authorized to say to any one to whom the firm of A. R. Kramer & Company may owe money for legitimate claims against them of any kind, arising out of the mercantile business, that this company will settle them up in full, and Mr. Davis will attend to the matter as soon as he is able to come down. I trust that you will give Mr. Purdy such assistance as he finds necessary to carry out his instructions in the matter. Any cash on hand belonging to the firm I wish you would remit at once to us, and you can say to the owner of the building that Mr. Davis will be down, and adjust with him any unsettled matter relative to rent or lease upon the storehouse. If you can do anything towards selling out the furniture and fixtures there, I wish you would do so. Again regretting the necessity for taking action in the matter, and with best regards, believe me, very truly yours, Thos. H. McKittrick, President Hargadine-McKittrick Dry-Goods Co." On December 6th, thereafter, one Purdy, representing the Hargadine Company, delivered to Kramer his notes, stating that the mercantile company would pay the mercantile indebtedness of Kramer & Co., and Kramer surrendered the possession of the store and fixtures. The Hargadine Company, as above stated, took possession of the entire stock of goods and fixtures, sold the fixtures in payment of the rent, shipped the stock of goods to the Indian Territory, and disposed of the same. On that date Kramer & Co. were indebted to Swofford Bros. for goods purchased in the sum for which judgment was rendered. They demanded payment from the Hargadine Company, which was refused, and this suit was instituted.

In the letter of December 3, 1898, Kramer & Co. were advised that "Mr. Purdy is authorized to say to any one to whom the firm of A. R. Kramer & Co. may owe money for legitimate claims against them of any kind, arising out of the mercantile business, that this company will settle them up in full, and Mr. Davis will attend to the matter as soon as he is able to come down." Prior to and at the time the goods and fixtures were delivered, the following conversation occurred between Purdy and Kramer: "(Purdy) Q. Are your accounts all on the ledger? (Kramer) Ans. Yes; with the exception of minor accounts around town that I kept no ledger account of. (Kramer) Q. Now, this is to release me absolutely? (Purdy) Ans. The instructions of that letter are to be carried out. (Kramer) Q. And I am to have a clean score, and these debts are all to be paid up? (Purdy) Ans. Yes; all of the indebtedness of your concern, as that letter says, shall be paid." The contract of March 2d was executed nearly three years prior to that date. It does not cover after-acquired property,

nor the fixtures. The stock of goods had been undergoing changes during all of that period. The evidence shows that one-half of the stock, at the time it was delivered to the Hargadine Company, consisted of new goods, a large portion of which had been purchased from Swofford Bros. It was provided by the agreement that Kramer & Co. should purchase goods on credit, and that the Hargadine Company should sell him goods on credit. The fixtures, some \$400 in value, were not included in the agreement. All of this property was taken possession of at the time the Hargadine Company agreed to pay the mercantile indebtedness of Kramer & Co.

The fact that Kramer & Co. surrendered to plaintiffs in error a large amount of after-acquired property, together with the fixtures, constituted a legal and abundant consideration for the agreement of plaintiffs in error to pay the mercantile indebtedness of Kramer & Co. It is contended, however, that on account of the fraud of Kramer & Co. in concealing the purchase of goods from Swofford Bros., and the existence of such account, plaintiffs in error are relieved from liability therefor. It will be noted that the Hargadine Company discovered the alleged fraud immediately after they took possession of the goods, and, notwithstanding this fact, they sold the fixtures, shipped the goods out of the state, and retained everything they had acquired by reason of the agreement. When the mercantile company discovered the fraud practiced, they had two remedies. They could have repudiated the whole transaction, restored the status quo, and be relieved of all the obligations of the contract, or they could have affirmed the contract, and bore the obligations imposed, and then have recourse upon Kramer & Co. for damages suffered on account of his fraud and deceit.

Plaintiffs in error cite *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619, in support of their contention that they may retain the benefits of the executed contract, and repudiate its obligations on account of fraud. This case does not sustain the contention. The defense in the *Clay v. Woodrum* Case was a failure of consideration and noncompliance with the contract. There was no question of fraud in it. The court held that the allegations in the pleadings on the contract between the original parties was "executory"; that facts had been averred which, if proved, would show the contract had not been executed prior to the commencement of the action by the third party; that in reality no contract had been consummated, and so no right of action existed. In the case at bar the Hargadine Company apparently made no effort to ascertain the real condition of Kramer & Co. They had no right to rely upon representations made in August to consummate a trade in December. They cannot close their eyes to the real financial condition of Kramer & Co., at the time they make and consummate a contract by which they acquire

large valuable property rights, and afterwards be permitted to say that they were imposed upon, when it reasonably appears that by the use of ordinary diligence they could have ascertained the real financial condition, and could have known of the obligations they were assuming.

It is contended that the court improperly excluded the testimony and tender of proof made by the defendant at the trial, as follows: "Is that one of the semiannual reports of the kind you have mentioned? A. Yes, sir. Q. Was that submitted to you by Mr. Kramer? A. It was sent to us by Mr. Kramer. (Exhibit 1 now offered in evidence again. Objected to as incompetent and immaterial.) Mr. Histed: That brings us to the point we stopped at yesterday. The Court: Yes; we are right up against it. Now I will hear you fully. Mr. Histed: Defendant proposes to follow up this statement of January 10, 1897 (Exhibit 12), with other letters and statements of the same character, submitted by A. R. Kramer to the Hargadine-McKittrick Dry-Goods Company, and to offer further and other evidence to establish concealment and misrepresentation by Kramer concerning his dealings with outside mercantile houses, and the extent of his mercantile indebtedness. And defendant's counsel now offers to show the course of dealing between A. R. Kramer and the Hargadine-McKittrick Company, and to show that during all this time that Kramer misrepresented the situation to the Hargadine-McKittrick Dry-Goods Company; that they had no knowledge of the situation as it in fact existed at the time the letter of December 3, 1898, was written, for the purpose of explaining the letter, and the avoiding of any claim that might be made under that letter of any liability upon his indebtedness to the plaintiff; and defendant particularly offers and expects to prove by this testimony that this claim of Swofford Bros. Dry-Goods Company was one of those, the knowledge of which was concealed from the Hargadine-McKittrick Dry-Goods Company. (The plaintiff objects to this evidence, unless counsel proposes further to follow up this proof with a showing that upon the discovery of the concealment or fraud the defendant took steps to rescind the contract, and to waive the benefits derived by the defendant company from contract made with Kramer under the letter of December 3, 1898.) The Court: Do you expect to offer any proof in that direction? (The defendant, in substance, answered that it did not intend to offer such evidence. The court thereupon sustained the objection.)" The testimony offered in support of the alleged fraud was too remote, under the circumstances, and was properly excluded, in the absence of any effort to show an effort on the part of plaintiff in error to rescind the contract upon the discovery of the alleged fraud. The testimony was properly rejected. If this testimony was

properly excluded, the court committed no reversible error in giving and refusing instructions. The motion for a new trial was properly overruled. The judgment is affirmed.

MAHAN, P. J. (dissenting). I cannot concur with my brother judges in their judgment in this case. By their petition, the defendants in error sought to recover from the plaintiff in error the amount of an indebtedness due to defendants in error from one Kramer for goods sold to him, by reason of an alleged contract between Kramer and plaintiff in error, whereby Kramer sold them a stock of goods, and as a part of the consideration therefor plaintiff promised to pay to defendants in error their claim against Kramer. The answer and the evidence disclose a different state of facts, in my view. The answer sets forth a prior contract between Kramer and the Hargadine-McKittrick Dry-Goods Company, under which the dry-goods company had a right to the possession of the stock of goods at any time, not a part of the goods, as stated in the first clause of the syllabus of the majority of this court. After this contract was made, Kramer was permitted to manage the business for some months, making statements at stated times, as provided by the contract, and receiving a fixed salary. The contract also limited the amount of expense to be incurred, provided that the dry-goods company should furnish a given amount of addition to the stock, and that Kramer should be permitted to buy goods not exceeding a certain amount from other houses, to be promptly reported to, and paid for through, the dry-goods company. The business not proving satisfactory, the debt of Kramer rather increasing than being reduced by the proceeds of the sales made by Kramer, the Hargadine-McKittrick Dry-Goods Company resumed possession, surrendering their evidence of debt to Kramer, amounting to about \$17,000. The value of the property taken possession of was about \$8,000. The reports of Kramer, prior to and at the time of the surrendering of the possession by him, disclosed a small indebtedness for rent, and some other items probably. Relying upon these statements to represent the true condition of affairs, the Hargadine-McKittrick Dry-Goods Company agreed, by a letter to Kramer announcing their intention to discontinue the arrangement and resume possession of the stock, to pay all the indebtedness contracted by Kramer, and start him off anew. His reports, however, as to purchases of goods, were false; made with intent to deceive the Hargadine-McKittrick Dry-Goods Company. So that, when they made the promise to pay the outstanding debts of Kramer, the claim of Swofford Bros. was unknown to the Hargadine-McKittrick Dry-Goods Company, and was not in their contemplation in making the promise, having been purposely concealed from them by Kra-

mer. Upon the trial, the plaintiff company having proved Kramer's indebtedness to it, and the promise in writing of the Hargadine-McKittrick Dry-Goods Company to pay Kramer's indebtedness growing out of the business, the defendant offered to prove the fraudulent practices of Kramer, by which it was induced to make the promise, and the trial court, upon the objection of the plaintiff company, held such proof of fraud on Kramer's part to be inadmissible, unless the defendant would also prove that it had rescinded the transaction in toto by restoring to Kramer the stock of goods and putting Kramer in statu quo. My judgment is that this was error; that a rescission was not necessary between Kramer and the dry-goods company to enable it to defend against its promise; that the rule of law announced by the supreme court in *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619, applies. Had Kramer been compelled by the Swofford Company to pay the debt, could he have enforced the promise induced by his fraud in an action for indemnity? His fraudulent acts inducing the promise would have been good defense. The Swoffords occupy no better position than would Kramer have occupied. The court also refused to instruct the jury to this effect. This was also error. In my view of the case, the judgment should be reversed, and a new trial awarded.

(10 Kan. App. 167)

ANDERSON v. CANTER et al.

(Court of Appeals of Kansas, Northern Department, El D. Jan. 1, 1901.)

EJECTMENT—EVIDENCE—LIMITATIONS— COMPROMISE—INSTRUCTIONS.

1. In an action to recover the possession of land, where the defendant's answer is a general denial, it is not error to permit him to prove by parol evidence that prior to the beginning of the suit, to settle the controversy between them respecting the land, they agreed upon a division thereof; that they made conveyances to each other by which they intended to convey the respective tracts according to the settlement; that they moved the division fence accordingly, and each went into possession of the tract intended to be conveyed, notwithstanding the deeds do not convey the land by reason of an insufficient description.

2. Where the statute of limitations governing actions to recover the possession of lands, being section 16 of the Code, begins to run, it will not be suspended by the parties in interest entering into negotiations for a compromise.

3. In such action it is not error for the court to refuse to instruct the jury that the imperfect descriptions do not convey the legal title.

4. It was not error to refuse to instruct the jury that the defendant could not avail himself of the statute of limitations unless he had paid the taxes on the land during the running thereof.

5. The court told the jury that if the parties had made a contract of settlement concerning their dispute about the land and its possession, and had executed the same, and, to carry the same into effect, had made and delivered their respective deeds for portions of the land, they were bound by such agreement of settlement,

notwithstanding the deeds did not sufficiently describe the land to convey the legal title; and that, if they so found, their verdict should be for the defendant. *Held* not to be error. A defendant may, in such case, rely upon an equitable title to sustain his possession.

(Syllabus by the Court.)

Error from district court, Doniphan county; R. M. Emery, Judge.

Action by Eugenius Anderson against William Canter and Ella Canter. Judgment for defendants, and plaintiff brings error. Affirmed.

A. Bowers and W. D. Webb, for plaintiff in error. Albert Perry and A. L. Perry, for defendants in error.

MAHAN, P. J. Plaintiff in error sued defendants in error to recover the possession of a certain tract of land, alleging title in fee and right of possession. The answer was a general denial and plea of the statute of limitations. On the second trial to the court and jury there was a verdict and judgment for the defendants. Plaintiff appeals. The tract of land in controversy was accretion caused by the change of channel of the Missouri river. The parties to the cause were owners of different tracts of land surveyed by the government, and originally bounded in part by the meander line of the river, and the controversy was as to whose land the tract in controversy was an accretion.

The first error assigned is that the court permitted the defendants to give oral testimony in regard to an agreement of settlement between the parties respecting this land, upon the ground that it violated the statute of frauds. The contract proven in this way was an executed one. The controversy existing, the parties got together, and agreed upon the boundary line, and established it by the construction of a fence and the execution of deeds by the respective parties quitclaiming to each other, so the deeds provided, as they supposed, for a division of the land upon the agreed line. The agreement was carried out, the deeds made and delivered, the fence built, and the parties went into possession of the respective tracts according to the agreement, and remained in possession for a number of years. In this there was no violation of the statute of frauds. In support of this ruling of the district court, see *Earnshaw v. Crout*, 23 Kan. 560; *Clayton v. School Dist.*, 20 Kan. 256; *Wicks v. Smith*, 18 Kan. 512; *Edwards v. Fry*, 9 Kan. 417; *Armstrong v. Brownfield*, 32 Kan. 116, 4 Pac. 185.

The second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error are based upon this same contention, namely, that it was not competent to prove this transaction, and introduce the deeds in evidence, notwithstanding the description therein was probably insufficient to convey the land as agreed upon.

The eleventh and twelfth assignments of error are based upon the refusal of the court to give an instruction that the second clause

of the answer was not sufficient to present an issue of the bar of the statute of limitations. The answer was, in effect, that the cause of action of the plaintiff, if he had any, had not accrued to him within 15 years. This is a sufficient plea of the statute of limitations.

The thirteenth assignment of error is that the court refused to instruct the jury that the statute of limitations would not run as against the plaintiff during negotiations between the parties for a settlement of the controversy. The statute makes no such exception, and the instruction was properly refused.

The fourteenth assignment of error is that the court refused to instruct the jury that the agreement of compromise under which the defendants conceded 20 rods of the land to the plaintiff and deeded the same to him, taking the plaintiff's quitclaim for the remainder of the land in controversy, was such a break in the continuity of the possession of the defendants as precluded them taking advantage of the 15-year statute. The court gave this instruction in substance, though not in the same form, in the thirteenth paragraph of its instructions to the jury.

The fifteenth assignment of error is that the court refused to instruct the jury that the deed made March 13, 1895, pursuant to the compromise heretofore spoken of, did not convey any lands to the defendants, and that they could not hold any land, or any part thereof, under the deed.

The sixteenth and seventeenth instructions are the same in substance. If that deed had been the only evidence of the right of possession relied upon by the defendants, the instruction would have been applicable. But it was not a question as to whether the defendants were entitled to the possession of the land under the deed, but under all the facts and circumstances shown in connection therewith. It was not competent to single out one item of evidence, and say the defendants could not recover on that alone.

The eighteenth assignment of error is that the court refused to instruct the jury that the defendants could not successfully resist the claim of the plaintiff under their plea of the statute of limitation unless they had paid the taxes on the lands. We know of no such rule of law applicable to the facts of this case.

The nineteenth assignment of error is that the court refused to instruct the jury that a payment of taxes on the tracts of lands owned by the plaintiff, and to which he claimed the accretions had been made, was a payment of the taxes on the accretions *per se*, and that, if the plaintiff paid them during the 15-years possession of the defendants, that possession was not exclusive. The evidence in the record does not authorize the instruction, because the proof of payment of taxes was confined to an assessment of the original acres of land, and not of any accre-

tions. Nor would the proposition be tenable even if the evidence justified it.

The twentieth assignment of error is that the court refused to give several instructions at the request of the plaintiff. The instructions were given by the court in its charge.

The twenty-first assignment of error is that the court refused to give an instruction requested by the plaintiff. The instruction is not set out in the brief.

The refusal to give the instruction, the basis of the twenty-third assignment of error, is without merit, as the court gave it to the jury in its own charge. The same is true of the twenty-third and twenty-fourth and twenty-sixth and twenty-seventh assignments of error.

The twenty-eighth and twenty-ninth assignments of error are that the court misdirected the jury, first, in telling them that, to constitute adverse possession of land so as to bar an action for its recovery, the possession must be actual, open, continuous, and exclusive. The plaintiffs had requested the court to give this instruction in three different forms, and now they object to the court giving it. It was not error. Again, they say the court erred in saying to the jury that if it found from the evidence that on the date named therein the plaintiff and the defendants, for the purpose of settling their respective rights to these accretions, agreed to adjust their differences by the defendant and his wife deeding to the plaintiff a strip 20 rods wide on the west side of the tract, and the plaintiff and his wife executing to the defendants a quitclaim for the remainder of the tract, and that in pursuance of that agreement they did execute and deliver to each other the deeds which they supposed carried out their intentions, such deeds, although defective in form, were available to the parties as muniments of title, and estopped each from claiming title to the land conveyed to the other. This is simply saying that parties are bound by their agreements carried into execution in settlement of differences existing between them. There can be no doubt about the correctness of this proposition. Again, plaintiff says that the court erred in saying to the jury that if they find from the evidence that such deeds were executed and delivered in pursuance of such agreement, and the parties staked out the line between their lands as agreed upon, and that Canter then moved his fence to the line so agreed upon, and the parties since said time have occupied up to the fence, recognizing it as the correct line between them, each is estopped from claiming the land of the other, and that such line and fence bounds the possessions of the respective parties, and that the jury in such case should find for the defendants. This is a repetition of the former instruction, with the addition, however, that the parties had carried their agreement into execution by the establishment of the line, the building of a fence, and

the recognition thereof for a number of years; that is, if the parties have a difference about the true line of division between their respective lands, make a contract of settlement, and execute the same, and abide by it a number of years, that neither party is at liberty to repudiate it at pleasure. This is not only good morals, but good law.

The other instruction complained of was to the effect that the plaintiff could not rescind this agreement without putting the defendant in statu quo, claiming that the same was induced by the fraudulent representations of the defendant. This was not error.

The thirtieth assignment of error is that the court denied the plaintiff's motion for judgment upon the special findings of fact. This is based upon the contentions heretofore noticed, and, they having failed, this must likewise fail.

The remaining contention is that the court denied the plaintiff's motion for a new trial. In this plaintiff relies upon his preceding assignments of error. There having been no prejudicial error committed by the court that would warrant it in granting the plaintiff a new trial, the motion was properly overruled, and the judgment must be affirmed.

(10 Kan. App. 211)

CITY OF ROSEDALE v. COSGROVE et al.
(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

DEFECTIVE STREET—NEGLIGENCE.

The city of Rosedale opened to travel 29 feet in width of one of its streets, and in the remaining portion of the width of the street dug an open drain 15 feet wide at the top, 5 feet deep, with sloping banks. Across this drain, to an alley, was placed a footwalk used by the inhabitants of the city. Held, that it was a question of fact for the jury to say whether it was negligence not to provide railings or barriers to said crossing.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; William G. Holt, Judge.

Action by James E. and Annie Cosgrove against the city of Rosedale. Judgment for plaintiffs. Defendant brings error. Affirmed.

Philip Erhardt and Hutching & Keplinger, for plaintiff in error. Edwin S. McAnany, Daniel O'Byrne, and Leon Block, for defendants in error.

MAHAN, P. J. This was an action in the common pleas court of Wyandotte county against the city of Rosedale to recover damages on account of the death of the plaintiff's child, occasioned by injuries received by the child through the negligence of the city in failing to keep one of its streets in a safe condition for public travel. By the authority of the city, a drain had been excavated along the side of Oak street about 13 feet wide, 5 feet deep, and several blocks in length. Across this drain, at the intersection

of an alley, had been placed by some one a timber for a crossing over that portion of the street remaining intact to the property on that side of the street where the excavation existed. This crossing was left without rails or barriers, and the child of the plaintiff, 7 years of age, in crossing thereon, had fallen into the excavation upon stone in the bottom thereof, and had thereby received injuries which resulted in her death. The main question was as to the responsibility of the city for the unsafe condition of this crossing. Also there was a question as to whether or not there was negligence, under all the facts and circumstances existing at the time, in the failure to erect rails or barriers to prevent accidents to those crossing the excavation. There was a trial to the court and jury, and a judgment for the plaintiff in the sum of \$2,000. Upon the proceedings resulting in this judgment the plaintiff specifies the following errors of the trial court: (1) In overruling the objection of the city to the introduction of any evidence under the petition, for the reason that it did not contain or state facts sufficient to constitute a cause of action against it. (2) In overruling the city's demurrer to the plaintiff's evidence. (3) In refusing to strike out evidence with reference to the decayed place in the timber constituting the crossing, for the reason that such condition was not averred as an act of negligence in the petition. The fourth and fifth assignments of error are based upon instructions given to the jury. The sixth is based upon instructions refused which were requested by the city, and the seventh in denying the city a new trial.

In support of the first assignment of error it is urged that the sole ground of negligence alleged in the petition is that the city permitted a footbridge spanning this excavation to be without guards or side rails, and that it may be said as a matter of law that this was not an allegation of negligence at all; that, as a matter of law, it must be held that such a bridge was reasonably safe for any person who was fit to be abroad without an attendant. We must respond thereto that it cannot be said as a matter of law that this was not an allegation of negligence upon the part of the city. Whether it was negligence or not to leave the crossing without barriers or side rails is a question of fact to be determined by the jury under all the circumstances upon the evidence at the trial. Under certain conditions it might be, and under others it would not be. See 2 Dill. Mun. Corp. (3d Ed.) § 1005; *City of Wyandotte v. Gibson*, 25 Kan. 236; *City of Wellington v. Gregson*, 31 Kan. 99, 1 Pac. 288; *Maulby v. City of Leavenworth*, 28 Kan. 745; *Osage City v. Brown*, 27 Kan. 74. It being a question of fact, and not a question to be resolved by the court as a matter of law, the court properly overruled the demurrer to the petition, and submitted the evidence to the jury to say whether or not, under all the circumstances,

the city was negligent in omitting the barriers or side rails.

Under the second assignment of error the same proposition is urged,—that is, that the evidence showed no facts to render the city liable for omitting guards or side rails; that it showed no necessity therefor. We are of the opinion that, if there was nothing else, the evidence that the child did fall and was killed in the manner and under the circumstances under which her fall occurred is sufficient evidence for the necessity of side rails or barriers to the crossing, assuming that the city was at all responsible for the situation. It is further argued under this assignment that the evidence shows that the immediate and proximate cause of injury was not the want of railings or barriers, but that it was the intervention of an intentional act of an intelligent agency; that is, that a little boy, 3 or 4 years old, who was in the company of boys and girls crossing the footbridge, pushed the child off the crossing. The record fails to sustain this contention; that is, it does not show that the child was pushed off the crossing, but, on the contrary, it shows that while the children were all upon the footbridge, waiting for a team to pass the end of the footbridge so that they might proceed, the little girl attempted to turn about and speak to a companion, and in so doing tripped and fell.

Under the third specification it is said that the court erred in not withdrawing from the consideration of the jury all evidence in relation to the decayed place or defect in the plank or footbridge which caught the child's foot and occasioned her fall, for the reason that it was not charged in the petition as a ground of negligence upon which to base a recovery. There seem to us to be two sufficient answers to this objection. The first is that there was no objection to the evidence, and no motion to strike it out, in the first instance; that is, the evidence disclosing the circumstances under which the child fell and came to her death. There was a motion to strike out some evidence in respect thereto at a later progress of the trial, which did not materially affect the right of the plaintiff in error. Another answer is that it was not sought to use this fact as the basis of recovery at all, but merely as a part of the occurrence,—the *res gestæ*,—and was competent to disclose the same as such. We say it was not relied upon as an act of negligence upon which to base a recovery, and there is nothing in the record which would indicate that the jury could possibly be misled into such a conclusion. The criticism of the first instruction of the court is that it left it to the jury to say whether the footbridge was reasonably safe without railings. We are of the opinion that it was a question of fact properly left to the jury to determine under all the circumstances and conditions disclosed at the trial.

The criticism of the tenth instruction or

the court under the fifth assignment of error is: "Can a city be held liable for an accident happening in an unimproved part of a platted street in a remote part of a small town, and upon a footlog or plank placed by private persons, for their own convenience, across an open ravine, when such plank is not a part of any walk or traveled way erected or prepared by the city for the public travel, and when said plank or footlog is used to go from a street across the ravine onto private grounds; it being further taken into consideration that the city had provided a safe and convenient roadway, thirty or forty feet wide, along said street, ample for all travel along the same, and where such footlog is not used generally by the traveling public?" If this statement of the case was sustained by the evidence, counsel's contention might be correct, probably would be correct. The excavation was a part of the improvement of the street made by the city. The crossing, although originally made by a proprietor of an addition to the city, was adopted and used by the public as a means of crossing that part of the street in connection with that part of the street used as a roadway, and was used by the public as a matter of public convenience, and was entirely upon public ground of which the city had charge, and for the care of which it was responsible.

Under the sixth assignment of error, which is based upon the refusal of the court to give certain instructions asked by the city, and the seventh, which is in denying the motion for a new trial, and which are by counsel, in their brief, discussed together, it is said, first, that the evidence was insufficient to show any liability on the part of the city, and in this connection is substantially repeated the statement heretofore quoted. But counsel say further that their chief objection is of a more fundamental nature; that the accident which occasioned the death of the child was not one which the city should have anticipated as a natural and ordinary result of leaving a footwalk without railings; that the foot walk was not in general use; that its use was very limited, and not by the traveling public; that in every city there are thousands of places adjacent to streets and alleys which are less safe than others, and at which accidents are happening from time to time; that it could not have been anticipated that any person fit to be abroad without attendants would fall from such a crossing, etc. Counsel are not sustained by the record in many of their assumptions of fact. The evidence discloses that this footbridge was used continuously, and for a number of years, by the public generally, but not to so great an extent as in the most populous part of Kansas City, of which Rosedale is a suburb; and it is not reasonable to say that a city should not anticipate that a fall might occur to a person crossing a footbridge 14 inches wide and 20 feet long,

63 P.—19

5 feet above the bottom of the excavation, the bottom of which was covered with rough and jagged rocks. It was for the jury to say; and it cannot be said as a matter of law that such a result was not the natural and ordinary result to be anticipated from the conditions disclosed by the evidence. The judgment is affirmed.

SCHALL et al. v. FLER.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

JUSTICE OF THE PEACE—FINAL ORDER.

An order of a justice granting a new trial is not a final order from which a writ of error lies.

Error from district court, Leavenworth county; Louis A. Myers, Judge.

Action by Thomas B. Schall and John W. Schall against J. K. Fler. An order of a justice granting a new trial was taken by writ of error to the district court, which dismissed the petition. From that order plaintiffs bring error. Affirmed.

Atwood & Hooper, for plaintiffs in error.
John T. O'Keefe, for defendant in error.

PER CURIAM. By this proceeding in error plaintiffs seek to have reviewed an order made by the district court dismissing a petition in error from that court from an order of a justice of the peace granting a new trial. It is contended that the district court based its order dismissing the proceeding exclusively upon the grounds that the summons in error issued by the clerk of that court recited that the petition in error was filed the day after the summons in error was issued. The record rather discloses that the district court dismissed the proceeding for want of jurisdiction. In this we are of the opinion that the district court is correct. The statute gives the district court jurisdiction to review a judgment rendered or a final order made by a justice of the peace. An order granting a new trial is not a final order. See section 543, Code (Gen. St. 1889); section 8, c. 83, p. 11, 2 Webb's Gen. St. 1897. If the court had jurisdiction at all to review the order, the mere fact that the clerk of the district court committed an error in reciting the date of filing the petition in the summons in error would not defeat such jurisdiction; but the district court, having no power to review the order, properly sustained the motion and made the order dismissing the case, and its judgment is affirmed.

(10 Kan. App. 185)**DOBBS et al. v. CAMPBELL.**

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

SETTLEMENT—CONCLUSIVENESS.

A settlement of an account is conclusive between the parties until impeached for fraud,

mistake, the omission of something, accident, or undue advantage taken; and where such settlement is evidenced wholly by correspondence, and there is no evidence to impeach it, its legal effect is a matter of law for the court, and it is error to submit the same to the jury, for which error a new trial was properly granted in this case.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Hugh Campbell against Charles J. Dobbs and George E. Stoker. Verdict for defendants. From an order granting a new trial, they bring error. Affirmed.

Rossington, Smith & Histed, for plaintiffs in error. Stebbins & Evans, for defendant in error.

MAHAN, P. J. This is a proceeding to reverse an order granting a new trial. The court sustained a motion for a new trial upon two specific grounds. The first was that he had submitted to the jury a question which he should have decided as a matter of law. The action was to recover money collected by Dobbs & Stoker as attorneys for the plaintiff, Hugh Campbell. They admitted the receipt of the money, and pleaded thereto a counterclaim for services performed as attorneys by them, and for which they averred the plaintiff promised to pay them their reasonable value, and that such reasonable value was the sum of one thousand and odd dollars. The relations between the parties were not denied. The business was conducted exclusively by correspondence. The plaintiff resides in Edinburgh, Scotland, and the defendants in Topeka, Kan. In the first instance the plaintiff sought advice of Call & Ingalls respecting certain debentures owned by him and issued by the Kansas Investment Company, respecting which a suit was pending in Scotland. The letter to Call & Ingalls was turned over to the defendants, Dobbs & Stoker, who succeeded to the business of Call & Ingalls. A considerable correspondence ensued. The defendants attended upon a commission at taking of depositions to be used in the course of the cause in Scotland. In all the letters written by Dobbs & Stoker they urged the plaintiff to employ them, and to attempt the collection of the debentures from the stockholders of the Kansas Investment Company. This the plaintiff declined to do. On the 12th of March, 1896, some two years after the first letter written by the plaintiff's solicitor in Scotland to Call & Ingalls, the defendants used in their letter this language: "We fear that if there is much more delay these different stockholders that we have referred to will in some way transfer their stock so as to avoid their liability. We will, however, look into the matter more carefully, and in the meantime let us hear from you by return mail whether your client is willing to advance the money to cover costs; for, if he is not, it is hardly worth while for us to spend further time on

the case, and we will present our account, covering small fee for services already rendered." This concludes the letter. In response thereto the solicitor of the plaintiff wrote, giving them his views at some length regarding the situation, and advises them that Mr. Campbell has been advised to commence another suit in Scotland against the Kansas Investment Company and two other companies, and hopes for success therein. Much stronger he expresses it than the defendants seem to have on their side of the water, and concludes: "If you desire to render your account now, my client will not object to pay a moderate fee for your services." In response to this defendants write, advising the solicitor of Mr. Campbell that they are unwilling to advance any costs to institute and carry on litigation in Kansas, and say: "We inclose you herewith account covering our fee for services to date, for which kindly favor us with remittance." The account was inclosed, and the solicitor of Mr. Campbell acknowledged the receipt, as follows: "I duly received yours of the 14th ulto., and now send you post-office order £2.2/. (£2 and 2 shillings), in payment of your account for 10 dollars. Please own receipt." In the course of the trial the defendants, in support of their counterclaim, offered proof of services rendered prior to this settlement, and their value, claiming that this account was only intended by them to cover postage stamps and stationery; that they did not contemplate at the time the correspondence would be discontinued entirely; that there was still hope of their being retained further in the case and in the matter of the debenture; and that their services were reasonably worth more than \$10, the amount of the claim made, and paid by the plaintiff. There was no contention that there was any fraud inducing this statement of account, or any mistake on their part. The only contention was that they did not intend that account should cover their services as they stated in their letters and in the account itself, but merely intended it to cover their advances for postage and stationery incident to the correspondence. Upon this evidence the court submitted the question to the jury to say whether the defendants tendered the account, in fact, as they stated they did in their correspondence, and the plaintiff so received it and paid it, or whether it was, in fact, only intended to cover postage and stationery, as they upon the trial contended. The new trial was granted upon the hypothesis that this was error; that the entire transaction being in writing, and there being no evidence sufficient to overthrow the effect thereof, it was the duty of the court to determine the effect of the writing, and so tell the jury. It is contended that in this the court erred; that the new trial was therefore improperly granted.

This settlement of account between the parties could only be overthrown or opened or corrected upon the ground of fraud, mistake,

omission of some item, accident, or undue advantage, and the burden of proving these necessary elements rested upon the defendants seeking to impeach the account, and the rule is, further, that a stronger case must be made where the statement is in writing, as in this case, without any ambiguity respecting the terms thereof. Now, the effect of this settlement, unimpeached, and the evidence existing in the writing, was for the determination of the court, and ought not to be submitted to the jury. See *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589; *Luckhart v. Ogden*, 30 Cal. 557; 11 Enc. Pl. & Prac. p. 81, par. 4 et seq. The defendants wholly failed to impeach the settlement by any evidence of fraud or undue advantage or accident. The mere matter of what they may have intended was not competent to prove by parol; that is manifest by the writing, which cannot be so lightly impeached. The submission of this question to the jury, and the admission of evidence of services performed prior thereto, was prejudicial error upon which to predicate an order for a new trial. It is unnecessary for us to consider the other ground upon which the court based its order, as this is sufficient to sustain it. The order granting a new trial is affirmed.

LEVERTON et al. v. KNEISEL.

(Court of Appeals of Kansas, Northern Department, El. D. Jan. 1, 1901.)

WRIT OF ERROR—NECESSARY PARTIES.

Where in an action on bond, judgment is rendered for the surety and against the principal, the principal is a necessary party in error to reverse judgment releasing the surety.

Error from district court, Atchison county; W. T. Bland, Judge.

Action by George W. Leverton and George S. Hovey against Henry Kneisel and others. Verdict for plaintiffs against Henry Kneisel and for other defendants, and plaintiffs bring error. Dismissed.

Jas. Falloon, for plaintiffs in error. S. L. Ryan and Jackson & Jackson, for defendant in error.

PER CURIAM. This action was originally brought in the district court of Brown county by George W. Leverton alone against Henry Kneisel and Henry Kneisel, designated, respectively, as "Henry Kneisel, P." (principal or lessee), and "Henry Kneisel, B." (bondsmen or surety), for rent of lands due for the year 1897 upon a lease purporting to have been executed by Henry Kneisel, P., and upon a bond purporting to have been executed by Henry Kneisel, P., and Henry Kneisel, B. But afterwards his partner, George S. Hovey, was made a party plaintiff, and the petition so amended. The separate answer of the defendant Henry Kneisel, B., alleged, in substance, that the lease in controversy was agreed to have been

made with conditions therein materially different from those actually inserted; that the bond was agreed to have been made obligating the principal and surety thereon for a period of one year only; that, when the lease and bond were signed they were wholly in blank, and that the terms thereof were to be inserted afterwards, according to the conditions then and theretofore agreed upon as stated; that George S. Hovey, who produced the blanks, and agreed to fill out the same according to the verbal agreement, represented that he had no interest in the lease and bond; that he was in truth and in fact a partner of Leverton, in whose name the lease was executed; and that, when the blank lease and bond were filled up, conditions and provisions were inserted materially different from those agreed upon. The answer was verified. The reply thereto was a general denial, with the averment that defendants were in possession of the leased premises. The action was tried in the district court of Atchison county upon a change of venue. The trial was had to the court and jury, resulting in a judgment for plaintiff against Henry Kneisel, P., for the amount of rent due for the year 1897, and in favor of defendant Henry Kneisel, B., for costs of suit. The motion of plaintiffs below for a new trial as to Henry Kneisel, B., was overruled, and they, as plaintiffs in error, present the record to this court for review, and allege error in the proceedings of the trial court: (1) That the court erred in the admission of incompetent evidence; (2) that the court erred in refusing to instruct the jury to find for the plaintiff as against each of the defendants; (3) that the court erred in instructing the jury.

The defendant in error challenges plaintiffs in error's standing in this court on the ground that the other defendant in the court below, Henry Kneisel, P., is not made a party to this proceeding in error. The action, as stated in plaintiff's petition in the trial court, was for the recovery of a judgment against Henry Kneisel, P., upon a lease for the rents due in 1897, and for a recovery against Henry Kneisel, P., and Henry Kneisel, B., upon a bond purporting to have been executed for the faithful performance of the conditions of the lease. The defendant in error, upon the hearing of this motion, offered in evidence the original files containing the pleadings and record. The separate answer of Henry Kneisel, P., so far as it relates to the lease and bond, is identical in substance with that of Henry Kneisel, B. Upon the trial the court directed a verdict against Henry Kneisel, P., because he had occupied the land during the year 1897, and was liable for the rent for that year by reason of his occupancy, even though the lease and bond were void for the reasons as stated in the answer of both defendants. The jury found in favor of Henry Kneisel, B., and a general verdict in his favor implied

the further finding by the jury that the lease and bond were void for reasons stated in the answer of both defendants. It is insisted, therefore, that Henry Kneisel, P., should have been made a defendant in error; that his interest might be materially affected by a reversal or modification of the judgment. The defense made by Henry Kneisel, B., which was sustained, was the same as that made by his co-defendant. The judgment, therefore, as to Henry Kneisel, P., and Henry Kneisel, B., is an adjudication that the bond and lease were obtained by fraud, and that they are not liable thereon. If the judgment is reversed as to Henry Kneisel, B., he will then be in the position of a surety without a principal to whom he may look to be reimbursed. If the judgment is reversed, it must be reversed as to both. Thus the judgment of the court as to Henry Kneisel, P., would be reversed without either a motion for new trial, case-made, or petition in error. Henry Kneisel, P., was and is materially interested in the ultimate judgment as to the validity of the lease and bond, and must be made a party to the proceeding in error to give this court jurisdiction. The suit was to recover upon the lease and bond one year's rent for the year 1897. The judgment is *res judicata* as to the validity of the lease, and the conditions thereof, and the bond. This court has no jurisdiction to review the judgment in the absence of Henry Kneisel, P. The petition in error must be dismissed.

**GRAND LEGION OF SELECT KNIGHTS,
A. O. U. W., OF KANSAS, v.
KORNEMAN.**

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

INSURANCE—ACCIDENTAL DROWNING—EVIDENCE.

1. A clause in a fraternal beneficiary certificate which reads, "and shall not die by his own hand, whether sane or insane," will not relieve the association from the payment upon the death of the party, where such death results from accidental drowning, although such drowning may be the direct result of the acts of the insured. Such clause will only relieve the association if the deceased purposely destroys his own life.

2. Where the insured was walking in water not to exceed three feet deep, was seen to fall, and remain apparently motionless until life was extinct, and the jury find that death resulted from drowning, but that such death was not caused by the intentional acts of the deceased, the association is liable upon its beneficiary certificate.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by Mary Korneman against the Grand Legion of Select Knights of the Ancient Order of United Workmen of Kansas. Judgment for plaintiff. Defendant brings error. **Affirmed.**

Lamb & Hogueland, for plaintiff in error.
B. H. Tracy, for defendant in error.

McELROY, J. This action was brought by Mary Korneman against the Grand Legion of Select Knights of the Ancient Order of United Workmen of the State of Kansas for the recovery of \$2,000, upon a beneficiary certificate held by her late husband. The Grand Legion of Select Knights of the Ancient Order of United Workmen of the State of Kansas is a fraternal beneficiary society or lodge, having for one of its purposes the issuance of beneficiary certificates to its members, whereby the society agrees to pay to the parties named in the certificate as beneficiaries the sum of \$2,000 on the death of the holder of said beneficiary certificate, provided the holder, while living, shall comply with all the laws, rules, and regulations of the society. On February 12, 1897, D. Korneman became a member of the society, and received beneficiary certificate No. 5,612, in the sum of \$2,000, made payable to his wife, Mary Korneman, the defendant in error. The constitution of the society in relation to the payment of money due on beneficiary certificates provides: "And shall not die by his own hand, whether sane or insane: providing, however, that when a member comes to his death by his own hand, who had previous to such death been declared insane by a court or other legal tribunal, the beneficiaries of such member shall be paid." Korneman died on August 14, 1898, and proof of death was duly made, and claim presented by the defendant in error for \$2,000, which payment was refused on the ground that Korneman "died by his own hand" (that is to say, "committed suicide"), and that he had never been adjudged insane by any legal tribunal. The society refused to pay the beneficiary money, and Mary Korneman brought her action for the recovery thereof. The defendant society filed its answer, alleging as its sole defense, in substance, that Korneman died by his own hand, and had not prior to his death been adjudged insane by any court or other legal tribunal. The plaintiff, for reply, filed a general denial. A trial was had before the court and jury, which resulted in a verdict for the plaintiff. The jury also made special findings of fact, as follows: "(1) Did Dan Korneman die of drowning? Ans. Yes. (2) If you answer the first question in the affirmative, state whether such drowning was intentional, or not, on his part. Ans. It was not. (3) Immediately preceding his death, was he sane or insane? Ans. Sane." Defendant's motion for a new trial was overruled, and the court rendered judgment upon the verdict for plaintiff. The defendant, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court: (1) That the court erred in its instructions to the jury; (2) that there was not evidence to sustain the

special findings of fact; (3) that the court erred in overruling the defendant's motion for a new trial.

1. The contention is that the court erred in instructing the jury as follows: "If you believe from all the evidence that Dan Korneman was sane, and shortly previous to his death was seized with an attack of epilepsy or vertigo, and his will power over his actions was thereby taken away, and while in that condition he unintentionally walked into the Kansas river, and, falling down while in the water, was drowned or died in the water while under the influence of such malady, then you will find that such death so caused was not intentional on the part of Dan Korneman, and in such case you will find the issues for the plaintiff." The first consideration is as to what is meant by the provision of the constitution of the society which reads, "and shall not die by his own hand, whether sane or insane." "Die by his own hand," "die by suicide," and "commit suicide" are synonymous with "voluntary suicide." The addition of the condition "sane or insane" will relieve the insurer, whatever be the condition of mind of the insured, if he purposely takes his own life. The defense that the assured died by his own hand, or, in other words, committed suicide, is an affirmative defense. The burden of proof thereon was upon the defendant to establish such fact by a preponderance of the evidence. The supreme court, in *Hart v. Modern Woodmen*, 60 Kan. 678, 57 Pac. 936, in considering similar provisions, quote with approval from *Bigelow v. Insurance Co.*, 93 U. S. 294, 23 L. Ed. 918, as follows: "Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one can be misled by them, nor could an expansion of this language more clearly express the intention of the parties. In the popular as well as the legal sense, 'suicide' means, as we have seen, the death of a party by his own voluntary act; and this condition, based as it is on the construction of this language, informed the holder of the policy that if he purposely destroyed his own life the company would be relieved from liability." In commenting thereon *supra* the court says: "Such a condition does not admit of an interpretation to include death by accident or by mistake, although it may have resulted from the immediate act of the assured; but, under an exception such as we are considering, if the insured purposely takes his own life the insurer goes free." The court committed no error in submitting the instruction of which complaint is made.

2. It is contended on the part of the plaintiff in error that the judgment should be reversed for the reason that there was no evi-

dence to support the findings of the jury that such drowning was not intentional. As already stated, the defense that the assured died by his own hand, or committed suicide, was an affirmative defense. The burden of proof thereon was upon the defendant to establish such fact by a preponderance of the evidence, and, unless the defendant established such fact to the satisfaction of the jury, the presumption would be that the drowning was the result of accident. The deceased had been carrying \$2,500 in some Masonic insurance order, and \$2,000 with plaintiff in error. Shortly before his death he had dropped \$1,500 of his Masonic insurance. His family consisted of his wife and two children, aged 10 and 20 years, respectively. His relations with his family were pleasant, and he was devoted to his family. The deceased's coat and vest were on the bank, perhaps 100 yards from where the body was found. There was a memoranda book in his vest pocket, in which, among other things, was written: "Good-by, Mary dear. Good-by, my Scotch Helen. Good-by, John dear; be a good boy; be careful,—not like me." There was another statement in the memoranda, which read: "Henry Hess, forgive me. You have been a friend to me." One of these statements was signed. The other was not. Neither of the statements was dated, nor was there anything to show at what time the writing was done. In the forenoon on August 14, 1898, the deceased left his house in good health and spirits. That was the last seen of him in life by his family. He walked away from home to and along the Kansas river. Willie Vilven testified in substance: "I saw a man about 3 rods from the bank on a sand bar. That was the first I saw of him. He walked across the sand bar, kind of staggering; walked like—reminded me of—a drunk man; and he walked into the water, staggered and circled around, and fell. I saw him come up and go down two or three times. That was the last we saw of him until we saw him on the sand bar. He had no coat or vest on. He left his hat on the sand bar. He made no outcry when he went into the water. He made no struggle, nor did he try to help himself. When he went out across that bar I noticed there was something peculiar in his gait. His feet were spread wide apart. He had his arms down, in this position. He appeared to be weaving as he walked out, his eyes apparently fixed on some object in front of him. We were in a boat. While he was going across that bar one of us dropped a piece of railroad iron into the boat. It made a very loud noise. He didn't appear to pay any attention to the noise. He kept the same position, and walked right on into the water 2 or 3 rods. The water was about up to his hips. He changed his direction and took a step or two, and then fell. As he walked into the water, it seemed like he would take a step to keep from falling."

Claude Ulrich, another young man, who was with Vilven, gave testimony to the same import. These were the only persons who witnessed the transaction. If the deceased came to his death by accidental drowning, although it may have resulted from his immediate act, such death cannot be termed death by his own hand, unless the act which resulted in his death was done on purpose, with the intention that it should result in death. It cannot be said that death is the natural result of walking into water two or three feet deep. Of course, if the deceased purposely walked in the water (that is, with the purpose of drowning himself), and intentionally threw himself in the stream for the purpose of producing death, there could be no recovery in this case. However, if he went into the water two or three feet deep for any other purpose, and while there fell from an attack of epilepsy, vertigo, or from accident (that is, not on purpose), and death resulted therefrom, the society would be liable. Such a death could not be said to be death by his own hand. There was evidence to support the finding of the jury. From what we have said it follows that the motion for a new trial was properly overruled. The judgment must be affirmed.

(10 Kan. App. 162)

CHICAGO, R. I. & P. RY. CO. v. SMITH.
(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

INJURY TO EMPLOYE—LIABILITY OF MASTER.

Where a section foreman and his subordinate, in the employ of a railway company, are in the habit of carrying a gun upon a handcar, without the knowledge, direction, or consent of their superiors in the employ of such corporation, for the purpose of their own amusement, in shooting rabbits, birds, and game, and through an accident or carelessness of the section foreman his assistant is injured by the discharge of such gun, in some manner unknown to the injured party, there can be no recovery against the railway company for such injury. An employer is not liable for the acts of his employé if such acts are not authorized by the former, or done by the latter in the discharge of some duty or obligation to his superior.

(Syllabus by the Court.)

Error from district court, Morris county; O. L. Moore, Judge.

Action by W. J. Smith against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

On the 15th day of December, 1897, the defendant in error received a gunshot wound in his right leg, which resulted in the same being amputated, and he brought an action against the plaintiff in error (defendant below) to recover the damages resulting from such injury. The defendant's answer consisted of (1) a general denial; (2) an admission that the defendant received a slight injury by a gunshot, but denied that the injury was caused by or was the result of any

carelessness or negligence on the part of the defendant, or any of its agents, servants, or employes, other than plaintiff, and averred that the injury was caused by and was the result of plaintiff's own carelessness and negligence; (3) admitted that George Meadows was section foreman, authorized to employ and discharge men, and to order, direct, and control the actions and movements of the men and servants of the defendant on said hand car and section; (4) the defendant further averred that at all times stated in the petition, and prior thereto, the plaintiff then knew that the gun was upon the hand car, and had been and was then being carried thereon; that plaintiff, with full knowledge of that fact, and of the risks and dangers incident thereto and connected therewith, remained in the service and employment of the defendant, and continued to work with and around the hand car, well knowing that the gun was thereon, and thereby assumed all risks and dangers connected therewith from such gun. The reply was a general denial. The case was tried to the jury, who returned a verdict in favor of the plaintiff for \$1,500, upon which the court gave judgment in his favor. The jury also returned special findings of fact. The railroad company filed its motion for judgment upon the special findings, which was overruled. The defendant, as plaintiff in error, presents the case to this court for review, and alleges that the trial court erred in overruling its motion for judgment upon the findings of fact, and in rendering judgment for plaintiff.

M. A. Low and W. F. Evans, for plaintiff in error. Madden Bros., for defendant in error.

McELROY, J. (after stating the facts). At the time of the injury W. J. Smith, defendant in error, was in the employ of the railroad company as a section hand, and one George Meadows was section foreman. On the date of the injury the foreman and defendant in error were the only men in the service on the section. They took the hand car from the tool house, placed it on the track, and run it south about a quarter of a mile, until the wind prevented their further progress. They then got off the car for the purpose of pushing it forward. As the defendant in error attempted to lift his shovel from the car to assist in pushing the same forward, the foreman gave the car a shove, and in some way the loaded gun that had been placed on the car exploded, injuring the plaintiff. The defendant in error for some months previous had been in the employ of the railroad company as a section hand. The section foreman and Smith were required to go over the track upon a hand car once a day, to see that the track was in proper condition. The hand car was kept in the tool house at night. The section men would go to the tool house every morning, get the car, and go over the

section. On the car were carried the tools, consisting of shovels, picks, crowbars, bolts, etc., with which the men repaired and kept in proper condition the track. The evidence showed that the hand car, the track, and all of the tools used by the section men were at all times in question in first-class condition; that each of them was at the time of the accident managed, operated, and controlled in a careful and proper manner, and in the same manner they had been handled, operated, and controlled during all of the time that Smith had worked for the company. The evidence further showed that the section men carried upon the hand car a shotgun, for their pleasure and amusement,—to shoot rabbits and other game. The gun was the private property of Meadows, the foreman. It was not used or intended to be used by the men in performing their duties or work for the railroad company. The special findings returned by the jury were as follows: "Q. 1. Did the plaintiff receive the injury of which he complains by being shot in the leg with the gun referred to in the evidence while it was on the hand car? Ans. Yes. Q. 2. For what purpose was the said gun, at the times shown by the evidence, carried on the hand car? Ans. For shooting game. Q. 3. What employes used said gun in shooting rabbits or other game while it was being carried on the hand car? Give names of all such employes. Ans. Meadows and Smith." "Q. 15. Did any officer, agent, or employé of the defendant, other than the section foreman, Meadows, and the other section man who worked with him, know at any time before plaintiff was injured that the gun was being carried or was on the car? Ans. No evidence to show." "Q. 17. Did the duty or work of Meadows and the other section men, or either of them, to or for the defendant, require that the gun should be carried on the hand car? Ans. No." "Q. 21. Was the gun furnished to or used by Meadows and the other section men, or either of them, to perform or in performing any act or duty for the defendant? Ans. No." The railroad company filed its motion for judgment in its favor upon the special findings. This motion was overruled by the court, and judgment rendered upon the verdict, to which action and ruling of the court the railroad company duly excepted.

The only question presented by the record and assignments of error is as to whether or not the court erred in overruling the railroad company's motion for judgment upon the special findings. The defendant in error, in his petition, alleges in express terms "that the said gun was shot off and discharged in some way unknown to the plaintiff." The defendant in error testified upon the trial "that he did not know what caused the gun to go off." The evidence and findings show, without conflict, that the gun was not furnished to the section men, or either of them, in working or performing any act or duty for the rail-

road company; that it was not in the line or within the scope of the foreman's duty to furnish a gun to carry, or have one, upon the hand car; and that he did not, nor did either of the section men, have to carry it, to do or perform any act or duty for the railroad company. The gun was carried upon the car for the pleasure of the section men,—to enable them to shoot rabbits and other game. These facts were fully known to Smith, the defendant in error, or should have been known by him. He participated in handling, carrying, using, and shooting game with, the gun. Upon the undisputed evidence and findings of the jury, the defendant in error cannot recover for the damages sustained. An employer is not liable for the act of his employé if such act was not authorized by the former, or done by the latter in the discharge of some duty. Smith testified that the gun was carried on several different occasions prior to the date of his injury, and on the day preceding his injury. The jury expressly find that the gun was the private property of Meadows, and was carried on the hand car for shooting game; that it was used by Meadows, the foreman, and Smith; that the duties and work of the section men did not require them to carry a gun; that the gun was not carried for the purpose of being used in the discharge of their duties. Upon the findings of fact the court should have rendered judgment for plaintiff in error. The judgment will be reversed, and the cause remanded, with direction that the trial court render judgment upon the special findings for plaintiff in error, and against the defendant in error. All the judges concurring.

KEPLEY v. SHEEHAN.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

On rehearing. Affirmed.

For former opinion, see 61 Pac. 333.

Edwin A. Austin and Otis E. Hungate, for plaintiff in error. Fagan & Nichols, for defendant in error.

PER CURIAM. This court rendered judgment in the above cause some months since (61 Pac. 333), and upon petition of plaintiff in error a new trial was awarded. The action is now before the court upon a rehearing. The case has been fully argued before this court on two occasions. We see no reason for changing our views as expressed in the former opinion. There seems to be no lack of substantial authority in support of the contention of each party to this action. The question at issue has not been determined by our supreme court. We conclude, however, that the weight of authority is against the contention of the plaintiff in error. The judgment of the trial court is therefore affirmed.

(10 Kan. App. 190)

MYERS v. GOGGERTY.

(Court of Appeals of Kansas, Northern Department, El. D. Jan. 1, 1901.)

EVIDENCE—OFFER OF COMPROMISE.

An offer or negotiation to compromise should not be regarded as an admission of indebtedness, nor should such fact be used in evidence against the party offering to adjust the matters in dispute. One who makes an offer to compromise should not be prejudiced thereby in his right to insist upon any legal defense he may possess.

(Syllabus by the Court.)

Error from district court, Jackson county; Marshall Gephart, Judge.

Action by John D. Myers, receiver of the State Bank of Circleville, against J. C. Goggerty. Judgment for defendant, and plaintiff brings error. Affirmed.

U. S. G. Mitchell and John D. Myers, for plaintiff in error. Hurrel & Graham, for defendant in error.

McELROY, J. This action was brought by John D. Myers, receiver of the State Bank of Circleville, against J. C. Goggerty, for the recovery of the amount alleged to be due upon a promissory note executed by the defendant to the bank, of which plaintiff was receiver. The petition contained the necessary and usual averments for a recovery upon the note. The defendant, in his answer, pleaded: (1) A general denial; (2) that he signed the note as an accommodation for the bank, without any consideration; (3) that on or about the 6th day of July, 1899, Hoffhines, the cashier of the State Bank of Circleville, plaintiff herein, as such cashier made, executed, and delivered to this defendant, J. C. Goggerty, on behalf of said bank, a receipt in full payment of said note, stating at the time that, as soon as the note could be returned, the same would be delivered to defendant. The plaintiff, for a reply, filed a general denial. A trial was had before a jury, who returned a general verdict for the defendant. The jury also made certain special findings of fact. Plaintiff's motions for a new trial and for judgment upon the special findings were overruled, and judgment rendered upon the verdict. John D. Myers, receiver, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court: (1) That the court erred in striking out competent testimony; (2) that the court erred in overruling plaintiff's motion for a new trial.

1. The testimony taken from the jury on motion of the defendant showed that the defendant was willing to compromise, rather than continue in litigation; that he was willing to part with some Oklahoma property in settlement of the claim set up by the receiver, and thereby purchase his peace. An offer or negotiation to compromise should not be regarded as an admission, nor should that fact be used in evidence against the party offering such adjustment. It appears that the

defendant, after the suit was instituted,—which was an action for the recovery of money only,—offered to turn over the Oklahoma property in settlement of the demand made against him. This was in no wise an admission inconsistent with his contention that the note was executed without consideration, or with his plea of payment. One who makes an offer to compromise should not be prejudiced thereby in his right to insist upon any legal defense he may possess. *Latham v. Hartford*, 27 Kan. 249. The testimony concerning this negotiation for compromise was properly excluded.

2. But one other question is presented, and that is as to the action of the court in overruling the motion for a new trial. The note was given in settlement of an overdraft, occasioned by the purchase of cattle. It was dated May 19, 1899, was for the sum of \$300, and due July 1st thereafter. The contention of the defendant was: (1) That the note was given for the accommodation of the bank, without consideration; (2) that, under an agreement between himself and the bank in regard to the purchase and sale of cattle, the same had been paid, and a receipt executed as evidence of payment. The receipt offered in evidence was as follows: "Circleville, Kans., July 6th, 1899. Received of J. C. Goggerty three hundred dollars, as payment of his note, payable to this State Bank of Circleville. This note is now in the National Bank of Commerce of Kansas City, Mo. Roy Hoffhines, Cs." The defendant contended that he had purchased cattle for the bank with its money, in his name; that the cattle were turned over to the bank, by it sold, and the proceeds appropriated, after paying the cattle account carried in the name of defendant. On the day the receipt was issued the bank informed the defendant it had sold \$3,000 worth of cattle so held. The defendant was interested in the profits, then in the hands of the bank, arising from the sale of the cattle. The cashier agreed with him to apply the same in payment of the note in controversy. It was at this time that defendant demanded his note. The bank for some reason was unable to deliver the note, as it was in Kansas City, but executed the receipt. The jury, in substance, found that the receipt was issued by the bank for a valuable consideration on July 6, 1899, and that the consideration was the amount specified in the receipt. The contention of plaintiff in error is that, inasmuch as there was no money paid at the time the receipt was issued, the same was without consideration. It appears that the consideration for the receipt was not the actual payment of cash currency, but was the adjustment of the profits arising to the defendant by reason of the purchase and sale of the cattle. There is nothing in the findings inconsistent with the general verdict. The findings are supported by the evidence.

It is further contended that there is no evidence to support the verdict of the jury.

The contention here was that the defendant relied upon the receipt; that the receipt was given simply for the purpose of showing he did not owe the note, and not that he had paid the same. The answer was very indefinite, but there was no effort made to have the same made more definite and certain. The case was tried upon the theory that defendant had sufficiently pleaded payment. The court instructed the jury, without objection, that the defendant claimed—First, that he executed the note without consideration, as a matter of accommodation for said bank; and, second, that he fully paid the note, and had a receipt therefor. There was competent evidence to sustain the findings and verdict of the jury. The motion for a new trial was properly overruled. The judgment is affirmed. All the judges concurring.

JACKSON v. KING et al.

(Court of Appeals of Kansas, Northern Department, E. D. Nov. 16, 1900.)

MORTGAGE FORECLOSURE—ORDER OF SALE.

Failure to issue order of sale on decree of foreclosure within a year does not postpone mortgagee's lien thereunder to other judgment liens, whereon execution has been issued within the year, and levied on the mortgaged premises.

Error from district court, Atchison county; W. T. Bland, Judge.

Action between Horace M. Jackson and Charles R. King and others. From the judgment, Jackson brings error. Affirmed.

Jackson & Jackson, for plaintiff in error. B. F. Hudson, for defendants in error.

PER CURIAM. The only question in this case is, does the failure to issue an order of sale upon a decree foreclosing a mortgage within one year postpone the mortgagee's lien thereunder to other judgment liens under judgments at law, whereon execution has been issued within the year and levied on the mortgaged premises, under the provisions of section 476, c. 95, Gen. St. 1897? In *Jackson v. King*, 58 Pac. 1013, we decided that it did not. Our decision in that case, upon that particular question, has been approved by the supreme court in its recent opinion in the same case (62 Pac. 655), upon the plaintiff's petition in error from this court. Upon the authority of that decision, so approved by the supreme court, the judgment of the district court in this case is affirmed.

SMITH et al. v. PERKINS.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

MORTGAGES—ACTION TO FORECLOSE—LIMITATIONS—DEFENSE—TAX DEED—MERGER—APPEAL—QUESTIONS CONSIDERED.

1. Where the statute of limitations is pleaded as a defense to a mortgage foreclosure suit,

and the court finds that the defendant left the state within two years after the execution of the mortgage, and remained a nonresident thereafter, it is not error to refuse to make finding as to when the first default occurred, since the cause of action did not mature until the plaintiff declared the debt due, and the defendant's nonresidence prevented the running of limitations.

2. Limitation does not run against a mortgage foreclosure suit against a nonresident, though the plaintiff is in possession of the mortgaged premises as grantee of the mortgagor.

3. The fact that a mortgagee procures a valid tax deed to the mortgaged premises is not a bar to a foreclosure suit, since the rule that such tax deed destroys all other titles and liens only relates to adversary claims, and is not within the rule of merger.

4. A judgment will not be reversed on the ground that evidence was erroneously admitted under the petition, which is claimed not to state facts sufficient to constitute a cause of action, where the defect is not pointed out in appellant's brief, and the court is not able to discover such defect in the petition.

Error from court of common pleas, Wyandotte county; William G. Holt, Judge.

Suit by Susan O. Perkins against J. A. Smith and others for the foreclosure of a mortgage. From a judgment in favor of plaintiff, and from an order overruling a motion for a new trial, defendants bring error. Affirmed.

J. A. Smith and L. W. Keplinger, for plaintiffs in error. Samuel Maher and Francis M. Hayward, for defendant in error.

PER CURIAM. This is an action by the defendant in error to foreclose a mortgage against the plaintiffs in error and others. From the judgment for the plaintiff the defendants prosecute this proceeding, and assign for error, first, the court's denying their motion for a judgment upon the pleadings. This assignment is abandoned, and hence we need not give it any attention. Second, that the court refused to make additional findings of fact. The additional facts which the defendants asked the court to find were immaterial. It would not aid the defendants for the court to say when first default occurred, for the reason that the cause of action did not begin until the plaintiff exercised her option to declare the debt due, and for the further reason that the makers of the note and mortgage became nonresidents of the state within two years after the execution of the note and mortgage, and have remained nonresidents according to the findings of the court. So that, even if the court should have found a default, and election on the part of the plaintiff to declare the debt due, it would not create a bar by reason of the absence of the makers from the state.

The third assignment of error is that the court erred in denying plaintiff's motion for judgment upon facts found. Two questions are presented in this assignment. The first is that the cause of action is barred by the statute of limitations. The court found to

the contrary. As we have said, the absence of the makers of the note and mortgage from the state suspended the running of the statute of limitations, and the fact that the plaintiff was in possession under the mortgages, as grantees, made no difference. The other contention under this assignment is that, the court having found that the plaintiff had acquired a tax deed to the property, thereby her mortgage lien was extinguished, and she had nothing to foreclose against them as grantees of the mortgages. In support of this proposition, counsel cite *McFadden v. Goff*, 32 Kan. 415, 4 Pac. 841; *Belz v. Bird*, 31 Kan. 141, 1 Pac. 246; *Board v. Linscott*, 30 Kan. 240, 1 Pac. 81. The supreme court holds in those cases that a valid title by tax deed extinguishes and destroys all other titles and liens existing, or based upon anything existing, at the time of the levying of the taxes, upon which the tax is founded. This refers to adversary claims, and does not establish a rule of merger. The plaintiff was not bound to rely upon her tax deed as against the claims of the plaintiffs in error to the mortgaged premises. She could rely upon either, at her election. The defendants were not entitled to judgment upon the facts found, and hence the court did not err in denying their motion therefor.

The fourth assignment is based upon the denial of the defendants' motion for a new trial. This claim is made upon two grounds, and the first is that the court at the trial overruled their objection to the introduction of evidence under the petition, for the reason that it did not state facts sufficient to constitute a cause of action. What the defect claimed is they do not point out in their brief. We are not able to discover any defect therein. The next ground for a new trial is that the court erred in finding that the Yoders, the mortgagors, became nonresidents of Kansas in 1891. This finding is supported by evidence. It is true that the evidence upon that issue is contradictory, but it is not our province to determine the weight thereof. The court settled the question, and we are bound thereby. The judgment is affirmed.

MANLEY v. CHANDLER.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

JUDGMENT—SETTING ASIDE—RES JUDICATA.

Where defendant appeared and participated in the trial of an action, of the subject-matter of which the court had jurisdiction, and judgment was rendered against him, and he afterwards brought error, and his petition was dismissed, he cannot set aside the judgment obtained therein, on motion made several years thereafter, on the ground that it was invalid, since as to him it was *res judicata*.

Mahan, P. J., dissenting.

Error from district court, Atchison county; W. T. Bland, Judge.

Action by Charles A. Chandler against Reuben M. Manley, executor of the estate of George Manley, deceased. From an order denying a motion to set aside a judgment for plaintiff, and to withdraw an order of sale, defendant brings error. Affirmed.

David Martin and L. F. Bird, for plaintiff in error. Jackson & Jackson, for defendant in error.

PER CURIAM. Charles A. Chandler, on November 14, 1895, brought his action in attachment, in Atchison county, against William H. Risk, executor of the estate of George Manley, deceased, for a recovery on the liability of a nonresident stockholder. Service was had by publication. The defendant filed a demurrer upon the following grounds: (1) That the court had no jurisdiction of the person of the defendant, or the subject-matter of the action; (2) that several causes of action were improperly joined; and (3) that said petition did not state facts sufficient to constitute a cause of action. The action was revived against R. M. Manley, executor of the estate of George Manley, deceased, and successor of William H. Risk, executor, and plaintiff filed his supplemental petition setting up such revivor. Thereafter the defendant filed an answer, to which plaintiff filed a reply. On December 13, 1897, a trial was had to the court without a jury, the court rendered judgment in favor of the plaintiff and against the defendant for the sum of \$1,990.20, with interest and costs, and ordered that the attached property be sold to satisfy the judgment. The defendant filed his motion for a new trial, which was overruled. The defendant afterwards filed his petition in error and case-made in the court of appeals, praying that the judgment be reversed. This proceeding in error was dismissed. On May 31, 1900, the defendant in the trial court filed his motion that the judgment be set aside and a motion to withdraw the order of sale. These motions were overruled. The defendant, as plaintiff in error, prosecutes this proceeding in error to reverse the decision of the trial court in overruling these motions.

The plaintiff in error in his argument contends that the judgment of December 13, 1897, is void (1) because the petition did not allege that plaintiff was a judgment creditor of the Kansas Trust & Banking Company; (2) because the petition did not allege that the Kansas Trust & Banking Company had been dissolved by the expiration of the time limited in its charter, or by judgment of dissolution rendered by a court of competent jurisdiction; (3) because the plaintiff in his petition shows that he has a special security for the payment of his indebtedness, and does not allege that such security has been realized on or exhausted; (4) for the reason that, under the constitution and laws of the state of Kansas, the district

court had no jurisdiction to entertain the suit or render judgment; (5) that, under the constitution and laws of the United States, the district court had no jurisdiction to entertain the suit or render the judgment; (6) that for the reason that the judgment was void the trial court erred in overruling plaintiff in error's motion to set the same aside.

All of the above contentions go to the effect and validity of the judgment of the trial court. If the court had jurisdiction of the subject-matter and of the person, the judgment is valid. A court has jurisdiction of the res by proper affidavit, writ, and levy, and has jurisdiction of the person by service of writ or by voluntary appearance. In this case the defendant entered his appearance, filed a demurrer, later answered, and participated in the trial. No matter what irregularities or errors were committed by the trial court, with these we have nothing to do. An examination of the pleadings and record satisfies us that the trial court passed upon every material question presented here adversely to plaintiff in error; that such decision and judgment is *res judicata*. The judgment will be affirmed.

MAHAN, P. J., dissenting.

(28 Colo. 184)

STARR et al. v. PEOPLE.

(Supreme Court of Colorado. Dec. 22, 1900.)
CRIMINAL LAW—EVIDENCE—CONVERSATION—
—EXPERIMENT OUT OF COURT.

Where witnesses for the people testified to overhearing an attempted bribery, it was error to exclude testimony in rebuttal as to an experiment made by witnesses under the same conditions at the place referred to, for the purpose of showing that the conversation could not have been heard.

Error to district court, Mesa county.

Reuben E. Starr and A. S. McKinney were convicted of attempted bribery, and they bring error. Reversed.

J. S. Carnahan and S. N. Wheeler, for plaintiffs in error. David M. Campbell, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and Dan B. Cary, Asst. Atty. Gen. (Samuel G. McMullen, of counsel), for the People.

PER CURIAM. The plaintiffs in error were convicted of the offense of offering a bribe of \$500 to one A. T. Wharton, a member of the city council of Grand Junction, to corruptly induce him, the said Wharton, with partiality and favor, contrary to law, to vote for the purchase by the city of Grand Junction of the waterworks system of the Grand Junction Water Company, and sentenced to imprisonment in the county jail for the term of six months, and to pay a fine of \$100 and costs. Upon the trial of the cause William Campbell was sworn as a witness on the part of the people, and testified that after the adjournment of the city council on the night of August 24, 1899, Whar-

ton had said to him that a conversation would occur at the Carpenter corner; that he met George R. Barton, and they went up to the Carpenter lots, and entered an excavation near the north end of said lots, about 11 o'clock, and while so concealed he overheard a conversation between Wharton and the plaintiffs in error, who were standing on Main street, near what is known as the "Carpenter Corner"; that he heard McKinney say to Wharton that, if he would vote for the proposition to buy the waterworks for \$49,600, he would guaranty him \$500 in cash; and heard Mr. Starr say, "Yes; \$500 to \$700." Mr. Barton, who was also a witness, testified to having heard substantially the same conversation; that the hole is 38 feet from the Main street sidewalk. The plaintiffs in error offered to show by C. C. Knowles and other witnesses, who had made the experiment, that it was impossible for the witnesses Campbell and Barton, standing in the hole on the Carpenter lots, to hear the conversation they had testified to. Mr. Knowles testified that he was in this hole on the previous night at about 11 o'clock, in company with George Garretson and Walter Abbey; that the depth of the hole is a little over 6 feet, and 40 feet distant from Main street; that while in this hole he saw McKinney and Starr, the plaintiffs in error, Perry Rogers, Commodore McKinney, and George Gates, standing north of him on the Main street sidewalk,—the place where Campbell and Barton had sworn the defendants stood on the night of August 24th; that he could, by tiptoeing, see the parties where they were standing. The witness was asked the following questions: "Q. State whether or not, while you were in this hole, they were talking. A. They were making some kind of a noise, supposed to be a conversation. (On motion of counsel for people, this answer was stricken out.) Mr. Wheeler, Counsel for Defendants: We offer to show by this witness and other witnesses that persons in this hole could not hear these defendants talking in an ordinary tone, standing on the sidewalk 40 feet north of the hole. By the Court: The conditions might not be the same. By Mr. Wheeler: We offer to prove them to be the same. The Court: The evidence can't be admitted." It is, we think, well settled by the authorities that the testimony of witnesses as to experiments made out of court is admissible in both civil and criminal cases for the purpose of illustrating or rebutting testimony given in the case, when it is shown that the conditions are the same. *Wilson v. State* (Tex. Cr. App.) 36 S. W. 587; *Burg v. Railway Co.*, 90 Iowa, 106, 57 N. W. 680; *Railway Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21; *Railway Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607; *Byers v. Railroad Co.*, 94 Tenn. 345, 29 S. W. 128; *Young v. Clark*, 16 Utah, 42, 50 Pac. 832; *Smith v. State*, 2 Ohio St. 511; *Boyd v. State*, 14 Lea,

161; *Lipes v. State*, 15 Lea, 125; 2 Jones, Ev. § 413; *Sonoma Co. v. Stofen*, 125 Cal. 32, 57 Pac. 681; *Schweinfurth v. Railway Co.*, 60 Ohio St. 215, 54 N. E. 89. We cannot accept the contention of the attorney general that it is entirely within the discretion of the trial court to admit or exclude such evidence. While it is largely within its discretion to determine whether the testimony shows that the experiment was made under such conditions as to fairly illustrate the point in issue (*City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964), yet, when it is shown that the conditions were essentially the same in both instances, the testimony should be admitted, and its weight determined by the jury. As was said in *Byers v. Railroad Co.*, supra: "It is uniformly held that in all such tests, to make them competent, the conditions under which the tests were made must be the same as near as practicable. This requirement appears to have been substantially complied with in this case, and, judging from the testimony offered to be given, the conditions of the test were essentially the same as when the accident occurred. We are of opinion the trial judge was in error in not allowing evidence of this test to be introduced under proper instructions to the jury as to its weight." Counsel for defendants offering to prove that the conditions under which Mr. Knowles made his test were the same as those present when the conversation testified to by Campbell and Barton occurred, the court erred in excluding the testimony. Such error necessitating a reversal of the sentence, it is unnecessary to notice the other questions presented, which may not arise upon another trial. Reversed and remanded.

(28 Colo. 160)

CAMPBELL v. WEST, Mayor, et al.

(Supreme Court of Colorado. Dec. 17, 1900.)

APPEAL — SUPREME COURT — CONTEST FOR PUBLIC OFFICE — JUDGMENT.

Under a statute providing that no appeal from a final judgment shall lie to the supreme court unless the judgment exceeds \$2,500, relates to a franchise or freehold, or a construction of the constitution is necessary, an appeal will not lie from a judgment dismissing certiorari to review the proceedings of a city council in determining an election contest between two aldermen; no constitutional question being involved.

Appeal from district court, Pueblo county.

Certiorari by Alexander Campbell against George West, mayor, and others. From a judgment dismissing the writ, plaintiff appeals. Dismissed.

Arrington & McAllney and Patterson, Richardson & Hawkins, for appellant. J. C. Elwell, E. E. Hubbell, and E. C. Glenn, for appellees.

CAMPBELL, C. J. This is an appeal from a judgment of the district court of Pueblo county dismissing a writ of certiorari which

was brought in that court to review proceedings in an election contest over the rival claims of two aldermen, heard before the city council of the city of Pueblo, which resulted in the exclusion of appellant here (petitioner below) from the office, and the seating of his opponent. The district court ruled that it could inquire no further than to ascertain if the city council had jurisdiction, and regularly pursued its authority, and, determining those questions in the affirmative, dismissed the writ. It is clear that this court has not jurisdiction to review the judgment. Under the statute which controls, no writ of error from or appeal to the supreme court shall lie to review the final judgment of any inferior court unless the judgment, or, in replevin, the value found, exceeds \$2,500, or unless the matter in controversy relates to a franchise or freehold, or a construction of a provision of the state or federal constitution is necessary to the determination of the case. Neither of these elements is present. The amount of the judgment does not confer jurisdiction, and no freehold is involved. No constitutional question fairly debatable is urged by counsel, and the only feature suggested at the oral argument that brings the case within the statute is that a franchise is involved. But in *Londoner v. People*, 15 Colo. 246, 25 Pac. 183, and *People v. Carver*, 19 Colo. 86, 34 Pac. 576, it is said that there is a difference between a franchise and a public office. No appeal to or writ of error from this court lies to review a judgment of an inferior court or tribunal rendered in an action for the usurpation of a public office, or in a proceeding involving the right of rival claimants to public office. The appeal is therefore dismissed. Appeal dismissed.

(28 Colo. 150)

DOLAND v. GRAND VALLEY IRR. CO.

(Supreme Court of Colorado. Dec. 17, 1900.)

TRIAL — VARIANCE — WAIVER — EVIDENCE — OPINIONS OF WITNESSES.

1. A judgment will not be reversed for variance between defendant's pleading and the proof where the plaintiff did not claim surprise on the trial or seek a continuance, but went on with the trial and put in evidence to support his case.

2. Where witnesses had testified that they had ascertained the total number of owners of certain water rights by an inspection of records showing the same, and had compared such number with the signers of a certain agreement, and that two-thirds of such owners had signed the agreement, such evidence was not objectionable as the opinion of the witnesses as to the proportion of signers, because of their failure to state the number of owners and signers, respectively.

Appeal from district court, Mesa county.

Action by Henry P. Doland against the Grand Valley Irrigation Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The Grand River Ditch Company was a corporation organized under the laws of this state to make a diversion of water from the

Grand river, and to supply the same for irrigation purposes to owners of lands lying under its Grand river ditch, through which the water thus diverted was carried. With these owners it entered into contracts for the sale of water rights, by whose provisions specified quantities of water were to be delivered by the corporation to the water consumers at the head gates of their respective ditches leading from its main canal, upon certain terms which the written instruments prescribed. The plaintiff became the owner, by purchase, of one of these water rights. In his complaint he alleges that the defendant, the Grand Valley Irrigation Company, a corporation, assuming to have obtained title at a foreclosure sale of the Grand River ditch, entered upon and took possession of, and is now operating and managing, the same; that it refuses, without right, to deliver water to the plaintiff in accordance with the terms of his contract with the ditch company, and also threatens to shut down and close the head gate through which he has hitherto been accustomed to receive, and is still entitled to receive, the water. He therefore asked for a permanent injunction restraining the defendant from interfering with or preventing him from getting water from the main ditch for the irrigation of his land. The answer contains three separate defenses, the first two of which, however, were abandoned by defendant at the trial. The third defense, in substance, alleges that the Grand River Ditch Company, the first owner of the canal in question, on account of its insolvency became unable to carry out its contracts with its various water consumers, and as a result of its inability to discharge certain of its obligations, which were evidenced by outstanding bonds secured by a trust deed upon its property, proceedings by its secured creditors to foreclose the trust deed were instituted, and a receiver was appointed to take possession of and operate the property pending the foreclosure. During the pendency of this suit the various water consumers, for the purpose of avoiding further litigation and expense, and to indemnify themselves against further loss on account of their unfortunate investment, formulated a scheme for relief. In substance, the plan was that there should be formed a new corporation to acquire the property and franchises of the old, and that the water-right consumers who participated in it should, in lieu of whatever interests in the old concern their so-called water-right contracts gave them, have of the capital stock of the new company such shares as their former interests equitably entitled them to receive. To perfect the plan, certain of the water consumers signed a writing authorizing a committee composed of a number of persons therein named to conduct negotiations for the acquisition of title from the old company. It was further alleged in this defense that plaintiff joined other water consumers in this endeavor, and that in pursuance of

the authority conferred upon the committee the new corporation (the defendant) was incorporated, and duly acquired title to the property and franchises of the old ditch company, and ever since its acquisition of title has been in possession of and operating the canal, and that it stands ready to deliver to the plaintiff at the head gate of his lateral ditch the quantity of water to which he is entitled under the terms of the reorganization. There was a replication to this defense, substantially putting in issue its material averments. The trial court, upon conflicting evidence, at the close of the trial found that, prior to the purchase by the defendant of the irrigation system in question, the committee having in charge the foregoing scheme was duly authorized by sundry water-right owners, including this plaintiff, to purchase the same, and that the purchase was consummated pursuant to and in accordance with such authority. Upon this finding of fact the court concluded the plaintiff was not entitled to the relief prayed, and dismissed his action.

Bucklin, Staley & Tafley, for appellant.
Chas. F. Caswell, B. C. Oyler, and John P. Brockway, for appellee.

CAMPBELL, C. J. (after stating the facts). A number of errors have been assigned to the judgment, but only three of the questions argued demand consideration:

1. It is said that there is a variance between the allegations of the third defense and the proof in its support. The allegation referred to is that unconditional power or authority was given to the committee to purchase the irrigation system, while the proof merely tends to show the giving of a power that was to become effective only on condition that two-thirds of the water-right owners should join in its execution. The authorities cited are not in point in this case. This court in *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369, and the court of appeals in *Railway Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76; *Iron Co. v. Cummings*, 8 Colo. App. 541, 46 Pac. 875; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058; *Rice v. Ross*, 9 Colo. App. 552, 49 Pac. 368; and *Schmidt v. Bank*, 10 Colo. App. 261, 50 Pac. 733,—have held that a variance which neither surprises nor harms a party is not necessarily fatal to the judgment. Plaintiff relied on his averment that he never made any sort of a contract by which he agreed to the so-called plan of reorganization. The allegations of his replication are broad enough to admit of the proof offered and admitted. *King v. De Coursey*, 8 Colo. 463, 9 Pac. 31. It alleges that he never entered into a contract of any kind—either that alleged in the third defense or otherwise—by which he agreed to the plan in question. From the printed abstract, it is uncertain whether his ground of objection to proof of conditional

authority was specifically upon the ground of variance. But, even if it were, he did not claim surprise. Indeed, he could not have been surprised; nor did he seek a continuance of the cause for that reason, but proceeded with the trial, and introduced evidence in support of his theory of the case. By strict practice the defendant might have been required to amend its defense to correspond to the proof, but, under the liberal provision of our Code, the judgment will not be reversed for its omission to make that request, or for its failure so to amend its pleading, when it is apparent that substantial justice has been done.

2. It is further urged that, if it be conceded that there was not a fatal variance, nevertheless the proof introduced by defendant that there was a compliance with the condition in the power given to the committee to purchase was merely opinion evidence of the witnesses, and not as to facts. The record is against this position. Several of the witnesses testified explicitly that two-thirds and more of the water-right owners signed the agreement by which the committee was empowered to act. The particular objection seems to be that the witnesses were not required, in their examination in chief, to say just how many water-right owners there were, and how many signed this written authorization. But the witnesses testified that they arrived at the ultimate fact that two-thirds signed by an examination of the records of the old company, from which they ascertained the total number of water-right owners, and compared this list with the number of such owners who signed the writing creating the committee. If this method of establishing the controverted fact was indefinite or improper, the plaintiff might, by proper cross-examination, have established its insufficiency or unsatisfactory character. The objection is not good.

3. The third point discussed is that one member of the committee never participated in any of its deliberations. Upon the proposition that, when authority to perform an act of a private nature is conferred upon two or more agents, the principal is bound only when the execution is by all, the plaintiff seeks to impeach the validity of the committee's action in purchasing the property of the old company. It clearly appears, however, from the instrument by which the committee was created, that a majority was authorized to act, and that more than a majority concurred in the action which was taken, and this is sufficient. Mechem, Ag. § 77; 1 Am. & Eng. Enc. Law (2d Ed.) 1057, and notes. Under its finding that the plan of reorganization was assented to by the plaintiff, and the purchase of the irrigation system by defendant made as the result of an authorization of water consumers, in which the plaintiff joined, the trial court declared that it would be inequitable in this action to grant the extraordinary relief pray-

ed. If some irregularities occurred in carrying out the plan of reorganization, and if some inaccuracies in matters of detail characterized the committee's action, they cannot be corrected in this kind of an equitable action. The trial court took the right view of the controversy, and, no prejudicial error being brought to our attention, its judgment is affirmed.

(28 Colo. 209)

SHAPTER v. PILLAR.

(Supreme Court of Colorado. Dec. 22, 1900.)

INSANE PERSONS—APPOINTMENT OF GUARDIAN—WRIT OF ERROR—CONSTITUTIONAL RIGHT TO POSSESS PROPERTY—MENTAL CAPACITY—EVIDENCE—ADMISSIBILITY.

1. Under Const. art. 6, § 23, providing that writs of error shall lie from the supreme court to every final judgment of the county court, one who has been adjudged incapable of managing his own affairs by the county court is entitled to sue out a writ of error, without a guardian ad litem, to review the judgment, since, till the judgment of the trial court is finally disposed of, it is not conclusive.

2. Under Mills' Ann. St. § 2935, as amended by Laws 1893, p. 331, providing that the county court, on the verified petition of any reputable person alleging that a person in the county is insane and unable to manage his affairs properly, may call a jury to determine the fact, and if such person has property, and is unable to manage the same, the court shall appoint a conservator, one who is not absolutely insane, but merely so mentally unsound as to be unable to manage his property, may have a conservator appointed.

3. Mills' Ann. St. § 2935, as amended by Laws 1893, p. 331, providing that the county court, on petition of a reputable person alleging that another is of unsound mind, may summon a jury to determine the fact, and, if it be alleged and proved that such person has property, and is so mentally unsound as to be unable to properly manage the same, may appoint a conservator, is not a violation of the right to acquire and possess property guaranteed by Const. art. 2, § 3.

4. On the trial of the question whether plaintiff in error was so mentally unsound as to be incapable of caring for his property, the admission of opinion evidence as to his capacity to properly manage his business affairs was error, since the question of the degree of his mental incapacity was for the jury, when informed by the evidence as to his delusions, if any.

Error to Arapahoe county court.

Application by Charles Pillar to have Edward Shapter adjudged a lunatic. From a judgment in accordance with the prayer of the petition, Edward Shapter brings error. Reversed.

From a judgment adjudging plaintiff in error so insane or distracted in mind as to render him incapable of properly or safely attending to or managing his estate, and appointing a conservator for that purpose, he brings the case here on error. He is about 65 years of age, and has been afflicted with shaking palsy for over 10 years last past, which has rendered him quite feeble physically, affected his power of speech, and, to some extent, impaired his mental faculties. He has an estate valued at between \$25,000

and \$30,000, which consists principally of realty in the city of Denver. The statute under which the proceeding was had is as follows: "Whenever any reputable person shall file with the county court * * * a complaint, duly verified, and shall allege therein that any person in such county is a lunatic or an insane person, and is so distracted in mind as to render such person incapable of properly and safely attending to his affairs or managing his estate, * * * the court, if satisfied that there is a good cause for the exercise of its jurisdiction, shall thereupon order a jury * * * to be summoned to inquire into such facts. * * * If it shall be alleged in said complaint and proved to the satisfaction of the court that said lunatic or insane person has personal or real estate, and if the jury shall return in their verdict that such person is so insane or distracted in mind as to render him or her incapable of managing his or her estate, it shall be the duty of said county court to appoint some fit person to be the conservator of said estate." Mills' Ann. St. § 2935, amended by Laws 1893, p. 331. Over the objection of plaintiff in error, several witnesses, both professional and nonprofessional, were asked to give an opinion regarding his capability of properly or carefully managing his business affairs; the answer in each instance being, in the opinion of the witness, that he was incapable.

E. T. Wells, M. F. Taylor, and R. T. McNeal, for plaintiff in error. George A. Smith, for defendant in error. Andrew W. Gillette, *amicus curiæ*.

GABBERT, J. (after stating the facts). It is suggested by counsel *amicus curiæ* that, the plaintiff in error having been adjudged incapable of managing his own affairs, this proceeding should be dismissed, for the reason that he cannot now prosecute a cause, except through the intervention of a guardian or next friend; or, if this is not the correct view, we should require him to be brought into our presence for the purpose of ascertaining his mental condition, and capability of electing to prosecute the writ of error in this case. The constitution provides (article 6, § 23) that writs of error shall lie from the supreme court to every final judgment of the county court. Ordinarily, it is true that one adjudged non compos mentis can only act through a recognized representative; but this is not the case where the very object of the action is to determine the legality of the judgment adjudging him incapable of managing his own affairs. In the original proceeding he is entitled to be heard, appear by counsel, and produce witnesses, and, although the judgment of the trial court may be that the management of his estate should be taken out of his hands, he is entitled to be heard touching the validity of such proceedings. In *re Moss* (Cal.)

53 Pac. 357. So long as the action for that purpose is undisposed of, the judgment of the trial court regarding his mental capacity is not conclusive. *Cuneo v. Besson*, 63 Ind. 524.

The sole province of this court in a proceeding of this character is to investigate the regularity of the proceedings which plaintiff in error seeks to have reviewed. If they are so in all respects, and the evidence is sufficient to support the judgment rendered, we cannot inquire into the question of the sanity of plaintiff in error. If prejudicial error exists, and there appears to be sufficient to warrant an inquest, the case must be remanded for a new trial, for the purpose of determining the sanity of the plaintiff in error in the manner which the statute provided.

Counsel for plaintiff in error contend that the statute under which this proceeding was instituted in the court below only applies to those entirely bereft of reason, and, if it is not susceptible of this construction, it is unconstitutional, because it violates natural rights. The object of the statute is to protect those whose mental faculties are affected to such a degree as to render them incapable of properly and safely managing their business affairs. The language employed indicates this purpose. It says, in effect, if it appears that any person is so distracted in mind as to render him incapable of safely and properly managing his estate, and a jury shall so find, a conservator shall be appointed. Absolute insanity is not the only test. The main object of the statute is the protection of the property of those mentally afflicted. Inquiry must be made as to the extent of such mental infirmity. If it exists in such a degree, and is of such character, that the person so afflicted is for that reason unable to act intelligently with respect to his business affairs, or is affected with that imbecility of mind not strictly insanity, but to such an extent that he is deprived of the mental power to act in a proper and provident manner in the management of his property interests, the statute is satisfied. *Ridgeway v. Darwin*, 8 Ves. 65; *McElroy's Case*, 6 Watts & S. 451; *Calderon v. Martin*, 50 La. Ann. 1153, 23 South. 900; *Nailor's Children v. Nailor*, 4 Dana, 339; *Gray v. Obear*, 59 Ga. 675; *McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. 455; *Fiscus v. Turner* (Ind. Sup.) 24 N. E. 662; *In re Barker*, 2 Johns. Ch. 232. On the other hand, although the mind may not be sound, "if there be capacity to manage, as the result of consecutive reasoning, although the management might not be such as intellectual vigor and skill might approve," the party retaining the possession of his mental faculties to this extent would not come within the purview of the statute. *Com. v. Schneider*, 59 Pa. St. 328.

The many authorities cited by counsel for plaintiff in error to the effect that partial

unsoundness of mind on the part of those executing deeds, wills, and contracts would not avoid such instruments, provided it appeared at the time of execution that the party was possessed of sufficient mental ability to comprehend in a reasonable manner the nature and effect of the transaction, does not militate against our construction of the statute in question, but is in harmony with its spirit, which recognizes that the degree of insanity necessary to warrant the appointment of a conservator must be such as incapacitates from properly and safely managing ordinary business affairs. Neither is our construction a violation of any natural or constitutional rights. Our constitution provides that all persons have certain natural and inalienable rights, among which may be reckoned the right of acquiring, possessing, and protecting property. It also provides that the enumeration of rights shall not be construed to deny, impair, or disparage others retained by the people. Sections 3, 28, art. 2, Const. It falls to the state to take care of those who, by reason of mental incapacity, cannot take care of themselves. *Ex parte Cranmer*, 12 Ves. 445.

In the absence of any statutory provision on the subject, a court of chancery, under the rules of common law, would undoubtedly have authority to protect the estate of those who, by reason of mental infirmities, were unable to do so; and, to accomplish this end, could appoint a proper person for that purpose. The vital question which the jury was required to determine, if it appeared that the mind of plaintiff in error was affected, was whether or not it was deranged to such a degree that he was incapacitated from safely and properly managing his estate. When the question at issue involves peculiar skill or the knowledge of a particular science, in which persons instructed by study or experience may be supposed to have more skill or knowledge than the average person, the opinion of an expert thereon may be received. Where the question at issue is such that it would be impossible for a witness to state all the facts or portray all those matters which created an impression upon his mind, his opinion may be taken. These two rules arise from the necessity of the case. On the other hand, when the facts can be given the jury from which a particular inference can be drawn, which is the one to be determined, and concerning which persons of average ordinary intelligence are capable and competent of determining for themselves, opinion evidence is not admissible. *Mining Co. v. Broderick*, 25 Colo. 16, 53 Pac. 169; 3 Tayl. Ev. §§ 1416, 1417, 1419; *Ferguson v. Hubbell*, 97 N. Y. 507; *Graham v. Pennsylvania Co.*, 139 Pa. St. 149, 21 Atl. 151; *Stumore v. Shaw*, 68 Md. 11, 11 Atl. 360; *Hamrick v. State* (Ind. Sup.) 34 N. E. 3.

Applying these rules, it is manifest that the opinions of the witnesses regarding the incapability of plaintiff in error to manage

and control his own business affairs should have been excluded. Those who had seen and conversed with him could properly give their opinion on the question of his insanity, but the vital one, i. e. the degree of his mental incapacity on that account, and the extent to which he may have been incapacitated thereby from managing his business, the jury should have determined from all the evidence on the subject. It was not a question which required peculiar skill or knowledge to comprehend. It was one which men of ordinary, average intelligence, after being acquainted with the hallucinations, if any, of plaintiff in error, his acts and thoughts prompted thereby, could ascertain for themselves, based upon their own experience and observations. In principle, the important question for the jury to determine was the same as in cases where the capacity of a testator to make a will, or of a grantor to execute a deed, is in issue, and the great weight of modern authority in such cases, in the absence of any statutory provision, is that such capacity is not properly the subject of opinion evidence, but must be determined from the probative facts bearing thereon.

Other errors are assigned and argued, which we do not deem it necessary to notice, further than to indicate that, within reasonable limits, a witness may be cross-examined for the purpose of showing his possible motive, bias, or interest in a case which might have some influence upon his statements, or prompt his action; that, in a case of this character, the mental, and not the physical, condition of the person for whom a conservator is requested is the main feature, and that the latter can only be considered in so far as it may affect the former; that, in determining the degree of incapability of such person, the character of his business and its extent should be taken into consideration. A party might be incapacitated by reason of mental disturbances from properly and safely attending to a complicated business, but capable of managing one which was not. Although in a degree mentally afflicted, his disposition to husband or waste his estate should also be considered. It is not the province of the trial judge to examine witnesses further than to ascertain if he has a correct understanding of what they may have stated. All things being equal, the court should, so far as consonant with duty, select a conservator agreeable to the wishes of the ward. Especially is this true if the latter is not so insane that he cannot exercise a sensible opinion upon that question. *Allis v. Morton*, 4 Gray, 63.

Counsel upon both sides have urged with considerable warmth the respective merits of this case. As already indicated, we cannot determine the mental capacity of the plaintiff in error. The subject is controverted. It must be determined by the statutory method, but in so doing the rules of evi-

dence must be observed. The alleged mental condition of plaintiff in error, and other unfortunates of like character which the statute is designed to protect, demands that great care should be exercised by the courts in determining whether the control of their estate should be taken out of their hands or not. The judgment of the county court is reversed, and the cause remanded for further proceedings. Reversed and remanded.

(28 Colo. 187)

BUCKERS IRR., MILL. & IMP. CO. et al.
v. PLATTE VALLEY IRR. CO.

(Supreme Court of Colorado. Dec. 22, 1900.)
WATERS AND WATER COURSES—JUDGMENTS—
RES JUDICATA—APPEAL.

1. Where a suit to restrain a water company from using the water of a lake is met by the defense that the defendant has largely increased the flow of water into the lake, and a decree is rendered for defendant, but it is found that the stream from the lake is a natural water course, a decision reversing such decree on the ground that defendant was only entitled to a part of the water, and ordering a new trial to determine the amount thereof, is not an adjudication of the rights to the waters collected in the lake, which will bar a subsequent suit between the parties to determine the rights thereto.

2. Where suit is brought to enjoin a water company from using the waters of a certain lake, as intercepting the water flowing into a certain stream, and it is denied that the lake is tributary to the stream, it is reversible error to rule that the burden of showing that the lake is not tributary to the stream is on defendant.

3. Where a supplementary answer is filed on the retrial of a case, asking for a modification of a former decree, to permit the defendant to use a certain water-feed pipe, which was denied by the former decree, and the right to have such a modification is not denied, the decree should affirmatively state the granting of such relief.

Appeal from district court, Weld county.

Injunction by the Platte Valley Irrigation Company against the Buckers Irrigation, Milling & Improvement Company and the Beaver Lake Irrigation, Milling & Improvement Company. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Joseph W. Taylor and Hayt & Dawson, for appellants. J. W. McCreery, for appellee.

GABBERT, J. This action was commenced by appellee, as plaintiff, against appellants, as defendants, to restrain the latter from diverting water from the South Platte river by means of a ditch known as "Feeder No. 1," and its extension, and also to restrain them from intercepting water flowing from Beaver Lake and adjacent swamps through a ditch designated "Beaver Lake," the stream from which sources, it was averred, was a tributary of this river. As a defense to the claim of plaintiff to the waters of the stream flowing from Beaver Lake and vicinity, the appellants (1) denied that such stream was a tributary of the river; (2) averred that the waters derived from this

source were obtained by draining lands adjacent to Beaver Lake, which were in no sense a source of supply of the river or any of its tributaries. The result of the first trial was a judgment in favor of appellants for the waters obtained by means of the ditch designated as "Beaver Lake," which was constructed from the point where it intersected Feeder No. 1 to Beaver Lake and beyond. The court gave them this relief upon the ground that by their efforts and expenditures they had drained lands lying adjacent to Beaver Lake, and thereby largely increased the water supply flowing from that source, but also found that the stream from the lake was a natural water course and tributary of the river. From this judgment the plaintiff appealed to this court, where, upon consideration of this branch of the case, it was held that the court erred in decreeing the present appellants all the water from this source, because they were only entitled to the water flowing from Beaver Lake to the extent they had increased its average continuous flow. For this reason the judgment was reversed and the cause remanded for further proceedings. *Platte Val. Irr. Co. v. Buckers Irr., Mill. & Imp. Co.*, 25 Colo. 77, 53 Pac. 334. On the second trial of the cause the issues between the parties with reference to the water flowing from Beaver Lake, as also its increase by virtue of the efforts of appellants, were the same as before. With respect to the rights of appellants to maintain the ditch known as "Feeder No. 1," they filed a supplemental answer, in which it was averred that, by reason of natural physical changes in the bed of the river, it became necessary for them to maintain that portion of the ditch for the purpose of supplying their main ditch directly from the river. It is unnecessary to state the facts upon which appellee bases its right primarily to maintain this action, because these matters were disposed of in the former judgment of this court. On the second trial the court found the issues with reference to the waters collected by Beaver Lake ditch in favor of the plaintiff, and decreed that defendants were not entitled to the use of any of the waters from this source, as against the plaintiff. From this judgment the defendants appeal. There is also involved, by reason of the judgment of the lower court, the right of appellants to maintain Feeder No. 1, which will be noticed later.

At the outset there is presented this question: What was the effect of the order in our former opinion, remanding the cause for further proceedings, on that branch of the case relating to the waters of the stream flowing or alleged to flow from Beaver Lake? Our answer is that it remanded the case for a new trial on this question, and that no finding of fact made by the lower court, or which this court said was supported by the evidence, was res adjudicata of any fact upon which the rights of the parties to the

waters collected by Beaver Lake ditch depended. The issues made by the pleadings upon this branch of the case were plain and simple. The appellee averred that the stream flowing from Beaver Lake was a tributary of the Platte river. The appellants denied this averment, and further claimed the right to divert the waters of this stream to the extent they had increased its natural flow. Under these issues it therefore became incumbent upon the appellee, in order to show it was entitled to relief, to establish that the stream from Beaver Lake was a tributary of the river. To defeat this claim, defendants were entitled, under the pleadings, to make two defenses: First, that it was not such tributary; second, that they had added to its volume waters which were not theretofore wont to flow down the natural stream. It appears from the record that the trial court ruled that the burden of proof was upon the appellants,—in other words, they must show that the stream from Beaver Lake was not a tributary of the river. This was certainly erroneous, because the very ground upon which appellee based its right to relief was that appellants were diverting the waters of a natural stream and tributary of the river, to its injury. Unless they established this fact in the first instance, their action must fail. It is not every error, however, which will result in reversing a cause upon review. The error must be prejudicial, and an error is presumed to be prejudicial to the party against whom it is made, unless it affirmatively appears that it was harmless. *George v. Railroad Co.*, 53 Iowa, 503, 5 N. W. 615; *Machine Co. v. Jacobson*, 73 Iowa, 546, 35 N. W. 627; *Jackson v. Water Co.*, 14 Cal. 19; *Du Bois v. Perkins*, 21 Or. 189, 27 Pac. 1044; *Clark v. Fairley*, 30 Mo. App. 335; *State v. Security Bank of Clark*, 2 S. D. 538, 51 N. W. 337; *Hayne*, New Trials & App. § 287; 2 Enc. Pl. & Prac. 532. The evidence upon the question as to whether or not this stream was a tributary of the river was conflicting. If the court had adopted the proper theory as to where the burden of proof rested upon this issue, and had found, as it did, that the water flowing from Beaver Lake was a natural stream and a tributary of the river, perhaps the evidence is sufficient to sustain this finding. But, as it was conflicting on the subject, we are not able to say that the error of the trial court in placing upon appellants the burden it did was not prejudicial; for, with this burden placed upon appellee, it might have found that the preponderance of the evidence on this subject was with appellants, or that appellee had failed to establish as a fact that which it was incumbent upon it to do in order to make a prima facie case. For this error the judgment must be reversed, and the cause remanded for a new trial.

We are urged, however, to determine the rights of the parties to the water claimed to have been collected by appellants through

and by means of Beaver Lake ditch. It is claimed on the part of appellee that this ditch is constructed from the point where it intersects Feeder No. 1 to Beaver Lake practically upon the line of the bed of a stream flowing from that source, designated "Beaver Brook," and that the water so collected in part is from the source of supply of this stream, as also from the stream itself. It being denied by appellants that the latter is a tributary of the river, and in fact claimed that there is no such stream, and that the water collected is not from any natural supply, it is manifest from the issues between the parties that their rights to this water would be dependent in part, at least, upon the fact as to whether what is termed "Beaver Brook" is a natural stream and tributary of the river or not, and from whence the water flowing in the ditch is collected. Therefore any opinion we might express on this proposition would necessarily be in the alternative. As the question presented is of great importance, and far-reaching in its effect, we do not deem it wise to express our views thereon until squarely presented for adjudication, and for this reason we must decline to pass upon it at this time.

In the former opinion the judgment of the lower court rendered at the first trial, directing that Feeder No. 1 be abated, was affirmed. This judgment was sustained for the reason that this portion of the ditch of appellants drew water by percolation directly from the river. By a supplemental answer which they filed when the cause was remanded for a new trial, appellants aver that a change in the channel has occurred, which makes it necessary for them to establish their head gate to the Buckers ditch at a point further up the stream, and for this reason they desire a modification of the former judgment, by which they will be permitted to utilize Feeder No. 1 for the purpose of diverting the water to supply their Buckers ditch. It is also claimed upon their part, and so stated in the answer, that this feeder will not draw any water from the river, except through its head gate. This answer was permitted to be filed, and issue was joined thereon. After all evidence was introduced, the trial judge announced that it was unnecessary to argue the matters set up in the supplemental answer, as there was no controversy about them. Evidently the court was of the opinion that appellants were entitled to a modification of the original decree in so far as it affected Feeder No. 1. It is claimed by counsel for appellants that in the decree finally rendered the court did not grant such relief. Counsel for appellee contends that it did. From an examination of the decree, we do not think it does. The relief to which appellants were entitled by reason of the facts set up in the supplemental answer was affirmative in its nature. It contemplated the modification of the original decree, by which they would be permitted to maintain Feeder No.

1, and that portion of the Beaver Lake ditch from where it intersected this feeder down to the point where connection was made with the Buckers ditch. As appellants were clearly entitled to this relief, it should have been granted, and the decree should have affirmatively so stated. The decree further provided that appellants should so maintain that portion of their ditch which has been designated as "Feeder No. 1," and the part of Beaver Lake ditch thence down to the intersection with the main Buckers ditch, as not to interfere with the water flowing down Beaver brook. Whether or not this is justified will depend upon the rights of the parties to the water in dispute. The judgment of the district court is reversed, and the cause remanded, with directions to enter a decree giving appellants the relief demanded by their supplemental answer, and for a new trial on the issues made by the pleadings with respect to the rights of the parties to the water flowing in Beaver Lake ditch above the point where it intersects Feeder No. 1, and upon the final determination direct, if necessary, how that part of the ditch of appellants between the river and the Buckers ditch which intercepts the waters from Beaver brook shall be maintained with respect to the flow of the water from that source. Reversed and remanded.

(28 Colo. 126)

JONES v. VAN HORN et al.

(Supreme Court of Colorado. Dec. 17. 1900.)

REFERENCE—NECESSITY FOR REVIEW OF TESTIMONY BY COURT—APPEAL AND ERROR—REVIEW.

1. Civ. Code, §§ 212-214, provide that the clerk of court shall enter judgment on a referee's report, in the same manner as if the action had been tried by the court, after five days' notice to the parties of the filing of such report, unless objections are interposed within that time, in which case the court may grant a new trial, or modify the findings of the referee and enter such judgment as is proper. A reference was ordered for examination of plaintiff's report as administrator. Plaintiff filed objections to the sufficiency of the evidence to sustain the referee's findings, within the proper time, which the court overruled, without an examination of the testimony taken before the referee. *Held*, that a judgment for defendants, based on the referee's report, would be reversed, since the court had no authority to pass on the objections without a review of the testimony and findings.

2. An objection that the evidence taken by a referee on which a judgment is based is not shown to have been wholly incorporated in the bill of exceptions will not be noticed on appeal, if, through the court's error in not examining the testimony taken by the referee, no findings were made that can be reviewed.

Appeal from district court, Arapahoe county.

Action by James A. Jones, administrator, against M. A. De L. Van Horn and others. From a judgment for defendants, plaintiff appeals. Reversed.

H. P. Bennett, Jr., and W. C. Kingsley, for appellant. Charles J. Hughes, Jr., and Branch H. Giles, for appellees.

GABBERT, J. The issue between the parties in the court below was raised by exceptions filed by appellant to the report of the referee, as administrator of the estate of Isaac Cooper, deceased. A reference was ordered, and the referee directed to examine the accounts, take testimony, and report the facts on items in report of administrator which were contested, together with the testimony taken. On the filing of the report of the referee, the administrator objected and excepted thereto, which, so far as necessary to notice, were to the effect that the findings of fact and conclusions of law that the administrator was not entitled to item charged for his services rendered the estate were against the evidence, and that the finding that the sum paid by the administrator to certain attorneys was excessive was not supported by the evidence. We notice these two for the purpose of showing that the exceptions were in the proper form. They appear to have been filed in apt time. The record discloses that the court passed upon these exceptions, and overruled them, without examining the testimony taken before the referee, and upon which he based his report.

Our Civil Code provides that, when the reference is for all purposes, the clerk shall enter judgment upon the referee's report in the same manner as if the action had been tried by the court, after five days' notice to the parties to the action of the filing of such report, unless objections thereto are interposed within that time, and that, if such objections are filed, the court may grant a new trial, or may modify the findings of the referee, and enter judgment accordingly, when it is manifest from the evidence what the findings or judgment should be. Sections 212-214, Civ. Code. When proper exceptions are filed, the findings of the referee do not become the findings of the court, unless approved by the court. If the sufficiency of the evidence to sustain the findings of the referee is challenged, the court cannot determine this question without an examination of the testimony taken and reported by the referee. The object of permitting exceptions to be filed is to give the party filing them an opportunity to point out to the court wherein the report of the referee is erroneous. The authority of the court thus invoked cannot be exercised capriciously. It cannot act intelligently without an examination of the questions raised by the exceptions, and, when they challenge the sufficiency of the evidence to sustain the findings of the referee, it is both the province and duty of the court to examine the testimony, and review the conclusions of the former. Failing to do this,

over proper exceptions, it has no authority to approve the report.

It is urged on behalf of appellees that the bill of exceptions fails to show that all the evidence taken before the referee is incorporated therein. If we were required to examine the testimony upon which the referee based his report, this would be a material question; but, the court having failed to examine the testimony returned by the referee, no findings have been made which we can review. In other words, until the court has regularly approved or modified the report of the referee, we are not required to do so, for the reason that this court cannot review findings of fact and conclusions of law which have never been made. The judgment of the district court is reversed, and the cause remanded for further proceedings. Reversed and remanded.

(28 Colo. 156)

**McALLISTER v. PEOPLE, to Use of
BRISBANE.**

(Supreme Court of Colorado. Dec. 17, 1900.)

PRINCIPAL AND SURETY—RELEASE OF SURETY—ADMINISTRATION BONDS—ACTIONS—ITEMIZED STATEMENT—HARMLESS ERROR—DOCUMENTARY EVIDENCE—RECORDS AND CERTIFIED COPIES.

1. Where the remedy against a surety is reserved by taking a default judgment against him, a dismissal as to the principal, even if it operates to release him, does not release the surety.

2. Under 2 Mills' Ann. St. § 4807 (Gen. St. 1883, § 3632), and Civ. Code, § 13, permitting the obligee in an administrator's bond to sue any or all the obligors, a dismissal as to the principal, sued with a surety, is not a release of the surety; the effect being the same as though the action had been brought against the surety only.

3. Where the breach of a bond sued on consisted in the failure of the obligor, an administrator, to account to the estate for certain moneys, a copy of his report, furnished by plaintiff, showing the balance due as it appeared from an itemized statement of his receipts and expenditures, is a sufficient compliance with Civ. Code, § 63, requiring an itemized statement to be furnished.

4. On a trial to the court, in an action by an administrator de bonis non against the surety of his predecessor, error in permitting plaintiff to testify that his predecessor, at the time of plaintiff's appointment, handed to him a book in which he kept his accounts as administrator, and allowing him to testify therefrom, without introducing the book, is harmless, where the record of the county court in which the same items appeared was afterwards introduced.

5. Under 1 Mills' Ann. St. §§ 1101-1103 (Gen. St. 1883, §§ 512-514), making record entries in probate matters, or a certified copy thereof, evidence in all courts of the state, if the county court permits one of the books of its office to be taken into another court as evidence, it cannot be objected that the original, and not a certified, copy is produced.

Appeal from district court, Lake county.

Action by the people, etc., to the use of W. H. Brisbane, administrator de bonis non of the estate of Charles Leitzman, deceased, against H. D. McAllister. From a judgment for plaintiff, defendant appeals. Affirmed.

A. W. Stone and N. Rollins, for appellant.
J. E. Havens, for appellee.

CAMPBELL, C. J. Edward Forbes was the administrator of the estate of Charles Leitzman, deceased. For his failure well and truly to administer its assets, the county court of Lake county, having jurisdiction of the matter, removed him, and appointed W. H. Brisbane administrator de bonis non. This action was brought by the latter against Forbes as principal, and H. D. McAllister as surety, on Forbes' official bond, to recover the amount due the estate because of the administrator's default. Both Forbes and McAllister were served with process. The plaintiff voluntarily dismissed as to Forbes, and took judgment against McAllister, who had suffered default. Afterwards, this default and judgment were set aside, and, upon a trial to the court without a jury, a judgment for \$3,422.69 was rendered against the surety.

1. The first objection to the judgment is that the action of the plaintiff in dismissing the action as to Forbes operated as a release of the principal in the bond, and consequently a discharge of the surety. Whether the dismissal released the principal we need not inquire. The remedy against the surety was expressly reserved by the obligee by taking judgment against him, and the surety, therefore, was not discharged. 1 Brandt, Sur. § 147. Whatever the law be elsewhere, our statute (2 Mills' Ann. St. § 4807; Gen. St. 1883, § 3632) permits the obligee in an administrator's bond to sue all, or any one or more, of the obligors at his pleasure. When the action was dismissed as to the principal, and continued as to the surety, it was the same as though the action in the first instance had been brought by the obligee against the surety only. This is permitted by section 13 of the Civil Code, as well as by the section of the General Statutes cited.

2. Complaint is made that, in response to the demand of the defendant, the itemized account furnished by the plaintiff was inadequate, and the court improperly allowed the trial to proceed without a sufficient statement. It is contended by plaintiff, as this is an action upon a bond, and not upon an account, that section 63 of the Code, providing for an itemized statement in an action on account, is not applicable. That question is not important here, for a sufficient itemized statement was furnished. The breach of the bond consisted in the failure of the administrator to account to the estate for certain moneys which came into his hands, and the statement furnished was a copy of the report which the administrator filed in the county court, showing the balance due, as it appeared from an itemized statement of his receipts and expenditures.

3. It is urged that the trial court erred in admitting certain evidence introduced by the plaintiff. Brisbane, the administrator de bo-

nis non, was permitted to testify that the administrator, Forbes, at the time of the former's appointment, handed to him, as his successor, a book in which were kept Forbes' accounts as administrator, and Brisbane was permitted to testify therefrom, without introducing the book in evidence. Whether this was erroneous or not is not material, for the record of the county court, in which precisely the same items of account appeared, was afterwards introduced in evidence. As the trial was to the court without a jury, the testimony of the administrator *de bonis non* was not prejudicial, even if erroneous. But it is said that the court improperly ruled in permitting the record itself, rather than a certified copy, to be introduced in evidence. We are not now considering the question whether the judge or clerk of the county court can be compelled to produce in the district court its record as evidence when the statute makes a certified copy admissible. If the county court permits one of the books of its office to be taken into another court as evidence, the objection that the original, and not a certified copy, is produced, is not tenable. 1 Mills' Ann. St. §§ 1101-1103 (Gen. St. 1883, §§ 512-514). There is no merit whatever in any of the objections urged against this judgment, and it is accordingly affirmed.

(28 Colo. 176)

BREWSTER v. SHOEMAKER et al.

(Supreme Court of Colorado. Dec. 17, 1900.)

MINES AND MINERALS—LOCATION OF CLAIMS—
CONFLICTING CLAIMS—DISCOVERY
AFTER LOCATION.

1. Where the location of a mining claim is void because of the absence of a valid discovery of mineral, a subsequent discovery of mineral after the filing of the location certificate, and after all acts of location have been performed, will validate it, if such subsequent discovery is made before the rights of any third party have attached.

2. Where a vein is discovered in driving a tunnel at a point 250 feet below the surface, a valid location of the claim can be made by marking the boundary on the surface at the place at which the vein, if continued to the surface, would be disclosed, though no surface work is done, and no actual tracing of the vein to the surface is attempted, and though the tunnel was not being located under the tunnel site act of congress, and was driven through patented property, not belonging to the owners of the lode discovered.

Appeal from district court, San Miguel county.

Action by Arthur Brewster against George W. Shoemaker and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The action concerns a strip of ground in conflict between the Bootjack and Contention lode-mining claims, situate in San Miguel county. The Bootjack is the earlier location in point of time. When its owners (defendants) applied in the land office for a patent, plaintiff, the owner of the Contention lode,

filed his adverse therein, and brought this action in its support. The facts material to the present controversy may thus be stated: The location of the Contention lode was made on May 1, 1898. No question is raised as to its validity, provided it was unappropriated public domain at the time of plaintiff's entry. The location of the Bootjack lode is claimed as of the 9th day of November, 1897, and also January 28, 1898. The first discovery of mineral was upon patented ground, and not within the boundaries of the Bootjack claim, as staked. It was therefore void. On the 28th of January, 1898, a valid discovery of mineral was made within these boundaries, and an amended location certificate filed. Both these discoveries of mineral were at a point about 250 feet below the surface, and upon the same vein, and were made in driving a tunnel; the latter discovery being at a point on the vein uncovered by running the tunnel further into the mountain. It was not a statutory tunnel,—that is, not located under the tunnel site act of congress,—but was driven by the owners of the Bootjack lode through patented property, not belonging to defendants, and into the territory in dispute, under an arrangement made between the patentee and the tunnel owners. The vein in the tunnel dipped about three degrees from the vertical. A calculation was made, based upon the dip of the vein as thus disclosed, and at a point on the surface where, according to such calculation, the vein should come to the surface, a discovery notice was posted, containing the statement required by statute, and also a recital that a like notice, which is admitted, was at the place of discovery (describing it), and information was given how to reach it through the tunnel. Starting with this discovery stake on the surface as the initial point, the boundaries of the claim were designated, and the stakes set, as the statute prescribes. No tracing of the vein upwards was done, and no surface work performed, by the locators of the Bootjack claim. The vein found in the tunnel was not by actual exploitation shown to apex within the limits of the claim, but only as might inferentially appear from the calculation to which reference has been made. When the plaintiff appeared upon the ground and made his attempted location of the Contention lode, the posted notice and boundary stakes of the Bootjack were in place, and the location certificate was on file. Upon this state of facts, and with evidence as to other acts necessary to constitute a valid location of a mining claim, the case was submitted to the jury, under the instructions of the court, and a verdict returned for the defendants, upon which judgment was entered.

Gerry & Taylor and W. H. Tripp, for appellant. Hogg & Hamill, for appellees.

CAMPBELL, C. J. (after stating the facts). Upon this appeal two questions only are im-

portant, and, as stated by appellant's counsel, they are: (1) Can a location admittedly void, because of an absence of a valid discovery of mineral, but regular in all other respects, be made good by a subsequent valid discovery of mineral within the limits of the location, made before the rights of third parties attach, but after the filing of the location certificate and all acts of location have been performed? (2) May a location of a valid mining claim be based upon an underground discovery of mineral made upon the dip of the vein at a distance of 250 feet below the surface, or any other distance, through a tunnel not statutory,—that is, not claimed under the tunnel site act of congress.—where the vein has never been opened upon the surface, or shown by actual working to have its apex within the limits of the claim as staked?

1. Plaintiffs rely upon *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *Id.*, 7 Mont. 449, 17 Pac. 728,—which was afterwards affirmed in *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330. In the opinion, as reported in 5 Mont. and 6 Pac., supra, it was said that a location void at the time it is made, because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located. Upon a second appeal of the same case, reported in 7 Mont. and 17 Pac., supra, the learned court seems to recognize the doctrine laid down by Mr. Justice Sawyer in the case of *Jupiter Min. Co. v. Bodie Consolidated Min. Co.* (C. C.) 11 Fed. 666, wherein it was said that in such a case a subsequent valid discovery, made before any other person has acquired any rights, will make such a location good. But the court proceeds at the second hearing, with the case then in hand, to say that the evidence sought to be introduced at the trial to show a subsequent valid discovery was properly rejected because it appeared—or at least it was not clear that the contrary was true—that the subsequent discovery to which the evidence was directed was made after the application for patent was filed. And the court held that a patent ought not to issue upon a discovery made after application. It also declared that the offer of evidence was not made in good faith, but to enlist the sympathy of the jury. In the review of the case by the supreme court of the United States there is nothing said to give color to the position taken here by appellant's counsel. Whether the owners of the Bootjack lode, in connection with the second discovery of mineral,—the one within its exterior boundaries,—in January, 1898, supposed they were merely amending the former attempted location by correcting the description and filing an amended location certificate, or whether they intended to make, and supposed they were making, a relocation of an abandoned claim, is immaterial; for, be-

fore the rights of third persons, including the claimant, attached, it is admitted that they had taken all of the steps which, under the federal and state statutes, constitute an appropriation of a lode mining claim. The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim, and refile their location certificate, or file a new one. In the case of *Beals v. Cone*, 62 Pac. 948, we have ruled against appellant's contention. The United States circuit court of appeals for the Eighth circuit, in *Erwin v. Prego*, 35 C. C. A. 482, 93 Fed. 608, in a case coming up from Utah, has reached the same conclusion. We know of no statutes of this state that require a different ruling. Other authorities sustaining our conclusion are *Craig v. Thompson*, 10 Colo. 517, 16 Pac. 24; *North Noonday Min. Co. v. Orient Min. Co.* (C. C.) 9 Morr. Min. R. 529, 1 Fed. 522; *Streprey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Mining Co. v. Mahler*, 4 Morr. Min. R. 390; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* (C. C.) 4 Morr. Min. R. 411, 11 Fed. 666; 1 Lindl. Mines, § 335 et seq.; Morr. Min. R. (9th Ed.) 28, and cases cited.

2. In *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, it was held that when a tunnel claim has been duly located under the provisions of the acts of congress, and the owner thereafter discovers a mineral lode therein, he is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface location of the same lode. This case was affirmed by the supreme court of the United States in *Campbell v. Ellet*, 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101. This, however, is not controlling of the proposition now under consideration. In the case at bar the defendants were not attempting to locate a tunnel site under the acts of congress. The mouth of the tunnel was not upon the Bootjack claim, and the entire work was done upon patented land by the plaintiffs under agreement with the patentee. The point of discovery was over 800 feet from the mouth of the tunnel. As well said by Mr. Morrison in his work on *Mining Rights* (9th Ed.) 30: "The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery." Certainly there is no requirement of the federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discov-

ery shall be within the limits of the claim. Under our statute (Mills' Ann. St. § 3154; Gen. St. 1883, § 2403) where a lode is cut at a depth of 10 feet below the surface by means of an open cut, cross cut, or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth. *Gray v. Truby*, 6 Colo. 278; *Development Co. v. Van Auken*, 9 Colo. 204, 11 Pac. 80. The question here is not whether a subsequent discovery on the apex of the lode would take precedence of the prior discovery on the dip, for there is no claim here that plaintiff's subsequent location is on the apex of the same lode on whose dip defendants' discovery was theretofore made. But the question is whether a valid location can be made by a discovery at a point 250 feet beneath the surface, when it is followed up by a marking of the boundaries on the surface as though the discovery had been made from the surface, and by the doing of the other acts which the statute requires, though no surface work is done, and no actual tracing of the vein to the surface attempted. The precise question has not, to our knowledge, been decided by a court of last resort, but we do not see why a location such as has been made by the defendants is not good. It has been held that where the discovery is made in a discovery shaft along the course of a vein, and the surface boundaries marked with reference to its course or strike as disclosed in the discovery shaft, the presumption is that the vein continues on the same course throughout the limits of the claim. When, as in the case at bar, the discovery is made underground upon the dip of the vein, it is fair to assume, in the absence of a contrary showing, that the vein extends upward at the same angle; and a marking of the boundaries by making the place at which the vein, if continued to the surface, would be disclosed, the initial point, is a sufficient compliance with the law. That the mouth of the tunnel was not upon the claim we do not consider important. That the tunnel was driven through patented property, not belonging to the owners of the lode discovered, is something of which the plaintiff cannot complain. If the owners of the land through which the tunnel is driven give their consent thereto, a third person may not object. Sufficient notice was conveyed to the public of this location. The defendants not only placed in the tunnel, at the point of discovery, a discovery stake and notice, but also posted the discovery notice on the surface, containing not only the things required by statute, but in addition informing the public of the exact spot where the discovery was made, and furnishing information how to reach the same through the tunnel, where inspection might be had. We do not think it necessary, in a discovery which is made underneath the surface, that the locator shall, at the risk of losing his claim, demonstrate by actual

working that the top or apex is within the limits of his location. In the absence of some proof to the contrary, the court will presume, as we have said already, that the vein continues in its upward course on the same angle to the surface; and if the locator selects and traces his boundaries with reference to this place on the surface, so as to include it within the limits of his claim, nothing further in this respect is required. On this last point *Armstrong v. Lower*, 6 Colo. 393, and *Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283, though not deciding the precise question, are, in principle, authority for the holding here. The judgment of the court below is in harmony with our views, and it is affirmed.

(28 Colo. 110)

CITY OF DENVER et al. v. HAYES et al.
(Supreme Court of Colorado. Dec. 3, 1900.)

MUNICIPALITIES—AUTHORITY TO CONTRACT
DEBTS—SUBMISSION TO ELECTORS—SEPARATE PROPOSITIONS—INTEREST.

1. Under Const. art. 11, § 8, and Sess. Laws 1893, p. 200, § 9, and Sess. Laws 1899, pp. 371, 372, requiring the question of incurring a municipal debt to be submitted to the qualified electors, and enumerating eleven purposes for which the city council may issue bonds, an election is invalid which submits more than one proposition in such a manner that the elector must vote for or against them as a whole.

2. Where bidders for a municipal bond issue make a deposit as guaranty of good faith, but afterwards sue to recover it because of the invalidity of the bonds, they are not entitled to interest.

Appeal from district court, Arapahoe county.

Action by William J. Hayes and others against the city of Denver and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. M. Ellis, City Atty., Guy Le Roy Stevick, Asst. City Atty., S. L. Carpenter, Asst. City Atty., and N. B. Bachtell, Asst. City Atty. (Fred. A. Williams, George F. Dunklee, and James H. Brown, of counsel), for appellants. Bicksler, McLean & Bennett and Thomas W. Heatley, for appellees.

CAMPBELL, C. J. The ultimate object of this action is to test the validity of an issue of so-called "Auditorium Bonds" of the city of Denver, aggregating \$400,000. Appellees, who were the successful bidders therefor, accompanied their bid by depositing with the city treasurer \$8,300 as evidence of their good faith, which, if their bid was accepted, was to be applied on the purchase price. Discovering, as they say, the invalidity of the bonds after the deposit was made, they brought this action to recover the same, when the city refused to refund it. It is a friendly action, but the controversy is real, and the pleadings are so framed as to demand a decision of the question argued.

The constitutional and statutory provisions

which control are section 8 of article 11 of the constitution, and sections 154 and 156 of the charter of the city of Denver,—the former of which is found in Sess. Laws 1899, pp. 371, 372; the latter in Sess. Laws 1893, p. 200, § 9. The sections, excluding words superfluous in this discussion, are:

"No city or town shall contract any debt by loan in any form, except by means of an ordinance * * * specifying the purposes to which the funds to be raised shall be applied. * * * But no such debt shall be created unless the question of incurring the same shall at a regular election for councilmen, alderman or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot box, shall vote in favor of creating such debt. * * * Const. art. 11, § 8.

"No loan shall be made and no bonds shall be issued for any purpose except in pursuance of an ordinance authorizing the same; * * * and such ordinance shall specify the purposes for which the sums to be raised shall be applied; * * * but no such debt shall be created nor bonds issued unless the question of incurring the same and issuing bonds therefor shall be submitted to the vote of such of the qualified electors of the city as shall in the next year preceding have paid a property tax therein, and a majority of such voting upon the question by ballot shall vote in favor of creating such debt and issuing such bonds." Sess. Laws 1893, p. 200, § 9.

"The city council is hereby authorized to contract an indebtedness on behalf of the city, and upon the credit thereof, by borrowing money and issuing bonds of the city at a rate of interest not exceeding five (5) per cent. per annum: (a) For the purpose of erecting public buildings, including a public auditorium. (b) For the purpose of constructing and maintaining public sewers for the city. (c) For the purpose of purchasing lands for parks and public squares within or without the city limits, and for the purpose of condemning sites for parks and public squares, and the assessments of benefits for the same and for sites for public buildings for said city. (d) For the purpose of improving existing parks. (e) For the purpose of building and constructing viaducts for the city, or aiding in the building or construction thereof. (f) For the purpose of constructing reservoirs within or without the city limits, for the storage of water to be used in irrigating the trees in said city, and for sanitary or domestic purposes in said city, and to acquire lands for such reservoirs. (g) For the purpose of constructing bridges and their approaches. (h) For the purpose of taking up, paying, redeeming and refunding any bonded indebtedness of the city, or any part thereof. (i) For the purpose of improving

the banks and channels of South Platte river, and for acquiring a right of way for a new channel for Cherry creek, and for turning the same. (j) For the purpose of constructing and purchasing a channel or channels, or ditches, or conduits, or some suitable system of supplying waters in the city. (k) For paying the city's proportion of any local improvements, where by this act any part of the cost thereof is to be paid by the city. Said indebtedness and bonds for all said purposes, together with all general indebtedness and bonds of the city previously issued, not to exceed in the aggregate the amount limited by the constitution of the state of Colorado." Sess. Laws 1899, pp. 371, 372.

The city council passed Ordinance No. 31 of the Series of 1899, which provided for submission, at the regular municipal election of that year, to the vote of the qualified electors of the city, the question of incurring an indebtedness in behalf of the city of \$400,000 for the eleven separate and distinct purposes above classified, from "a" to "k." The form of the ballot as therein prescribed required each elector to designate, by a cross mark in the margin of the ballot, his answer to the questions submitted. They were two, or rather the question was only one, but in the alternative,—for incurring, and against incurring, the indebtedness. The eleven separate and distinct purposes were so grouped in one proposition that an elector desiring to vote for any one purpose was, to accomplish it, obliged to vote for all collectively, though he might favor one only, and be against the others; and, if he wished to vote against any one purpose, though he might not object to any of the others, he must vote against all. In other words, he was not permitted to vote for one or more of the separate purposes, and against the others, but he must vote for all, against all, or not vote at all.

A majority of the electors voted in favor of incurring the indebtedness and issuing the bonds. After the vote was taken and canvassed, and the result declared, the city council proceeded to enact Ordinance No. 67, Series of 1899, whereby it assumed to create an indebtedness in the sum of \$400,000, and to issue bonds therefor, and out of the proceeds received from their sale it was proposed to set aside one-eighth as a park fund (the charter elsewhere providing that one-eighth of all proceeds from bonds voted should be so applied), and seven-eighths to the building of a public auditorium.

There are four particulars in which the bonds are said to be invalid. In the view we take of the controversy, it is necessary to consider only one. It is the contention of plaintiffs that the bonds are invalid because Ordinance No. 31, providing for ascertaining the will of the voters, and the election called in pursuance thereof, were invalid, in that in the ordinance and the notice for the election, and in the form of the ballot to be used, eleven separate purposes were

included as one proposition to be voted upon, and electors were not able understandingly to cast their ballot. Defendants, on the other hand, contend that several purposes may be submitted as a single proposition at the same election, and, if a majority of the qualified electors authorize the creation of an indebtedness in a lump sum, this is a due observance of the regulations prescribed by law, and the council may thereafter, by ordinance, apportion among the different purposes the proceeds of the bonds as it sees fit, or may apply them exclusively (less one-eighth for parks) to one purpose. A careful examination of the constitutional and statutory provisions involved will disclose that they are harmonious. Indeed they are substantially the same. The precise question for determination, therefore, is not whether the legislative enactments are constitutional, —though by necessary deduction that point is also ruled upon,—but whether the city council, in its proceedings leading up to the issue of these bonds, has observed the provisions of the charter.

That the action of the city council was fundamentally wrong we have not the slightest doubt. The purpose of the framers of the constitution, which they expressed in the section under consideration, and the object of the general assembly which is embodied in the city charter, were to prohibit municipal authorities from creating a debt for municipal purposes, and from issuing bonds, unless a majority of the legal electors of the city gave their consent thereto. By the proceedings under review, no opportunity was given by the city council to the electors to express their will as to incurring a debt for any particular purpose, and the voice of the electors has never been heard. Neither the constitutional limitation nor the statutory provisions expressly declare that only one purpose may be submitted at the same election, nor that, if more than one purpose may thus be submitted, each shall be separately stated. But the object of neither can be attained, and effect to the language in which they are expressed cannot be given, unless such purposes be separately stated, and the amount proposed to be applied to each particular purpose designated. This must be done, not only in the ordinance which provides for the submission, but in the election notice; and the ballots must be so prepared that every elector may declare his choice as to each purpose, and the amount proposed to be applied thereto must also be stated.

To combine several distinct and independent purposes into one proposition, without specifying the amount which is to be devoted to each, is a clear evasion of the law, and, if permitted, would fritter away the safeguards thrown around such transactions. As already indicated, under the provisions of Ordinance No. 31, and in the form of the ballot as therein prescribed, an elector has three

poses collectively; second, to vote against all of them collectively; third, to abstain from voting. If he wants to vote for one or more, and against the others, he is not able to do it. Voting for all combined is not voting for any one or more separately, and so the fact that a majority of the legal votes was cast for the eleven purposes enumerated in ordinance No. 31 and in the notice of election is not equivalent to a majority for any one of the eleven independent purposes. If such a proceeding can be tolerated as was attempted by the city council, then, if an aggregate indebtedness of \$11,000,000 is authorized by the electors of the city for the eleven purposes enumerated, the city council, after deducting from the sale of bonds one-eighth of the proceeds and applying the same for park purposes, which the charter requires, might devote the remainder to the single purpose of constructing bridges, or improving existing parks, or improving the banks or channels of the Platte river. In fact, that, is just what, in principle, was done in this instance, when seven-eighths of the proceeds of the bond sale were devoted to the erection of a public auditorium. By combining the advocates of each of the eleven propositions submitted a majority of the votes was secured, but by the procedure adopted it is impossible to ascertain whether a majority of the electors was in favor of any one of the propositions submitted.

So far as the question before us is concerned, it makes no difference whether we hold that only one purpose may thus be voted upon, or that two or more may be combined and submitted at the same election. It would seem, under the decisions of other courts under constitutions and statutes somewhat similar to ours, that the better rule is to submit only one such question at a time. By statute in some of the states, it is expressly provided that two or more such propositions may be combined, but, if they are, each must be separately stated, and an opportunity given the electors to vote upon each purpose separately. The electors must have the right, which is theirs alone, of separately determining each purpose for which a debt shall be created, and what amount shall be applied thereto. It is not sufficient that a lump sum be authorized by the electors, which the city council may thereafter apportion as it sees fit, but the separate purpose and amount devoted to each must be determined by them.

Not a single authority has been cited by the city attorney in support of the construction which we are asked to sanction, but he says that there are no similar constitutional and statutory provisions in other states on which a decision might be expected. This may be true, but there are several decisions which we consider, in principle, to be squarely against his contention. He cites, however, the case of *Thomas v. City of Grand Junction*, 13 Colo. App. 80, 56 Pac.

665, as authority for the proposition that an ordinance which authorizes the purchase or construction of waterworks is not void on account of including two subjects. But the court there expressly ruled that the one subject and one object of the ordinance under consideration was to secure for the city the ownership of its own waterworks. "It authorizes the purchase or construction, not the purchase and construction." This language impliedly recognizes the rule that, if there had been more than one purpose included, the ordinance would be void. Whether the distinction made is sound we do not say. But nothing in that case decided is against the conclusion which we have reached, but, if there is, it must give way to the ruling here. The following, among other, cases are in harmony with our resolution of the question under consideration. *Elyria Gas & Water Co. v. City of Elyria*, 57 Ohio St. 374, 49 N. E. 335; *Truelsen v. City of Duluth*, 61 Minn. 48, 63 N. W. 714; *Metcalf v. City of Seattle*, 1 Wash. St. 297, 25 Pac. 1010; *Petros v. City of Vancouver*, 13 Wash. 423, 43 Pac. 361; *Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 338, 372; *Gray v. Mount*, 45 Iowa, 591.

Under the laws of Iowa, it was provided that, upon an affirmative vote of the people at any general or special election upon the proposition submitted to them, certain land, or proceeds arising from its sale, might be devoted to the erection of county buildings and buildings devoted to the purpose of education. The question submitted was whether the funds in question should be devoted to the erection of a court house and a county high school. Speaking to the objection that such a submission was invalid, because there was a union of two objects, and two separate appropriations for distinct objects, in one proposition, so that the elector could not vote for one and against the other, the court, in the case of *Gray v. Mount*, *supra*, speaking by Mr. Justice Beck, said: "The question to be submitted to the voters was not simply whether it was their will to appropriate the fund, but there must be an object for the appropriation in order to constitute the proposition to be voted upon. The object is of the essence of the proposition. This cannot be denied. The appropriation for a given object is the proposition submitted. If there be two objects, and a specified amount of funds to be devoted to each, it is very plain that there are two propositions submitted at the same election. If they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of

choice. The plan of submitting the questions, for there are two, resembles more the common device of an auctioneer in disposing of worthless goods, whereby a good article is mingled with them, and made to draw bids, or the cunning tricks of gamblers to induce wagers of the unwary, rather than the open, direct, and fair manner that always should prevail in elections by the people. The very letter, as well as the spirit, of our election laws condemns this plan. It has never been heard of that electors were, by any plan, denied the right of choosing one, and rejecting another, candidate for office, to be voted for at the same election." We have made the foregoing excerpt because it so clearly and concisely presents the reasons for holding invalid the proceedings of the city council in submitting to the electors of the city of Denver the proposition of creating a debt for eleven distinct and independent purposes, without giving to the voter an opportunity to express his will as to any one of them.

The cross error assigned by appellees, that the trial court was wrong in refusing to allow interest on the deposit from the date of the demand on the city to return it, is resolved against them. This is not a case for the award of interest. The judgment of the district court being in accordance with our conclusion, it is affirmed.

(28 Colo. 87)

**COOPER et al. v. PEOPLE, to Use of
BOARD OF COM'RS OF ARAPAHOE COUNTY.**

(Supreme Court of Colorado. Nov. 19, 1900.)
CLERKS OF COURTS—OFFICIAL BOND—VALIDITY—PROPER OBLIGEE—CONDITION—COMPLIANCE WITH STATUTE—ACTION—PLAINTIFF—EVIDENCE—ADMISSIBILITY.

1. Under 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477), requiring clerks of the district courts to execute bonds to the people of the state of Colorado, but not prescribing the form of the bond, a bond running to the state of Colorado is good.

2. Under 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477), requiring the clerks of the district court to execute bonds for the faithful performance of their duties, but not prescribing the form of the bond, a bond conditioned that defendant should faithfully perform the duties of clerk of the district court of the Second judicial district is a sufficient designation of the office of clerk of the district court of Arapahoe county, since the court will take judicial notice, under the statute so declaring, that the Second judicial district and Arapahoe county are coterminous.

3. 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477), provides that the clerks of the district court shall execute a bond conditioned for the faithful performance of their duties. *Held*, in an action on such a bond for the clerk's misappropriation of money, that the fact that the bond was conditioned for faithful performance of his duties without fraud, deceit, or oppression, did not relieve the sureties from liability, since the fact that the condition expressed was less onerous than the statutory requirement did not render it not a substantial compliance with the statute, nor relieve the sureties for a breach of the condition actually expressed.

4. Where clerks of the district court were required by law to pay over to the county treasurer fees received by such clerk in excess of the amount of his salary, a clerk's bond conditioned that he should pay over all moneys coming to his hands as such clerk, and should deliver to his successor all books, moneys, and papers and other things pertaining to his office which might be so required by law, was not void as requiring the clerk to pay over to his successor moneys which the law required should be paid to the county treasurer, since the clause requiring him to deliver to his successor all moneys which might be so required by law will be construed to include only the amount in his hands not then due and payable to the county treasurer.

5. Under 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477), requiring clerks of the district court to execute bonds conditioned that they will punctually pay over to the person entitled to receive them all moneys coming officially to their hands, a bond conditioned that the clerk shall pay over all moneys coming into his official hands and shall deliver to his successor all moneys pertaining to his office which may be so required by law is not void for the omission of the word "punctually" from the condition, since the language of the bond, "which may be so required by law," will be construed to require punctual payment.

6. The bond of the clerk of a district court, conditioned that defendant "shall well and faithfully perform and execute the duties of the office of clerk of the district court of said judicial district during his continuance in office by virtue of said appointment without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as said clerk of said district court, and shall deliver to his successor all books, moneys, and papers, and other things pertaining to his office, which may be so required by law, then the above obligation shall be void," is not so defective and uncertain as to be void.

7. Under 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477), providing that clerks of the district court shall give official bonds running to the people of the state of Colorado, defendant's contention, in an action on a clerk's bond for failure to pay over moneys, that a bond so running to the people was void because the county treasurer was the only person authorized by law to receive moneys collected by the clerk, and was, therefore, the only one injured by the failure to pay over the money, and should have been named as obligee, was without merit.

8. 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477), provides that the clerks of the district court shall give official bonds running to the people of the state of Colorado; and section 3296 (section 2478) provides that such bonds may be sued on in the name of the people for the use of any person injured by a breach. 1 Mills' Ann. St. § 791, subd. 5 (Gen. St. 1883, § 538), gives the board of county commissioners power to represent the county, care for its property, and manage its business and concerns, where no other provision is made by law. *Held*, that an action on the bond of a clerk of the district court to recover public money misappropriated by him was properly brought by the people of the state of Colorado for the use of the board of county commissioners, since no special provision was made by law as to who should sue on such a bond.

9. Mills' Ann. Code, § 381, requires clerks of the district court to keep a register of actions, in which he shall enter the title of actions, with notes of papers filed and proceedings had therein. *Held*, that entries in such register of fees received by a clerk were properly admitted in evidence in an action on a clerk's bond for failure to turn over fees received by him as required by law, as the register of actions was a book required by law to be kept, and

therefore prima facie evidence against defendants.

10. Where a clerk of a district court entered, in a book in which he was not bound to make such entries, the receipt of fees collected by him, such book was properly admitted in evidence to prove the receipt of such fees in an action on the clerk's bond for fees which he failed to pay over as required by law.

Appeal from district court, Arapahoe county.

Action by the people, for the use of the board of commissioners of Arapahoe county, against Matt Adams and others. From a judgment in favor of plaintiff, defendants Cooper and McIntosh appeal. Affirmed.

The title of this case below was "The People of the State of Colorado, for the Use of the Board of County Commissioners of the county of Arapahoe, in the State of Colorado, Plaintiff, vs. Matt Adams, Job A. Cooper, and Charles L. McIntosh, Defendants." The object of the action was to recover the penalty of the official bond of Matt Adams as clerk of the district court, for that he misappropriated certain witness fees, jury fees, fines, and fees collected by him, aggregating about \$4,000. Cooper and McIntosh were sureties on the bond. There was a judgment against the defendants for the full penalty, to wit, \$5,000, to be satisfied by the payment of \$3,299.46, the aggregate amount of the clerk's shortage. The sureties have appealed from that judgment. The statute which requires clerks of district courts to give bonds reads as follows: "That the clerks of the district court of this state be, and they are hereby required, to execute a bond to the people of the state of Colorado in the penal sum of five thousand dollars each, with sufficient surety, to be approved by the judges of their respective districts, conditioned for the faithful performance of their duties as clerk of said court, and that they will punctually pay over to the person legally authorized to receive the same, all moneys that may come into their hands by virtue of the said office." 2 Mills' Ann. St. § 3295 (Gen. St. 1883, § 2477). The condition of this bond is: "Now, the condition of this obligation is such that, if the said Matt Adams shall well and faithfully perform and execute the duties of the office of clerk of the district court of said judicial district during his continuance in office by virtue of said appointment without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as said clerk of said district court, and shall deliver to his successor all books, moneys, and papers, and other things pertaining to his office, which may be so required by law, then the above obligation shall be void; otherwise, to be and remain in full force and effect."

A. B. Seaman and H. S. Silverstein, for appellants. A. B. McKinley and Cass E. Harrington, for appellee.

CAMPBELL, C. J. (after stating the facts). The propositions upon which appellants rely to reverse the judgment, and which they contend should have operated to dismiss the action, are: First. The bond upon which the action is based is not a statutory bond. Second. It is not a good common-law bond; that is, it is invalid. Third. If the bond is a valid common-law bond, nevertheless, under its conditions, the plaintiff in this case cannot recover. Fourth. The court erred in admitting evidence to establish the misappropriation charged. The particular objections which appellants urge will more clearly appear as we proceed with the discussion. As preliminary, we remark that the principal was inducted into office, and given the opportunity to receive the moneys thereafter misappropriated by him, upon the strength of the bond signed by the sureties, who are now trying to escape liability thereunder. While the contract of a surety is strictissimi juris, courts should not, in a case like this, be astute to furnish an avenue of escape. Sureties who sign a bond are estopped to deny certain of its recitals.

1. We think the bond is a statutory bond. The statute does not prescribe its form; and in such case, if the bond substantially conforms to the statute, that is all that is required. *Murfree, Off. Bonds*, § 38. Let us examine in detail the objections raised. The obligee in the bond is the "state of Colorado." The statute makes the obligee the "people of the state of Colorado." These are equivalent expressions. *Brown v. State*, 5 Colo. 496. It is contended that there is and was no such office as clerk of the district court of the Second judicial district, and, if so, that the bond is void. Appellants say the proper title is "clerk of the district court of Arapahoe county," while appellee insists that it is "clerk of the district court," and the language describing the office and following the expression "clerk of the district court" may be treated as surplusage. It is a matter of which we take judicial notice, because the statute so declares, that the Second judicial district of the state of Colorado is composed of the county of Arapahoe alone; so that the expression in this bond, "clerk of the district court of the Second judicial district," is equivalent to the expression, "clerk of the district court of Arapahoe county." It would be a strained construction to hold otherwise. Again, it is said that the words "without fraud, deceit, or oppression" limit the faithful performance of his duties by the clerk, and that because of their presence the bond is less onerous than it would be without them. It would scarcely be argued that the misappropriation of public money by the clerk would not constitute fraud and deceit, and therefore it cannot be maintained that his failure to pay them over as the law requires is not a fraud; so that the particular breach alleged is covered by the conditions named in the bond. The fact that the bond,

as executed, has conditions less onerous than the statute prescribes, does not exempt the sureties from liability for a breach of the conditions that are there. Neither does it constitute the bond not a statutory bond. *Kincaid v. Carroll*, 9 Yerg. 11; *People v. Slocum*, 1 Idaho, 62; *Fellows v. Gilman*, 4 Wend. 414; *Skellinger v. Yendes*, 12 Wend. 306. It is further said that by the last two clauses of the bond the clerk (the principal) is required to do something which is in direct violation of the law. Our statutes provide that under certain conditions the clerk is to pay over to the treasurer of the county certain fees received and collections made by him. It is said by appellants that this bond, instead of requiring the clerk to pay over the moneys that come into his hands in that capacity to the persons legally entitled to receive them, calls for their payment to his successor in office, for which there is no authority. We do not so construe this language. The clerk is not obliged to pay over to the treasurer the moneys that come to him from certain fees until after the amount of his annual salary has been met therefrom, and, after that sum has been reached, the balance, or excess, only, is to be paid over to the county treasurer. *Airy v. People*, 21 Colo. 144, 40 Pac. 362. Bearing this in mind, let us scrutinize the clauses of the bond alleged to be repugnant to the statute. The expression therein "which may be so required by law" refers to all moneys that may come into the hands of the clerk, and also to moneys, papers, and other things pertaining to his office. All moneys which the law directs him to pay to the treasurer this bond requires him to do; and the books and papers pertaining to his office, and such moneys as may be in his hands at the time his successor is appointed, and which then are not due and payable to the treasurer, shall likewise be delivered to his successor. This is a natural construction of the language in view of the statutory provisions regulating his duty. That is to say, such moneys as come into his hands are to be paid to the person legally authorized to receive the same, and such person is, under certain conditions, the treasurer, and, under other conditions, the successor in office. The bond, therefore, substantially conforms to the statute. It is further said that, while the statute requires the clerk punctually to pay over to the person legally authorized to receive the same all moneys that may come into his hands by virtue of his office, the omission in the bond of the word "punctually" constitutes a material and fatal variance. With this we cannot agree. The language of the bond "which may be so required by law" means that he is to pay over the moneys "punctually," if such be—as it is—the statutory requirement; but, if the omission of that word from the bond made the instrument less exacting, in that the principal might more leisurely pay, this does not, as we have seen, relieve the sureties from lia-

bility under the bond which they have signed, nor does it destroy its character as a statutory instrument.

2. The reasons assigned why this bond is not good as a common-law bond are those already considered under the first general head. We have held them not meritorious. It is also said that the bond is so imperfect, defective, and uncertain as to be void; but we do not so interpret its language.

3. But it is argued that, inasmuch as by the law the county treasurer is the person who is legally authorized to receive moneys collected by the clerk, he is the only one who could be injured by its breach, and, since he has not been named as the obligee, the bond is void; but, if valid, the action cannot be brought in the name of the people of the state of Colorado for the use and benefit of the board of county commissioners of the county. Neither contention is tenable at all unless the bond is a common-law bond, which we have held it not to be. Being a statutory bond, our statute itself provides that suit shall be brought as was done here. Besides this, the incapacity of the plaintiff to sue, if such is the case, appears upon the face of the complaint; and that is an objection which, under our Code, must be taken by demurrer, and, if not, it is waived. Furthermore, there is no express provision of the statute that the county treasurer, in a case of this sort, shall bring the suit. On the other hand, the only provision we have is that such bond shall be payable to the people of the state of Colorado, and suit shall be brought thereon in the name of the people to the use of any party injured by its breach. 2 Mills' Ann. St. § 3296 (Gen. St. 1883, § 2478). And by section 791 (section 538) it is provided that the board is given power to represent the county, and have the care of the county property, and the management of its business and concerns in all cases where no other provision is made by law. We see no valid objection to the action being brought in the name of the people for the use of the board. The money belongs to the county, and the board is its representative.

4. It is strenuously insisted that the court erred in admitting in evidence the register of actions kept by the clerk. The court permitted the plaintiff to introduce this book, for it appeared therefrom that the clerk had received in his official capacity certain fees and other collections which he had not turned over as required by law. The defendants, however, insist that, while the statute requires the clerk to keep a fee book, in which he shall put down all these collections, there is no such requirement that he should put them in this book called the "register of actions." The statute does not expressly provide that the fee book shall be separate and distinct from any other book in the office, and we think that its fair construction is that the clerk may use this register as a fee book. But section 381, Mills' Ann. Code, directs

that the clerk shall keep a register of actions, and that he shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein. A part of the proceedings in any action is the receiving of certain fees provided for by statute, and therefore the register, showing receipt of fees, might be considered as a book required to be kept by law; and, if so, as conceded by counsel for defendants, entries therein would be at least prima facie evidence against the clerk, and also the sureties upon his official bond. If, however, the book is not one expressly required by the statute to be kept, still it is a book in which, as a matter of fact, the clerk (the principal of this bond) made entries of fees collected by him, and such, it seems, has been the practice of the office. Both the clerk and his sureties are prima facie bound by the entries therein found. We perceive no substantial error in this record, and the judgment must therefore be affirmed.

(27 Colo. 469)

KNOWLES v. LOWER CLEAR CREEK DITCH CO. et al.

(Supreme Court of Colorado. Dec. 17, 1900.)

SUPREME COURT—JURISDICTION OF APPEAL—JUDGMENT RELATING TO FREEHOLD OR FRANCHISE.

A stockholder in a ditch and mill company, whose charter had expired, brought action for the appointment of a receiver to take possession of its property, and distribute the proceeds among its stockholders, and, a demurrer to the complaint having been sustained, the action was dismissed. *Held* that, though ditch and water rights are freehold estates, the judgment did not deprive him of a freehold or franchise, and hence did not relate to nor involve either, within Mills' Ann. Code, §§ 388, 406a, authorizing an appeal to the supreme court where it does.

Appeal from district court, Arapahoe county.

Action by Joseph C. Knowles against the Lower Clear Creek Ditch Company and others. From a judgment for defendants, plaintiff appeals. On rehearing. Former opinion withdrawn, and appeal dismissed.

Appellant, as plaintiff, brought this action in the court below for the purpose of having a receiver appointed to take possession of and sell certain ditch, water rights, and other property, and distribute the proceeds among the stockholders of the Clear Creek Platte River Ditch & Mill Company. He claims this relief upon facts stated in his complaint, which are to the effect that the above-named company was a corporation, organized under the laws of this state, the charter of which expired by limitation on the 12th day of July, 1893; that he is the owner of a part of one share of the stock of the defunct corporation; that at the time of the expiration of its charter it owned the property which he seeks to have disposed of through a receiver; that at the time of the

expiration of the charter certain of the individual defendants were the directors of the corporation; that these defendants have never entered upon the performance of the duties imposed upon them by law, by virtue of their relationship to the company at the time its charter expired, but have wholly refused to act in that capacity, or as trustees of the stockholders of the corporation with respect to its property; that they and the remainder of the individual defendants, except Sigler, have conveyed to the Lower Clear Creek Ditch Company their individual interests in the assets and property of the defunct corporation, and that the Lower Clear Creek Ditch Company has taken possession of all the estate and property, both real and personal, of the Clear Creek Platte River Ditch & Mill Company, and refuses to recognize his right in and to any of such property. To this complaint a general demurrer was interposed by the defendant the Lower Clear Creek Ditch Company, which was sustained, and, plaintiff electing to stand by his complaint, on motion of the defendant demurring his action was dismissed. From this judgment he brings the case here on appeal.

Section 619, 1 Mills' Ann. St., provides: "Upon dissolution by expiration of its charter * * * of any corporation, * * * unless some other person * * * be appointed by some court of competent jurisdiction, the board of directors * * * of such corporation, * * * acting last before the time of their dissolution, * * * shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same; * * * to have, hold, reserve, sell, and dispose of property, real and personal, of any such corporation dissolved; to adjust and pay all the debts of the corporation dissolved; to divide the residue of the moneys and property belonging to the corporation dissolved, after payment of debts and the necessary and reasonable expenses, among the stockholders holding stock in such corporation, in proportion to the amount paid upon such stock of each stockholder." Counsel for appellees contend that this court has no jurisdiction to entertain the appeal, for the reason that neither a freehold nor franchise is involved.

Frank I. Willsea, for appellant. Hugh Butler, for appellees.

GABBERT, J. (after stating the facts). A rehearing was granted for the one purpose of reconsidering the question of the jurisdiction of this court to entertain this appeal. Counsel for appellant contends that the action relates to both a franchise and a freehold. Counsel for appellees suggests that jurisdiction might attach on error, but that it cannot on appeal. This distinction is not tenable. The Code of Civil Procedure provides

that appeals shall lie from the district to the supreme court in all cases where the judgment appealed from relates to a franchise or freehold. Section 388, Mills' Ann. Code. This provision is not affected by the act creating the court of appeals. The latter does provide, however, that no appeal or writ of error to the supreme court shall lie to review the final judgment of any inferior court, unless the judgment, or, in replevin, the value found, exceeds \$2,500, exclusive of costs; but this limitation does not apply where the matter in controversy relates to a franchise or freehold. Section 406a, Id. Measured in money, the judgment rendered in this cause is only for costs. Therefore its nature is such that, unless some question is presented which gives this court jurisdiction, it is without authority to review it, either on appeal or error (406a, supra); so that, under the act creating the court of appeals, unless a freehold or franchise is involved (no other jurisdictional question being suggested), the supreme court cannot review the judgment of the trial court in either of the ways provided by the Code, but, if there is, then it may be reviewed here, either on appeal or error. Ditch and water rights are freehold estates. *Wyatt v. Irrigation Co.*, 18 Colo. 298, 33 Pac. 144; *Daum v. Conley* (Colo. Sup.) 50 Pac. 753. The question as to when a freehold is involved, within the sense of the statute relating to appeals and writs of error, is often difficult to solve. So far as the decisions of this court are concerned, no rule has been announced which would be an infallible test in all such cases. Perhaps one cannot be formulated, because the circumstances under which the question may arise are so varied. Plaintiff is not seeking to recover an interest in a freehold. No title to an interest in the ditch and water rights mentioned is vested in him by virtue of an ownership of stock in the defunct corporation. If that legal entity was still in existence, the title to such ditch and water rights would be vested in it. *Mor. Priv. Corp.* § 233. According to the theory upon which the complaint of plaintiff is framed, and the statute upon which he relies for the relief demanded, the title to such property is vested in certain individuals. The ultimate object of the action is to wind up the affairs of the defunct corporation, dispose of its property, and have the proceeds distributed among its stockholders. This appellant seeks to accomplish through a receiver. In a measure, it may be said that for this reason the cause relates to or involves a freehold, but these terms are synonymous. *Wyatt v. Irrigation Co.*, supra; *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445.

The judgment of the trial court has not divested plaintiff of any freehold estate. It is only to the effect that he is not entitled to the relief which he seeks. True, if he is granted the relief demanded by the method sought, it will result in divesting the appel-

lees of whatever title they may have in a freehold. This, however, is immaterial; for they are not complaining. As applied to the facts in this case, it is the actual effect, and not the result of a judgment which might be rendered, which furnishes the test of whether a freehold is involved or not. In other words, if the effect of the judgment upon the party seeking a review in this court has not been to deprive him of a freehold estate, then one is not involved, within the sense of the statute regulating appeals to this court. *Harvey v. Insurance Co.*, 18 Colo. 354, 32 Pac. 935; *McClellan v. Hurd*, supra; *Rose v. Choteau*, 11 Ill. 167. For the same reasons, a franchise is not involved. We conclude, therefore, that we were in error in previously holding that this court had jurisdiction. The former opinion is withdrawn, the judgment rendered thereon vacated, and the appeal dismissed, without prejudice, for want of jurisdiction. Appeal dismissed.

(28 Colo. 102)

HEALEY et al. v. RUPP.

(Supreme Court of Colorado. Dec. 3, 1900.)

PUBLIC MINERAL LANDS—ADVERSE CLAIMS—INSTRUCTIONS—EVIDENCE.

1. Where a charge that a discovery of the mineral within the boundaries of a mining claim will validate a location has been given, at defendants' request, in an action to establish an adverse claim to a mining location, they cannot complain of a refusal to charge that a discovery at any point other than in the discovery shaft will not validate the location, though the latter charge may be correct, since the charge given is inconsistent with the charge refused.

2. In an action to establish an adverse claim to a mining location, evidence that parties who were pointed out in the court room had visited the discovery shaft on defendants' location at night, and had acted in a suspicious manner, was admissible to sustain plaintiff's claim that the shaft had been "salted," though there was no evidence that such parties were connected with defendants or interested in the controversy.

3. In an action to establish an adverse claim to a mining location, it was error to exclude defendants' evidence that an assay of a sample of ore claimed to have been taken from the dump of the discovery shaft on their location, showed precious minerals in appreciable quantities, offered to show a discovery of mineral in the shaft.

Appeal from district court, Lake county.

Action by Albert J. Rupp against John Healey and others. From a judgment for plaintiff, defendants appeal. Reversed.

The subject of this controversy is the conflict between two lode-mining claims, known as the "Canestota" and the "Last Batch." Appellee, as plaintiff, and owner of the former, brought this action in the court below in support of his adverse against the application of appellants, as defendants, for patent to the latter. From a judgment in favor of plaintiff, the defendants appeal. The Last Batch bases its location as of October 11, 1887, and the Canestota as of January 13, 1896. The discovery shaft of the Canestota

discloses no vein or mineral whatsoever. It is the point designated "Discovery" on this location. The existence of a vein in the discovery shaft of the Last Batch is controverted. For the purpose of establishing the discovery of mineral within the boundaries of the Canestota, evidence was introduced on behalf of plaintiff to the effect that in a shaft known as the "Price," sunk partially within the boundaries of that location and an adjoining one, known as the "Salina," mineral was discovered in that part within the Canestota. No location of the Canestota was made upon this alleged discovery. On behalf of defendants the following instruction was requested and refused: "The jury is instructed that a discovery of mineral, within the meaning of the statute of the state of Colorado upon that subject, requires that such discovery shall be made in the discovery shaft upon which the location is based. A discovery of mineral elsewhere than in the discovery shaft will not avail, and if you believe from the evidence in this case that there has been no discovery of mineral, as hereinbefore defined, in the discovery shaft of the Canestota location, in such case the plaintiff cannot prevail in this action." At the instance of defendants the court instructed the jury as follows: " * * *

To make a valid location of a mining claim, a citizen of the United States, or one who has declared his intention to become such, must enter upon the unoccupied, unappropriated, and unclaimed mineral domain of the United States, and discover within the limits of the claim located a vein, lode, ledge, or deposit of mineral-bearing rock in place, and substantially comply with the following requirements: First, sink a discovery shaft upon the lode to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice; second, post at the point of discovery on the surface a plain sign or notice containing the name of the lode and the name of the locator and the date of discovery. * * *

(2) The court further instructs you that if you believe from the evidence in this case that the defendants or their grantors, being citizens of the United States, or having declared their intention to become such, made a valid discovery of a vein or lode of mineral-bearing rock in place, carrying gold, silver, or lead in appreciable quantities, within the exterior bounds of the Last Batch lode-mining claim, and duly located their said claim, and filed a location certificate thereof as required by law, and if you also find that their discovery of such vein antedates any valid discovery made on the Canestota claim by plaintiffs, then the defendants have the better right, and are entitled to a verdict in their favor. (3) * * * So, in this case, if you find from the evidence that the Last Batch location in all things conformed to the law, save and except the finding of mineral within the discovery shaft, and if you further find from the evidence that such mineral was

found on the Last Batch claim, in rock in place in the general mass of the mountain, prior to the finding of mineral in rock in place in the general mass of the mountain on the Canestota lode-mining claim, then and in that event the Last Batch location is entitled to prevail over the Canestota location as to priority of discovery of mineral. And if you find from the evidence the location of the Last Batch in all respects to be prior to and superior to the Canestota location, and you further find that such location has a valid discovery of mineral within it, as herein defined, prior to the finding of mineral in the Canestota location, then and in that event the Canestota location is invalid and of no force or effect in so far as the said Canestota location conflicts with the Last Batch location." Defendants made no claim that mineral had been discovered on the Last Batch at any point other than in the discovery shaft of that claim. Counsel for defendants contend that a valid discovery of mineral cannot be shown at any place within the limits of the claim located other than the discovery shaft, unless the claim be relocated, and the second discovery made the basis of such relocation. On behalf of the plaintiff it is contended that defendants are foreclosed from having this question considered and determined, for the reason that, under instructions given at their request, the jury was directed that a discovery of mineral within the boundaries of the Last Batch at any point would render the location of that claim valid, if made prior to a discovery upon the Canestota. Defendants offered to prove that a sample of ore claimed to have been taken from the dump of the Last Batch discovery shaft showed precious minerals in appreciable quantities, which offer was refused. It appears from the record that plaintiff attempted to establish that the discovery shaft of the Last Batch had been "salted." Norman Estey, interested in a lease on the Canestota, employed one Anderson to watch this shaft. While so engaged, four persons, neither of whom is a party to this action, or in any manner interested in the subject-matter of the controversy, came to this shaft about midnight, and acted in a suspicious manner. Anderson did not see these parties do anything which would indicate that they did any salting, nor was there any evidence tending to connect them with the defendants. Counsel for the latter moved to strike out this evidence, which was refused. The court stated in its instructions that this evidence was admitted for the sole and only purpose of throwing light upon assays of samples claimed to have been taken from the Last Batch shaft,

Phelps & Penderly and Patterson, Richardson & Hawkins, for appellants. T. A. Dickson, for appellee.

GARBERT, J. (after stating the facts). The instruction requested on behalf of defendants and refused was to the effect that

the discovery of mineral at any point other than in the discovery shaft will not avail or validate a location. According to the undisputed facts, the point of discovery and the discovery shaft upon each claim are one and the same, so that the important question (independent of the disclosure of a vein in the discovery shaft) which defendants raised by the instruction refused is, must a location of a lode-mining claim be based upon a specific vein? In the opinion of the majority of the court, they are precluded from having this question considered and determined, for the reason that, under the instructions given at their request, the jury was, in effect, directed that the discovery of mineral within the boundaries of the Last Batch at any point would render the location of that claim valid, if made prior to a discovery upon the Canestota. If, in effect, the instructions given at the request of defendants are susceptible of this construction, then, unquestionably, they are precluded from having the question sought to be raised by the instruction requested and refused determined, for the obvious reason that, if instructions given at their request do not state the law correctly, they cannot complain of the refusal of the court to give an instruction which, though correct, is inconsistent with those given, or, in other words, states the law differently on a given point from those given at their instance. With the conclusion of the majority that the instructions given at the request of counsel for defendants state, in effect, that a discovery of mineral at any point within the boundaries of the Last Batch could be considered as a discovery which might validate that claim, the writer does not agree. The instructions as given, and which appear in the statement, must be read and construed as a whole. From these it appears, in the judgment of the writer, that the jury was directed, in effect, that a discovery shaft must be sunk upon the vein; that a notice must be posted at the point of discovery; that it must appear from the evidence that a valid discovery of a vein was made within the exterior boundaries of the Last Batch, as required by law (from which it must be understood that a vein was disclosed in the discovery shaft); and that, in order to entitle the defendants to recover, it must appear that the finding of mineral within the limits of their claim in the manner defined in the instructions (i. e. upon the vein which they claim to have located, and at the point designated "Discovery") must antedate the finding of mineral in the Canestota. As an additional reason why this construction should be given these instructions, it must be borne in mind that the defendants made no claim that mineral was discovered at any point on the Last Batch except in the discovery shaft. The conclusion of the majority precludes a consideration of the action of the trial court in refusing to give the

instruction requested. The fact that the Price shaft was only partially within the boundaries of the Canestota is immaterial. The simple question, so far as that location is concerned, was whether mineral had been discovered in that shaft, within the boundaries of the Canestota. If so, and it antedated a discovery of mineral in place on the Last Batch, then, under the theory upon which the cause was submitted to the jury, it validated the Canestota. As this was a theory which, in the opinion of the majority of the court, appears to have been adopted at the instance of counsel for defendants, whether or not it is correct we do not pretend to pass upon; and the conclusion that the discovery of mineral in the Price shaft might validate the Canestota location, if made before mineral was discovered on the Last Batch, is reached for the reason that the instructions of the court that it would be in harmony with those given at the instance of defendants in this respect.

In the opinion of the majority of the court, the evidence of the witness Anderson was admissible. Plaintiff claimed that the shaft of the Last Batch had been "salted," and therefore any evidence tending to establish this claim was competent. Whether or not the parties who visited this shaft at the time mentioned by Anderson did so at the instance of the defendants was a matter for the jury to determine, especially in view of the fact that Anderson pointed out at least one of them in the court room, and the defendants did not place him upon the stand for the purpose of either contradicting the witness Anderson, or showing at whose instance or for what purpose they visited the shaft. Neither did they attempt to show that these parties did not visit the premises at their request. The writer does not believe that this evidence should have been admitted. The fact that the defendants did not see fit to attempt to show that these parties did not visit the shaft, or do the acts as detailed by Anderson, at their request, or did not call the witness pointed out by him in the court room, are not matters which should be taken into consideration in determining the admissibility of this testimony. Their failure to contradict it or explain it in any way does not affect their right to object to that which is immaterial and incompetent. There was no evidence whatever tending to show that these parties who visited the Last Batch shaft did so at the instance of the defendants, or were in any manner connected with them, or interested in the subject-matter of the controversy. In the absence of such testimony the statement of Anderson tended to cast suspicion upon the defendants, that they were guilty of salting the shaft of the Last Batch, by the suspicious action of parties with whom they had no connection, and who, so far as disclosed by the record, may have visited the property at the instance of the plaintiffs.

This testimony, in the opinion of the writer, should have been excluded.

The evidence regarding the assay of a sample of ore claimed to have been taken from the dump of the Last Batch should have been admitted. Whether or not, as a matter of fact, such sample was originally taken from the shaft, was a proper matter for argument before the jury, and for it to consider in determining what weight should be given to such evidence. For the error in excluding this evidence, the judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

(28 Colo. 161)

PEOPLE ex rel. LONG et al. v. DISTRICT COURT OF EIGHTH JUDICIAL DIST. et al.

(Supreme Court of Colorado. Dec. 17, 1900.)

PROHIBITION — NEW TRIAL AS MATTER OF RIGHT — REPEALING STATUTE — CONSTITUTIONALITY — VESTED RIGHT — JURISDICTION OF COURT — UNAUTHORIZED TRIAL OF ACTION — RESTRAINT — PROPER REMEDY — WRIT OF PROHIBITION.

1. Code Civ. Proc. 1887, § 272, provides that the party against whom a judgment was rendered in an action to recover possession of real property might, at any time before the first day of the next succeeding term, pay all the costs, and require the court to vacate the judgment and grant a new trial as a matter of right. Sess. Laws 1899, p. 161, repealed section 272, but excluded from its operation actions pending in courts of record in which one trial was had before the repealing act took effect. Defendant began an action prior to the repealing act, but it was not tried, nor an application made for a new trial under section 272, until after the repealing act had gone into effect. Held, that the repealing act was not unconstitutional, as destroying defendant's vested right to a new trial, since he still retained the right to one trial, and could have no vested right to another as a matter of course.

2. Where the district court, after overruling defendant's motion for a new trial as of course, and after the statute granting the losing party a new trial as a matter of course had been repealed, set aside the judgment, and granted defendant a new trial, under the statute, the supreme court will grant a writ of prohibition to restrain the trial of the action, since the district court was without jurisdiction, and a judgment in the action would be a nullity.

Application by the people, on the relation of Frederick C. Long and another, for a writ of prohibition to restrain the district court of the Eighth judicial district from entering on the trial of an action. Writ granted.

This is an application for a writ of prohibition against the district court of Boulder county to restrain it from entering upon the trial of an action which, as it is alleged, the court has no jurisdiction to try. The complaint was filed in the district court on the 19th of November, 1898. The action was in support of an adverse claim protesting against an application for a patent to a mining claim. It was tried at the April term of the district court of Boulder county before a jury, which, on the 7th of that

month, returned a verdict in favor of defendants there (petitioners here). Afterwards, and on the 14th of April, 1900, plaintiffs in the district court (respondents here) filed their motion for a new trial for cause, which, on the 16th of June following, was overruled, and judgment entered awarding defendants possession of the land in dispute. On the 17th day of August, plaintiffs, conceiving that they were entitled to a new trial, under the statute, as a matter of right, upon due application therefor and the payment of costs, filed in the district court a motion to vacate the judgment, and, having paid the costs, the court, against the objection of defendants below (petitioners here) that it had no power so to do, set aside the judgment, and placed the cause upon the trial docket for a new trial. Section 272 of the Code of Civil Procedure of 1887, in force at the time the action was begun, made it lawful for the party against whom a judgment was rendered in an action for the recovery of the possession of real property at any time before the first day of the next succeeding term to pay all costs recovered thereby, and upon his application the court was required to vacate the judgment and grant a new trial as of right, without showing cause therefor. This provision was repealed by an act of the 12th general assembly (Sess. Laws 1899, p. 161), but section 3 of the repealing act excluded from its operation pending actions in courts of record in which one trial was had before the act took effect. The act took effect June 22, 1899. The only trial of this action—the one resulting in the judgment which was set aside by the district court on the application of the plaintiffs—occurred nearly a year after the repealing act took effect.

Sylvester S. Downer, for petitioners. E. I. Stirman and Edwin H. Park, for respondents.

CAMPBELL, C. J. (after stating the facts). The petitioners here contend that, although the district court originally had jurisdiction of the subject-matter of the action, its jurisdiction ceased, so far as the question here is concerned, when it overruled plaintiffs' motion for a new trial for cause, and rendered judgment for defendants; and its ruling on the subsequent motion, which it proposes to make effective by entering upon another trial, being wholly beyond the realm of its authority, this writ of prohibition should go. Respondents maintain that the district court had jurisdiction of the subject-matter, which still continues, and which includes power to entertain the motion attacked, and this jurisdiction involves the power to decide wrong as well as right. If there was any error at all, it is insisted that it was, like any other error occurring in the trial of a cause over which the court had jurisdiction, reviewable by writ of error or appeal. They further contend that, since their action

was begun while section 272 of the Code of 1887 was in force, they had a vested right, as of course, upon the prescribed conditions, to the remedy of a second trial when judgment was rendered against them, which it was beyond the power of the general assembly to devert. We are clearly of opinion that this repealing statute is constitutional as to pending actions, since a sufficient and adequate remedy of one trial was left. The parties to an action for the recovery of the possession of real property had no vested right under section 272 to the mere remedy of more than one trial as of course. It was entirely competent for the general assembly, even after an action was begun, to take away the unusual remedy given by the former law. The case is brought within the provisions of the statute; and, as it is not within the exception, the right to a second trial as of course was gone the moment the act took effect. *Cooley, Const. Lim.* (6th Ed.) 442 et seq.; *Templeton v. Horne*, 82 Ill. 491; *Coffin v. Rich*, 45 Me. 507; *Brown v. Challis*, 23 Colo. 145, 46 Pac. 679. The fact that the district court originally had jurisdiction of the subject-matter is not conclusive that it had jurisdiction to make whatever order therein it might see fit. When the motion for a new trial for cause was overruled, and judgment entered, the court lost jurisdiction of the action, with the exception that during the same term it might have modified or altered its judgment, and except as to other recognized matters by which the present discussion is not affected. When the court assumed to grant plaintiffs' application for a new trial as a matter of right, it had no jurisdiction whatever to do so, for there is no statute, and no principle of the common law, that confers such right. There is thus presented a clear case in which the court having original jurisdiction of the subject-matter of an action entered a particular order therein entirely beyond its authority. Not every case, however, where an inferior court acts without jurisdiction, invokes at the hands of this court the extraordinary remedy of prohibition. In *People v. District Court of Larimer Co.*, 11 Colo. 574, 19 Pac. 541, we declined to grant a writ of prohibition commanding an inferior court to desist from trial of an action upon the ground that it had no jurisdiction of the subject-matter. If the present application were, in its essential facts, similar to, or in principle the same as, that, the same order would be entered here. In the opinion in that case it was said that extraordinary cases might arise, where, in the exercise of a sound discretion, the writ of prohibition would be allowed for the purpose of considering rulings like the one then before the court. We think the present application is such a case. It is perfectly clear, as already said, that the district court had no power to set aside the judgment and grant a new trial as a matter of right, and that such

lack of jurisdiction is just as manifest now as it could be made to appear on a review of a final judgment on the merits. The parties to the action should not be put to the cost and inconvenience of going through the farce of a trial which could do neither party any good. If a judgment should again be rendered in favor of defendants, they would be in the position of having a void judgment, with the only valid judgment, theretofore rendered in their favor, that could be rendered in the action, set aside; and, if plaintiffs succeeded, their judgment would be of no possible benefit to them, but could be set aside by a reviewing court. As will be seen from the opinion reported in *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535, when the case referred to in 11 Colo., supra, came before this court upon appeal from the final judgment, and again as reported in *Handy Ditch Co. v. South Side Ditch Co.*, 26 Colo. 333, 58 Pac. 30, the jurisdictional question raised involved the consideration of some exceedingly important and difficult questions; and it is doubtful if, when the application for the writ was filed, the facts said to show lack of jurisdiction sufficiently appeared. Indeed, a careful examination of the opinions cited discloses that only as the result of a trial of the merits could these facts be satisfactorily shown. In addition to this, the plea of the want of jurisdiction was closely connected with a plea of *res adjudicata*, and this court might properly, as it did when the application for prohibition was presented, decline to pass upon the question at the inception of the litigation, but require the parties to proceed with the trial where all the facts necessary for the court to know could be fully exhibited. Other differences might be pointed out, but enough has been said to differentiate the two applications. The remedy by appeal or error is not plain, speedy, and adequate in this cause. While we jealously guard our original jurisdiction in applications of this sort, and are slow to comply with such requests, still, considering the complications that might arise therefrom, and the hardships that thereby would be imposed upon the petitioners, it would seem useless to require them to conduct an expensive litigation which may safely, and for the benefit of all parties, stop now. The litigants should be saved unnecessary expense; the time of the court should be devoted to the disposition of matters within its powers. The writ is a preventive, rather than a corrective, remedy, and issues usually only to prevent the commission of a future act, rather than to undo an act already performed. But where, as here, an unauthorized act of an inferior tribunal has been performed, and something remains to be done to give full effect to that judgment of the court in a matter beyond its jurisdiction, the writ may be granted to prevent such further action, and also to undo what has already been

done. High, Extr. Rem. (3d Ed.) § 766. The permanent writ of prohibition will, therefore, go as asked, and the district court is directed to set aside its order heretofore entered vacating the judgment and granting a new trial, and to enter a new order reinstating the former judgment of May 7, 1900, the same to be effective as of that date. The costs of this proceeding will be taxed to the respondents. Writ allowed.

(28 Colo. 194)

STUART v. NANCE, State Treasurer.

(Supreme Court of Colorado. Dec. 22, 1900.)

MANDAMUS TO STATE TREASURER—PUBLIC OFFICES—COMPENSATION—PRIORITY OF WARRANTS—APPEAL.

1. In proceedings by mandamus to compel the state treasurer to pay a warrant, the alternative writ must allege all the facts making it the treasurer's duty to pay it; and, if such facts are put in issue, the burden is on the petitioner to establish them, and not on the treasurer to negative their existence.

2. Where, in mandamus to compel the state treasurer to pay a state warrant, there is an issue whether there were enough prior registered warrants of the same grade as that in suit to consume all the revenues in the treasury applicable to the payment of such warrants, and no specific finding thereon, the cause will be remanded for findings of fact on such issue.

3. Appropriations, whether for salaries of constitutional and statutory officers, or for employes of the executive, legislative, or judicial departments of the state government, or for the ordinary incidental expenses thereof, are constituent elements making up expenses of the state government; and hence no preference attaches to a warrant drawn for a judge's salary over warrants drawn for salaries of such employes.

4. All preferred appropriations for a given fiscal year, whether continuing or made at the legislative session for such year, being of the same relative rank, an appropriation for a judge's salary does not give it a priority over another of the same rank, which is subsequently made in the general appropriation bill at a biennial session of the general assembly.

5. In mandamus to compel a state treasurer to pay a state warrant, he cannot be held responsible for the derelictions of a former treasurer or auditor, as he is accountable only for the fund transferred to him on his induction into office.

6. Under 1 Mills' Ann. St. § 1802 (Gen. St. 1883, § 1358), providing that every fund with the treasurer for disbursement shall be paid out in the order in which the warrants drawn thereon and payable out of the same are presented for payment, where there is a shortage of the public revenues a warrant drawn in payment of a preferred claim, though registered subsequently to the registration of a warrant for a deferred claim, notwithstanding its later register, must be paid before the earlier registered deferred claim.

Appeal from court of appeals.

Mandamus by Thomas B. Stuart against Albert Nance, state treasurer, for whom was substituted George W. Kephart, state treasurer, to compel the payment of a state warrant. From a judgment of the court of appeals (54 Pac. 867) reversing a judgment for petitioner, he appeals. Affirmed.

Tolles & Cobby, for appellant. B. L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for appellee.

CAMPBELL, C. J. This mandamus proceeding, begun in the district court of Arapahoe county, was to compel the state treasurer to pay a state warrant. The judgment was in favor of petitioner, which, on an appeal to the court of appeals by the state treasurer, was reversed, and the cause remanded for a new trial. *Nance v. Stuart*, 7 Colo. App. 510, 44 Pac. 779. Upon a second trial judgment was again rendered against the public officer, and upon his second appeal in the court of appeals the judgment was also reversed. *Nance v. Stuart*, 12 Colo. App. 125, 54 Pac. 867. The petitioner then appealed to this court, having properly raised a constitutional question. While the treasurer is content with the judgment, his counsel criticises certain statements of fact made, and some of the legal propositions laid down, by the learned writer of the opinions, upon which, in part at least, the judgment was based; while petitioner, dissatisfied with the conclusion there reached, maintains the correctness of the legal propositions attacked by the attorney general. In the briefs filed in this court only one question is much discussed, and that is the only one which, in strictness, we are required to determine. But having jurisdiction, because of the constitutional question, we are permitted, under our practice, to go into all others presented by the record. And in view of prior decisions of this court, rendered since the ruling upon the first appeal was made, and in which was announced a doctrine different from that then declared by the court of appeals, we deem it a wise precautionary measure again to enunciate the principles by which procedure in trials of this character should be governed, and the substantive law applicable to the duty of the state auditor and treasurer in the issuing and payment of state warrants in cases similar to the one at bar.

1. The court of appeals, as will be observed by a reading of its two opinions, held "that where mandamus proceedings were instituted against the state treasurer to compel the payment of a warrant which was a preferred claim under an actual or a continuing appropriation, and the petition exhibited the fact that there was money in the treasury unexpended and not applicable to the payment of warrants for which calls had been made, if the treasurer refused payment because other warrants of the same class had been issued and were duly registered in his office, and therefore entitled under the statute to priority of payment, it was incumbent on him to plead a registry which would exhaust the money in the treasury." Doubt, however, was expressed as to the soundness of the rule promulgated, and it was said that courts might well differ in regard to it. The reasons given for it are concisely stated in

the opinion. Without restating our reasons for arriving at a different conclusion, we content ourselves by referring to our former decisions, in which we said that, in a proceeding by mandamus to compel the state treasurer to pay a warrant, the alternative writ must clearly allege all the facts which make it the duty of the treasurer to pay the same, and when such facts are put in issue by an answer the burden of proof is on the petitioner affirmatively to establish them, and not on the treasurer to negative their existence. In principle, it is immaterial whether it be a preferred or a nonpreferred warrant, drawn upon a fund created by a continuing or biennial appropriation. *Nance v. People*, 25 Colo. 252, 54 Pac. 631; *Kephart v. Same* (Colo. Sup.) 62 Pac. 946.

2. After the judgment upon the first appeal was reversed and the cause remanded to the district court for a new trial, the attorney general, though insisting that the necessity of stating in the alternative writ, and, if denied, the burden of proving, all the facts necessary to show the duty of the treasurer to pay, lay with petitioner, nevertheless amended the return to correspond to the directions of the court of appeals, and by answer set forth the fact that of the revenues of the year 1889, against which the warrant in question was drawn, there were \$80,000 in the state treasury, but before it was issued other warrants of the same rank had been issued and presented to the treasurer, countersigned and registered by him, more than sufficient to exhaust the entire fund, and therefore, under the statute requiring him to pay warrants in their order of presentation, this one should not be paid. There was no replication to this answer, and it stood admitted. But, because the court of appeals had ruled that the burden of showing these facts with reference to the prior warrants was upon the state treasurer, evidence was introduced by him in support of his answer. No issue was made touching the validity of the warrant. It is conceded that it was for the salary of one of the district judges, and, as such, is part of the necessary expenses of one of the three great departments of government, and, under previous decisions of this court, hereinafter referred to, constitutes a preferred claim upon the public revenues. Wholly without reference to the evidence, the judgment rendered upon the last trial, because of insufficiency of the petition, could not stand, were it not that the defects of that pleading, under the doctrine of express alder, are made good by the answer. It was set aside, however, by the court of appeals, for two reasons: First, because the trial court was wrong in its interpretation of the law; and, second, because no findings of fact were made by that court to which the law, as declared by the court of appeals, could be applied. It was also stated, as the opinion will disclose, that that tribunal declined to organize itself into a *nisi prius* court to make

findings of fact, particularly as the evidence in the record was so indefinite and uncertain that it was impossible to determine whether enough legal warrants of the same grade had been previously registered by the treasurer to consume the public revenues of 1889 then in the treasury, and applicable to the payment of legal warrants issued for the fiscal year. We cannot agree with the court of appeals as to some of the particulars mentioned in that opinion. No question was raised as to the validity of the warrant sued upon, nor was there any issue as to the validity of the 772 prior registered warrants described in the answer. There was no necessity, therefore, for determining whether or not any of them were valid obligations of the state. It must be presumed that the state auditor, whose duty it was to investigate and determine the validity of the claims for which these prior registered warrants were issued, did his duty; and his determination, evidenced by the issuing of the warrants, is, under the issues as they now are, conclusive upon the courts in this proceeding. Yet we have reached the same conclusion to which the court of appeals came, but for a different reason. We think the case should be sent back for a new trial, and the court below directed to make specific findings of fact upon the question at issue under the present pleadings, viz. whether or not there were enough prior registered warrants of the same grade as that in suit to consume all the revenues in the treasury applicable to the payment of the warrants of that year, and upon such other issues of fact, if any, as may be raised by any amendments to the pleadings. One reason for the omission in this record in this respect, doubtless, is that the trial court erroneously, as we shall presently see, held that claims of legislative employes for their salaries, and for ordinary expenses of the three departments, (aside from salaries of constitutional and statutory officers) for which many of the prior registered warrants were issued, were inferior in grade to the one in suit. Another reason is that upon the second trial the parties were endeavoring to comply with the directions of the court of appeals contained in its opinion upon the first review. Both parties might well have supposed that the case was ultimately to be determined in accordance with those directions, and it is plain that neither party tried the case in accordance with the true theory. There was not, therefore, such a fair and full trial upon the issue of facts, under proper legal rules, as would enable an appellate court satisfactorily to make findings.

3. Without noticing in detail, or in the order followed by counsel, their specific arguments, we proceed to announce the substantive law governing the questions in this case, some of which were raised at the former trials, and others will become material if another trial is had.

It is now the firmly-established doctrine in

this jurisdiction, first enunciated in *Re Appropriations* by General Assembly, 13 Colo. 316, 22 Pac. 464, that the necessary appropriations to defray the expenses of the executive, legislative, and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over any other appropriations from the public revenues of the state, without reference to the date of the passage of the acts of the general assembly by which they are made. Approving these principles are the subsequent cases of *Henderson v. People*, 17 Colo. 587, 31 Pac. 334; *Institute v. Henderson*, 18 Colo. 68, 31 Pac. 714, 18 L. R. A. 398; *Goodykoontz v. People*, 20 Colo. 374, 38 Pac. 473. In *Parks v. Commissioners*, 22 Colo. 86, 43 Pac. 542, in a comprehensive opinion by Chief Justice Hayt, the doctrine of the principal case was again approved, and its principles applied to the new question then before the court. Emphasis was laid on the previous announcements to the effect that, in the event of deficiency of revenue to meet appropriations, the necessary expenses of the executive, legislative, and judicial departments of the state, and interest on the public debt, are entitled to preference. The principal question, however, in that case was what officers belong to the executive department, and as such have preferred claims against the state. The conclusion was that: "Every officer of this state who holds his position by election or appointment, and not by contract, and whose duties are defined by statute, and are in their nature continuous, and relate to the administration of the affairs of the state government, and whose salary is paid out of the public funds, is a public officer of either the legislative, executive, or judicial department of the government, and may, in the discretion of the legislature, properly have his salary included in the general appropriation bill, and have the appropriation therefor take rank accordingly; and as the priority attaches, not to the form of the act making the appropriation, but to the office, the priority of a particular appropriation will not be jeopardized if made by a separate act. Moreover, as the officers established by the constitution and those created by authorized legislative authority are usually required to keep offices, records, papers, etc., it is evident that expenses for these and like items may also be provided for as a part of the ordinary expenses of the legislative, executive, and judicial departments of the government." The court further said: "It has also been determined that, where appropriations are made in excess of the revenue, priority of date of the taking effect of the acts making such appropriations must govern after preferred appropriations are discharged." It will be observed that the only constitutional classification of claims, as hitherto expressly decided by this court, is that of preferred claims and nonpreferred claims. It is the position of petitioner here that under the principles of these cases, taking warrants

as evidencing claims, the implied holding was that there are three general classes: (1) All warrants issued for salaries of those filling constitutional and statutory offices under the three great departments of government, and for which there are continuing appropriations; (2) warrants issued in payment of the expenses of said offices; (3) warrants drawn for salaries and expenses pertaining to educational, penal, and reformatory institutions. A distinction is also drawn between officers and employes, the latter including those who hold their positions by contract. While it is conceded that warrants for salaries or wages of employes of the three departments, and for all their contingent and incidental expenses, constitute or represent preferred claims, which must be paid in advance of salaries and expenses included within the third class, yet it is said that they are inferior to warrants for preferred claims of the first class, and therefore fall under the second class, since they properly are a part of the expenses of first-class offices. We may, by borrowing the language of the stock exchange, designate the contention by classifying claims, and warrants issued for them, as first preferred, second preferred, and common.

It is the contention of the attorney general that, so far as the question of priority is concerned, there is no distinction between warrants issued for salaries of constitutional and statutory officers, for salaries of employes of the three great departments of government, and the ordinary, incidental, and contingent expenses of these departments, whether the appropriations are continual or biennial. There may be, for some purposes, a scientific basis for this subdivision into two classes of preferred claims, as well as for the distinction between officers and employes; but, so far as any preference in time or order of payment from the public revenues is concerned, it has no foundation under the constitution or laws of this state, or the decisions of this court. The question before the court in *Parks v. Commissioners*, supra, called for the determination there made, and it was there repeated that expenses of the three great departments of the state might be met by the general appropriation bill. This necessarily implies that, as to liens or preferences on public revenue, there is no distinction in rank between, or difference in the relative importance of, the objects for which appropriations therein may be made. The state could not be maintained, and its three great departments could not effectively do their proper work, without assistance of employes, and without stationery, rooms in which to work, and the various facilities which the performance of their duties demands. It is no convincing answer to the proposition under consideration that because the governor is the executive head of the state, and the judges of the supreme court are members of the highest judicial tribunal, they are for that reason superior in rank, dignity, and importance to

the clerks employed to do clerical work for the members of the general assembly during the session of that body. That may be true in one sense, but, in contemplation of law, salaries of such employes are entitled to the same preference as salaries of public officers. Whether the appropriation be for salaries of constitutional and statutory officers, or for employes of the three great departments, or for ordinary contingent and incidental expenses thereof, each and all are constituent elements that go to make up the expenses of the state government, proper, and no preference of one over the other attaches to warrants drawn therefor.

But it is said, since the appropriation for the salary of the district judges is a continuing appropriation, made by the constitution itself years before the biennial appropriation was passed to defray the ordinary expenses of the three departments for the year 1889, under the established doctrine that, in case of shortage of revenues, appropriations take effect in the order of the passage of the bills making them, this warrant takes precedence of all warrants drawn against the fund created by the appropriation made in the general appropriation bill of that year. This is a misapprehension, for, as will be seen from the language above quoted, this priority based on the date of the taking effect of the respective acts does not apply to preferred appropriations; and we may add it applies to subsequent or deferred appropriations only in case the general assembly has not otherwise legally provided. This, it is said, has been done since the foregoing decisions were rendered, but the act is not retrospective, as counsel agree. Sess. Laws 1897, p. 21. All preferred appropriations for a given fiscal year, whether continuing or those made at the session of the legislature for that particular year, are of the same relative rank and importance. The fact that the appropriation for one such object is a continuing one, either by virtue of the constitution or statute law, does not give it priority over another of the same rank, but which is subsequently made in the general appropriation bill at a biennial session of the general assembly. Counsel seem not to distinguish—at least, are not disposed to admit of a distinction—between the idea of a continuing appropriation and a preferred claim; apparently supposing that a continuing appropriation is necessarily a preferred claim, and a noncontinuing or biennial appropriation, as compared with a continuing one, is necessarily a deferred claim. An illustration will serve to show the fallacy of this motion. This court has held that an appropriation for educational institutions is, in case of a shortage of revenue, postponed to an appropriation for the salaries of the officers of the three departments of government. There was, years ago, a special levy of a fractional mill tax made by statute to support the state university, and in the act

providing for the levy there was also an appropriation of the revenues to be realized therefrom, which have been judicially declared continuing appropriations. Appropriations for the salaries of a number of the officers of the three departments are made at each session of the general assembly, and not by continuing appropriations; but a subsequent biennial appropriation for these salaries, in case of a shortage of revenues, would take precedence over a prior continuing appropriation for the state university. So it will be seen that there may be a clear distinction between a continuing appropriation and a preferred claim against the revenues of the state.

It is said, moreover, by petitioner that the inability of the treasurer to pay this warrant arises from the fact that a large number of illegal warrants were issued by the state auditor during the year 1889, and registered ahead of his legal warrant, presented to the treasurer, and by him paid, and thus the fund out of which the warrant in suit should have been paid was improperly disbursed. It is further said that it is the duty of the auditor to issue different series of warrants,—a separate series, at least, for preferred and nonpreferred claims,—and to consecutively number each. And it is further contended that it is the duty of the state treasurer to divide the public revenues into separate funds or accounts, to correspond to the separate series of warrants. We are further told that the treasurer and auditor should have made a calculation as to the probable revenues for the year 1889, and ascertained at the end of the session of the general assembly held that year the total appropriations coming within the first or preferred class, and thereupon the treasurer ought to have set aside, in a separate fund, enough money to pay all preferred claims. So far neither of these questions is in this case, in the sense that they affect the present judgment; for, whatever may have been the dereliction of duty of former state auditors and treasurers, the present state treasurer, who has been substituted as respondent, is not responsible therefor. He is accountable only for the fund transferred to him on his induction into office. We consider it important, however, to give expression to our views concerning the statute (1 Mills' Ann. St. § 1802; Gen. St. 1883, § 1358) which requires the treasurer to pay warrants in the order in which they are presented for payment. In *Kephart v. People*, 62 Pac. 946, we held, by implication, at least, that the treasurer must observe this statutory direction. That method should be limited to cases where warrants are of the same rank. There was no intention of holding that, in case of a shortage of public revenues, a warrant drawn for a nonpreferred claim, which has been presented and registered by the treasurer, is to be paid in advance of a warrant for a preferred claim,

though subsequently drawn and registered. This, if sanctioned, would subordinate the constitution, as construed by this court, to the statute, and permit these executive officers, by arbitrary action in registering warrants, to nullify the decisions of the judicial department. The statute itself contemplates a division of the public revenues into different funds, for it says: "Every fund in the hands of the state treasurer for disbursement shall be paid out in the order in which the warrants drawn thereon and payable out of the same are presented for payment." 1 Mills' Ann. St. § 1802 (Gen. St. 1883, § 1358). Compliance with this direction involves something more than a mere question of bookkeeping. In case of a shortage of the public revenues a warrant drawn in payment of a preferred claim, though presented for payment and registered subsequent to the presentation and registration of a warrant for a nonpreferred or deferred claim, must, notwithstanding its later registry, be paid before payment of the earlier registered deferred claim. The auditor must take such steps and prescribe such regulations and safeguards in the issuing of a warrant, and the treasurer must do likewise as to the payment, as will, in case of such deficiency, secure this result. It is scarcely necessary to remark that the rank and importance of claims, and a division into preferred and nonpreferred, become important only in case of a shortage of revenue. When there are ample funds to pay appropriations of all classes, these distinctions are practically of no consequence.

There was another question raised in argument, that may sometime have to be decided. Suppose the revenues of any fiscal year are insufficient to pay the first-class or preferred appropriations; should warrants drawn upon the fund set apart for their payment be paid in full in the order of their presentation, up to the full limit of the revenues applicable thereto, even though the payment of a portion of those registered will consume the entire fund, or should the amount of revenue be equitably apportioned, and the warrants paid pro rata? That situation may sometime confront us, but we must not assume that such a state of affairs now exists. We decline, therefore, to consider it until it becomes necessary.

It was strongly urged at the oral argument that if the court should determine that the wages of janitors of the capitol and the compensation of the clerks and other employees of the general assembly, and the expenses for carpets and for cleaning the same, and renovating the rooms in which the constitutional officers do their work, and the expenses for stationery and pens and ink, are all of the same rank and dignity as the salaries of the governor and of the officers of the executive and judicial departments, then we subordinate these departments to the legislative, and put it within the power of the latter,

either by withholding appropriations for them, or by increasing the number and salaries of its own employes and enlarging its ordinary expenses, to consume for the legislative department alone all of the public revenues of the state. This may be a persuasive argument to address to the members of a constitutional convention, to dissuade them from intrusting to the general assembly plenary power of this nature. But it is no argument against the existence of the power under the constitution as it is written. A similar argument could be made against the powers which unquestionably lie with the executive and judicial departments. The governor of the state may call out the militia to execute the laws, suppress insurrection, or to repel invasion. He might be tempted to use the militia to enforce some personal end of his own, not contemplated by the constitution, or to subvert the constitution itself. But this is no argument against the existence of the power which he undoubtedly has to call out the militia for a proper purpose, and we are not to presume that the governor would violate his duty. So, too, the supreme court of this state may pass upon the constitutionality of every act passed by the general assembly. Merely because it has this power is no reason for supposing that it would abuse it, and declare every valid act of the general assembly invalid, or hold constitutional every act clearly inhibited by the organic act. Neither are we justified in supposing that the general assembly will so far forget its duty as to neglect to make provision for the support of the co-ordinate branches of government, or that it will arbitrarily and recklessly so increase the expenses of the legislative department as that there will be no revenue left to defray the expenses of the others. When an attempt of that kind is made, there will be time enough for the courts to pass upon its action. The judgment of the court of appeals is affirmed, and the cause remanded, with instructions to that tribunal to reverse the judgment of the district court and remand the case for a new trial, with further directions to the trial court to permit the parties to amend their pleadings as they may be advised, to correspond to the rules of procedure announced in this opinion; and, if there be another trial, let it be in accordance with the law as declared in this opinion. Affirmed.

(15 Colo. App. 291)

CATLIN, Superintendent, v. CHRISTIE et al.:
(Court of Appeals of Colorado. June 11, 1900.)
COUNTY SUPERINTENDENT OF SCHOOLS—CAPACITY TO SUE—ACTION TO RESTRAIN VIOLATION OF SCHOOL LAW—COMPLAINT—SUFFICIENCY—CONCLUSION OF LAW.

1. Mills' Ann. St. § 3984, imposes on county superintendents the duty of general supervision of the school system within their respective counties, and makes it their duty to

see that all provisions of the general school law are observed by teachers and school officers. *Held*, that a county superintendent of schools has the legal capacity to maintain an action to restrain a board of directors from employing a person not possessed of a certificate to teach, since public officers have implied authority to sue commensurate with their public trusts and duties, if not expressly prohibited by statute from doing so.

2. Mills' Ann. St. § 4024, provides that no district board shall employ any person to teach in the public schools of the state unless such person shall have a license to teach, issued from the proper district, county, or state authority, and in full force at the date of employment. *Held*, that a complaint which alleged that a board of directors had employed a person holding a valid certificate at an exorbitant salary, with the understanding that such person was to employ at her own expense another person as assistant, who did not possess a valid certificate in force at the time of such employment, and that such arrangement was made for the purpose of evading and disregarding the law requiring a certificate, stated facts sufficient to constitute a cause of action to restrain the attempted violation of the statute.

3. Mills' Ann. St. § 4024, provides that no person shall be employed to teach in the public schools who does not hold a valid certificate in force at the time of such employment. *Held*, that an allegation, in a complaint to restrain defendants from employing J. to teach in the public schools, "that J. did not possess a certificate to teach in force during any of the times mentioned in the complaint," was not objectionable as the statement of a legal conclusion, since it constituted an averment of an essential fact in the express language of the statute.

Error to district court, Montrose county.

Action by Alice M. Catlin, county superintendent of schools, against C. C. Christie and others, to restrain defendants from violating the school law. From an order sustaining a demurrer to the complaint, plaintiff brings error. Reversed.

F. D. Catlin, for plaintiff in error. John Gray and S. S. Sherman, for defendants in error.

WILSON, J. This suit was brought by plaintiff, as county superintendent of schools of Montrose county, to restrain an alleged attempted violation of the school law by the directors of a school district in that county. The character of the violation charged can best be seen by the following extract from the complaint: "That Miss Jennie Jones is a teacher of Montrose county, and has a regular certificate as such from the county superintendent; but Miss Lella Jones, her sister, has no teacher's certificate in force which would entitle her to teach in said county, or would permit the directors of any district of said county to employ her as a teacher. That Miss Lella Jones has not had any certificate in force during any of the times mentioned in this complaint, but, disregarding the law in this respect, said defendants, the directors of said district No. 15, in September, 1898, employed Miss Jennie Jones and Miss Lella Jones to teach the schools of said district under the subterfuge and deceit of employing defendant Miss Jennie Jones at a salary of

¹ Rehearing denied December 24, 1900.

\$125 per month to teach the schools of said district, with a distinct understanding and agreement that she (Jennie Jones) was to employ her sister, Leila Jones, to teach one of the schools; all with the knowledge of the fact that Miss Leila Jones had no teacher's certificate, and with the intention and for the purpose of evading and disregarding the law. That Miss Jennie Jones' services were not worth more than \$75 per month, and it was not intended to pay her more than \$75 per month for her services; but the other \$50 was intended for Miss Leila Jones. * * * That said two schools in said district are necessarily different and separate schools and separate grades, and are and were intended to be taught in different rooms; and it is a physical impossibility for said Jennie Jones to teach both said schools, and it was never intended she would or could. That said directors defendants have by said unlawful acts attempted to, and, unless restrained by order of this court, will, disburse the funds of said district unlawfully and fraudulently, and will delegate the employing of teachers to an agent, and pay out the funds of said district to compensate a teacher they have not hired and could not hire, and who could not teach in the county because she is not qualified by having a certificate to teach." The suit went off on demurrer to the complaint, and two questions are presented to us for determination: (1) Did the plaintiff have the legal capacity to sue? (2) Did the complaint state facts sufficient to constitute a cause of action?

The constitution contemplates the adoption and maintenance of a general system of public schools, and the general policy of the legislation in this state is and has been, under such constitutional provision, to provide a complete and harmonious system which shall effectuate to the greatest extent the beneficial objects desired. Various officers are provided for, each charged by statute with the performance of some special duty, and, like other public officers, invested by the state, whose instruments and agents they are, either directly or impliedly, with the powers necessary to discharge the duties imposed upon them. Section 6, art. 9, of the constitution provides for the election in each county of a county superintendent of schools, and that his duties shall be prescribed by law. In furtherance of this, the legislature has imposed upon county superintendents the duty of general supervision of the school system within their respective counties, and, among other things, has specially charged them with the duty "to see that all the provisions of this act [the general school law] are observed and followed by teachers and school officers." Section 3984, Mills' Ann. St. The statute is silent as to what powers, if any, they shall have in "seeing" that the school laws are observed and followed in their counties. It does not specifically give them any power to enforce obedience to the laws, or to restrain

their violation; but, if they have no such power, the requirement is idle and nugatory. It is never to be presumed that the legislature intends any such character of an act. It is, therefore, well settled by the overwhelming weight of authority that all public officers, though not expressly authorized by statute, if not expressly prohibited, have a capacity to sue commensurate with their public trusts and duties. *Treasurer v. Bunbury*, 45 Mich. 84, 7 N. W. 704; *School Dist. v. Arnold*, 21 Wis. 666; *Supervisor v. Stimson*, 4 Hill, 136; *Haynes v. Butler*, 30 Ark. 70; *Mechem, Pub. Off.* § 893. The last authority cited thus lays down the rule: "Where the law has not created prohibitions, public officers have an implied authority to bring and maintain all suits, as incident to their office, which the proper and faithful discharge of the duties of the office require." There is no prohibition in our statute against county superintendents maintaining suits which are required or which may be necessary to fulfill the duties of their office; and hence it follows that the plaintiff in this instance had the legal capacity to sue if the acts charged in the complaint constituted a violation of law. The law further contemplates that the schools shall be taught only by persons of proper and sufficient moral and educational qualifications. For this purpose it provides for the examination of those desiring to teach, and for the issuance to those qualified of certificates to that effect, which shall be licenses to teach. Section 3979, Mills' Ann. St. Further, to more effectually accomplish the purpose desired, the statute expressly provides that "no district board shall employ any person to teach in any of the public schools of the state, unless such person shall have a license to teach, issued from the proper district, county or state authority, and in full force at the date of employment." Section 4024, *Id.* Here is a direct and positive prohibition of the employment as teachers of any person except those having the proper certificates. It has been repeatedly held that contracts made in violation of this statutory provision, which exists generally in the states having a public-school system, are wholly void. Any attempted act of the school board in contravention of this section is absolutely null, and of no effect. It is a well-known principle requiring no discussion that what a public officer is prohibited by law from doing directly he cannot do indirectly. The complaint clearly alleges an attempted violation of this statutory provision, and hence it states a cause of action. The contention of defendants that the allegation in the complaint to the effect that Leila Jones did not have any certificate "in force during any of the times mentioned in the complaint" is no allegation at all, but a legal conclusion, is not tenable. It is a proper allegation, in the express language of the statute, of an essential fact. The prohibition, as will be seen from the part of the

statute which we have quoted, is against the employment as a teacher of one who, not only has no license to teach, but none in full force at the date of attempted employment. These latter words were necessary allegations in a complaint in order to bring the alleged violation within the terms of the statute. This provision of the statute is a wise one, and should be upheld. School directors should not be permitted to violate it, either directly or by evasion. This suit is not, as contended, an attempted interference with the discretionary power of the board in the selection of a teacher, because it had no discretion to employ a teacher disqualified by law. It does not attack the selection of Miss Jennie Jones, who is admitted to have had a regular certificate as teacher, but only the employment, in the alleged violation of the statute, of Miss Lella Jones as an assistant. It may be questionable whether the former had any right at all to select and employ an assistant or proxy. *Directors v. Hudson*, 88 Ill. 563; *State v. Williams*, 29 Ohio St. 163. But, even if she had, it is unquestionably true that she had no authority to engage one whose employment in such capacity was expressly prohibited by statute. If this was done with the consent, connivance, or permission of the school board of the district, then its acts were in attempted violation of the statute, and this suit could be maintained. For these reasons it follows that the demurrer should have been overruled, and the judgment must be reversed. Such will be the order, and the cause will be remanded for further proceedings in accordance with this opinion. Reversed.

(15 Colo. App. 468)

CRESWELL v. WOODSIDE et al.

(Court of Appeals of Colorado. Dec. 10, 1900.)

ATTACHMENT—REDELIVERY BOND—RETURN OF PROPERTY—DECREASE IN VALUE—LIABILITY OF APPOINTMENT—SALE BY SHERIFF—SUM RECEIVED—EVIDENCE OF VALUE—CONCLUSIVENESS.

1. Where, in an action on a redelivery bond in attachment, there was no evidence that the diminution in value of the goods from the date of their release to the date of their redelivery was \$360, an instruction that if the goods, when they were redelivered, were not in substantially the condition they were when released to the defendants, plaintiff was entitled to a verdict of \$360, was properly refused.

2. Where goods retained by defendants under an attachment bond were returned to the sheriff and sold, and plaintiff brought an action on the redelivery bond for diminution in their value, an instruction that if plaintiff inspected the property prior to its redelivery, and after such inspection made a demand for its return, without objecting to its quality or quantity, and the proper officer advertised it and sold it to plaintiff, and defendants were thereby misled and prevented from taking steps to protect themselves by electing to pay its value, plaintiff was estopped from asserting the property was injured, was erroneous, since the goods were returned to the sheriff, who was bound to receive them, and plaintiff had nothing to do with their inspection.

3. Where property retained by defendants under a redelivery bond was returned to the sheriff, and advertised and sold at public auction, and purchased by plaintiff, who subsequently brought an action on the redelivery bond for diminution in the value of the goods while detained by defendants, an instruction that the sum for which the property sold at the sheriff's sale was not conclusive as to its value was erroneous.

Appeal from district court, Arapahoe county.

Action by John Creswell against A. J. Woodside and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

C. J. Blakeney, for appellant. Thos. W. Lipscomb, for appellees.

THOMSON, J. In an action brought by the appellant against C. W. Phelps and W. D. Pennock, a writ of attachment was issued and levied upon a printing press, and certain type and other printing material, belonging to the attachment defendants. The latter procured the release of the property so taken, by executing a bond or undertaking as provided by the statute, with A. J. Woodside and S. J. McClanathan as sureties, conditioned for the redelivery of the property to the proper officer in case the plaintiff should recover judgment in the action and the attachment should not be dissolved, and for the payment of the value of the property in default of such redelivery. This suit was brought upon the redelivery bond. The complaint set forth the instrument; alleged that the attachment was sustained, and that the plaintiff recovered judgment in the action for \$546.63 and costs; and averred that default was made in the redelivery of the property, in that, when the property was released to the attachment defendants, it was new and in good condition, whereas, when it was redelivered by them, it was injured and damaged by the use which they had given it while it was in their possession. The damage was laid at \$420. The denials in the answer are unintelligible. Each is confined to a numbered paragraph of the complaint. There are no numbered paragraphs in the complaint. The answer alleged that, at the time of the redelivery, the plaintiff had ample opportunity to examine it, and that it was accepted by the officer in his presence, without objection from him. The trial resulted in a verdict and judgment for the defendants, and the plaintiff appealed.

At the trial the plaintiff produced evidence showing that the property had been used by the attachment defendants after it was released to them, and that the consequence of its use was a considerable diminution of its value. It appeared that at the sheriff's sale of the property it was bid in by the plaintiff for \$250. In *Creswell v. Woodside*, 8 Colo. App. 514, 46 Pac. 842, a former proceeding upon the same bond by the same plaintiff against the same defendants, although we ad-

judged the complaint bad, we held that a return of property worn and damaged by use, which was in good condition when received, was not a return of substantially the same property, and constituted a breach of the conditions of the bond. The plaintiff requested an instruction to the effect that if the goods, when they were redelivered, were not in substantially the condition they were in when released to the attachment defendants, and that if the difference in their condition was caused by the use made of them by the attachment defendants, the plaintiff was entitled to a verdict for \$360. We do not entirely understand what was meant by \$360. That sum was possibly intended to represent the difference between the judgment, with interest added, and the amount for which the goods were sold, after deducting costs. The court committed no error in refusing the request. The utmost to which the plaintiff was entitled was the amount of diminution in value of the goods between the date of their release and the date of their redelivery, resulting from their use by the attachment defendants, not to exceed the unpaid residue of the judgment, and that amount could be ascertained only by proof.

Over the objection of the plaintiff, the court instructed the jury as follows: "(7) The undertaking given by the defendants herein was in the alternative, to redeliver the attached property on demand to the proper officer or pay the value thereof; and the defendants had the right to do either the one thing or the other. The plaintiff had the right, if, upon inspection and examination of said property, he found it to be injured or damaged, and for that reason in a worse condition than when attached, to decline to receive it in a damaged or injured condition, and in that event could have claimed of the defendants the value thereof, to the extent of the amount actually remaining at that time unpaid on the judgment in the county court rendered on June 6, 1892, in his favor against Phelps and Pennock. If the jury find from the evidence that the plaintiff, either himself or through his agent, examined said property, or had the opportunity and means of examining the same, prior to said redelivery, and after such examination, or opportunity to examine, himself, or by his agent, made demand on said Phelps for a redelivery of said property under said undertaking, and accepted a redelivery from him, without objections to the quantity, quality, or condition thereof, and without making any claim that said property was injured or damaged, and that the proper officer, with the knowledge of the plaintiff, advertised said property for sale, and sold the same to the plaintiff, and that the defendants were thereby led to and did believe that the plaintiff had accepted said redelivery as a compliance with the primary condition of said undertaking, and were thereby misled and deceived or lulled into a sense of feeling of security with reference to their liability on said

undertaking, and thereby prevented from taking steps to protect themselves, and from exercising their right of election to pay the value of said property to the extent of the amount remaining unpaid on said judgment, and retain the same, such conduct on the part of the plaintiff would amount to an acceptance by him of said redelivery as a compliance with the primary condition of said undertaking, and he would thereby be estopped from thereafter asserting that said defendants had made default therein, or that said property was injured or damaged. (8) The liability of the defendants on said undertaking, in case of a failure to redeliver said property, was to pay the full value thereof, up to the amount, but not in excess, of the judgment recovered by the plaintiff against Phelps and Pennock; and if the jury find upon the evidence that the value of the attached property, when redelivered to the proper officer by Phelps, on May 10, 1893, together with the cash payment of \$300, made by Willis B. Herr to the plaintiff on December 18, 1897, equals or exceeds the amount of said judgment, including interest and costs, in that event the plaintiff is not entitled to recover; and you are further instructed that the sum for which said property sold at sheriff's sale is not conclusive of its value, but a circumstance merely in evidence, which you may consider in connection with all the other evidence in the case."

Both these instructions are fatally erroneous. The seventh assumes that the plaintiff accepted the property, and applies to him a doctrine which obtains in the case of a debt payable in personal property in good condition, and which doctrine is that it devolves upon the payee, when the property is tendered, to determine whether it is in good order or not, and that, if he accepts it, he is not permitted to question its condition. *Manufacturing Co. v. Funge*, 109 U. S. 651, 3 Sup. Ct. 436, 27 L. Ed. 1064. Between such a case and the one at bar there is no likeness or analogy. These goods were not delivered in payment of a debt. With their acceptance or rejection the plaintiff had nothing to do. They had been levied upon by the sheriff, released to the attachment defendants, and were returned, not to the plaintiff, but to the sheriff. Upon their receipt by the latter, it became his duty to sell them, and apply the proceeds on the judgment. Inasmuch as the identical articles released were brought to him, he was bound to receive them. In the matter of their acceptance, the sheriff had no discretion. And a refusal by him to receive the property, with or without the consent of the plaintiff, would have discharged the sureties. It was the right of the latter that the property, whether damaged or not, should be received and sold, and the proceeds applied upon the judgment in reduction of their own liability. So far as we can see, in the acceptance of the property and the subsequent proceedings, there was a substantial

compliance with the law. See *Yelton v. Slinkard*, 85 Ind. 190. The instruction we have been considering is explicable only on the hypothesis of a complete misconception of the case.

The eighth instruction is equally bad. In glancing over the record, we failed to discover any evidence of the payment of \$300. In so far as we have observed, the only intimation of such payment is contained in this instruction. But we do not think it necessary to make this feature of the instruction the subject of criticism. Our objection goes deeper. Whether the recital of the payment is warranted by the facts or not, the principle of the instruction is the same. It undertakes to charge the plaintiff with the value of the property returned, regardless of the amount which it brought at the sale. A general statement of the proposition would be that a fair and legal sale of property taken on execution would not conclude the parties to the judgment. The judgment defendant might say that it was worth more than it brought, submit the question of its value to a jury, and, if they should find for him, compel the judgment plaintiff to account to him for the excess; that is, for something which was never received. This is a new doctrine to us. If a creditor, after he has reduced his claim to judgment, is compelled to take property he does not want, at a valuation fixed by a stranger, or if, after its sale by the proper officer in conformity with law, he is compelled to make good to the defendant such excess of value as a jury may find over the amount realized at the sale, his situation is certainly not a comfortable one. Upon that theory, it behooves every person to avoid being a creditor. But the law is not so. Property which has been released to the attachment defendant, where the attachment is sustained and judgment recovered against him, is redelivered to the sheriff for the purpose of being applied to the payment of the judgment. *Mills' Ann. Code*, § 112. The law provides but one method of applying property levied upon to the payment of a judgment, and that is by its sale. And, if the sale is regular and fair, the amount of the highest responsible bid is, as between the parties, conclusive of the value of the property. There is no significance in the fact that in this case the plaintiff was the purchaser at the sheriff's sale. He was under no disability. He was upon the same footing with any other bidder, and, if the sale was in all respects fair, the result was precisely the same as if he had been a stranger. His bid was the highest, and, surely, these defendants cannot complain of an act by means of which the judgment received a larger credit than it would have received otherwise; and the supposition of the seventh instruction, that they were, or could have been, misled or deceived by an act from which they knew they derived a benefit, is not to be entertained. The judgment should be reversed. Reversed.

(23 Utah, 56)

CAMP v. SIMON et al.

(Supreme Court of Utah. Dec. 18, 1900.)

CONTRACT—INTERPRETATION—FINDINGS—EVIDENCE—HEARSAY—ADMISSION OF IMMATERIAL—JOINT CONTRACT—INSOLVENCY OF SOME NO DEFENSE FOR OTHERS—ASSIGNEE OF FOREIGN EXECUTORS—RIGHT OF ACTION.

1. The term "ninety days from the expiration of said five years," expressed in a contract, and referring solely to a time limit within which the obligees therein could exercise a certain option therein given them, can be given no other effect than to fix the period of time within which, after the expiration of five years, the obligees should exercise the right and option specified; and this although the contract may by other terms provide a similar option upon default by the obligors.

2. When findings are justified by the evidence, and, in connection with facts admitted by the pleadings, support the judgment, the judgment must be affirmed, unless some reversible error was committed in the course of the trial.

3. When certain facts are admitted by the pleadings, the admission of certain letters in evidence as additional proof of such facts is not reversible error, although such letters may be hearsay and incompetent.

4. Defendants all being principals in the contract sued on, the insolvency of some of them cannot affect the plaintiff's rights regarding the others, and no delay in the enforcement of the contract short of the statutory period of limitation can defeat his claim.

5. Where plaintiff sues as the assignee of the executors of a certain estate administered in New York, and it appears that under the law of New York the executors had authority to transfer the contract sued on, plaintiff had the right to sue and maintain the suit as such assignee, without regard to any administration of the estate in this state.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by E. M. Camp against Fred Simon and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Brown & Henderson, for appellants. S. McDowell and Richards & Varian, for respondent.

BASKIN, J. This action is based upon a written contract entered into on the 8th day of March, 1892, by and between T. H. Camp and George W. Wiggins, parties of the first part, and the defendants, who are the appellants in this action. The contract is set out in full in the complaint, and is as follows, to wit: "Whereas, the undersigned are interested in the Union Stock-Yards Company, of Salt Lake county, Utah, and are desirous of assisting the said company in securing money with which to continue improvements now in progress; and whereas, T. H. Camp and G. W. Wiggins, both of Wadsworth, Jefferson county, New York, have agreed to subscribe and pay for one hundred and fifty shares of the capital stock of said Union Stock-Yards Company: Now, therefore, in consideration of said subscription and payment by said Camp and Wiggins into the treasury of said company of the sum of fifteen thousand dollars, the par value of said stock, and in further consideration of the

sum of one dollar to each of us in hand paid, we guaranty and covenant that we will pay or cause to be paid to the said Camp and Wiggins a dividend of eight per cent. per annum on the par value of said stock for the term of five years, from the 21st day of March, 1892, payable at the Jefferson County National Bank, of Watertown, New York; and we covenant and guaranty to pay or cause to be paid the said eight per cent. dividend promptly each year as the same become due, for a period of five years. It is further covenanted and agreed by the undersigned that within ninety days of the expiration of the said five years said T. H. Camp and G. W. Wiggins shall have the right and option to retain said stock at par value, without being required to make any further or other payment therefor than the original amount of their subscription and payment; or they (the said T. H. Camp and G. W. Wiggins) may at any time within the said ninety days from the expiration of the said five years tender the said stock to the Utah National Bank, of Salt Lake City, Utah (transmission by mail will be sufficient tender), duly assigned in blank for the benefit of the obligors upon this undertaking, and thereupon the undersigned covenant and agree to pay the said Camp and Wiggins the full sum of fifteen thousand dollars, with accrued interest from the time when the fifth annual dividend of said eight per cent. was due and paid. And the undersigned further covenant and agree, if said interest is not paid promptly at the time and place hereinbefore mentioned, that the entire principal and interest shall then and there become due, and upon tender of the stock to the said Utah National Bank in the manner and for the purposes aforesaid payment in full may be demanded and collected from the undersigned on this bond, for which payment of the principal sum of fifteen thousand dollars, and the interest thereon annually at the rate of eight per cent. per annum, which interest for the said term of five years is to be paid or payment thereof secured as dividends on the stock aforesaid, well and truly to be made, we, the undersigned, hereby bind ourselves, our heirs, administrators, and assigns, jointly and severally, firmly by these presents." The following allegations of the complaint are not denied by the answer, and are, therefore, admitted, viz.: That the said defendants, on the 8th day of March, 1892, executed and delivered to T. H. Camp and George W. Wiggins said obligation in writing. That in pursuance thereof the said Camp and Wiggins subscribed for the stock therein mentioned, and paid into the treasury of the Union Stock-Yards Company, for said stock, the sum of \$15,000. That no dividends have been paid or declared by the Union Stock-Yards Company, or at all. That, after the first dividend was due on said stock pursuant to the terms of the written obligation hereinbefore set out, and beginning on, to

wit, April 3, 1893, and at divers times thereafter, said defendants paid in all, as interest on said sum of \$15,000 secured by the obligation hereinbefore set out, the sum of \$3,200, interest up to and including November 21, 1894. That an installment of interest on said obligation, amounting to the sum of \$1,200, became due and payable on March 21, 1895, and that said defendants paid on account thereof only \$800, and as to \$400 thereof made default, and neglected and failed to pay the same, or any part thereof; and that on March 21, 1896, another installment of interest on said obligation, amounting to \$1,200, became due and payable, but said defendants made default, and neglected and failed to pay the same, or any part thereof. That on the 9th day of October, 1896, said defendants not having paid the said two last-mentioned installments of interest, the said T. H. Camp (to whom, it is alleged in the complaint, the said Wiggins, on the 25th day of March, 1892, transferred his interest in said contract and stock, but which allegation is denied in the answer), by his agent and attorney, tendered said stock, indorsed in blank for the benefit of the defendants, to the Utah National Bank in Salt Lake City, Utah, and demanded of said bank payment of said \$15,000, with the interest due thereon, but said bank refused to pay the same, or any part thereof; and that thereupon the said T. H. Camp, by his said agent and attorney, in writing notified each of the defendants of said tender and refusal, and demanded of them payment of said \$15,000, and the accrued interest thereon, but that said defendants did not pay the same, or any part thereof, and have ever since failed to make such payment. In avoidance of these admitted facts, the defendants, in their answer, allege that the said T. H. Camp, instead of tendering said stock while the defendants were in default, accepted and retained said stock as his own; "that on the 21st day of March, 1895, the interest on said obligation became and fell due, to wit, the sum of \$1,200; that the said defendants did not pay the same, but did pay thereupon the sum of \$800, and made default in payment of the remaining \$400; that no part of said \$400, or interest thereon to date, was then, or at any time since has been, paid; that thereby, by the terms of said bond, the principal sum of said bond, \$15,000, became and was due, and remained thereafter due for the space of 90 days; that by the terms of said bond the holders thereof were required to elect within said 90 days whether to retain the stock or rely upon the said liability upon the bond; that at the expiration of the said 90 days the holders of the bond elected to retain the stock, and not to rely upon the personal liability of the signers of said bond; that the said holders of said stock did retain the said stock at that time and afterwards until the 9th day of October, and ever since 1896, and never at any time during that period between

the 21st day of March, 1895, and the 9th day of October, 1896, indicated in any form to the defendants that the then holders of the bond intended to rely upon the personal security at all, but, by the retaining of said stock, elected to waive any suit upon said bond." There is no evidence that the said T. H. Camp in expressed terms elected to retain the stock, and release the defendants from liability; but the claim that he did so is based solely on the terms of the contract and the admitted facts that he retained said stock for more than 90 days from the first default of the defendants, which occurred on March 21, 1895, and did not tender the same to the Utah National Bank, or indicate any intention of holding defendants liable, on account of the default, for the principal sum mentioned in said contract, until October 9, 1896. The court below held that the contract did not warrant defendants' contention that such retention of the stock and the failure to tender the same to the Utah National Bank in 90 days from the default of the defendants was, under the provisions of the contract, an election by the said T. H. Camp to retain the stock, and release the defendants from liability.

The following statements in the appellants' brief indicate the important points presented by the assignments of error, and principally relied upon by defendants: "The principal points relied upon by the appellants are that the court erred in holding that the grantee could make a tender of the stock at any time to the bank, and in not holding that the grantee had elected to treat the stock as his by not tendering it within ninety days after default; in admitting in evidence the letters of the co-signers to the bond and the letters of Mason; in ruling that defendants could not show by way of defense that some of the signers had become insolvent, and permitting the plaintiff to sue without administration of the estate of T. H. Camp being had in the state of Utah."

As the facts relating to the first point mentioned in said brief are not disputed, the decision of the points depends solely upon the true interpretation of the contract. Its terms are plain and unambiguous. Defendants' counsel claim that by the terms of the contract the obligees were required, within 90 days from the date of the first failure to pay the interest, to make the election mentioned in the answer. No such terms are expressed in said contract, or implied from its expressed terms. The words, "ninety days from the expiration of said five years," expressed in the contract, evidently were not intended to have, and under no tenable interpretation could be given, any other effect than to fix the period of time within which, after the expiration of five years, the obligees should exercise the right and option specified in the contract of either retaining the stock or tendering it to the Utah National Bank. The words "ninety days" do not occur in the contract except in

connection with the expression "from the expiration of said five years." The contract provides that, if the interest is not paid promptly, both the principal and interest shall then become due; and immediately following this provision the following language occurs: "And upon tender of the stock to the Utah National Bank in the manner and for the purpose aforesaid payment in full may be demanded and collected." Counsel for the appellants claim that this clause of the contract requires the obligees to tender the stock to the Utah National Bank within 90 days after default. The language used is not susceptible of such a construction. While the purposes of both of the tenders mentioned in the contract are evidently the same, and each was required to be made in the same manner, yet as the right to make the first tender mentioned depends solely upon the lapse of time, and cannot be made until after the expiration of five years, and the right to make the second tender depended upon entirely different events, and accrued immediately upon default in the payment of the interest, the words "in the manner and for the purpose aforesaid" have no relation whatever to the period of 90 days named in the contract, and did not limit the time within which the stock might be tendered to the Utah National Bank to 90 days after default. The plaintiff claims to be the legal owner and holder of said contract and stock by virtue of certain assignments thereof. It is alleged in the complaint that on the 23d day of March the said George W. Wiggins, for the consideration of \$7,500, to him in hand paid by the said T. H. Camp, assigned to said Camp all his right, title, and interest in and to said contract and stock; that the said T. H. Camp died in the county of Jefferson, state of New York, on the 7th day of February, 1897, leaving a last will and testament and an estate in said county, and that at the time of his death he was a resident thereof; that on the 10th day of February, 1897, Walter H. Camp, George V. S. Camp, and Frederic S. Camp were appointed executors of the last will and testament of the decedent, T. H. Camp, by the surrogate of said Jefferson county, and thereupon said appointees qualified as such executors; that on the 21st day of June, 1897, said executors, for a valuable consideration, paid by plaintiff, did, by writing, assign, transfer, and set over to said plaintiff said contract, and all their right and the rights of the said decedent and of his estate thereunder, together with all sums of money due or to become due thereon; that by the laws of the state of New York said contract, and all the rights of said decedent thereunder, passed to said executors, to be used and disposed of by them according to their own discretion, without the order of any court in the premises. The foregoing allegations are denied by the answer, but the trial court, in its findings, found the facts as alleged in the complaint. The findings are justified by the evidence, and, in connection

with the facts admitted by the pleadings, support the judgment rendered in favor of plaintiff for the sum mentioned in said contract, with interest thereon, and should, therefore, be affirmed, unless some reversible error was committed in the course of the trial.

The second principal point relied upon by appellants is that the court erred in admitting in evidence, over appellants' objection, the letters of the co-signers of the contract. These letters had no bearing on any of the issues formed by the pleadings, but were admissions by the co-signers, who wrote the letters, of the liability of the defendants to the obligees of the contract; and the objection urged to the admission of these letters in evidence was that the admission of liability by one of the co-signers of said contract could not bind the other signers. As the liability of the defendants to the obligees of said contract, as before shown, is admitted by the pleadings, the plaintiff was not required to introduce any testimony on that point; so that the introduction of these letters, even though it were admitted that they were, as claimed by the appellants, hearsay and incompetent, as they related to facts admitted by the pleadings, their admission is not reversible error. See 2 Enc. Pl. & Prac. (2d Ed.) 553, note 3, and cases cited.

The third principal point relied upon by appellants is that the court erred in ruling that the defendants could not show by way of defense that some of the signers had become insolvent. The defendants, for a good and sufficient consideration moving to them as principals, not only guaranteed the annual payments mentioned in said contract, but, as principals, covenanted and agreed to pay to the said Camp and Wiggins, upon the happening of certain events, the \$15,000 mentioned in the contract. As the defendants are principals in said contract, the insolvency of some of them cannot affect the plaintiff's rights regarding the others, and no delay in the enforcement of the contract short of the statutory period of limitations can defeat his claim.

The last principal point relied upon in the appellants' brief is that the court erred in permitting the plaintiff to sue without administration of the estate of the said T. H. Camp, deceased, being had in the state of Utah. As the executors, under the laws of New York, had authority to transfer said contract and stock by assignment, and did so transfer the same, the plaintiff had the right to sue and maintain the suit as such assignee, without regard to any administration of said estate.

It is not necessary to pass upon the remaining assignments of error. No reversible error is shown by the record. It is therefore ordered that the judgment of the lower court be affirmed, and that the appellants pay the costs.

BARTCH, C. J., and McCARTY, District Judge, concur.

(139 Cal. 350)

In re LEVIN et al. (S. F. 1,304.)

(Supreme Court of California. Dec. 31, 1900.)

INSOLVENCY — MARSHALING ASSETS — MORTGAGE FOR PART OF CLAIM — DEDUCTION — RIGHT OF CREDITORS.

St. 1895, p. 148, provides that, when a creditor has a mortgage securing payment of a part of his debt, he shall be admitted as a creditor in insolvency proceedings against the debtor only for the balance of his debt after deducting the value of the mortgaged property. L. and others, doing business as L. Bros., were adjudged insolvent, and property occupied by L. was set off to him as a homestead. Prior to the insolvency proceedings, appellant procured a mortgage on the homestead, signed by L. and wife, securing a part of the firm's indebtedness to appellant. The members of the firm had no individual creditors. *Held*, that appellant was entitled to be admitted as a creditor in the insolvency proceedings only for the balance of his claim after deducting the mortgage.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Voluntary proceedings in insolvency by Isidor Levin and others, co-partners as Levin Bros. From an order settling the final account of the assignee in insolvency, the Anglo-Californian Bank appeals. Affirmed.

Jesse W. Lillenthal, for appellant. Joseph Kirk and Walter D. Mansfield, for respondents.

VAN DYKE, J. Voluntary proceedings in insolvency were commenced herein on January 7, 1897, and said firm and the individual members thereof adjudged to be insolvent. Prior thereto, to wit, April 20, 1893, the Anglo-Californian Bank, Limited, procured from Isidor Levin and his wife, to secure to it the payment of all sums due or to become due from said Levin Bros., a mortgage on a piece of property owned by said Isidor Levin, individually, and occupied by him and his wife as a domicile, but no declaration of homestead had been filed prior to the commencement of the proceedings in insolvency. Under section 64 of the insolvent law of 1895, the court in such insolvency proceeding, on March 24, 1897, set apart to said Isidor Levin the property so mortgaged as a homestead. The said mortgage which was so held by said bank is of the value of \$6,000, and in the settlement of the final account of the assignee in said insolvency proceedings the court below held that the amount of said mortgage security should be deducted from the claim of said bank. From this portion of the order settling the said final account the bank appeals. The mortgage held by the appellant was not displaced by the homestead, but is superior and paramount thereto. Further, it appears there are no separate creditors of any of the members of said partnership firm. The claims of 182 creditors are approved, ranging in amount from a few dollars to over \$27,000; the largest being the claim of said appellant, after deducting \$6,000 covered by its security. The net amount

to be distributed among these numerous creditors was only \$21,714.82. Section 48 of the insolvency act provides: "When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property," etc. St. 1895, p. 146. It is also provided by section 39 of the same act that the assignee shall keep separate accounts of the joint stock or property of the co-partnership, and the separate estate of each member thereof, and the net proceeds of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate property of each partner shall be appropriated to his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors.

It is contended on the part of the appellant that the security held by it is no part of the assets of the partnership, "the debtor," and that such security was upon property excluded from the jurisdiction of the insolvency court. But in section 66 of the insolvency law it is expressly provided that "words used in this act in the singular include the plural, and in the plural the singular, and the word 'debtor' includes partnerships and corporations." The individual members, as well as the partnership, are before the court in the insolvency proceeding, and subject to its jurisdiction. "Each partner owes all the debts of the partnership, and his goods may be taken to pay them." In re Straut, 125 Cal. 417, 58 Pac. 62. The general purpose and policy of the law is to produce equality, as far as possible, among the creditors of the insolvent debtors; and in the marshaling of assets to bring about this result our Civil Code lays down the following rule: "Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in, or is entitled as a creditor to resort to some but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons." Civ. Code, § 3433. See, also, section 2899, Id. This declaration of our Code represents an old established principle of jurisprudence in reference to marshaling of assets. In Kent v. Williams, 114 Cal. 541, 46 Pac. 462, it is said: "The doctrine of the marshaling of assets, under which, if one creditor has a lien on only one of them, the former must first proceed against that upon which the latter has no lien, is not only fully established by general authority, but is also expressly declared in sections 2899, 3433, Civ. Code." We are

of opinion that the court below correctly held that the amount of security in question should first be deducted from appellant's claim, and that it should be allowed to participate in the distribution only upon the balance of such claim. Whatever may have been held to the contrary in other jurisdictions in reference to such proceedings, the statute provisions and our own decisions thereunder must control here. Order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(121 Cal. 211)

CONTRERAS v. MEROK et al. (S. F. 1,600.) (Supreme Court of California. Dec. 29, 1900.)

EJECTMENT—MINING CLAIM—COMPLAINT—DEMURRER FOR UNCERTAINTY—HARMLESS ERROR—GENERAL ISSUE—FACTS PROVABLE—JUDGMENT—FINDINGS—SUFFICIENCY.

1. Plaintiff sued for possession of a mining claim, alleging that defendants unlawfully took possession of and ousted plaintiff therefrom, that defendants were engaged in extracting ore, and that the value of the ore wrongfully taken was \$1,000. Defendants demurred to the complaint for uncertainty, objecting that the ouster was alleged to be from only a portion of the mine, and did not describe the portion, that the damages were alleged on information and belief, and that there was no allegation that any cuts had been made by defendants. The demurrer was overruled, and the defendants answered, alleging ownership and right of possession in the whole claim. *Held*, that the overruling the demurrer was not reversible error, since the defendants could not have been misled by the uncertainty in the complaint.

2. In ejectment for a mining claim the complaint contained the usual allegations of plaintiff's ownership and ouster by defendants, but did not allege any forfeiture or abandonment of the claim by defendants; while the answer alleged defendants' ownership of the entire claim. *Held*, that findings that on a given date defendants claimed to own the tract under the United States location laws, but that such location had lapsed, and become void, and the land was at that time vacant public mineral land, and that on that date plaintiff located such claim, thereby becoming the owner, and was such owner at the time of ouster, were within the issues raised by the pleadings.

3. Defendants' contention that such findings were equivalent to a finding of abandonment or forfeiture by defendants, which must be specially pleaded, could not be sustained, since the term "lapsed" in the finding had no well-defined significance in mining law, and might be rejected as surplusage, and the judgment allowed to rest on the finding that the land was vacant public mineral land.

Commissioners' decision. Department 2. Appeal from superior court, Mariposa county; John M. Corcoran, Judge.

Action by T. G. Contreras against Emelle Merck and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Frank H. Farrar, for appellants. Congdon & Congdon and G. G. Goucher, for respondent.

CHIPMAN, C. Action to recover possession of a mining claim, for damages, and for

an injunction. Plaintiff had judgment for possession, for one dollar damages, and perpetually enjoining defendants from trespassing upon the premises in controversy. The appeal is from the judgment on the judgment roll.

1. Appellants contend that their demurrer for uncertainty, ambiguity, and unintelligibility should have been sustained. The complaint alleged ownership and right of possession of plaintiff in and to a certain mining claim known as the "St. Gabriel Mine," and alleged that defendants unlawfully "entered upon and took possession of a portion of said mining claim and premises, and ousted plaintiff from said portion, * * * and are now engaged in wrongfully digging, mining, and extracting gold-bearing quartz, gold specimens, and gold from said mining claims, and converting the same to their own use." The complaint further alleges that plaintiff, being uninformed as to the exact value of said gold-bearing quartz * * * so wrongfully and unlawfully dug, mined, * * * converted by defendants, alleges, on said lack of information and on his belief, that the value thereof is one thousand dollars." Appellants claim uncertainty, for (1) that the complaint alleges unlawful possession by defendants of only a portion of the mine, and does not describe such portion; (2) the allegations of damage are on information and belief; and (3) there is no direct allegation that "any holes or cuts have been made and done" by defendants. The answer claimed ownership and right of possession of the entire premises to be in defendant Merck, and the answer admitted having taken possession, and by the form of denial as to the alleged extracting of ores therefrom admitted having done so, and by the same form of denial admitted an intention to continue extracting ores. In short, the answer put in issue the question of ownership or right of possession of the entire premises, and the resulting right of defendants to occupy the premises, and do with them as they liked. The cause was tried on the issues presented by the complaint and answer, and we cannot see that appellants could have been misled or injured by the form of the complaint. In speaking of the rule where the demurrer is for uncertainty, the court, in *Alexander v. Mill Co.*, 104 Cal. 532, 38 Pac. 410, said: "It must not be mere abstract error, but it must be prejudicial and injurious error, in order to avail appellant; for otherwise he has no cause of complaint." See, also, *Jager v. Bridge Co.*, 104 Cal. 542, 38 Pac. 413.

2. It is contended that the findings are not within the issues. The claim seems to be that the court finds forfeiture as a fact on the part of defendant Merck, whereas there is neither allegation of abandonment nor allegation of forfeiture on her part in the complaint. The finding is "that on the 19th day

of February, 1898, the defendant Emelie D. Merck claimed to hold the tract of land described * * * under the location laws of the United States relative to quartz claims, * * * but the said location had lapsed and become void, and said tract of land was at that time vacant public mineral land." The court then finds that plaintiff was, on February 19, 1898, a qualified mineral locator, and located the premises in question on that day, and thereby became the owner and entitled to possession thereof, and was such owner when subsequently defendants entered upon said premises and ousted plaintiff therefrom. The principal fact at issue was the ownership of the mine. It was not necessary for plaintiff to allege forfeiture or abandonment by defendant Merck. The complaint contained sufficient allegations in an action in ejectment, which defendants concede this to be. As was said in *Harris v. Kellogg*, 117 Cal. 488, 49 Pac. 708: "A mining claim is real estate, and the rules of pleading relative to real estate are applicable to it. In the ordinary action of ejectment it is sufficient for the plaintiff to allege that he was the owner of the land in question. Such an averment carries with it all the facts essential to establish his ownership, and the means by which he became the owner would be only evidence of his ownership, and should not be alleged." The same rule would apply to the defendants in setting up ownership in their answer. In the present case defendants averred ownership in defendant Merck, and the answer is deemed to be denied. It was competent for plaintiff to show that the location under which defendant Merck claimed ownership "had lapsed and become void," and that when plaintiff initiated his claim the land was "vacant public mineral land of the United States." What the evidence was from which the court made its finding we do not know, and we must, on this appeal, presume that it was sufficient. Appellants contend that the finding that the defendants' claim had "lapsed" was equivalent to a finding that it was "forfeited," and this, it is contended, could not be proved under the general issue, but must be specially pleaded. Precisely what the court meant by the term "lapsed" may not be easily conjectured, as it is a term unknown to mining usage or laws; but we have no right to assume that it meant a technical forfeiture. The judgment may rest on the finding that "the land was vacant public mineral land," and the finding that the claim had "lapsed" may be rejected altogether. We advise that the judgment be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(131 Cal. 199)

SAN DIEGO COUNTY v. DAUER et al.
(L. A. 789.)

(Supreme Court of California. Dec. 29, 1900.)
COUNTY TREASURER—LIABILITY ON OFFICIAL BOND—LIMITATIONS.

Code Civ. Proc. § 337, limits the right of action on any contract obligation to four years; and County Government Act, § 87 (St. 1891, p. 318), requires the county treasurer to keep the county funds in his own possession until disbursed according to law. *Held*, that an action in 1896 on a county treasurer's official bond for money lost by him by deposit in a bank in 1891, which was then known to the county, was barred by limitations, though his term of office did not expire until 1893, since the cause of action arose when he lost control of the money, and not at the expiration of his term of office.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrence, Judge.

Action by the county of San Diego against C. R. Dauer and others to recover on his official bond as treasurer. From a judgment in favor of defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

Atty. Gen. Ford and T. L. Lewis, for appellant. Sam Ferry Smith, Haines & Ward, McDonald & McDonald, H. E. Doolittle, and Oscar A. Trippet, for respondents.

GRAY, C. Plaintiff appeals from a judgment, and from an order denying its motion for a new trial. The defendant Dauer was the treasurer of San Diego county from the first Monday in January, 1891, to the 2d day of January, 1893. This action is on his official bond, and was commenced against him and the sureties on said bond on the 31st day of December, 1896, to recover the sum of \$24,108.87, which it is alleged in the complaint he received during his term of office, and did not deliver to his successor or leave in the treasury, but converted the same to his own use. Among many other defenses, the defendant pleaded the statute of limitations (section 337, Code Civ. Proc.), limiting the right of action upon any contract obligation or liability founded upon an instrument in writing executed in this state to four years, and also subdivision 1 of section 338, Id., limiting an action upon a liability created by statute to three years. The case was tried on an agreed statement of facts, from which we gather the following: On account of state school money due the said county the defendant Dauer on the 13th day of August, 1891, received from the state three warrants aggregating \$15,987.70, drawn by the state controller upon the state treasurer, and payable to Dauer's order as county treasurer. On the same day Dauer indorsed and delivered these warrants to the California National Bank, and received certificates of deposit therefor from said bank to the extent of \$10,975.70, and the balance, \$5,012, in cash. Dauer entered in his books

the whole amount of said \$15,987.70 as received in cash. Again, on the 2d day of November, 1891, said Dauer, as county treasurer, received from H. W. Weineke, the county tax collector, in making his monthly settlement, certificates of deposit for \$26,114.85, issued by the said California National Bank to said Weineke for county tax collections deposited by him in said bank. At the same time, and on the same monthly settlement, the said treasurer received from said tax collector over \$10,000 in coin, and receipted for the whole amount, including the certificates of deposit, as cash, and so entered it in his books. On the close of business on the 11th day of November, 1891, and while said sums aggregating \$37,090.55 were yet on deposit therein, no demand for the same having been made by Dauer, said bank closed its doors and ceased to do business, and has not since resumed business. Thereafter a receiver of said bank was duly appointed under the provisions of the national banking laws, and a suit was commenced on March 4, 1892, by the said plaintiff herein against said bank and its officers, and such proceedings were therein had that the claim of the said county, plaintiff, was allowed against said bank, and dividends amounting to the sum of \$12,981.68 have been paid thereon to said county, which amount, being credited on the aggregate amount of \$37,090.55 on deposit when the bank closed, leaves \$24,108.87 unpaid, which is the amount sought to be recovered herein. On January 30, 1892, the chairman of the board of supervisors, together with the county auditor and district attorney of said county, made an actual count of the funds of the county treasury in the hands of said treasurer, and found that he had on hand in coin \$139,882.17, and the aforesaid certificates of deposit, representing \$37,090.55, and that he should have had on hand \$176,972.70. Each month thereafter during said treasurer's term of office the said chairman, district attorney, and auditor made a similar count of said funds, and found and certified to the fact of the treasurer having said certificates of deposit on hand, and having an amount in coin less than he should have, in the amount represented by said certificates of deposit. The board of supervisors of plaintiff on December 19, 1892, passed a resolution reciting, in substance, that "whereas, by an official count of the money on hand it appears that Chas. R. Dauer, county treasurer, has certificates of deposit in his possession issued by the California National Bank (which bank has suspended payment) aggregating \$37,090.55; that all of said money is county money, that should be in possession of said official: Therefore, be it resolved that the district attorney be, and he is hereby, instructed and directed to forthwith bring an appropriate action against Treasurer Dauer and the sureties on his official bond to recover the money deposited

by him in the California National Bank at the time of its suspension." In pursuance of the foregoing directions, and on the 20th day of December, 1892, the said district attorney filed a complaint and commenced an action, in which the same parties were plaintiff and defendants, respectively, as in the present action. This complaint was on the said official bond of said treasurer, and sought to recover the said \$37,090.55 from said treasurer and his sureties. On the 31st day of December, 1892, the board of supervisors, by a vote of three to two, directed the district attorney to dismiss the said action they had so recently ordered him to begin, and the said action was accordingly dismissed on said last-mentioned date. It will be seen that the recovery sought in the present action is on account of the failure of said treasurer to turn over to his successor in office at the conclusion of his term that portion of the said \$37,090.55 sought to be recovered in the action of December 20, 1892, which had not been collected from the said bank. The court found in favor of defendants on their defenses of the statute of limitations mentioned above.

It is contended by appellant that the statute of limitations did not commence to run until the expiration of Dauer's term of office, and that the action would not be barred until the expiration of four years from that time, but we think this contention cannot be upheld. Section 87 of the county government act (St. 1891, p. 318) provides: "The county treasurer must keep all moneys belonging to this state, or to any county of this state, in his own possession, until disbursed according to law. He must not place the same in the possession of any person, to be used for any purpose; nor must he loan, or in any manner use, or permit any person to use, the same, except as provided by law; but nothing in this section prohibits him from making special deposits for the safe keeping of the public moneys, but he shall be liable therefor on his official bond." That was the law in force at the time of the acts complained of, and thereunder it was the duty of the treasurer to keep the funds of the county under his own personal control; and when he lost that control by his own neglect of official duty a cause of action arose on his official bond at once, and the statute of limitations began to run against such cause of action certainly as early as that condition of affairs was brought to the knowledge of plaintiff. Certainly the statute began to run as early as the date of the commencement of the first action on the treasurer's bond, December 20, 1892; and, more than four years having elapsed thereafter before the commencement of the present action, the court below was correct in the conclusion that the cause of action was barred. The failure of Dauer to turn over to his successor at the conclusion of his term of office the funds which he had lost some months prior to that

time did not constitute a new or different cause of action on behalf of the county, so as to affect the running of the statute of limitations. Whether the suit were begun before or after the expiration of said term, the judgment must be the same, and the damages in either case would be measured by the amount of money which had been lost by the treasurer and not previously recovered from the bank; and, if a full recovery were had in a suit brought before the expiration of Dauer's term, it would preclude any recovery thereafter, as the amount in which the treasurer was in default could be recovered but once. Under our statutes the treasurer is the mere custodian or bailee of the funds of the county, and his failure to have certain funds in the treasury at the conclusion of his term of office adds nothing to his previous transgression of having allowed the same funds to remain out of the treasury and become lost to the county. It is only because of the original conversion or loss of the funds that suit can be maintained at any date. The continuance of the loss, conversion, or absence of the funds from the treasury can no more be treated as a new cause of action than can the failure to pay a debt on June 1, 1900, that was due a year before, be treated as a new debt for the purpose of fixing the period of limitations.

Appellant cites *People v. Van Ness*, 79 Cal. 84, 21 Pac. 554, to show that the statute of limitations for the breach of an official bond does not commence running until the expiration of the official term, but an examination of that case will show that no breach of official duty occurred therein until the expiration of the official term. This is clearly pointed out in *People v. Weineke*, 122 Cal. 535, 55 Pac. 579, wherein it is said of the former case: "Van Ness was a commissioner of immigration. The question as to whether the statute commenced to run when he converted the funds was not considered, but it was assumed, as the most favorable to defendants, that it did not commence to run until the close of the term of office. When this default arose there was no law requiring the commissioner to pay over to the state treasurer monthly the moneys received by him. Section 2069 of the Political Code, requiring him to do so, was passed March 15, 1883." It is clear that the case cited furnishes us no guide herein. Appellant also cites *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72, and other cases of the same character, holding that, where there is a provision in a note that the same shall become immediately due and payable on default in the payment of any installment of interest, the statute of limitations begins to run from the date of the expiration of the term of credit, and not from the default in the payment of interest. An examination of those cases discloses that they are based on the theory that the stipulation as to default in the payment of interest "is evidently in the nature of a penalty inserted

for the benefit of the creditor, and when he does not properly claim the benefit of such penalty he waives it," and thereafter the rights and obligations continue, without regard to the forfeiture. Of course, no such principle can apply to this case.

There was no prejudicial error in the trial court refusing to exclude portions of the agreed statement as requested by appellant. It becomes unnecessary to determine any of the other interesting questions discussed in the briefs, because the cause of action, as it appears from the agreed statement, is barred by limitations, whichever statute may be held applicable; and this defeats appellant's right to recover, however correct it may be as to other contentions in the case. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(21 Cal. 219)

In re SHAVER'S ESTATE et al. (S. F. 2,421.)¹

(Supreme Court of California. Dec. 29, 1900.)
JUDGMENT—CONSENT—APPEAL AND ERROR—
ESTOPPEL—AFFIDAVITS.

1. Where distributees filed their consent to the settlement and distribution of the estate of a decedent, and accepted the benefits going to them under judgment of final settlement of the administration of the estate, they could not then appeal from such judgment.

2. Affidavits of appellants, tending to show that they consented to the judgment from which they appealed under a misapprehension of fact, will not be considered on a motion to dismiss their appeal, when not presented to the court which rendered the judgment.

Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

In the matter of the estate of Aaron Shaver, deceased. From a decree of distribution, Annie J. Shaver and Jacob Shaver, distributees, appeal. On motion, the appeals were dismissed.

T. Z. Blakeman, for appellants. Lennon & Hawkins, for respondents.

HARRISON, J. Motion to dismiss the appeal. The executor of the last will and testament of the above decedent presented to the superior court for final settlement an account of his administration of the estate, and at the same time a petition for the distribution of the estate remaining in his hands, setting forth therein the provisions of the will, and the names of the persons entitled to receive distribution, and also the shares of the estate to which they were respectively entitled. After due notice of the time and place appointed for hearing the same, the court heard the testimony and proof submitted in support of the account, made an order settling the same, and thereupon made an order distributing the estate in accordance with the

terms of the petition. The decree of distribution was entered April 24, 1900. June 20th, Annie J. Shaver and Jacob Shaver, two of the distributees named in the decree, appealed therefrom to this court, bringing as the record here the petition and decree, without any bill of exceptions. The respondents have filed herein copies of certain records and papers on file in the superior court in the matter of the administration of said estate, showing that after the above-named petition was filed, and prior to the day appointed for its hearing, the appellants signed their consent to the settlement and allowance of the account, and to the distribution of the estate in accordance with the prayer of said petition, and that the same was filed in court before the hearing upon the said petition; and that on the next day after the said decree of distribution was entered of record, viz. April 24th, the executor paid and delivered to each of said appellants all of the personal property, and the possession of the real estate distributed to them by said decree, and that their voucher therefor was filed in said court, and that thereupon, on April 25th, the court made an order discharging the said executor from all further duties and responsibilities of his trust as such executor. Upon these facts the respondents have moved for a dismissal of the appeals upon the ground that the appellants, having accepted the provisions of the judgment and voluntarily satisfied the same, were not at liberty thereafter to appeal therefrom.

The right to accept the fruits of a judgment, and the right of appeal therefrom, are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other. *Bennett v. Van Syckel*, 18 N. Y. 484. The precise question involved herein was presented in *Re Baby's Estate*, 87 Cal. 200, 25 Pac. 405, and upon the motion of the respondents therein the appeal was dismissed, the court saying: "When a judgment has been satisfied it has passed beyond review, for the satisfaction thereof is the last act and end of the proceeding." And upon the authority of that case the motion must be granted.

The appellants have presented herein certain affidavits tending to show that their consent to the settlement of the account and the entry of the decree of distribution was signed by them under certain misapprehension and misinformation of fact, and that they received the property distributed to them and signed their receipt therefor by reason of the same misapprehension. The matters presented in these affidavits cannot, however, be considered upon this motion to dismiss the appeal. Whether they could have been considered upon a motion in the superior court to set aside the decree of distribution need not be determined. If such motion had been made in that court, the affidavits would then have formed a part of its records, and could have been authenticated in a bill of exceptions, and

¹ Rehearing denied January 29, 1901.

would form a part of the record on appeal from the order made upon the motion. No motion of this nature was, however, made before that court, nor was any matter presented for its consideration tending to impair the validity and correctness of the decree, and, while the decree remains as the judgment of that court, this court has no jurisdiction to question its sufficiency or force by reason of any matters which are not of record. The appeals are dismissed.

We concur: VAN DYKE, J.; GAROUTTE, J.

(121 Cal. 283)

MOHR v. BYRNE et al. (KOWALSKY, Intervener. S. F. 1,843).

(Supreme Court of California. Dec. 31, 1900.)
APPEAL AND ERROR—NOTICE—SERVICE ON ATTORNEY—PROOF—AFFIDAVIT—SUFFICIENCY.

Code Civ. Proc. §§ 940, 1015, 1011, provide that service of notice of appeal may be made on a party's attorney, if personal, by delivery to him, and, if delivery cannot be made, it may be left at his office during his absence, by leaving the notice with his clerk therein, or with a person in charge thereof, or, if no person is in the office, by leaving the notice between the hours of 8 in the morning and 6 in the afternoon in a conspicuous place in the office, or, if the office is not open, by leaving it at the attorney's residence, in charge of some person of suitable age and discretion. The affidavit of service of such a notice stated that a copy of it was left at the office of the adverse party's attorneys, but did not show whether the attorneys were absent therefrom; whether a clerk or anybody else was in charge thereof; whether the office was open or closed; whether the notice was left in a conspicuous place therein, or at what time in the day it was left. *Held*, that the affidavit was insufficient to show service of the notice of appeal, since it did not show compliance with the statutory requirements for service, or the existence of conditions authorizing service in the mode adopted, and therefore the appeal should be dismissed.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Action by Henry Mohr against Kate C. Byrne and others, in which Henry I. Kowalsky intervened. From a judgment in favor of plaintiff, intervener appeals. Dismissed.

W. A. Kirkwood and W. C. Shepard, for appellant. Hepburn Wilkins, Wilson & Wilson, T. J. Crowley, W. H. H. Hart, and Aylett R. Cotton, for respondents.

HARRISON, J. Motion to dismiss the appeal. This action was brought to recover the amount of certain promissory notes executed by the respondent Kate C. Byrne, and held by the plaintiff. A complaint in intervention was filed by Henry I. Kowalsky, in which he claimed an interest in one of said notes. Judgment was rendered in the action in favor of the plaintiff, and against the defendants, and that the intervener, Kowalsky, "take nothing by this action." From this judgment the intervener has taken an appeal.

A motion is now made in behalf of the defendants Kate C. Byrne and John E. Byrne to dismiss the appeal upon the ground, among others, that no notice of the appeal was served upon them.

The only evidence of service of the notice of appeal upon them, or either of them, is contained in an affidavit of Isidore Golden, a clerk of Kowalsky, who states therein that on the 2d day of December, 1898, he prepared typewritten notices of the appeal, and "left a copy at the office of Wilson & Wilson, attorneys for Kate C. Byrne et al." It appears from the record that Wilson & Wilson were the attorneys for the respondents Kate C. Byrne and John E. Byrne. It is not shown that the notice of appeal was ever received by these attorneys.

Section 940, Code Civ. Proc., requires the notice of appeal to be served "on the adverse party or his attorney"; and section 1015 declares that, "in all cases where a party has an attorney in the action or proceeding, the service of papers when required must be upon the attorney instead of the party." Section 1011 provides that, if the service is personal, it is to be made by a delivery of the notice or other paper to the party or attorney on whom the service is required to be made. The section, moreover, provides for service in certain instances where such delivery cannot be made, as follows: "If upon an attorney, it may be made during his absence from his office by leaving the notice or other paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving them between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving them at the attorney's residence with some person of suitable age and discretion." The affidavit of service must show that all the requirements of the law to effect service have been complied with, and also the existence of the conditions authorizing service in the mode adopted. In the present case the affidavit fails to show whether the attorneys for the respondent were absent from their office, or whether any clerk was present, or anybody in charge of the office, or at what time in the day the copy was left. Neither does it show whether the office was open or closed, and the statement that the affiant left it at the office is consistent with the fact that the office was closed, and that it was left at the outside of the door. If the office was open, the affidavit does not state that the notice was left "in a conspicuous place in the office"; and, as was said in *Doll v. Smith*, 32 Cal. 476: "For aught that appears to the contrary, it may have been put in the stove or some other place where it was not likely to be found." In that case the statement in the affidavit that the affiant "served the within notice on the plaintiff by leaving a copy of the same at the office of J. G. Doll, plaintiff's attorney,

in the town of Red Bluff, on the 23d day of July, 1868," was held to be insufficient proof of service, and the appeal was dismissed. In *Gallardo v. Telegraph Co.*, 49 Cal. 510, the statement of the affiant that he "left a true copy of the notice at the office of Crane & Boyd, the attorneys for the defendant," was held not to show service of a notice of the settlement of a bill of exceptions. See, also, *Dalzell v. Superior Court*, 67 Cal. 453, 7 Pac. 910. Under these authorities it must be held that there is no proof of the service of the notice of appeal. The appeal of the intervenor, Kowalsky, is dismissed as to the respondents Kate C. Byrne and John E. Byrne.

We concur: VAN DYKE, J.; GAROUTTE, J.

(131 Cal. 30; 6 Cal. Unrep. 615)

PEOPLE ex rel. SILVA v. LEVEE DIST. NO. 6 OF SUTTER COUNTY et al.
(Sac. 687.)¹

(Supreme Court of California. Dec. 20, 1900.)

LEVEE DISTRICTS—SPECIAL LAWS—VALIDITY.

1. A levee district was organized under Act March 25, 1868 (St. 1867-68, p. 316), providing a method for the organization of such districts, and, such act being declared void as to the method of organization, the legislature, by Act March 30, 1872 (St. 1871-72, p. 734), recognized the existence of such district. *Held*, that such legislative recognition gave legal existence to such district, though it was irregularly created, since the legislature, having power to create such districts, on the law under which it was created being held invalid could give it legal existence by positive recognition.

2. Act March 31, 1891 (St. 1891, p. 235), providing a new form of government for a certain levee district, is not violative of Const. art. 11, § 6, and art. 12, § 1, declaring that neither municipal nor private corporations shall be created by special laws, since such levee districts are neither municipal nor private corporations, but are mere governmental agencies having certain of the attributes and functions of corporations.

3. Act March 31, 1891 (St. 1891, p. 235), providing a new form of government for a levee district, does not contravene Const. art. 4, § 25, subd. 3, forbidding the enactment of local or special laws if a general law can be made applicable, since it was a question for the legislature whether a general law was applicable, and its determination of the necessity for a special law will not be interfered with.

Department 2. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Quo warranto, on the relation of John F. Silva, against levee district No. 6 of Sutter county and others. Judgment for defendants, and relator appeals. Affirmed.

Atty. Gen. Ford, Hart & Aram, and Kirby S. Mahon, for appellant. W. H. Carlin and M. E. Sanborn, for respondents.

HENSHAW, J. This is a proceeding in quo warranto to test the legal existence of levee district No. 6. The other defendants are the officers of the district. The case was heard and determined upon an agreed statement of facts, which are the findings in the

case. Upon these facts judgment was rendered for defendants, and plaintiff appeals.

Levee district No. 6 was organized under the act of March 25, 1868 (St. 1867-68, p. 316). By virtue of that act levee district No. 1 was created, and there was provided a scheme for the organization and government of other levee districts which might thereafter be formed. But section 21 of the act, setting forth the method of organization for such districts, has been declared unconstitutional and void. *Moulton v. Park*, 64 Cal. 183, 30 Pac. 613; *Brandenstein v. Hoke*, 101 Cal. 134, 35 Pac. 562. It follows, therefore, and is conceded, that the organization of levee district No. 6, effected under section 21 of the act of March 25, 1868, was irregular and void. Notwithstanding this fatal irregularity in its organization, the legislature made distinct recognition of the existence of the district by an act approved March 30, 1872 (St. 1871-72, p. 734), and again by acts approved March 31, 1891 (St. 1891, p. 235, and St. 1891, p. 237). The first of these acts of recognition was passed under the constitution of 1849, and the latter two under the present constitution. That they are positive acts of recognition sufficient to invest the district with the functions and attributes which it had assumed to exercise under the law of 1868 may not be doubted, under the authority of *People v. Reclamation Dist. No. 108*, 53 Cal. 346, and *Reclamation Dist. No. 108 v. Gray*, 95 Cal. 605, 30 Pac. 779, unless it can be said that the legislature itself was without power so to validate the existence of a levee district thus irregularly organized. This is the contention of appellant. But legislative action in such matters is only circumscribed by the express limitations of the constitution. It is not questioned but that in the first instance, by direct enactment, the legislature could have carved out levee district No. 6 precisely as it did in the case of levee district No. 1. Where the exercise of a particular power is limited by the constitution, the legislature must act in the mode prescribed. But, where there is no such limitation, if the legislature shall prescribe a mode for its exercise which is, perchance, illegal, it may by subsequent ratification or recognition validate the acts done under the irregular mode. To illustrate, the present constitution forbids the creation of corporations for municipal purposes, except by general law. A special law creating a special municipal corporation would be violative of this constitutional inhibition, and no subsequent act of ratification or recognition by the legislature could validate that which in the first instance it had no power to do. But under the constitution of 1849 corporations for municipal purposes could be created by special law. If, then, the legislature, acting under that constitution, should so by special law create a municipal corporation, and for some reason the law lacked validity, the legislature, having the power thus to create the corporation, could

¹ For opinion in bank, see 63 Pac. 676.

by ratification or recognition of its corporate existence erect it into a valid municipality. If, then, levee district No. 6 be considered as a corporation (a matter inviting later attention), it was a corporation created for municipal purposes, and, notwithstanding this irregularity of its creation, the legislature could, as it did, give it a legal existence by its positive acts of recognition.

But, appellant still further contends that levee district No. 6 was a corporation for municipal purposes under the act of 1868 and the act of 1872 recognizing its existence; that a new and distinct organization was perfected for it under the act of March 31, 1891, passed under the present constitution; that the district elected to come under this act, and to exercise the corporate functions provided for by the act; that the act itself is void; and that therefore the district is improperly exercising corporate functions, from using which it should be restrained. Since levee district No. 6 was a legal entity before the passage of the act of March, 1891, if that act be itself void it would not interfere with the legal existence of levee district No. 6; and the utmost which the court could do would be to require it to exercise the powers which it had theretofore enjoyed under the act of 1868, and the acts amendatory thereto, and restrain it from exercising any new rights or powers under the act of 1891. But, upon the other hand, respondent insists upon the validity of the act of 1891, and upon its right to exercise the powers conferred upon it by that act, and thus a further consideration of the question is demanded.

Appellant's argument against the validity of the act of March 31, 1891, is that levee district No. 6 is a corporation for municipal purposes; that, under the constitution, corporations for municipal purposes shall not be created by special laws; and that the act of March 31, 1891, dealing as it does with levee district No. 6 alone, and providing a new form of government for it, is a special law. Article 12, § 1, of the constitution, having reference to private corporations, provides that they may be formed under general laws, but shall not be created by a special act. Article 11, § 6, of the constitution declares that corporations for municipal purposes shall not be created by special laws. The act of 1891 is unquestionably a special law. If levee district No. 6 be a corporation, it is certainly not a private corporation, and must come under the designation of article 11, § 6,—“a corporation for municipal purposes.” And if it be a corporation for municipal purposes, within the meaning of that article and section, then, indubitably, the act of March, 1891, forcing upon a levee district a new, distinct, and different organization, is special and inhibited legislation. But is levee district No. 6 a corporation for municipal purposes, within the meaning of the constitution, or is levee district No. 6, in strictness, a corporation at all? Expressions will be found in the cases

where such organizations have been designated “corporations for municipal purposes,” or “public corporations,” or “corporations for public purposes,” but these were convenient phrases of designation and description, rather than judicial declarations as to the nature and character of these agencies. The first question propounded is conclusively answered by *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016. It is there held that a reclamation district, conceding it to be a corporation, is not a corporation for municipal purposes within the meaning of the constitution. But, as such levee districts or reclamation districts are distinctly not private corporations, it must follow that, if they be corporations, they are corporations in a class by themselves; and the general powers of the legislature for their creation, organization, and control are in no wise limited by the constitution of the state. The second question is likewise answered in *People v. Reclamation Dist. No. 551*. This court there said, speaking through Mr. Justice Temple: “These districts, in my opinion, belong to neither of these classes [public or private corporations]. They are special organizations, formed to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. They are described by Dillon in his work on *Municipal Corporations* (sections 24–26). He calls them quasi corporations. Perhaps it would have been more accurate to say that they are not corporations at all, but are so classed because many of the presumptions and rules which apply to corporations have been made applicable to them. They are public agencies, which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform. And there is nothing in the constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them out of existence.” We think that what was thus tentatively expressed in the above quotation is a strict and accurate definition of the character of these organizations. The designation of them by Dillon as quasi corporations is, in itself, a distinct denial that they are corporations. They are governmental agencies—mere mandatories—having certain of the attributes and functions of a corporation, but, in strictness, not corporations at all. They are created to perform certain work for lands districted, for the benefits to be received. Their work accomplished, they cease to exist. They have grown up out of our new conditions and progressive civilization. It is concluded, therefore, upon this point, that levee district No. 6 is not a corporation, and that the constitutional inhibition against creating corporations, private or municipal, by a special law, has no applicability. Nor can it be perceived how the act

of 1891 contravenes the provisions of article 4, § 25, subd. 3, which forbids the legislature to pass local or special laws in cases where the general law can be made applicable. We would not overthrow the act of a co-ordinate branch of the government under this provision unless it clearly appears that a general law could be made applicable. Considering the nature and duties of such districts, it might well be that, for the proper performance of their work, the powers to be conferred or duties imposed upon one would have no value if imposed upon another, or, if imposed upon all, might work injury to the many, while conferring benefits upon the few. It is a case, as was that of *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, where the legislative determination of the necessity for a special law will not here be interfered with. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 210)

HERMAN v. PACIFIC JUTE M. CO. (S. F. 1,504.)

(Supreme Court of California. Dec. 29, 1900.)
TRIAL—DISMISSAL OF ACTION—LACHES—SHAM ANSWER.

Where an affidavit of plaintiff shows that the defendant has admitted having no defense to the suit, and that the answer on file is a sham, and false, and was filed for the purpose of delay, and no counter affidavit is filed, it is error to dismiss the case for plaintiff's laches in failing to prosecute the action.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action on a note by Alexander Herman against the Pacific Jute M. Company. From a judgment dismissing the case for failure of prosecution, the defendant appeals. Reversed.

Wm. B. Sharp, for appellant. Wilson & Wilson, for appellee.

PER CURIAM. Appeal from a judgment dismissing the case for failure of prosecution. The suit was brought by the plaintiff, as assignee, to recover the amount due on a note made to plaintiff's assignor by the defendant April 20, 1881. The sole issue raised by the answer was as to the plaintiff's ownership of the note. The motion was made October, 1897, on the "records, files, and entries" in the case, from which it appears that the complaint was filed June 6th, and the answer October 31, 1883. From the affidavit of the plaintiff—besides matter in excuse of delay, which need not be passed on—it appears, in effect, that the defendant had no defense to the action, and that the answer was a sham or false answer, known to be such to the defendant and its attorneys; and that it was in fact filed under a resolution of the board of directors (which is

set out in the affidavit), referring to a letter of its attorneys advising that the case be allowed to go by default, but instructing him to file the answer. The attorneys referred to are the same that now represent the defendant. There was no affidavit in rebuttal. Without discussing other questions raised by appellant, it is sufficient to say that, conceding the power of a court to dismiss a case for laches, there was an abuse of discretion in the case at bar in exercising that power in favor of a defendant who admittedly has no defense, and has filed a sham answer for purposes of delay. The judgment appealed from is reversed.

(131 Cal. 178)

BANK OF VISALIA v. CURTIS. (Sac. 832.)
(Supreme Court of California. Dec. 29, 1900.)

APPEAL—JUDGMENT—CONSTRUCTION—DISMISSAL.

Where an issue raised by a pleading was struck out, and no evidence was offered to sustain it, the judgment entered on the other issues is not appealable for the court's refusal to render a judgment covering the issue stricken.

Department 1. Appeal from superior court, Tulare county; W. B. Wallace, Judge.

Action by the Bank of Visalia against William M. Curtis, administrator, etc. From a judgment for plaintiff for less than the relief demanded, plaintiff appeals. Dismissed.

Chas. G. Lamberson, for appellant. Bradley & Farnsworth, for respondent.

HARRISON, J. Motion to dismiss the appeal. Judgment was rendered in this action in favor of the plaintiff for a specified amount of money, and declaring the same to be a lien upon certain lands, and also upon a certain water ditch. Thereafter the plaintiff served and filed a notice of appeal "from all that portion of the judgment whereby the court refused to order, adjudge, and decree that five shares of the capital stock of the Wutchumna Water Company were mortgaged by the terms of the mortgage set out in paragraph 6 of the complaint." The respondent now moves to dismiss the appeal upon the ground that it is not taken from the judgment, or from any part thereof. The action is for the foreclosure of a mortgage, and the judgment follows the terms of paragraph 6 of the complaint. The judgment does not in terms "refuse" to decree that the shares of stock referred to in the notice of appeal were mortgaged by the terms of the mortgage set forth in the complaint, but is silent upon that subject; and it does not appear in any part of the record that such shares of stock were mortgaged. The complaint, as originally presented, after setting forth the mortgage in *hæc verba*, contained an averment that the defendant was the owner of five shares of the capital stock of the said water company, and that

said five shares "was intended to be and was in fact included in the said mortgage, and was thereby mortgaged" as security for the promissory note. Upon the motion of the defendant the court ordered that this averment be struck out of the complaint, and it thereafter formed no part of the record, and the cause was tried upon the remaining averments of the complaint. The court does not find that the stock was included in the mortgage, nor does it appear that any evidence was offered at the trial tending to show that fact. The plaintiff could have had the action of the court in striking out this averment reviewed through a motion for a new trial, but he is not entitled to appeal from a judgment rendered upon findings which cover all the issues in the action, upon the ground that the court has refused to render judgment upon issues which were not presented to it or tried. There is no authority for an appeal from the refusal of a court to render judgment upon matters which are supported by neither averment nor evidence. The motion is granted, and the appeal is dismissed.

We concur: VAN DYKE, J.; GAROUTTE, J.

(131 Cal. 180)

In re TAYLOR'S ESTATE. (S. F. 1,691.)
(Supreme Court of California. Dec. 29, 1900.)
APPOINTMENT OF GUARDIAN—JURISDICTION—
RESIDENCE OF MINOR—APPEAL—BILL
OF EXCEPTIONS—CONTENTS.

1. Code Civ. Proc. § 1747, declares that a minor must be a resident of the county in which the appointment of guardian is made. Civ. Code, § 228, declares that, after the adoption of a child, the person adopting and the child shall sustain to each other the relation of parent and child. Pol. Code, § 52, subd. 4, provides that the residence of the father is the residence of an unmarried minor child. *Held*, that where, pending the application of a sister of a minor for appointment as his guardian, he was properly adopted in proceedings before the superior court of another county by persons residing in such county, an order thereafter made in the county of the sister's residence, appointing the sister guardian, was improper.

2. On appeal it is to be presumed that the bill of exceptions contains all the evidence relative to the specifications and exceptions of the appellant.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Application by Maud Taylor for appointment as guardian of the person and estate of Ralph Russell Taylor, a minor. From an order granting the application, W. E. Parkhurst and another appeal. Reversed.

A. P. Catlin, for appellants. D. W. Burchard and H. F. Dusing, for respondent.

COOPER, C. This appeal is from an order of the superior court of Santa Clara county appointing a guardian of the person and estate of Ralph Russell Taylor, a minor. It

appears from the bill of exceptions that the said minor was born in October, 1890, in Santa Clara county; that being the place of residence of his parents. His mother died shortly after his birth, and in December, 1890, the infant was sent by his father and placed in the care and custody of W. E. Parkhurst and Hannah E. Parkhurst, his wife; the latter being the maternal aunt of the child. The father requested the Parkhursts to take the child, stating that if they did not take it he would have to send it to an orphan asylum. They first agreed to take it for a year only, but they have furnished it a home, kept it, and it has continuously lived with them in their care and custody up to the present time. The Parkhursts at the time lived in Eldorado county, but moved to Sacramento city in 1891, and have ever since continuously resided there. The father of said minor was poor, but assisted the Parkhursts to support the child at sundry times up to the time of his death, by contributions in money and clothing; the amount of money so contributed being \$115. On June 15, 1897, Maud Taylor, a sister of the minor, filed a petition in the superior court of Santa Clara county, which petition was accompanied by the written request of Samuel Taylor, the father, asking to be appointed guardian of the person and estate of said minor. On July 18, 1897, before action on said petition, the father died. After the death of the father, and in October, 1897, by proceedings in the superior court of Sacramento county the said minor was adopted by the Parkhursts, who entered into and executed the agreement required by the Code in such cases. The record is silent as to whether or not the Parkhursts at the time of the proceedings for adoption had any notice of the application of Maud Taylor to be appointed guardian. On the 19th day of March, 1898, the said Parkhursts filed a written answer and contest to the petition of Maud Taylor, in which they denied that the minor was a resident of Santa Clara county, and alleged that he was at the time of filing the petition, and continued to be, a resident of Sacramento county, and further alleged the proceedings of adoption, showing that said minor was adopted by them in October, 1897. After hearing the evidence, and upon the facts herein stated, the court made an order appointing Maud Taylor, the sister, guardian of the person and estate of the said minor.

A minor must be an inhabitant or resident of the county in which the appointment of a guardian is made, in order for the court to have jurisdiction to make the appointment. Code Civ. Proc. § 1747; In re Raynor, 74 Cal. 424, 16 Pac. 229; Rodg. Dom. Rel. § 848; Harding v. Weld, 128 Mass. 589; Schouler, Dom. Rel. p. 424. There is no different principle laid down in Re Danneker, 67 Cal. 645, 8 Pac. 514. In fact, in that case it is said: "Letters will be issued, if necessary, by the court of the county where it may be

legally determined the child resides." After the minor was adopted in October, 1897, his residence was that of the Parkhursts, who adopted him. Civ. Code, § 228; Pol. Code, § 52, subd. 4; Jacobs, Dom. §§ 247, 248; Younger v. Younger, 106 Cal. 379, 39 Pac. 779; Washburn v. White, 140 Mass. 569, 5 N. E. 813. We think the bill of exceptions purports to give all the evidence upon which the court acted. After giving certain evidence and facts, it is recited therein, "Upon the foregoing facts in evidence, and the testimony of Maud Taylor, hereinafter set forth, the said matter was on the 25th of March, 1898, submitted to the court for its decision." Then follows the testimony of Maud Taylor. In the specifications and exceptions it is stated that by the adoption the child became, to all intents and purposes, the child of the parents adopting it, and that the evidence shows that at the time of hearing the petition the child was a resident of Sacramento county. It is presumed that the bill of exceptions contains all the evidence relative to the above-specified points. *Association v. Willard*, 48 Cal. 619.

It follows that the order should be reversed.

We concur: SMITH, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(131 Cal. 215)

RAISCH v. SAUSALITO LAND & FERRY CO. (S. F. 2,458.)

(Supreme Court of California. Dec. 29, 1900.)
COURTS—JURISDICTION—APPEAL AND ERROR—TITLE TO LAND—MATTER OF RECORD.

1. Where defendant, in an action before a justice of the peace for a money demand less than the amount necessary to give the circuit court original jurisdiction, failed to raise the issue of title to realty, and have the case certified to the circuit court, as required by Code Civ. Proc. § 838, but judgment was had, and defendant appealed to the circuit court on questions of law and fact, where the case was tried without its being made to appear of record that title would be involved, the jurisdiction of the circuit court was appellate, and not original, as where the case is certified by the justice; and hence, under the constitution, giving the supreme court jurisdiction to review judgments of the circuit court only where its jurisdiction is original, the judgment rendered by the circuit court was final, and the supreme court was without jurisdiction to review it.

2. Statement of counsel, made for the purpose of having the evidence taken down, that the case involved title to land, cannot be accepted as a substitute for matter of record to show that title was involved, from which the jurisdiction of the court is to be ascertained.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Action by A. J. Ralsch against the Sausalito Land & Ferry Company. From a judgment of the circuit court affirming a justice's judgment in favor of plaintiff, defendant appeals. Dismissed.

Robt. Harrison, for appellant. D. H. Whittemore, for respondent.

HARRISON, J. Motion to dismiss the appeal. The plaintiff brought this action in the justice's court to recover from the defendant the sum of \$299, alleging in his complaint that his assignor had entered into a contract with the defendant for the doing of certain work in improving a street in Sausalito, and that the defendant had agreed to pay the above sum therefor. The defendant answered the complaint by a general denial, and also pleaded as a separate defense a former judgment in its favor upon the same cause of action. The cause was tried in the justice's court, and judgment rendered in favor of the plaintiff, from which the defendant appealed to the superior court upon questions of both law and fact. Upon the trial in the superior court judgment was rendered in favor of the plaintiff, from which the defendant has appealed to this court. The plaintiff now moves to dismiss the appeal upon the ground that this court has no jurisdiction to entertain the same; that, the amount of his demand being less than \$300, the justice's court had jurisdiction of the case, and the judgment of the superior court upon the appeal therefrom is final. The motion is resisted by the appellant upon its claim that the case is one wherein the title or possession of real estate is involved.

The constitution gives original jurisdiction to the superior court and appellate jurisdiction to this court in all cases at law in which the title or right of possession of real estate is involved, but denies such jurisdiction in those cases at law in which the demand, exclusive of interest, is less than \$300. The appellate jurisdiction of this court over the judgments of the superior court is limited to the cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction. If the plaintiff's demand is less than \$300, the superior court will have no original jurisdiction to try the case, unless it appear upon the record before it that it involves a question of which the constitution has given it original jurisdiction. The jurisdiction of a court over any subject-matter that is not included within its general jurisdiction must appear upon the record of its proceedings. A plaintiff may invoke the jurisdiction of the superior court when the title or right of possession of real estate is involved, irrespective of the amount of his money demand, by alleging that fact in his complaint, and setting forth the matters out of which the question arises (*Holman v. Taylor*, 31 Cal. 338; *Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256); but, when his demand is for less than \$300, and he brings an action therefor in the justice's court without showing that such question is involved, if the defendant would invoke the jurisdiction of the superior court he must

comply with the procedure authorized therefor (*Boyd v. Railway Co.*, 126 Cal. 574, 58 Pac. 1046). The mode in which the jurisdiction of a court may be invoked by a litigant is regulated by the legislature, and in this state is defined in the Code of Civil Procedure. Section 838, Code Civ. Proc., declares that the parties to an action in the justice's court cannot give evidence upon any question which involves the title or possession of real property, and that that court cannot try any issue presenting such question. It also provides that, "if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property," the justice must suspend all further proceedings in the action, and certify the pleadings to the superior court. Under this section the justice has no authority to certify the pleadings to the superior court, nor will the superior court obtain jurisdiction of the case by his certifying them to it, unless the defendant shall have presented in the justice's court an answer, verified by his oath, that such question is necessarily involved in the determination of the action. When the case is thus certified to the superior court, the jurisdiction exercised by it is not an appellate jurisdiction, but is the original jurisdiction given it over this question by the constitution. *Arroyo Ditch & Water Co. v. Superior Court of Los Angeles Co.*, 92 Cal. 47, 28 Pac. 54. Section 838, Code Civ. Proc., declares that in such case "the superior court shall have over the action the same jurisdiction as if it had been commenced therein." Over its judgment, therein rendered, this court has an appellate jurisdiction.

In the present case it in no respect appeared from the pleadings in the justice's court that the title or right of possession of real estate was involved in the action. The complaint is merely a money demand, alleged to be due upon a personal contract. The defendant did not file a verified answer, nor does it appear that any evidence was offered in the justice's court upon any question which involved the title or possession of real property. The justice had no authority, therefore, and was not asked, to transfer the case to the superior court; but the parties proceeded to a trial before him, in which judgment was rendered in favor of the plaintiff. From this judgment the defendant appealed to the superior court upon questions of both law and fact. The jurisdiction of the superior court to try the case was, therefore, an appellate, and not an original, jurisdiction, and it proceeded to try the case *de novo*, as required by section 976, Code Civ. Proc. No amendment of its answer was asked by the defendant, nor was it made to appear to the court by any matter of record that the determination of the case would present any question involving the title or possession of real property. It is recited in the statement of the case that at the opening of the trial

the attorney for the plaintiff stated that, "as the case involved the title or possession of real property, he desired that the evidence be taken by the reporter, and that the usual findings be made"; but the statement of counsel, made, as it appears, for that special purpose, is not the equivalent of, nor can it be made a substitute for, matter of record, from which the jurisdiction of the court is to be ascertained. Although the proceedings at the trial in a matter in which the court had only appellate jurisdiction cannot be considered for the purpose of determining whether it might not have had original jurisdiction if it had been properly invoked, yet we have examined the statement of the case, and do not find that evidence was offered by either party upon any question which involved the title or right of possession of real estate, or that the determination of the case involved such question. As it, therefore, appears from the record on appeal that the superior court was merely in the exercise of its appellate jurisdiction, it follows that the appeal from its judgment therein to this court is unauthorized. The appeal is dismissed.

We concur: VAN DYKE, J.; GAROUTTE, J.

(131 Cal. 231)

PEOPLE v. ARLINGTON. (Cr. 647.)

(Supreme Court of California. Dec. 29, 1900.)

CRIMINAL LAW—CREDIBILITY OF WITNESSES—REASONABLE DOUBT—INSTRUCTIONS.

1. Under Code Civ. Proc. § 2061, subd. 3, authorizing the court to instruct that a witness false in one part of his testimony is to be distrusted in others, it is not error for the court, after instructing in the language of such subdivision, to add that, if the jury find that any witness has willfully testified falsely to any material matter, they have a right to entirely disregard his testimony.

2. Under Code Civ. Proc. § 2061, subd. 3, authorizing the court to instruct that a witness false in any part of his testimony is to be distrusted in others, the court cannot single out a particular witness, and apply such section to him.

3. A contention that the court erred in its instruction, as not based on evidence, cannot be sustained where the bill of exceptions does not bring up all the evidence.

4. The court's instructing that the accused was presumed to be innocent, and was not required to prove himself innocent until the prosecution had proven his guilt beyond a reasonable doubt, does not deprive accused of the presumption of innocence at some time in the trial, where it was further stated that the presumption abided with accused throughout the trial of the case, until the evidence convinced the jury to the contrary beyond all reasonable doubt.

Department 2. Appeal from superior court, Alameda county; S. P. Hall, Judge.

A. Arlington was convicted of grand larceny, and from the judgment and an order denying his motion for a new trial he appeals. Affirmed.

J. E. McElrath, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Defendant was charged with the crime of grand larceny and of two prior convictions for the like offense. He was found guilty by the jury, and the court sentenced him to imprisonment in the state prison during his natural life. The appeal is from the judgment and from the order denying defendant's motion for a new trial. There is no brief for respondent. Appellant's points relate exclusively to the instructions of the court.

1. The point first presented arises on the following instruction: "I instruct you, gentlemen of the jury, that a witness false in one part of his or her testimony, as the case may be, is to be distrusted in others. *And if you find that any witness in this case has willfully testified falsely to any material matter in the case, you have a right to entirely disregard and cast aside the testimony of such witness.*" The first part of the instruction is in the language of section 2061, subd. 3, of the Code of Civil Procedure, and is not objected to; but the latter part, in italics, is urged as prejudicial to defendant, because it tended to confuse the jury, and prevent them from giving proper consideration to the facts of the case; and, besides, is erroneous as embodying any part of the law of this state. Appellant's counsel review at some length the decisions in which this provision of the Code has been commented upon, and concludes that much confusion exists as to its meaning; and the learned counsel insists that the rule was laid down in *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734, to the effect that the language of the statute should be followed without amplification or modification. We do not so understand that case. The trial court had used the phrase "may be distrusted," instead of "is to be distrusted," and it was with reference to this change in phraseology that it was suggested as safer and better to follow the language of the statute. That the trial court may amplify the Code rule substantially as was done in the present case was decided in *People v. Flynn*, 73 Cal. 511, 15 Pac. 102, and that it should be so is laid down in *People v. Plyler*, 121 Cal. 100, 53 Pac. 553. The instruction there read as follows: "If you are satisfied that any witness has willfully testified falsely in regard to any one person, or any one particular fact in the case, then you are authorized to distrust his or her testimony in all particulars; that is, you may reject it entirely, if you choose to do so, or you may reject it in part and receive it in part, as you find it contradicted or sustained by other testimony, as you are satisfied of its truth or falsity." See, also, *People v. Clark*, 84 Cal. 573, 24 Pac. 313, where a similar instruction was upheld; and the rule is sustained by what was said with considerable amplification in *People v. Sprague*, 53 Cal. 491, quoted approvingly in *White v. Disher*, 67 Cal. 402, 7 Pac. 826.

2. The defendant requested and was re-

fused the following instruction: "If you believe that the prosecutrix testified falsely about being in San Francisco on the night of April 14, 1899, she is to be distrusted in other parts of her testimony." The court did not err. The instruction first above considered applied to all the witnesses in the case, and, besides, it would have been improper to single out a particular witness, and apply to him or to her the rule in question. *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315.

3. The court charged the jury as follows: "Before you can find him [defendant] guilty of grand larceny, you must be satisfied beyond all reasonable doubt that he stole from the prosecuting witness, Minnie M. Smith, of her personal property, money in excess of the value of fifty dollars; but if you find that he stole such money, but are not satisfied that the amount thereof exceeded fifty dollars, you can only find him guilty of petit larceny." Section 678, Pen. Code, provides that, "wherever in this Code the character or grade of the offense, or its punishment, is made to depend upon the value of the property, such value shall be estimated exclusively in United States gold coin." The court elsewhere in its instructions referred to the indictment as charging defendant with having stolen "two hundred and fourteen dollars, of the value of two hundred and fourteen dollars, in lawful money of the United States"; and again reference is made to some of this money as "bills of currency of the United States," or as "greenbacks," or as "fifty-dollar bills," but the court does not tell the jury in estimating the value of these greenbacks or bills that they are to "estimate their value in gold coin of the United States." The evidence was that the money stolen consisted of two \$50 greenbacks, five \$20 greenback bills, a \$10 piece of gold, and \$4.85 in various denominations of silver coin. The contention is that there was no testimony offered to show the meaning of the word "greenbacks," or instruction that their value was to be estimated in gold coin. The bill of exceptions does not bring up all the evidence, and what appears is stated in the bill to bear only "upon the defendant's exceptions hereinafter to be stated." We find no exception on the point now raised, and, as the presumption is that there was evidence to meet the requirements of the law, it was incumbent on defendant to show affirmatively that there was no such evidence. The question now raised is not necessarily involved by the appeal.

4. The court charged the jury as follows: "The charge in the information puts upon the prosecution the burden of proving that he is guilty of the charge laid in the information beyond all reasonable doubt. In other words, gentlemen, the defendant at the outset of this trial is presumed to be an innocent man. He is not required to prove himself innocent, or to put in any evidence at all upon that subject until the prosecution has proven

to your satisfaction and beyond all reasonable doubt that he is guilty. Now, in considering the testimony in the case, you must look at that testimony, and view it in the light of that presumption which the law clothes him with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case, until the evidence convinces you to the contrary beyond all reasonable doubt." It is claimed that the effect of this instruction was to deprive defendant of the presumption of innocence at some time throughout the trial, before the jury should, by their verdict, determine to the contrary; that the jury were, in effect, told that when the prosecution closed its evidence, and the defendant was called upon to put in his defense, at that point of time the presumption of innocence with which the defendant was clothed ceased to operate. There is no doubt but that the presumption of innocence continues not only during the taking of the testimony, but during the deliberations of the jury, and until they reach a verdict (*People v. McNamara*, 94 Cal. 509, 29 Pac. 953); and, if it could fairly be said that the instruction deprived the defendant of the full operation of this rule, we should not hesitate to hold the error to be prejudicial. But we cannot so interpret the meaning of the instruction. The court told the jury that "it is a presumption that abides with him throughout the trial of the case," and we do not think the language "until the evidence convinces you to the contrary beyond all reasonable doubt" conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution, or at any time before the jury had finally determined upon a verdict. The court meant, and we think must have been by the jury understood to mean, that the presumption remained to the last with defendant, and until in their deliberations upon the evidence they became convinced of his guilt. When the jury reached that conclusion on the whole evidence, and beyond a reasonable doubt, of course the presumption disappeared, and should disappear. The judgment and order are affirmed.

(131 Cal. 263)

BLANCHARD v. HARTWELL et al.
(L. A. 1,018.)

(Supreme Court of California. Dec. 29, 1900.)

MUNICIPAL CORPORATIONS—CHARTER—ADOPTION—AMENDMENT.

1. Const. art. 11, § 8, authorizes a city to frame a charter for its own government by causing a board of freeholders to be elected to prepare a charter, which may be adopted by a majority vote of the electors and by the legislature, and provides that the charter may afterwards be amended at intervals of not less than two years, by proposals submitted by the legislative authority of the city. *Held*, that the payment of the expenses of a board of freeholders elected by a city already having a freehold charter, to prepare a new charter, will be enjoined, since such city can only change the

charter by the procedure provided for making amendments.

2. Pol. Code, § 1188, prescribing the methods of nominating candidates for office, does not authorize proceedings to elect a board of freeholders, for the purpose of preparing a city charter, to be instituted by citizens of the city, as Const. art. 11, § 8, authorizing the election of such a board, requires that they be caused to be elected by the city, which can act only through its council.

Henshaw, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Extended opinion. For original opinion, see 62 Pac. 509.

M. L. Graff, for appellant. R. H. F. Variel, for respondents.

TEMPLE, J. This action is by a taxpayer to enjoin the city treasurer of Los Angeles and the city from paying the expenses of a certain board claiming to be a board of freeholders elected to prepare a charter for the city. The city of Los Angeles already had a freeholders' charter, which was approved by the legislature in January, 1889. In that year a board of freeholders was again elected, which formed a new charter, which was submitted to the inhabitants of the city for their approval, but was rejected. In July of the present year another board was elected, and formally qualified, and is proceeding to prepare a new charter. The case was submitted upon the stipulated facts. The defendants had judgment, and plaintiff appeals.

The constitutional provisions bearing upon this matter are contained in section 8, art. 11. So far as material here, it is as follows: Any city having the requisite population may frame a charter for its own government by causing a board of 15 freeholders to be elected to prepare a charter, which, in the mode specified in the section, shall be submitted to the qualified electors of the city; and, if approved by a majority of them and by the legislature, it will become the charter of said city and the organic law thereof, and supersede any existing charter and amendments thereof, and all laws inconsistent with such charter. It is then provided, as to amendments: "The charter so ratified may be amended at intervals of not less than two years by proposal therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter. In submitting any such charter, or amendments thereto, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others." In *People v. Gunn*, 85 Cal. 238, 24 Pac. 718, the provisions of the section in regard to the mode of framing and adopt-

ing a freeholders' charter in the first instance were discussed, and it was held that the procedure prescribed must be strictly pursued. This conclusion was based largely upon the ground that the procedure was, under constitutional provisions, expressly declared to be mandatory and prohibitory, and it is said, "Under such provisions the mode is the measure of the power." Upon this point the decision has never been questioned, so far as I am advised. Since a procedure for the amendment of such a charter is expressly provided, the presumption would be (independently of the declaration that all the provisions of the constitution are mandatory and prohibitory unless the contrary is expressly stated) that such mode is exclusive. Under such a constitution this seems indisputable. The one mode of amendment is commanded, and all others are prohibited. But every feature of the prescribed mode indicates that it is exclusive. It can be amended only once in two years. This would be a vain restriction if nevertheless the charter can be amended by framing a new charter (as remarked at the argument) every 60 days. Here is a clear and positive constitutional policy, calculated to insure some degree of permanency and to prevent frequent changes. Such is the prescribed policy. People may differ as to its wisdom. It certainly is the law. In the second place, it prescribes a different notice from that required upon the adoption of the charter in the first instance, and provides that alternate propositions may be submitted for the choice of electors. These are both important matters, not only providing for greater deliberation, but enabling the electors to decide by direct vote between different proposed policies, thus bringing local self-government nearer to the individual voter. No one should be permitted to deprive the electors of this privilege by compelling them to vote upon a different proposition, to wit, whether they will adopt a new scheme as a whole or not. I regard the right to submit specific amendments as a matter of great importance, but, whether important or not, such is the constitutional scheme. In the third place, the amendment must be approved by a majority of three-fifths of the qualified electors. A charter may be adopted by a majority vote of such electors. This is also a provision favoring permanence, and against changes made under temporary excitement. What a fatuous limitation or requirement this would be, if the policy thus clearly indicated could be defeated by adopting a new charter once in 60 days by a mere majority vote! A new charter, if it could be framed, would be but an amendment of the charter it displaced. In the mode provided, every section of an existing charter could be radically changed. A newly-framed charter could adopt all sections of the old, save one. If it was thought desirable to change but one simple provision, and doubts were entertained whether a three-fifths vote could be obtained,

schemers, if the power existed, could accomplish their purpose by framing a new charter. In view of such a proposition, how foolish this carefully prepared provision for amendments, with its limitations, which has been three times adopted by the people of the state, becomes! The principle here declared has been approved in numerous cases,—among them, in *City of St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686; *State v. Ohase*, 5 Ohio St. 528; *Argenti v. City of San Francisco*, 16 Cal. 283; *Zottman v. City and County of San Francisco*, 20 Cal. 102; *French v. Teschemaker*, 24 Cal. 550; *Gas Co. v. Toberman*, 61 Cal. 199; *Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3.

Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625, is not altogether in point. A freeholders' charter there was like ours only in name. The legislature, which could amend such charters *ad libitum*, provided a mode in which the city councils could be compelled to call an election to elect a board of freeholders to frame "a new charter for said city by altering, changing, revising, adding to or repealing their existing charter." Since the legislature could do all these things itself, the most important question was whether this was an improper delegation of legislative power. The court held that it was not, and this really settled the case. The chief justice took that view, and did not concur in the opinion upon the point here involved. As to that point the opinion, which was not by a majority of the court, merely states, without argument or citation of authority, that the grant of power to frame a charter is a continuing right. The provisions of the constitution of the state of Washington are not declared to be mandatory and prohibitory, and the charter was at the mercy of the legislature; and, when it is added that the opinion was not by a majority of the court, it has not much value as authority. But there a mode was provided by which the council could be compelled to call an election upon a mere petition. Here the movement can only be initiated by the city council,—the legislative body of the city. The constitution provides that the city shall cause the election to be held. The city can only act through its legislature. Counsel asserted at the argument that the people could initiate the movement under section 1188 of the Political Code, but did not stop to show how under those provisions it could be done. There is no mode provided in that section or in any other, and, as to the city having a freeholders' charter, it is at least doubtful if such a law could be enacted, even though it were held that the right to frame a charter is a continuing right. Nor is it true that to hold that this constitutional mode of amendment is exclusive restricts to any extent the power of the people to cause desired amendments to be proposed, except that this can only be done once in two years. It would

seem as easy to induce the council to submit desired amendments as to induce them to call an election for a board of freeholders, supposing them to have that power. Judgment of reversal was entered at the October term, 1900, at Los Angeles.

We concur: HARRISON, J.; McFARLAND, J.; VAN DYKE, J.

HENSHAW, J. I dissent, under the conviction that the constitutional power to frame a freeholders' charter is a continuing one, not exhausted by its single exercise.

(131 Cal. 240)

PEOPLE v. RODLEY. (Cr. 643.)¹

(Supreme Court of California. April 3, 1900.)

PERJURY—EVIDENCE—SUFFICIENCY—COMPETENCY—INDICTMENT—JURY—PANEL—LIST—SELECTION—INSTRUCTIONS—CONSPIRACY—CO-CONSPIRATOR.

1. Defendant, at the probate of a will, swore that he signed in the presence of the other witness and the testator, at testator's request, who declared that he had signed it. The other witness pleaded guilty to perjury, and testified that he and defendant signed the will several months after testator's death; that defendant persuaded him to do so, because there was \$5,000 in it for each of them. Another witness told of defendant's attempt to get him to sign the will after testator's death, and that he would get \$3,000 for so doing. Another testified that the principal beneficiary, who also wrote the will after testator's death, offered him \$5,000 to witness it, saying that she was to pay defendant that amount for being the other witness. Defendant, whose character was good, denied this testimony, but was uncorroborated. The will was admitted to probate, but was afterwards declared invalid. *Held* sufficient to sustain a conviction for perjury.

2. Where an indictment for perjury alleged that the statements made by defendant were then and there false and untrue, and known by him to be so, in the absence of a demurrer it is a sufficient assignment of perjury, within the requirement of Pen. Code, § 966, that the indictment contain proper allegations of the falsity of the matter in which perjury is assigned.

3. The allegation in the indictment that the testimony alleged to be false was then and there material to the issue and matters being heard in said proceeding is a sufficient allegation as to materiality.

4. Where the grand jury presented a true bill against defendant for perjury on a petition for letters testamentary, but, after retiring for further deliberation, and on the same day, they returned into court, changing the indictment found to conform to the fact that the petition in the probate proceedings called for letters of administration with the will annexed, on which amended indictment defendant was arraigned and tried, there was nothing of which defendant could complain, he not having been arraigned on the indictment before amendment, since such a mistake may be corrected at any time before the prisoner has pleaded and the jury been discharged.

5. Where defendant filed an affidavit for trial before another judge because of prejudice, as authorized by Code Civ. Proc. § 170, and counter affidavits of the judge were filed, and considered by the court in determining whether the judge was disqualified, without objection of defendant, it is too late to make such objection on appeal from conviction.

6. Under Code Civ. Proc. §§ 206, 211, providing that the list of jurors shall contain the number ordered by the court to be selected from the wards and townships in proportion to the number of inhabitants, and the lists to be kept separate, and that the names of persons remaining in the grand or petit jury boxes at the end of the year who have not been drawn, and have not served as jurors during the year, may be placed on the list for the succeeding year, though the number fixed in the order cannot be increased by the names left in the jury box at the end of the previous year, it was proper for the supervisors to select such as possessed the necessary qualifications, and had not served the previous year, as part of the list for the current year.

7. Under Code Civ. Proc. § 206, authorizing the list of jurors to be selected from the wards or townships of a county in proportion to the population therein as nearly as can be estimated by the persons making the lists, it was not improper for the supervisors, in making the list, to estimate the population by the number of votes cast in each district at the last preceding election.

8. Where the clerk testified that the 75 ballots drawn from the jury box were folded, so as to conceal the names therein written, the objection that the name of one of the jury was not properly concealed was untenable, and challenge to the panel was properly overruled.

9. In a prosecution for perjury in proving a will, the affidavit of the publication of notice of hearing of the petition for probate and letters was properly admitted in evidence as part of the record of the matter in which the perjury was charged to have been committed, and was competent evidence of the matter therein stated, under Code Civ. Proc. §§ 2010, 2011, providing that evidence of publishing of a notice required by law may be given by the printer's affidavit, which shall be prima facie evidence of the facts stated therein.

10. Where a will had not been signed by witnesses until after testator's death, in a prosecution of defendant for perjury in swearing that the will was duly witnessed by him it was proper to admit in evidence the testimony of the beneficiary of the will and the other subscribing witness as to its being duly witnessed, given at the hearing of the probate matter, since such acts and declarations, in connection with defendant's acts and declarations, tended to show that the three were each working to accomplish one criminal purpose, which tended to establish a conspiracy to rob testator's estate.

11. It having been shown that the will had been written by the beneficiary, and that defendant had been endeavoring by improper means to secure a witness to the will after the death of testator, the conversation of the beneficiary with the party wherein she attempted to persuade him to subscribe the will of the already deceased testator for \$5,000 was properly admitted in evidence, since there was sufficient proof of conspiracy between defendant and the beneficiary to make her acts in carrying out the common criminal purpose competent against him.

12. In a prosecution of a witness to a will for perjury in swearing that he duly witnessed it, there was no error in permitting evidence of a conspiracy between the beneficiary and subscribing witnesses to defraud the estate, after the admission of the declarations of the beneficiary that she had offered to pay another witness the amount she was going to pay defendant, where, taking all the evidence together, it established the conspiracy, since the order of proof rested in the sound discretion of the court.

13. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, testimony by a witness of declarations of the beneficiary tending to

¹ Rehearing denied January 23, 1901.

show a conspiracy to defraud testator's estate by establishing a fraudulent will being properly admitted, it was not error to admit evidence of declarations in the same conversation by her tending to show that defendant was a party to such conspiracy, over an objection to strike out the whole testimony.

14. An instruction, given at defendant's request, that the jury should not consider the declarations of the beneficiary to the party whom she tried to induce to sign the will that she had agreed to pay defendant for so signing, unless they first found that there existed a conspiracy to which defendant and the beneficiary were both parties, was equivalent to granting a motion to strike out the portions of the declarations as to defendant.

15. Where, in a prosecution of a witness to a will, which was in the beneficiary's handwriting, for perjury in swearing at the probate thereof that it was duly witnessed, it was claimed that there was conspiracy between the beneficiary and the witnesses to defraud the estate by a false will, testimony by a witness of a conversation in which the beneficiary tried to get him to not testify before the grand jury, that she had offered him \$5,000 to sign the will as a witness, was properly admitted.

16. In a prosecution of a witness to a will for perjury in swearing that it was duly witnessed, it was proper to sustain an objection to defendant's answering a question as to whether he stated, after testator's death, that there was such a will, and when and where he made such statements, since they were self-serving declarations.

17. In a prosecution of a witness to a will for perjury in swearing that it was duly witnessed, evidence of declarations by deceased that he intended to remember the principal beneficiary named in the will offered was properly excluded, since such declarations are not admissible on questions pertaining solely to the formal execution of the will.

18. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, it was proper to refuse to instruct that defendant's testimony was not material to the matter before the probate court, the decree of that court being to the effect that the will was olographic, and was executed as a nonolographic will should be.

19. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, whether or not he was sworn in the usual form at the probate proceedings makes no difference, under Pen. Code, § 121, providing that it is no defense to a prosecution for perjury that the oath was taken or administered in any irregular manner.

20. In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, it was proper to refuse to instruct that there was no evidence that the probate court had jurisdiction of the proceeding in which the perjury was committed, where the decree admitting the will to probate showed that the court had jurisdiction in the matter.

21. Where the other witness to the will testified to facts and circumstances tending to show defendant's guilt other than the direct evidence he gave of the falsity of the testimony charged to be perjury, since Code Civ. Proc. § 1968, requires direct evidence only as to the falsity of the testimony charged to be perjury, and as to which sufficient instructions had been given at defendant's request, it was not error to refuse to instruct that, if the jury did not believe such witness' testimony, they must acquit defendant, as they might believe his direct evidence while disbelieving the other.

22. Where two instructions as to evidence of defendant's good character were as favorable as defendant could reasonably ask, it was not error to refuse to add a third instruction on

that subject, everything stated in it being plainly implied in the other two.

23. Where an erroneous instruction cautioning the jury against testimony of verbal admissions was given, it was not error to refuse defendant's other requested instructions that the jury view with caution testimony of a witness as to oral admissions by defendant, and also the testimony of another witness as to oral admissions of the beneficiary of the will, between whom and defendant there was alleged to be a conspiracy to defraud the estate, since the subject of such instructions had been treated in the first one, of which defendant could not complain, he having requested it.

24. It was not error to refuse an instruction that defendant could not be convicted unless each of the jury was satisfied from the evidence that he was guilty beyond all reasonable doubt, and in determining such question it was the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others.

25. Where, in addition to instructions that the burden of proof was on the prosecution, and that the jury must be entirely satisfied of defendant's guilt before they could convict, an instruction was given that if, on the proof given, there was a reasonable doubt, the accused was entitled to an acquittal, and the evidence must establish the truth of the charge to a reasonable and moral certainty, it was not error to refuse to instruct that a preponderance of evidence would not be sufficient to justify a conviction.

26. It was proper to amend defendant's offered instruction as to the corroboration necessary in perjury cases by striking out the word "strong" before "corroborating circumstances," to make it accord with Code Civ. Proc. § 1968, requiring perjury to be proved by the testimony of one witness and corroborating circumstances.

27. An instruction was given containing the definition of perjury in Pen. Code, § 118,—that every person having taken an oath that he will testify truly before a competent tribunal, who willfully, and contrary to such oath, states as true any material matter known by him to be false, commits perjury. Another instruction was given that the jury were required to determine whether or not the testimony was false, and known by defendant to be false at the time delivered, and given willfully, and contrary to the oath taken. *Held*, that it was not error to refuse to instruct that defendant could not be convicted unless they found beyond reasonable doubt that he gave the testimony with a criminal intent, and, if they had reasonable doubt that he had a specific criminal intent, he should be acquitted.

28. An instruction was given that there must be direct testimony of at least one credible witness, directly contradictory of defendant's oath, and, in addition thereto, there must be testimony of another witness, or corroborating circumstances established by independent evidence, and of such character as to overcome defendant's oath and the presumption of innocence. Another instruction was that the additional evidence must be at least strongly corroborative of the accusing witness. *Held*, that it was proper to refuse an instruction that there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true, but, if the corroboration does not go to that extent, defendant must be acquitted, since the former instructions were sufficient on corroboration.

29. A judgment of conviction will not be reversed because of instructions given at defendant's request.

30. Where, in a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, when it

was not witnessed until after testator's death, it was conceded that the will was bogus, and the evidence showed that the will was not valid, a remark of the district attorney to the jury that the jury in the will contest, within an hour after retiring, brought in a verdict that it was not a valid will, though improper, was not prejudicial to defendant.

Commissioners' decision. In bank. Appeal from superior court, Butte county; John C. Gray, Judge.

J. Ellis Rodley was convicted of perjury, and from such conviction and an order denying a new trial he appeals. Affirmed.

George D. Collins, for appellant. Tiley L. Ford, Atty. Gen., for the People.

GRAY, C. The defendant was convicted of perjury, and sentenced to imprisonment in the state prison for the term of 12 years. He appeals from the judgment and from an order denying his motion for a new trial.

The transcript on appeal contains a bill of exceptions. The defendant was a practicing physician, and for at least a portion of the time covered by the evidence he was the mayor of Chico. The theory of the prosecution is that the defendant committed the crime charged to assist the purpose of a conspiracy entered into between himself, Mrs. Houseworth, and J. M. Garner, to the end that Mrs. Houseworth might succeed to the estate of one A. Fuller, deceased, by means of a false and forged will. The perjury is charged to have been committed by defendant, as a pretended subscribing witness, at the probate of the will. The alleged will was shown to be in the handwriting of Mrs. Houseworth, and she was, by the terms thereof, to have received all the property and estate of deceased except \$1,000; said estate being about \$32,000 in value. The accomplice, Garner, pleaded guilty to the charge of perjury, and thereafter, at the trial of defendant, he testified, in substance, that he and defendant signed the will together in the presence of each other, and without the request or presence of Fuller, in the summer of 1898, and several months after the death of said Fuller; that defendant persuaded him to sign by saying there was \$5,000 in it for each of them; and that, after they had both signed, defendant wrote the attesting clause in above their signatures. The following is a copy of the said alleged will and the attestation thereto, to wit:

"June 9th, 1897. I desire that Mrs. Minnie Houseworth have all my property at my death, except I reserve one thousand dollars to be equally divided between the legal heirs to my estate. A. Fuller.

"Signed as witnesses, after being requested to do so by A. Fuller, he declaring this to be his will and that he had signed it. We therefore, in his presence, and in the presence of each other, signed our names as witnesses, Aug. 3, 1897. J. E. Rodley. J. M. Garner."

It is shown that Fuller died on or about October 18, 1897, and that defendant testi-

fied at the hearing in the matter of the probate of said alleged will that he signed the will as a subscribing witness on August 3, 1897, in the presence of Fuller and Garner; and that Fuller then and there declared that he had signed the will, and requested defendant and Garner to sign as witnesses. H. T. Batchelder, county clerk of Butte county, testified that in February, 1898, he had two conversations with defendant; that in the first one defendant asked him if he was acquainted with Fuller's signature, and, on his replying that he thought he was, defendant asked him if he would be willing to certify to it if he knew it to be Fuller's signature. Defendant did not at that time exhibit any document, but said, "If you could be certain that it is his will, it would be to your interest in the sum of three thousand dollars." In the second conversation, had also in February, 1898,—the date of which is fixed by a letter from defendant,—the defendant exhibited the identical will which was subsequently filed for probate, and concerning which defendant gave the alleged false testimony. The witness read the same over once or twice. The defendant asked him if he thought that was Fuller's signature, to which he replied, "I think not, doctor." The defendant then said, "You wouldn't be willing to sign it as a witness?" and Batchelder answered that he would not; that he had signed but few wills, and those always upon invitation. The defendant was the family physician of the witness Batchelder, and they were on friendly terms at the time of the occurrences narrated. The defendant, as a witness, squarely denied that he had ever exhibited any will to Batchelder, or had ever asked him anything about Fuller's signature, and reaffirmed the truth of the testimony given by him at the probate of the will. On cross-examination the defendant was asked if, on the 25th day of October, 1899, in a conversation with S. H. Wilson, the sheriff, he (the defendant) did not use the following language: "There is nothing in that Batchelder matter that has been before the grand jury. I did go down to Biggs on the 15th day of February, 1898, and I had witnessed a will for Alfred Fuller, and it was lost; so I made a copy of it, and took the copy down with me, and showed it to Batchelder, and asked him if he thought he would sign that as a witness or not, and he told me he wouldn't have anything to do with it; so I put on my overcoat, and went out, and on the road home I tore the copy up." In reply the defendant said, "I think I did make that statement," and, when asked if the statement was correct, he said, "I think so; yes, sir." Later in his cross-examination, when the same matter was reverted to and he was asked concerning it, he replied: "I don't recollect saying anything of the kind." Subsequently said S. H. Wilson was called by the prosecution, and testified, in substance, that the defendant did make the statement substantially

as quoted in the question above. It appeared from the evidence that Mrs. Houseworth and said Garner were also witnesses at the probate of the will; that the testimony of the latter as to the facts surrounding the witnessing of the will was substantially the same as that of the defendant. Mrs. Houseworth presented the will for probate October 19, 1898, in her petition stating that she believed it was in the handwriting of the deceased, Fuller, and at that hearing she testified that she had received the will from one H. Carmack on October 17, 1898, and that she never saw the document before that date. In May, 1898, as testified at the trial by one J. B. Swearingen, Mrs. Houseworth stated to him that she had a will that Mr. Fuller had left her, and she had received it in a letter handed her by a Mr. Fimple; that it did not have any witnesses to it, and the lawyers told her it needed two witnesses; "and so all they will have to do is to write on a piece of paper that they had signed it at Fuller's request, and sign their names to it, and attach it to the will." "'Now,' she said, 'I want you to sign as one of the witnesses. Dr. Rodley has agreed to sign it for one, and I have agreed to give him five thousand dollars to sign it, and I will give you the same. I would not offer you any less than I agreed to pay Mr. Rodley.'" On this appeal a great many points are made, the more important of which we will take up and dispose of in the order in which they are presented in appellant's brief.

1. The indictment is in the following language: "J. Ellis Rodley is accused by the grand jury of the county of Butte, state of California, by this indictment, of the crime of perjury, a felony, committed as follows, to wit: That on the 23d day of November, 1898, and before the finding of this indictment, at the county of Butte, state of California, in the superior court of the said county of Butte, and state of California, Honorable John C. Gray, judge presiding therein, there was pending and on trial before the said superior court of the county of Butte a certain proceeding, to wit, the matter of the probate of the alleged will of one Alfred Fuller, deceased, and the petition of Mrs. Minnie Houseworth for letters of administration with the will annexed; and said superior court as aforesaid had competent jurisdiction then and there to hear, decide, and determine said matter and proceeding according to the law of the state of California, and was then and there fully empowered to administer the law in said matter and proceeding. The said J. Ellis Rodley was then and there called as a witness in said matter, and then and there took an oath before the said superior court, and under the direction of said superior court of the county of Butte, state of California, in due form of law, that he, the said J. Ellis Rodley, would then and there testify truly as a witness in the matter and proceeding then and there being heard by said su-

perior court, as aforesaid; said oath having been then and there administered by one C. F. Belding, who was then and there a duly appointed, qualified, and acting deputy county clerk of said county of Butte, state of California, then and there an officer authorized by law to administer oaths, and to administer an oath to said J. Ellis Rodley as a witness in said proceeding then and there pending as aforesaid. He, the said J. Ellis Rodley, did then and there, and being so sworn, at said county of Butte, state of California, and in said proceeding aforesaid, in a matter material to such issue then and there being heard by said court as aforesaid, he, the said J. Ellis Rodley, having so taken such oath as aforesaid, willfully, unlawfully, corruptly, falsely, feloniously, and contrary to such oath by him, the said J. Ellis Rodley, then and there taken, and he, the said J. Ellis Rodley, then and there knowing the same to be false and untrue, state, declare, make oath, swear, and testify the truth to be in substance as follows, to wit." Then follow some nine or ten folios of the testimony, both question and answer, of the defendant, given at the hearing of the said probate proceeding, and after that the indictment continues as follows: "All of which was then and there material to the issue and matter being heard in said proceeding, and that said statements made as aforesaid by said J. Ellis Rodley were then and there false and untrue, and were then and there, at the time of making them by said J. Ellis Rodley, known by said J. Ellis Rodley to be so false and untrue. Whereby he, the said J. Ellis Rodley, did then and there, as aforesaid, willfully, corruptly, and contrary to his oath, and knowing his testimony to be false, swear falsely, and feloniously commit willful perjury, contrary," etc. There was no demurrer to the indictment, but on arraignment the defendant pleaded not guilty.

The objections urged to this indictment are: (a) It omits the requisite "assignment of perjury"; (b) there is no adequate averment showing the materiality of the testimony. The requirement of the law as to "assignment of perjury" is found in section 966 of the Penal Code, and requires only that there be "proper allegations of the falsity of the matter on which the perjury is assigned." The allegations to the effect that the statements made by defendant were then and there false and untrue, and known by him to be so false and untrue, are, we think, in the absence of a demurrer, a sufficient "assignment of perjury" under the Code provision above cited. This precise question has never been decided by this court, so far as we have been able to ascertain. In *People v. Ali Bean*, 77 Cal. 12, 18 Pac. 815, and *Same v. De Carlo*, 124 Cal. 462, 57 Pac. 383, the indictment was in each instance in substantially the same form, so far as the "assignment of perjury" is concerned, as it is in this case. But in neither of those cases was any

question made as to the sufficiency of the indictment in this respect. However, it seems plain here that the indictment states facts constituting an offense, and the worst that can be said of it is that it is not as specific and certain as it should have been in its allegations as to the falsity of the numerous statements of defendant charged to have been perjurous; and perhaps the indictment for that reason does not conform to the requirements of sections 950, 952, Pen. Code. But an uncertainty of such a character would be waived by the defendant's failure to demur. He cannot, under our system, lie by until he shall see the result of a trial of his case on its merits, and then be permitted to take advantage of a mere uncertainty in the indictment by motion in arrest of judgment. Sections 1004, 1012, 1185, Id.; *People v. Swenson*, 49 Cal. 388; *Same v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080; *Same v. Mesa*, 93 Cal. 580, 29 Pac. 116; *Same v. Villarino*, 66 Cal. 228, 5 Pac. 154. It is specifically alleged in the indictment that the testimony alleged to be false "was then and there material to the issue and matter being heard in said proceeding." This is a sufficient allegation as to materiality. *People v. De Carlo*, 124 Cal. 462, 57 Pac. 383, at page 467, 124 Cal., and page 385, 57 Pac. The other objections to the indictment are based on false premises, and will each disappear on a careful reading of that document.

2. It appears that the grand jury made a partial report, and presented a true bill against defendant for perjury on December 15, 1899, and the clerk was directed by the court to file the same, and issue a bench warrant thereon for the arrest of defendant; and his bail was fixed at the sum of \$5,000. The jury then retired for further deliberation. At 3 o'clock p. m. of the same day the grand jury returned into court, and, after being called, the court stated and the jury responded as follows: "The indictment which was presented this forenoon in the case of *The People of the State of California vs. J. Ellis Rodley*, Defendant, was resubmitted by the court to the grand jury from the district attorney to correct an error that appeared upon the face of the indictment, in this: that it appeared from the indictment presented that the matter before the court at the time that *J. Ellis Rodley* was sworn was a petition for letters testamentary in the estate of *Alfred Fuller*, deceased, whereas the fact was, and it is in the knowledge of the court, that the petition called for letters of administration with the will annexed. Q. Have you now, Mr. Foreman, the indictment corrected in that respect? A. Yes. Q. Has it been submitted and voted upon after correction? A. Yes. Q. And it is now returned to this court as the correct indictment? A. Yes." The clerk was thereupon directed to file the indictment, and that the record show that it had been resubmitted. A bench warrant was ordered to issue for the arrest of

said *J. Ellis Rodley*, with bail fixed at \$5,000. It was upon the indictment as amended that the defendant was arraigned, pleaded not guilty, and was thereafter tried. He was not arraigned on the indictment prior to its amendment. It appears from the foregoing that there must have been a variance between the indictment as originally presented to the court and the evidence upon which the indictment was found. There is nothing in the law that will prevent the correction of a mere mistake like this, the result, no doubt, of an inadvertence. The defendant is injured in no way by the correction. "There is no doubt that, with leave of the court, an indictment may be amended by the grand jury at any time before the prisoner has pleaded, and before they are discharged." *Thomp. & M. Jur.* p. 704; *Lawless v. State*, 4 Lea, 173; *State v. Creight*, 1 Brev. 169. In the case of *Terrill v. Superior Court (Cal.)* 60 Pac. 38, the question for determination was whether the court, after demurrer sustained to the indictment, could resubmit the case to the same grand jury that had found the first indictment. It was held that this could not be done under the Code provision cited therein; but the judge who delivered the opinion of the court in the course thereof remarked: "Perhaps, before the defendant has been arraigned, the indictment could be withdrawn, and by leave of the court sent back to the jury for amendment." This is what seems to have been done in the present case, and we can see nothing in it prejudicial to any right of defendant, and nothing of which he can be heard to complain.

3. The defendant made and filed his affidavit, intending to thereby invoke the provisions of section 170, Code Civ. Proc., and have his case tried before a judge other than the regular judge of the court in which the same was pending. The counter affidavits of the district attorney and of the judge before whom the defendant objected to being tried were also filed. The court decided, after reading all said affidavits, that the regular judge was not disqualified to try the case, and refused to secure the services of another judge for that purpose. In this we cannot see that the court erred. There was no objection made by defendant at the hearing to the court considering the affidavit made by the judge as to the condition of his own feelings towards the defendant and his case. It is too late to object to it for the first time on appeal. *Higgins v. City of San Diego*, 126 Cal. 303, 58 Pac. 700.

4. The challenge to the panel was properly overruled. The number of jurors fixed in the order of the court is not to be increased by the names left in the box at the end of the previous year, but the supervisors are at liberty to select from such names as many as possess the necessary qualifications of jurors and have not served the previous year, and make them part of the list for the current year. Sections 206, 211, Code Civ.

Proc. There was no impropriety in the supervisors estimating the population by the number of votes cast in each district at the last preceding election. We cannot say that this was not the most accurate basis they possessed for such estimate. Section 206, *Id.* The clerk testified that the 75 ballots or slips drawn from the jury box were folded so as to conceal the names of the persons thereon written. John S. Henrison being one of these names, it follows that his name was duly concealed. There was no substantial departure from the forms prescribed by law in respect to the drawing and return of the jury.

5. The affidavit of the publication of notice of hearing of petition for probate and for letters was properly admitted in evidence as part of the record of the matter in which the perjury is charged to have been committed, and was competent evidence to prove the matters therein stated. Sections 2010, 2011, Code Civ. Proc.; *Heflin v. State* (Ga.) 14 S. E. 112, 30 Am. St. Rep. 147. The other affidavits used in the probate proceeding were admissible for the same reason.

6. It was competent to put in evidence the testimony of Mrs. Houseworth and Garner, given at the hearing of the probate matter, as well as the conversation of the former with the witness Swearingen, wherein she attempted to persuade said Swearingen for \$5,000 to subscribe as a witness the alleged will of the already deceased Fuller, for the reason that all these acts and declarations, taken in connection with the acts and declarations of defendant, tended strongly to show that the defendant, Mrs. Houseworth, and Garner were each working to accomplish one common criminal purpose. Such concert of action on their part would be evidence tending to establish a conspiracy between them by the circumstantial method, which is usually the only way a conspiracy can be established. *People v. Bentley*, 75 Cal. 407, 17 Pac. 436. Before it was sought to put in evidence the conversation of Mrs. Houseworth with Swearingen, it had been shown that the will was false and fictitious, and had been written by Mrs. Houseworth, and that she was, according to its terms, the beneficiary thereunder, and that the defendant had been endeavoring by improper means to secure a witness to the will after the death of the pretended testator. This was sufficient proof of conspiracy between the defendant and Mrs. Houseworth to make the declarations and acts of the latter done in course of carrying out the common criminal design competent evidence against the former. *People v. Lovern*, 119 Cal. 88, 51 Pac. 22, 638. Much evidence tending to establish the conspiracy was introduced after the declarations of Mrs. Houseworth, and, taking all the evidence on this subject together, the conspiracy is made to appear beyond any doubt. The order of the proof was in the sound discretion of the trial court,

and we see no abuse of such discretion. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *Same v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678. It is particularly urged that the conspiracy could not be proved by the declarations of Mrs. Houseworth; reference being had, doubtless, to her declaration that the defendant was to receive \$5,000 for witnessing the will. There was no objection made to the particular portion of the conversation referred to above, but the objection was general to the whole of it. Much of the conversation was competent evidence beyond any question, and if defendant desired those portions of it which tended only to show that the defendant was a party to the conspiracy excluded he should have moved to strike out those portions. The motion that the testimony of Swearingen be stricken from the record was certainly too broad. However, an instruction was given at the request of defendant which perhaps had the same effect as would the granting of a proper motion to strike out as to this evidence. This instruction reads as follows: "You are instructed that the alleged declarations of Mrs. Houseworth to the witness Swearingen cannot be considered by you unless you first find from the evidence, and beyond all reasonable doubt, that there existed a conspiracy to which both defendant and Mrs. Houseworth were parties." In view of this instruction, and the failure to object in the proper time and manner, it is not necessary for us to here determine whether any portion of Mrs. Houseworth's declarations were hearsay evidence of the part that defendant was taking in the conspiracy or not. That portion of Swearingen's testimony wherein he details a conversation with Mrs. Houseworth in which she sought to induce him not to testify before the grand jury that she had offered him \$5,000 to sign a will as a witness was properly admitted, because the conspiracy and its purpose were not then accomplished. The object of the conspiracy was to "loot" the estate of the deceased, Fuller. The perjury of defendant and the others in the probate proceeding was only one step to this end. It had been necessary before this to fabricate a will, and it was still necessary for the conspirators to avoid detection, keep themselves out of the state prison, and keep up the deception that they were practicing on the probate court, in order to realize anything from their crimes; and it was with these ends in view, no doubt, that Mrs. Houseworth approached Swearingen on the subject of his testimony before the grand jury. We think, therefore, that what she said and did in that connection was in furtherance of the purpose of the conspiracy, and does not come within those cases which exclude the acts and declarations of one conspirator, done and made after the "common criminal design" is accomplished or abandoned, as against his co-conspirator. *Carter v. State*, 32 S. E. 347, 106 Ga. 372;

Byrd v. Same, 68 Ga. 661; Scott v. State, 30 Ala. 503; People v. Opie, 123 Cal. 294, 55 Pac. 989. See, also, People v. Ward, 77 Cal. 113, 19 Pac. 373; Same v. Winters, 125 Cal. 325, 57 Pac. 1067; O'Neal v. State, 14 Tex. App. 582; McFadden v. State, 28 Tex. App. 241, 14 S. W. 128; Allen v. State, 12 Lea, 424.

7. The defendant, while on the witness stand, was asked by his counsel the following question: "After the death of Mr. Fuller, did you make a statement to any one that this document was in existence; and, if you did, how soon after, and to whom, did you make such statements?" to which the witness answered: "Well, I made the statement to several people. I think I told Mr. White. I told several people right after he died." Following this answer, and without any motion to strike out, the prosecution objected to the evidence as irrelevant, immaterial, and incompetent. After argument, and a recess of the court, this objection was sustained. Waiving the question of whether the evidence is shown to have been excluded, the defendant had already testified to the existence of the will from a time prior to the death of Fuller, and we cannot see how his testimony as to a statement made by him after the death of Fuller, showing the existence of the will, can add anything to the force of his evidence. Certainly, such testimony is inadmissible under the general rule excluding self-serving declarations, and no exception to this rule has been called to our attention under which it might be admitted. For all that appears to the contrary, the defendant may have had the same motive and purpose to manufacture evidence the day after Fuller died that he and his confederates had at any later date to manufacture a will. To make it admissible at all, it must be shown that the corroborating statement sought to be put in evidence was made at a time when defendant had no motive or interest to fabricate such statement. Here, however, there is nothing to show when the criminal design was first conceived. *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213; *People v. Doyell*, 48 Cal. 85.

8. That the deceased, Fuller, in his lifetime, declared an intention to remember Mrs. Houseworth for the kindness she had shown him, was not competent evidence in this case. The defendant is charged with false swearing as to the execution of the will. The declarations of the deceased are not admissible on questions pertaining solely to the formal execution of the will.

9. The petition for the probate of the will sets forth that petitioner believes the will "to have been wholly written, dated, and signed by said testator." It also states facts showing that the will was executed and attested as wills other than olographic are required by law to be executed and attested. The decree of the court was, in effect, that the will was olographic, and also that it was execut-

ed as a nonolographic will should be. Therefore, whatever view we may take as to the sufficiency of the allegation of the petition to show that the will was olographic, the defendant's testimony in the probate court was material to the matter before it beyond any question, and the court at the trial herein properly refused to instruct the jury that it was not material.

10. The defendant was sworn in the probate proceeding in the usual form, as shown by the evidence; but, were it otherwise, it would be no defense in this action. *Pen. Code*, § 121.

11. The record of the probate proceeding is the evidence upon which we must rely to determine whether the court had jurisdiction. 2 *Bish. New Cr. Proc.* § 933b. The decree admitting the will to probate was placed in evidence, and it contains all the necessary recitals to show that the court had jurisdiction in the matter. *Whart. Cr. Ev.* § 602a. The petition for probate, filed, as it is shown to have been, gave the court jurisdiction of the subject-matter of the action; and, even if it be admitted that the affidavit of publication of the notice of hearing was defective, the court had the power to hear the evidence as to the will, and permit a new affidavit of publication to be filed thereafter, if necessary. In *Smith v. State*, 31 Tex. Cr. R. 315, 20 S. W. 707, the jury had not been sworn at the time of the alleged perjury, and it was held that the correct rule is "that, if the court has jurisdiction of the subject-matter of the suit, and the oath is required by law, irregularities in the proceeding will not prevent perjury." The court properly refused to instruct that there was no evidence that the court had jurisdiction of the proceeding.

12. The court refused to give defendant's requested instruction No. 11, which reads as follows: "If you do not believe the testimony given by the witness Garner, or if you are not convinced beyond all reasonable doubt of the truth of what he has testified to, you must acquit the defendant." The witness Garner testified to facts and circumstances tending to show the defendant's guilt, other than the direct evidence he gave of the "falsity of the testimony charged to be perjury." The rule laid down in section 1968, *Code Civ. Proc.*, requiring direct evidence in perjury cases, means that there must be direct evidence only as to the falsity of the testimony charged to be perjury. 2 *Bish. New Cr. Proc.* § 929. Therefore, if the jury believed the direct evidence of Garner given on this point, they might doubt his testimony on other points, and still be entirely satisfied from all the evidence in the case that the defendant was guilty, and thus be warranted in convicting him. The rule in respect to the matter, stated as broadly as could properly be asked, was given by the court in defendant's requested instruction No. 9. We can see no error, therefore, in the refusal to give the offered instruction

No. 11. The same may be said of instruction No. 15, refused by the court, which reads as follows: "If you distrust the testimony of the witness Garner, you must acquit the defendant." The court had already told the jury that "there must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive, and directly contradictory of the defendant's oath," etc. Here the word "credible" is added to the statute at the request of defendant. Surely, he ought to be satisfied with this. It is not a rule of law that an accomplice is never to be believed, nor is it the rule that he can never be the one witness giving the direct and positive evidence required by section 1968, Code Civ. Proc., in cases of perjury. His credit and the weight of his testimony are questions for the jury (*People v. Gibson*, 53 Cal. 601) in such cases as in others, except that there is a positive rule of law that the direct evidence of one witness must always be corroborated in perjury cases to warrant conviction.

13. The two instructions given by the court as to the evidence of the defendant's good character were as full and favorable to defendant as he could reasonably ask, and there was no error in refusing to add the third instruction on that subject. Everything stated in the rejected instruction was plainly implied in the two given.

14. The defendant requested the court to instruct the jury that the testimony of the witness Wilson as to certain oral admissions of defendant ought to be viewed with caution, and also that the testimony of the witness Swearingen as to alleged oral admissions made by Mrs. Houseworth ought to be viewed in the same way. These two instructions were refused; but the court did give, at the request of defendant, as the record shows, an instruction embodying practically the whole of section 200 of 1 Greenleaf on Evidence, cautioning the jury against testimony of verbal admissions and statements. An instruction in effect the same as the one last referred to was held by this court in *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124, to have been given in disregard of "the provision of the constitution that 'judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.'" The decision referred to was undoubtedly correct, and an instruction of that kind should not be given for the reasons stated in that case. If any instruction is given on the subject of oral admissions, it should be confined as nearly as possible to the language of subdivision 4, § 2061, Code Civ. Proc. However, the defendant cannot be heard to complain of the instruction here, for the reason that it was given at his own request; and, having been so given, it covered the subject treated of in the two instructions refused, and rendered them unnecessary. The defendant is not entitled to an instruction directed to the

evidence of a particular witness, and naming him, where a general instruction has been given covering the point sought. *People v. Patterson*, 124 Cal. 102, 56 Pac. 882. The defendant complains of the instruction, and seems to treat it as having been given of the court's own motion; but a careful inspection of the transcript will show the defendant's mistake.

15. The jury were instructed at some length as to the defendant's right to the benefit of the presumption of innocence in the second and third of the unnumbered instructions and in the tenth and thirty-fifth of the numbered instructions, and the subject did not need the amplification found in the instructions numbered 33 and 34 and refused by the court.

16. The court refused to give the following instruction: "You cannot convict the defendant unless each of you is entirely satisfied from the evidence before you that defendant is guilty beyond all reasonable doubt. In determining the question it is the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others." There was no error in refusing this instruction. Juries are impaneled for the purpose of agreeing upon verdicts if they can conscientiously do so. They are admonished at each recess of the court not to form an opinion as to the merits of the case until it shall be finally submitted to them, and when it is so submitted it is the duty of jurors to deliberate and consult together with the view of reaching an agreement if they can without violence to their individual understanding of the evidence and instructions of the court. They should not be lectured by the court to make them strong and steadfast in their individual opinions; neither should they be exhorted to reach an agreement; and, while it is probably true that "each juror must decide the matter for himself," yet he should do so only after a consideration of the case with his fellow jurors; and he should not hesitate to "sacrifice his views or opinions of the case" when convinced that they are erroneous, even though in so doing he defer "to the views or opinions of others." There is a marked distinction between this instruction and the one discussed in *People v. Dole*, 122 Cal. 495, 55 Pac. 881.

17. Defendant complains that the jury were not instructed, as requested in instruction 39, that a preponderance of evidence would not be sufficient to justify a conviction. Besides instructions given that the burden of proof is on the prosecution, and that the jury must be entirely satisfied of defendant's guilt before they can convict, we find the following in the fourth unnumbered instruction: "If, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a

strong one, arising from the doctrine of chances that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty," etc. This is a very plain statement, many times approved, and certainly it is the equivalent of an instruction that no mere preponderance of evidence would warrant a conviction; and, while the instruction 39 was undoubtedly sound, and ordinarily should be given when requested by the defendant, yet, in view of the very full instructions which were given, substantially covering the important points contained in that instruction, we see no error in its refusal.

18. It was proper to amend defendant's offered instruction 44, as to the corroboration necessary in perjury cases, by striking out the word "strong" before the words "corroborating circumstances." The amendment placed the instruction in accord with the statute. Section 1968, Code Civ. Proc.

19. The court refused to give instruction 45 requested by defendant, which reads as follows: "The defendant cannot be convicted if you do not find from the evidence before you, and beyond all reasonable doubt in your mind, that when he gave the testimony set forth in the indictment he did so with a criminal intent. If, after considering all the evidence in this case, you entertain a reasonable doubt as to whether defendant did give such testimony with a specific criminal intent, then you must return a verdict that he is not guilty." In the fifth unnumbered instruction the court gave the definition of perjury contained in section 118, Pen. Code, and in instruction 50 the jury were told: "But you are required to determine whether or not such testimony was false, and known by the defendant to be false at the time it was delivered, and that said testimony was given willfully, and contrary to the oath he had taken." The words "a specific criminal intent" would need some defining to make them perfectly intelligible to a jury in the connection in which they are used in the rejected instruction. We understand that the "intent to swear falsely" is the "specific criminal intent" that must be shown to establish the crime of perjury. 2 Bish. New Cr. Law, § 1048. If the testimony was "known by the defendant to be false at the time it was delivered," and it "was given willfully, and contrary to the oath he had taken," it would certainly be given with "intent to swear falsely." We think the instructions given on the subject rendered the rejected instruction unnecessary.

20. The court gave two instructions on the subject of corroboration in perjury cases. In instruction 9 the jury was told: "There must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive and directly contradictory of the defendant's oath. In addition to such testimony, there must be either an-

other such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence; otherwise, the defendant must be acquitted." In instruction 17 the court said to the jury: "The additional evidence must be at least strongly corroborative of the testimony of the accusing witness in this case, the witness Garner." In addition to these two instructions, the defendant requested the following: "You are instructed that there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true also. If the corroboration does not go to that extent, the defendant must be acquitted." There was no error in refusing the instruction last quoted. The former instructions were sufficient on the question of corroboration.

21. Instructions 50, 50½, and 52 are complained of, but the case cannot be reversed on account of the giving of these instructions for several reasons, the first being that the record shows them to have been given at the request of defendant; and we think we should be guided by this record in the matter notwithstanding that in the briefs of both parties these instructions are treated as if not given at defendant's request. Again, the last instruction mentioned is free from error. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107. And there is nothing in either of the other instructions on which the case should be reversed, if it is read and construed in connection with all the other instructions given. *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021.

22. The verdict is not contrary to the instructions, nor is it unsupported by the evidence; but, on the contrary, the case made against the defendant was a strong one, as may be seen by a reference to the brief summary of the evidence of the prosecution contained in this opinion. Against this evidence the defendant was compelled to rely almost exclusively on his own uncorroborated testimony and his good character. The jury were the judges of the weight of the evidence, and we see no reason to interfere with their verdict.

23. The defendant excepted to the remark of the assistant district attorney to the jury, which reads as follows: "The jury in the will contest over people's Exhibit A, within an hour after they had retired, brought in a verdict that people's Exhibit A was not a valid will." This statement was improper, and should not have been made; but still we cannot see how the defendant could be injured by it when it was virtually conceded by him at the trial that the will was bogus. When it was sought to be shown that the will was not in the handwriting of the deceased, Fuller, the defendant admitted the fact; and of course this admission involved the signature to the instrument. In addition

to this, it was shown by the evidence, without conflict, that the will, including the signature, was in the handwriting of Mrs. Houseworth. This, with the other evidence tending in the same direction, established the fact that "Exhibit A was not a valid will" beyond any question; and the assertion that a jury had so found could add nothing to defendant's burden.

24. Several other exceptions were taken to statements of the prosecuting attorneys in their arguments to the jury, but we see nothing in any of them calling for special notice. It is deemed sufficient to say that they are free from prejudicial error under the recent decision of this court in *People v. Molina*, 126 Cal. 505, 59 Pac. 34.

25. A number of objections to the action of the court in refusing instructions have been ignored in this opinion for the reason that, after a careful examination of them, the conclusion was reached that they were entirely devoid of merit. It should not be a matter of great surprise that, where upwards of 50 instructions are requested, some of them should be refused. The judgment and order should be affirmed.

We concur: HAYNES, C.; CHIPMAN, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 279)

ELLEDGE v. SUPERIOR COURT OF LASSEN COUNTY et al. (Sac. 547.)

(Supreme Court of California. Dec. 31, 1900.)

CERTIORARI—ORDER MODIFYING JUDGMENT—REVIEW.

Code Civ. Proc. § 1068, denies a review by writ of certiorari where an appeal may be taken. Section 939 provides that an appeal may be taken from a special order made after judgment. Plaintiff recovered judgment, and defendants afterwards filed a cost bill, which was stricken out because the judgment made no provision for such costs, and the court then made an order deducting an amount equal to such costs from plaintiff's judgment. *Held*, that certiorari would not lie to review such order, since it was a special order after final judgment, from which an appeal could be taken.

Department 1.

Certiorari by Grace Elledge against the superior court of the county of Lassen and others. Writ discharged.

Goodwin & Goodwin, for petitioner. Spencer & Raker and H. D. Burroughs, for respondents.

PER CURIAM. In an action brought by the petitioner against D. W. Ridenour et al., in the superior court of Lassen county, judgment was entered in his favor for the amount of \$290 damages. Thereafter the defendants therein filed a memorandum of costs, amounting to \$92. Plaintiff thereupon moved

the court to strike this memorandum of costs from its files, upon the ground that, as the judgment made no provision regarding costs, the defendants were not entitled to recover their costs. The court granted this motion, but immediately thereafter, of its own motion, made and caused to be entered the following order: "Ordered that the judgment entered herein be reduced the full amount of defendants' cost bill herein, to wit, ninety-two dollars." The plaintiff has obtained a writ of review for the purpose of having this order annulled, upon the grounds that it was without the power of the court to make it.

The order sought to be annulled was a special order made after final judgment, in direct terms modifying the judgment previously given, and by express provision of the statute is made appealable. Code Civ. Proc. § 939. Although the cost bill is referred to as the basis of its action, the order of the court applies to the judgment, and not to the cost bill. The order could have been reviewed, either upon an appeal taken directly therefrom, independent of an appeal from the judgment, or its correctness could have been determined upon an appeal from the judgment as modified in accordance with its terms. Being an appealable order, it cannot be reviewed upon a writ of certiorari. *Id.* § 1068. This subject has recently been very fully considered in *Southern California Ry. Co. v. Superior Court of San Diego Co.*, 127 Cal. 417, 59 Pac. 789, and this rule is there specifically declared. The writ is discharged.

(131 Cal. 236)

GREEN v. BURR. (L. A. 751.)

(Supreme Court of California. Dec. 29, 1900.)

TROVER AND CONVERSION—TAKING BY SHERIFF—LIABILITY—OWNERSHIP OF PROPERTY—EVIDENCE—SUFFICIENCY—PLEADING—AMENDMENT TO CONFORM TO PROOFS—WHEN ALLOWED.

1. Plaintiff furnished money at the request of H., made through plaintiff's agent, to pay the creditors of a restaurant company, and took a bill of sale of the restaurant property, giving H. a 15-days option to purchase it. H. went into possession as plaintiff's agent, and while he was in possession, and before the expiration of the 15 days, the property was seized by defendant, as sheriff, in attachment against H. by one of his creditors. The party procuring plaintiff to advance the money had been acting for her in investing her money, and she gave him special authority as her agent to purchase the property, and look after her interests in the matter. H. had made declarations that the property belonged to him. *Held*, in an action against the sheriff to recover the value of the property seized, that plaintiff owned it, and was, therefore, entitled to recover.

2. Where defendant did not move to amend his answer to conform to the proof until after submission of the case to the court,—whether before or after decision not appearing,—and it did not appear that any evidence was excluded because of any defect in the answer, or that he was injured by the want of anything therein, it was not error to refuse his request.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by L. A. Green against John Burr. From an order denying a new trial, defendant appeals. Affirmed.

Dillon & Dunning, for appellant. Geo. D. Blake, for respondent.

GRAY, C. The defendant appeals from an order denying a new trial. The action is to recover the value of the furniture and contents of a certain restaurant in the city of Los Angeles, alleged to have been wrongfully converted by defendant. The defendant denies plaintiff's title, and justifies the taking, as sheriff, under a writ of attachment issued in a cause entitled "G. C. De Garmo vs. George F. Harvat," and alleges that the defendant in that action is the owner of the property in controversy. The appellant contends that the findings in favor of plaintiff as to the ownership of the property are not sustained by the evidence. The evidence shows that the property in dispute belonged to a certain restaurant company, of which Harvat was a creditor, in a small amount. He assigned his claim to one Clark, who brought suit thereon, and attached the said property. Harvat then, fearing the restaurant owners would be thrown into insolvency, desired to purchase the property in controversy for enough to pay the other creditors of the restaurant 50 per cent. of their claims, which they had agreed to accept in full satisfaction thereof. For lack of funds, Harvat was unable to do this, and so, through his assignee, Clark, who seems to have been a mere agent in the matter, he applied to the plaintiff herein, and she consented to and did put up the money, about \$500, to pay the creditors, and took a bill of sale of the property from the owners of the restaurant. The plaintiff then gave Harvat a 15-days option to purchase the property from her for \$600. The constable who had the property under attachment and Clark, the plaintiff in the attachment suit, then placed said property in the possession of Harvat as the agent of the plaintiff; and while the property was so in the possession of Harvat, and before the expiration of the 15-days option, the defendant, as sheriff, seized the goods as the property of Harvat in an attachment suit brought against him by one of his creditors. It further appears from the evidence that Clark had previously been acting for the plaintiff in the investment of her money, and she gave him special authority as her agent to purchase the property in question from the restaurant company, and look after her interests in the matter. At the time of the seizure of the property by defendant, Harvat was running the restaurant, and was in possession of the property in litigation herein. The creditors of the restaurant company were settled with, and they are making no claim with reference to the property. The foregoing facts were proven without substantial conflict in the testimony, except that there was evidence tend-

ing to show that Harvat, while in possession, had made some declarations of his proprietorship in said property. On the evidence as presented the court was fully warranted in finding that plaintiff was the owner of the property at the time it was seized by defendant. There was nothing tending to show that Harvat, the debtor in the attachment suit, was the owner of the property, except his own declarations to that effect, which seem to have been received in evidence without objection made thereto. As against the other undisputed facts showing that plaintiff had bought and paid for the property, these declarations could have little weight.

The remaining contention of appellant is that the court erred in refusing to allow the defendant to amend his answer to conform to the proofs. It appears from the record that the request to be permitted to amend the answer was not made until after the case was submitted to the court for decision. How long after such submission, or whether the request to amend was made before the case was decided, does not appear. But, aside from this, it does not appear that any evidence was excluded at the trial on account of any defect in the answer. Nor can we see how any prejudice or injury accrued to defendant for want of anything in his answer, or how his situation might be bettered if his answer were in any way changed. The defendant appears to have lost his case for want of evidence, and not on account of any defect in his answer. The order appealed from should be affirmed.

We concur: HAYNES, C.; SMITH, O.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(131 Cal. 205)

FRANZ v. MENDONCA. (S. F. 1,672.)
(Supreme Court of California. Dec. 29, 1900.)

EASEMENTS—RIGHT OF WAY—DOMINANT ESTATE—NATURE—STATUTE OF LIMITATIONS—INTERRUPTION—NEW TRIAL—WEIGHT OF EVIDENCE—FINDING OF FACT.

1. Where plaintiff pre-empted government land, his right of sole possession and use was sufficient estate in him, without a patent, to start the statute of limitations running as to a right of way claimed in behalf of such lands over lands of another.

2. Where a landowner claimed a right of way over lands of another, the fact that a lessee of the dominant estate was at the same time the lessee of the servient estate did not interrupt the running of the statute of limitations in favor of the dominant estate.

3. Where, in an action to enjoin defendant from obstructing plaintiff's right of way across defendant's lands, there was a finding that plaintiff's use of the right of way was permissive only, and the court granted a new trial on the ground that such finding was against the evidence, the order granting a new trial will not be disturbed on appeal, since the question whether the use was adverse was one of fact, and the trial court, not being bound by

the rule as to a conflict of evidence, is bound to grant a new trial when a finding of fact is against the weight of evidence.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Sebastian Franz against Francisco A. Mendonca. From an order granting a new trial, defendant appeals. Affirmed.

John D. Whaley, for appellant. Reed & Mesbaumer, for respondent.

HAYNES, C. Plaintiff brought this action to enjoin the defendant from obstructing his private way across the defendant's land and for damages. Upon the trial defendant had findings and judgment. Plaintiff moved for a new trial, his motion was granted, and the defendant appeals from the order granting said motion. Plaintiff in 1858 settled upon and entered a certain quarter section of government land, situate in Washington township, county of Alameda, and in August, 1870, obtained a patent therefor. Subsequently he acquired several other contiguous parcels, and plaintiff's said lands in part adjoin the land of defendant, over which said private way is claimed to exist. Defendant's land is part of a Mexican grant known as the "Vallejo Grant," for which a patent was issued by the United States to Vallejo in 1862; and in February, 1863, Vallejo conveyed the same to Jonas G. Clark. On December 18, 1884, Clark conveyed to Jorgenson, who reconveyed to Clark November 28, 1890, and Clark conveyed to defendant March 22, 1893. Plaintiff's lands lie about a mile and a half northerly from the county road leading from Haywards to Niles, and defendant's land, consisting of a tract of about 300 acres, part of said Mexican grant, lies between plaintiff's land and said highway. The court found that "at various times during the period of thirty-seven years next preceding the commencement of this action, plaintiff has used and traveled over said private road in order to reach his lands from said highway, and return therefrom, for agricultural and pasturage purposes; but said use and travel over said private road by plaintiff was not continuous or with claim of right during said period of thirty-seven years, or during any period of five successive years thereof, but was with the permission of defendant's grantors." The foregoing finding is the only one that need be quoted or specially noticed. Plaintiff's motion for a new trial specified said finding, among others, as not supported by the evidence, and also specified that the decision was against law. The plaintiff testified, in substance, that he lived on the land he entered from 1858 to 1872; that he did some work on the road in 1858, and on the Mendonca land in 1862 and 1863; that from 1862 until he left in 1872 he had to fix the road every spring; that during those years he traveled over it

with a team,—two horses and a wagon; that he hauled his grain to Alvarado over this road; that after Decoto station was established he hauled his grain there, and made two trips a day, and could make three; that during all these years he used this road to take his produce out; that the division fence was built between himself and the Mendonca lands a year or two before he left; that "when they built the fence they came up to my house and asked me where I wanted the gate, and I went with them down, and they showed me the gate; and they leave the board on the side, and I fix the gate." He further testified that since 1872 he leased the land every year, and went up there every year four or five times, and followed that road, and that he was first prevented from going over the land in April, 1895.

1. Appellant contends that an adverse use of the way over the Mexican grant would not set the statute in motion until the grant was confirmed and the patent issued; but, as the patent issued the same year the road was made, it may be conceded that the statute did not begin to run in plaintiff's favor prior to 1862.

2. But it is also contended that a way appurtenant to plaintiff's land could not be initiated by adverse use until plaintiff's patent for the dominant estate was issued, which was not until 1870. It is conceded that plaintiff pre-empted his first tract in 1858; that is, his title under the government was initiated that year, and he then had a right of possession, cultivation, and use, good against all, and that was sufficient.

3. It is also contended that in 1866 the plaintiff leased defendant's land and cultivated it for two years, ending in 1868, and that such leasing, possession, and control stopped the running of the statute, and that, if plaintiff now has a prescriptive right, it must have been reinitiated after his tenancy terminated, and continued thereafter for the full term of five years. This may be conceded; but said tenancy ceased in 1868, while the use of the way continued down to the date of the interruption in 1895, so that a new period commenced in 1868, and we do not see that any interruption to the running of the statute occurred afterwards. Certainly the fact that Turkelson, who was plaintiff's tenant in 1877 to 1879, was also the lessee of the servient estate at the same time, could not affect the plaintiff's right. Besides, the period from 1868 to 1877 was more than sufficient for the running of the statute, and to give a prescriptive title, if the other requisite conditions existed.

4. The principal question, however, is suggested by the finding that plaintiff's use of the road "was not with claim of right, * * * but was with the permission of defendant's grantors." In *American Co. v. Bradford*, 27 Cal. 361, 367, Mr. Justice Curry, speaking for the court, said: "In order that

the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been adverse in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." This case was cited and followed in *Water Co. v. Hancock*, 85 Cal. 226, 24 Pac. 645. In *Thomas v. England*, 71 Cal. 460, 12 Pac. 493, it was said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or license is expressly given. But it is no less true where the permission or license is implied, as it may well be from facts and circumstances under which the use was enjoyed. The question is one for the jury, or for the court sitting as such, to determine as a fact in the light of the relations between the parties and all the surrounding circumstances." As to the facts which are essential to the creation of an easement by prescription there is no controversy. It is upon the facts to be inferred from the use under the circumstances detailed by the witnesses that the battle is waged. In *Washb. Easem.* (4th Ed.) p. 156, it is said: "And if there has been the use of an easement for twenty years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." To this statement the author cites a large number of cases from different states. In *Cox v. Forrest*, 60 Md. 79, the court, in an action to recover damages for obstructing a private right of way, said: "By 'adverse' is meant a user without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment; the real point of distinction being between a permissive or tolerated user, and one which is claimed as a matter of right. Where one, however, has used a right of way for twenty years, unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission." *Mr. Justice Story*, in *Ricard v. Williams*, 7 Wheat. 105, 5 L. Ed. 409, in speaking of the inference to be drawn from possession, said: "Possession per se evidences no more than the mere fact of present occupation by right, for the law will not presume a wrong. From the very nature of the case, therefore, it must depend upon the collateral circumstances what is the quality and extent of the

interest claimed by the party, and to that extent only will the presumption of law go in his favor." These cases lay down the general principles by which the question whether the use was adverse should be determined. The question is one of fact for the trial court, and it is the duty of the judge of the trial court to grant a new trial whenever he is satisfied that the verdict or finding is contrary to the weight of the evidence. The rule as to the conflict of evidence does not apply to the trial court. *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Bjorman v. Redwood Co.*, 92 Cal. 500, 28 Pac. 591. The order appealed from should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(131 Cal. 222)

BRYAN v. ABBOTT et al. (L. A. 784.)

(Supreme Court of California. Dec. 29, 1900.)

LIENS — IMPROVEMENTS — REPUTED OWNER — NOTICE — INCONSISTENT — AMBIGUOUS — MUNICIPAL CORPORATIONS — JUDICIAL NOTICE.

1. A recorded notice of a lien which stated that "S. A. is the name of the reputed owner of the premises," sufficiently named the owner, where S. A. owned the premises, since he could not have been misled by being described as "reputed owner."

2. Where the notice of a lien stated that no time was specified for the commencement or completion of the work, payment to be made upon completion or as required during its progress, and the complaint alleged that no time for said payment was or is stated or set forth in said contract, the complaint was not demurrable for uncertainty or ambiguity, since the law would require payment on completion of the work.

3. Where the lien complaint, to which was attached a diagram of the premises, stated that a contract was for the construction of a sidewalk "in front of and adjoining the lot" described, and the contract stated that the sidewalk was to be constructed "around the premises," etc., a demurrer on the ground of ambiguous description should not be sustained, since defendant, being the owner and occupier of the premises, could not have misunderstood such description.

4. As under Code Civ. Proc. § 1875, the court is authorized to take judicial notice of the incorporation of a city, a complaint for a mechanic's lien for building a sidewalk, describing the property as situated in a certain city, is not defective, in not stating that said property is in an incorporated city; Code Civ. Proc. § 1191, providing for a lien for improving streets or sidewalks in front of any lot in an incorporated city.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by Solon Bryan against Seth Abbott and Frances Bill. From a judgment for defendants, plaintiff appeals. Reversed.

A. D. Jordan and Eugene Daney, for appellant. Sam Ferry Smith and McDonald & McDonald, for respondents.

HAYNES, C. Action brought to enforce a lien for work and materials in laying cement sidewalk and curb, and constructing cement steps on the sidewalk leading up to the doorways. Defendants severally demurred to the second amended complaint, the demurrers were sustained, and, plaintiff failing to amend, judgment of dismissal was entered, and plaintiff appeals. The contract was made, the work performed, and notice of lien filed by William McDonald, who assigned his claim and demand to the plaintiff. The demurrer is general and special.

1. The notice or claim of lien stated "that Seth Abbott is the name of the reputed owner of said premises, and caused and requested said Wm. McDonald to perform said labor and furnish said materials"; and the complaint alleges "that at all the times herein mentioned said defendant Seth Abbott was the owner and reputed owner and in possession of, and personally occupied, the following described real property" (describing it). Respondent contends that the recorded notice of lien is insufficient because it does not state the name of the owner of the premises sought to be charged with the lien. It is sufficient if the name of the reputed owner only is given. *Corbett v. Chambers*, 109 Cal. 178, 184, 41 Pac. 873. The case of *Pavement Co. v. Lyons*, 117 Cal. 212, 48 Pac. 1097, cited by respondent, does not either directly or indirectly hold that the recorded notice of lien must state the name of the owner; but the reasoning of the case and the conclusion reached is entirely consistent with *Corbett v. Chambers*, supra, where it was said: "The provision therein that the claimant shall give the name of the owner or reputed owner, if known, implies that, if he does not know the name of the owner, he may state this fact, and perfect his lien without naming an owner (*Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231), and also that, if, in good faith, he gives the name of a reputed owner, he shall not lose his lien if he shall afterwards ascertain that some other person was the owner." Here the demurrer admits that Seth Abbott, who was described in the notice as the "reputed owner," is the "owner" of the premises sought to be charged with the lien; and if Seth Abbott, as owner, examined the records in the recorder's office, as the law presumes he did, the false description, "reputed owner," could hardly lead him to doubt his identity.

2. The notice of lien, after describing the work, stated there was "no time specified for the commencement or completion of the work; * * * payment to be made in U. S. gold coin upon completion of the work, or as required in its progress." Attached to the complaint, and made part thereof, is a copy of the notice of lien, and in the complaint it is alleged "that no time for said payment was or is stated or set forth in said contract or agreement." It is contended that the allegations of the complaint are inconsis-

ent with the notice of lien attached as an exhibit, and that the complaint is therefore demurrable for uncertainty or ambiguity. I think no one could be deceived or misled in this particular. The allegation in the complaint is that no time for payment was or is "stated or set forth" in the contract. That is literally true, though the law construes the contract to require payment upon the completion of the work, and therefore the time of payment, though not the date, is fixed.

3. The complaint states that the contract was for the construction of a cement sidewalk and cement curb "in front of and adjoining the lot" described, while the contract set out in the claim of lien was to construct a sidewalk and curb "around that certain premises," etc.; and respondent makes the point that the complaint is uncertain in this respect. A diagram of the property is attached to the complaint, showing the curb and sidewalk along the side and across the end of the property, being all of it that bordered on any street. We would not like to say that the defendant, the owner and occupier of the property, misunderstood the expression "around" as here used, or had any doubt as to its meaning. The defendant had personal knowledge of the work done, and cannot avail himself of a demurrer upon the ground that the description of the work is ambiguous. *Doe v. Sanger*, 78 Cal. 150, 20 Pac. 366.

4. Section 1191, Code Civ. Proc., provides for a lien for improving the street or sidewalk, etc., in front of "any lot in any incorporated city or town," and it is objected that in the notice of lien and complaint it is not stated that said property is in an "incorporated city or town." The property is described as "situate in the city of San Diego, county of San Diego, state of California," and the court will take judicial notice that the city of San Diego is incorporated. Code Civ. Proc. § 1875; *Diggins v. Hartshorne*, 108 Cal. 157, 41 Pac. 283. The judgment should be reversed, with directions to the court below to overrule the demurrer.

We concur: COOPER, C.; CHIPMAN, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer.

(121 Cal. 267)

MARR v. RHODES. (S. F. 1,502.)

(Supreme Court of California. Dec. 31, 1900.)
VENDOR AND PURCHASER—CROPS—ESCROWS—
SET-OFF AND COUNTERCLAIM—AMEND-
MENT—CONTINUANCE.

1. Defendant contracted with plaintiff to exchange his fruit farm for certain real estate belonging to plaintiff, and deeds were made out and delivered in escrow, to be delivered to the parties when the title to the properties should

be made satisfactory. Thereafter defendant recommended to plaintiff that the person then in charge of the orchard was a competent person to continue in charge thereof, and informed such person that thereafter he would be working for plaintiff instead of defendant; and bills for the expense of carrying on the orchard were sent to plaintiff directly or through defendant, the bills being paid by plaintiff. Thereafter, and prior to the delivery of the deeds, a crop of prunes growing on the orchard were prepared for market and sold by defendant, who refused to pay over the proceeds to plaintiff. Subsequently the deeds were delivered. *Held* that, the delivery of the deeds relating back to the date of their execution, and plaintiff having been put in possession of the premises and having defrayed the expense of the crop, he was entitled to the proceeds thereof.

2. Where, during trial, it appeared that defendant was entitled to a set-off which he could not avail himself of under his plea, the court should have permitted an amendment.

3. If, by reason of an amendment to defendant's plea during trial, plaintiff is taken by surprise, and requires further time to prepare to meet the defense, a continuance may be granted, or such terms may be imposed as are reasonable under the circumstances.

Department 1. Appeal from superior court, Santa Clara county; A. S. Kittredge, Judge.

Action by Ben. C. Marr against M. G. Rhodes. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

C. D. Wright, for appellant. Archer & Archer, for respondent.

VAN DYKE, J. Prior to September 10, 1895, the appellant was the owner of a tract of land in Santa Clara county containing about 20 acres on which there was a fruit orchard, and respondent was the owner of some improved property in Riverside county under rental, and some unimproved property in Los Angeles county. At that time the parties agreed upon the exchange of their properties, the appellant selling his tract of land in Santa Clara county to the respondent, and the respondent selling his Riverside and Los Angeles property to the appellant, and also assigning to appellant certain certificates of mining stock, and a payment in cash of \$750, as the difference between the properties; and a written agreement was entered into between the parties, and at the same time the lease of the Riverside property was assigned to the respondent. Deeds were made by the respective parties conveying the respective pieces of property according to said agreement, which deeds were left in the hands of C. D. Wright, to be delivered when the title to said respective pieces of property should be made satisfactory. After the execution of the papers and the delivery of the deeds in escrow, the parties on the same day went upon the property in Santa Clara county, and the appellant pointed out and explained to the respondent what he should know concerning the orchard property in question, as the respondent did not live in California, but in Illinois. The appellant also

at the same time recommended one Rose, who had previously cultivated and cared for the orchard under his (appellant's) employment, as a good and competent man to look after and cultivate the place for the respondent; and it was agreed by the parties at the time that appellant was to pay the taxes on the Los Angeles and Riverside property, and respondent was to pay the taxes and expenses on the Santa Clara property, which was done. The expenses of cultivating and caring for the orchard were to be paid by the respondent. Shortly after this, the appellant saw Rose, the man whom he had recommended, and informed him of the exchange of properties, and that thereafter he would be working for Mr. Marr, and not for himself, and directed him (Rose) to attend well to the orchard, and that expenses would be paid by Mr. Marr. From that time Rose understood that he was working for Marr, and not for Rhodes; and the bills for the expense of caring for the orchard were sent to Marr, either directly or through Rhodes, which bills Marr paid. Some hitch occurred, causing delay in passing the title of the properties sold to the appellant, so that the deeds were not delivered to the respective parties until December 24, 1896. In the meantime a crop of prunes, grown on the orchard in question, were prepared for market, and in November, 1896, were sold by appellant for \$1,089.95, and, on refusing to pay over this sum to the respondent, this action was brought to recover the same. The answer denies that the plaintiff was the owner or in possession of the prunes in question, and avers that the defendant had said crop of prunes on hand, which was the product of the orchard for the year 1896, which crop he sold for the sum stated; but denies that he received said sum to or for the use or benefit of the plaintiff, or to or for the use of any other person than said defendant. The court found in favor of the plaintiff, and judgment was entered accordingly, from which judgment, and from the order denying defendant's motion for a new trial, defendant appeals.

When all the conditions of the agreement between the parties had been complied with, and the deeds delivered, they related to the day of their execution, and the rights of the parties existed just as if the deeds had been fully delivered on the day of their date. *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. Besides, here the plaintiff was put in possession of the premises on which the prunes were grown, and defrayed the expenses of caring for and gathering the crop. The court, therefore, correctly held that the plaintiff was the owner of the crop of prunes, and entitled to the proceeds thereof.

It developed during the progress of the trial, by the testimony of the defendant, that he had paid out for labor and supplies in raising the crop of prunes the sum of \$278.64, and the defendant sought to have this considered as an offset against the amount of the

proceeds of the sale of said prunes. The court held that under the pleadings the defendant could only deduct such expenses as he was put to in marketing the prunes, but the claim for labor and materials in connection with raising the prune crop could not be considered, inasmuch as the answer contained no plea of such offset or counterclaim; whereupon counsel for defendant moved the court for leave to amend the answer of defendant by setting up an offset in his favor against the plaintiff. This motion the court denied, to which ruling the defendant duly excepted. We think the court should have allowed the defendant to amend his answer to enable him to prove facts which would have constituted an offset or defense to plaintiff's demand, as proposed; and if, by reason of such amendment, the plaintiff would have been taken by surprise, and required further time to prepare to meet the defense, the case could have been continued, or such terms imposed as might seem just under the circumstances. *Stringer v. Davis*, 30 Cal. 321; *Guldery v. Green*, 95 Cal. 630, 30 Pac. 786. In the latter case the court, in its opinion, says: "It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading." See, also, *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86. The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: HARRISON, J.; GAROUTTE, J.

(131 Cal. 192)

PALLETT et al. v. MURPHY. (L. A. 806.)
(Supreme Court of California. Dec. 29, 1900.)
IRRIGATION — CONTRACT — CONSTRUCTION — BREACH—MEASURE OF DAMAGES.

1. Defendant, in consideration of being allowed to construct an irrigation ditch across plaintiffs' lessor's lands, contracted to allow them the use of water on the lands on the most favorable conditions that they allowed the use to others, which contract was recorded. Plaintiffs' lease gave them all water rights of the lessor, and the amount of water flowing in the ditch above that absolutely sold was sufficient for plaintiffs' needs, but defendant refused plaintiffs the right to use the water on the ground the water had previously been applied for for temporary use by others. *Held*, that plaintiffs were entitled to damages, since the lessor had given consideration for the right to use the water, and others desiring it, having notice of plaintiffs' right, could not claim priority.

2. In an action by a tenant of land against the owner of an irrigation ditch for breach of a contract to deliver water, the measure of damage was the difference between the rental value of the land with and without water.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William A. Pallett and others against Simon J. Murphy. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Works & Lee, for appellant. H. S. Van Dyke and J. S. Chapman, for respondents.

HAYNES, C. This is an action to recover damages alleged to have been sustained by the plaintiffs by reason of the failure of the defendant to supply water to lands occupied by them as lessees. The plaintiffs recovered judgment, and this appeal is taken therefrom, and from an order denying a new trial.

The principal question arises upon the construction of a contract executed by and between Charles Prager and others, the owners of the Rancho Paso de Bartolo, and the appellant, Simon J. Murphy, whereby the owners of said rancho granted to Murphy a right of way for a ditch or conduit over the same for the conveyance of water for the purposes of irrigation, the plaintiffs herein being lessees of said rancho, or portions thereof, and contending that the terms and conditions of said grant entitled them, as such lessees under the terms of their lease, and the circumstances alleged in their complaint, to be supplied by defendant with water for the irrigation of said leased lands; and that they suffered damage by the failure and refusal of defendant to furnish the water demanded by them in the sum of \$1,552. Said contract for the right of way for said ditch is set out in full in the complaint. It was made on May 30, 1890, and was duly recorded. The right of way thereby granted to Murphy, his heirs and assigns, was specifically defined as to location, its width fixed at 1 rod, and its length at about 23.123 feet. The right was given the grantee to enter upon said rancho for the purpose of constructing the ditch, and afterwards for the purpose of repairs or doing any necessary work thereon, and specified the consideration of one dollar. Said contract further provided as follows: "It is further agreed and stipulated that the party of the second part, his heirs and assigns, hereby agree that the granting of the right of way herein is a part of the consideration of this indenture; and the said party of the second part, his heirs and assigns, in consideration of the same, agree that they will always allow the use of water for land on the Rancho Paso de Bartolo upon the lowest terms and most favorable conditions that they allow the use of water to others." A large portion of the lands leased to the plaintiffs were below defendant's ditch, and could be irrigated therefrom, and from no other source, and their lease contained this clause: "The lessor herein also leases, together with the lands hereinbefore described, all such water rights as may be appurtenant to said lands; but the said lessor, or his successors, shall not be liable for any water rates that might be charged for the use of water from

any company or companies supplying water to said lands, but such charges are to be met by the said lessees herein." It is not seriously questioned but that plaintiffs had, under this lease, whatever right to demand from defendant water for the purpose of irrigating the leased land that the indenture for the right of way secured to the owners of the lands over which it was granted. Plaintiffs' lease was executed May 2, 1894, and was for the term ending December 31, 1894. On May 12th the plaintiffs demanded of the defendant the use of water upon lands described in the complaint upon the terms and conditions stipulated in said indenture, and offered to comply with all the terms and conditions imposed thereby upon the owners of the land. Defendant refused to comply with this demand, giving as a reason therefor, in substance, that prior to this demand he had promised all the water to other parties; and for that reason, and no other, did not comply with the demand. The court found that during the irrigating season of 1894 there were 300 inches of water, measured under a 4-inch pressure, flowing in said ditch, and being managed, controlled, and distributed by the defendant; that of said quantity about 60 inches were required to supply purchasers of absolute water rights, and that the remainder was amply sufficient for the irrigation of the lands leased by plaintiffs, and for which water was demanded. Some extracts from the testimony of Mr. Reed, defendant's agent who had been in charge of the ditch and water from the time the ditch was constructed, will give a clearer idea of the situation, and of defendant's contention. He testified that up to the year 1894 perhaps a thousand acres, some wholly and some partially, had been supplied from the system; that portions of the lands leased by plaintiffs had been supplied the previous year; that defendant's water supply had been disposed of first to actual purchasers of water, and the surplus to parties who wished it; that they sold water rights at so much an inch with their own land, and to other parties so many inches or parts of inches, absolute sale, for specified land, and he thought about 60 inches had been disposed of in that way; and that the balance of the water had been supplied to the lands of people who applied for it temporarily, and generally in the order of their application. "If any one made application for a run of water, it was given to him, if we had it." That the grantors of the right of way for defendant's ditch acquired some right to the use of water to be furnished by the defendant from his ditch would appear to be incontrovertible. The ditch traversed their lands for the distance of about $4\frac{1}{2}$ miles, and occupied nearly 9 acres of land. It was agreed and stipulated by the party of the second part, the defendant, his heirs and assigns, that the granting of said right of way "is a part of the consideration of this indenture, and the said party of the second part, his heirs and as-

signs, in consideration of the same" agreed to confer some right, benefit, or privilege upon the grantors, and expressed the same in the following language: "That they will always allow the use of water for land on the Rancho Paso de Bartolo upon the lowest terms and most favorable conditions that they allow the use of water to others." It is argued by appellant that "the conditions upon which water might be demanded by the plaintiffs' lessors is that upon which other consumers were allowed the use of water." But this construction puts the grantors of the right of way in the same category with others who paid no consideration for a right to the use of water, and gives the grantors nothing for the concession of a valuable and essential right of way. That the grantee would "always allow" the grantor and his heirs and assigns "the use of water" is as much a part of the covenant as that which relates to the compensation, and must be given its proper effect. It was a promise in advance of the construction of the ditch for a valuable consideration, made in writing, and recorded; and all others desiring to use water from that ditch were charged with notice of the plaintiffs' rights, and could not claim priority over them. It is not contended by respondents that the absolute sales of water by the defendant to the extent of 50 or 60 inches was a violation of his covenant with the owners of the ranch. Plaintiffs were interested only in the supply for their leased lands for that year, and were not authorized to litigate for their lessors questions in which they had no interest. There was enough water flowing in the ditch, aside from said 50 or 60 inches, to have supplied the demand of the plaintiffs; and it is, therefore, not necessary to consider the extent to which the defendant might sell absolute water rights without violating his covenant, nor the quantity of water which the grantors of the right of way, or those claiming under them, might lawfully demand under all conceivable circumstances. The case here is much stronger than *Merrill v. Irrigation Co.*, 112 Cal. 426, 44 Pac. 720. There the plaintiff conveyed to the defendant a right of way across her land for a water pipe for a nominal consideration, "but the real inducement for the conveyance was an understanding [not in writing] that plaintiff could have water from defendant's pipe to irrigate her land." Defendant furnished water for a time, and then extended its pipe, and sold its water to others, and refused to furnish the plaintiff needed water, though requested so to do. *Mandamus* to compel the defendant to furnish water was sustained.

The evidence introduced by the plaintiffs to ascertain the amount of their damages was based upon the theory that the true measure of damages in such cases is the difference between the rental value of the land with and without water for irrigation. Appellant contends that such is not the true rule, and that the evidence admitted was

incompetent. That plaintiffs leased the land with the understanding and belief that it would be supplied with water is apparent from the provisions of the lease upon that subject. The refusal of the defendant to furnish water to the plaintiffs did not abrogate the lease, nor deprive the plaintiffs of all use of the land. They remained in possession, and were obliged to pay the stipulated amount of rent, and had all the benefit of the leased land that they could have without water for irrigation. The evidence objected to and received by the court was confined to the rental value of the land with and without water for irrigation. This was the true rule. Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined; while the rental value of land in communities where for many years portions of the land are leased or occupied without the possibility of irrigation, and other portions are leased or occupied with water for irrigation, fixes a standard for the estimation of damages in cases such as this as nearly accurate as it is possible to devise. Appellant has not cited any authorities upon this question, nor made any reply to the argument of respondents. In 8 Am. & Eng. Enc. Law, p. 611, it is stated in the text that, "where the damages may be estimated in more than one way, that mode should be adopted which is most definite and certain" (citing many cases). In *Gilbert v. Kennedy*, 22 Mich. 117, Christlancy, J., speaking for the court, said: "Where elements of certainty are lacking by which damages can be accurately measured, resort must be had to such principle or basis of calculation applicable to the circumstances of the case as will be most likely to approximate certainty, and which may serve as a guide in making the most probable estimate of which the nature of the case will admit." The court did not err in receiving the evidence, and the finding as to the amount of the damages is justified by the evidence.

It is further contended by appellant that the findings are not justified by the evidence. But counsel say that "there is no conflict whatever as to the manner of furnishing the water, or of the reason for not supplying the water to the plaintiffs"; so it is apparent that the supposed insufficiency of the evidence to justify the findings is but an attack upon the legal construction placed by the court below upon the covenant contained in the indenture. I think the findings amply sustained by the evidence, and that the judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C., COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

MURPHY v. FARMERS' & MERCHANTS' BANK OF LOS ANGELES. (L. A. 794.)¹
(Supreme Court of California. Dec. 27, 1900.)²

EXECUTORS AND ADMINISTRATORS — MORTGAGE OF ESTATE PROPERTY — FORECLOSURE — APPROPRIATION OF PROCEEDS — VALIDITY OF FORECLOSURE SALE — APPEAL — NEW TRIAL.

1. Where a debtor of an executor knowingly receives a part of the money borrowed by the latter on estate property in payment of the executor's individual indebtedness, the creditor holds such money in trust for a devisee who is injured thereby.

2. Where an executor mortgages estate property to a bank under order of court for the purpose of borrowing money to pay estate debts, and the money is paid to the executor, but a portion thereof is appropriated by the executor, and knowingly received by the bank, in payment of an individual debt of the executor, and the mortgage is afterwards foreclosed, and the land sold to the bank, the wrongful receipt of the money will not render the sale void.

3. A mortgage of land, part of a decedent's estate, given by the executor by order of court for money borrowed for the payment of debts, is not void, as depriving a devisee of a vested right in the property, because St. 1837, p. 115, authorizing the mortgage of such property, was not enacted till after the testator's death, since Code Civ. Proc. §§ 1546, 1563, making testator's real estate subject to sale to pay his debts, was in force at his death, and the mortgage was but a change in form of the debt, and not an additional burden, though the interest was increased thereby.

4. Where the complaint, in an action to quiet title, does not ask for general relief, and the evidence does not authorize the relief prayed, but shows that certain money is held by defendant in trust for plaintiff, the court, on appeal, cannot decree the payment of such sum under the pleadings, but will remand the case for a new trial, with leave to the plaintiff to amend his pleadings.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action to quiet title by Alice Winston Murphy against the Farmers' & Merchants' Bank of Los Angeles. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Graves, O'Melveny & Shankland, for appellant. Albert M. Stephens and Stephens & Stephens, for respondent.

CHIPMAN, C. Action to quiet title. Plaintiff is one of 10 children of William H. Winston, who died testate in May, 1886. In June, 1886, his surviving widow, Mary E. Winston, was appointed executrix. Plaintiff is a devisee under the will of deceased, and claims as such. She brings this action to quiet her title to an undivided one-eleventh interest in a certain tract of land in Los Angeles county, as property of the Winston estate. The judgment was that plaintiff is the owner in fee of an undivided one-eleventh interest in the property in question; that defendant has no right or interest in said one-eleventh interest; and that plaintiff's interest

¹ For supplemental opinion, see 63 Pac. 731.

² Rehearing denied January 26, 1901.

"is subject to all lawful claims that may be made thereon in the course of the further administration of the estate of said William H. Winston, which is now uncompleted." The appeal is from this judgment, and from the order denying defendant's motion for a new trial.

The testator made certain specific bequests to plaintiff and other heirs at law, and provided that, after the legacies mentioned in the will were paid, the residue of the property should be equally divided between the testator's wife and children, share and share alike. The court found the following facts: That plaintiff is the owner of an undivided one-eleventh interest in the land described in the complaint, and that defendant's claim thereto is without right; that in November, 1891, the executrix filed her petition for an order authorizing her to mortgage the real estate in dispute; the petition showed that of the money coming into her hands all had been disbursed by the executrix in payment of debts of the deceased, expenses of administration, payment of the legacies, and family allowance, and other costs and charges against said estate; that certain exempt personal property was set aside to the widow, and there remained belonging to the estate two old mules, two young mules and one colt, valued at \$500. The petition showed accrued liabilities amounting to \$21,052.38; and debts, expenses, and charges to accrue, \$28,247.70; total, \$49,300.08. The petition was granted to the extent of authorizing the mortgage for \$45,000, and such mortgage was executed to defendant bank on December 16, 1891; and on December 1, 1896, there was due and unpaid thereon \$63,081.64. Foreclosure followed, and in due course, in June, 1898, a sheriff's deed, granting the premises to defendant as purchaser, and the land has been in defendant's possession ever since, claiming under this deed. No question arises as to the form of the proceedings to mortgage or the sale on foreclosure. There has been no final account or settlement of the estate or distribution, and the court found that there is no property of the estate with which to pay to plaintiff her legacy, and the executrix is insolvent, and was serving without bonds. At the time this mortgage was executed the executrix owed the defendant in her individual capacity \$33,347.03, which was made up of \$24,000 and accrued interest, being money borrowed by her from defendant some years before the probate mortgage was executed, and she used this money to purchase the entire interest of six adult children in the estate; and the personal indebtedness of the executrix also included the further sum of \$1,175 borrowed from defendant by her on personal account, for which she had given her note. The mortgage was executed by the executrix as such, and by three of the adult heirs, who had not sold their interest to Mrs. Winston, and by her individually; thus in-

63 P.—24

cluding ten-elevenths of the interest in the property. The court found that of the \$45,000 borrowed by the mortgage the bank paid her only \$7,329.97, and applied \$4,323 in satisfaction of its own claim against the estate, which was justly due the bank, and credited the balance, namely, \$33,347.03, in payment of the personal debt above referred to, due it from the executrix; that the executrix paid out of this \$7,329.97 the legacies of two brothers of plaintiff, amounting to \$6,900, including three years' interest. The evidence was that the \$45,000 was passed to the credit of the executrix on the books of the bank on the day the mortgage was executed and delivered, and on the same day she gave the bank her checks to pay her individual indebtedness of \$33,347.03, above stated, and the allowed claim of the defendant, \$4,323, leaving a balance to her credit of \$7,329.97.

1. The written opinion of the learned trial judge printed in the briefs discloses the theory on which his decision rests, and it was that the mortgage money was impressed with a trust, and its application to pay the personal debt of the executrix was a breach of trust on her part; that the defendant had notice of the fact that the money it received was held by the executrix in trust, and could not be applied to the payment of her individual debt; and that, therefore, the mortgage was void as to plaintiff. I think the facts warranted the trial court in concluding that the defendant had knowledge that the money it received on the checks of the executrix, drawn upon this mortgage loan, belonged to the estate, and that in receiving it to pay the individual debt of the executrix the defendant became a party to the violation of the trust, and acquired no right to the money it received from her so far as plaintiff is concerned, and plaintiff's right to the money was unaffected by the mortgage or by the payment to defendant. But it does not follow that the deed under which defendant claims title is void, or that the proceedings by which it acquired title can be set aside or annulled upon the pleadings and evidence now before us. The petition showed legitimate charges against the estate amounting to more than \$45,000. The money borrowed passed to the credit of the executrix, and was under her control as executrix. The transaction was fair and open, so far as the evidence shows, and the mortgage was a valid lien, unless void for the reason next to be noticed. It was in the application of the money thus borrowed, and not in the execution of the mortgage or the sale under foreclosure, that an implied or constructive trust arose under which defendant must account. The title to the land is now in defendant.

2. Respondent contends that the mortgage was void as to plaintiff because it deprived her of vested rights. The testator died in 1886, and the act authorizing the mortgage was passed March 15, 1887 (St. 1887, p. 115),

and was an act adding a new article to the Code of Civil Procedure relating to mortgages and leases of real property of decedents. The sections relating to mortgages are 1577 and 1578. The proceedings to mortgage the property being regular and conformable to the statute, its provisions need not be set forth. Respondent relies upon *Brenham v. Story*, 39 Cal. 179. Upon the authority of that case, it was held in *Re Packer's Estate*, 125 Cal. 396, 58 Pac. 59, that under section 1537, Id., as amended in 1893, the real estate of the intestate could not be sold where the petition showed nothing more than that a sale would be for "the advantage, benefit, and best interests of the estate and those interested therein," so as to affect the title of an heir that had vested prior to the passage of the act; there being no debts or charges on the estate. *Brenham v. Story* decided that upon the death of the ancestor the heir at once becomes vested with the full property, subject only to liens then existing or created by statute then in force. See cases cited in *Re Packer's Estate*, supra. In the present case plaintiff took subject to such charges on the estate as the law authorized at the death of her testate. These were "debts of the deceased, the expenses of administration, and the allowance to the family." Section 1516, Code Civ. Proc. "The estate, real or personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies." Section 1563, Id. All the property of a decedent shall be chargeable as above stated, and "may be sold as the court may direct, in the manner prescribed in this chapter." Section 1516, supra. There was therefore authority of law for disposing of the property for the purposes named, namely, to pay debts of the deceased, expenses of administration, family allowance, and legacies. The real property belonging to the estate could be sold to provide money to discharge the liabilities above enumerated. The title of the devisees under the will, "though a vested estate in a general sense, was incumbered by the lien created by the testator in his lifetime, and by the law at his decease, and was therefore a qualified, though a vested, interest" (*Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542); and plaintiff took her interest subject to the power of the probate court to sell the property for the purpose of paying the charges or liens resting against it. To authorize the mortgage of the property for the express purpose of raising money with which to pay these charges is but to change the form of the lien, and adds no new burden not already borne by the property, or to which the property may be subjected under the law as it existed when the testator died. It is true, as is claimed, that the mortgage, under the statute, may bear a greater rate of interest than the legacies may bear. But the increased rate of interest al-

lowed by law is an incident of the power by which the burden or lien already on the property may be changed by changing the form of the statutory burden or lien to a mortgage lien. It does not affect the question of power, nor can it reasonably be said to be a new burden. Presumably the mortgaged property would have a market value greater than the mortgage debt, for the lender would rarely loan up to the full cash value. But the mortgage is not a sale, and the creditors may at any time petition to sell and pay the mortgage, and they would thus have an opportunity to realize the margin of value above the mortgage debt; and, if a sale could not be made for an amount in excess of the loan, it would show that the estate had realized on the mortgage all the property was worth in the market, and creditors would have no cause of complaint, for no deficiency judgment can be entered. The mortgagee must look alone to the property. *St. 1887, supra*. We think that within the limitations placed by law upon the power to sell to pay charges against the estate, as the law existed at the decedent's death, the court may, on cause shown as required by the statute, authorize the mortgage, whether the decedent died before or after the passage of the act of 1887. This view of the statute would often save the estate from forced sale and consequent sacrifice; and, under the wisely exercised discretion of the court, would result in benefit to the interests it was designed to conserve. Cases where probate mortgages have been upheld, where given under sections 1577 and 1578, are the following: *Thomas v. Parker*, 97 Cal. 456, 32 Pac. 562; *Stow v. Schiefferly*, 120 Cal. 609, 52 Pac. 1000; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Fast v. Steele*, 127 Cal. 202, 59 Pac. 585. Upon the general question of the power of the legislature to authorize the mortgaging of estates of decedents, see *Cooley, Const. Lim. (6th Ed.)* pp. 115-124; 2 *Woerner, Adm'n*, § 345; *Woerner, Guardianship*, § 86.

Our opinion is that the court erred in deciding that plaintiff owns an undivided interest in the land. We think, however, that the money received by defendant in payment of the individual debt of the executrix was a trust fund, as to which defendant must account to the estate to the extent of plaintiff's right thereto. What that right is can be determined only after an accounting is had, and the estate is in a condition to be closed. As the complaint now stands, it is a simple action to quiet title, without even a prayer for general relief, and proceeds on the theory that plaintiff owns a definite interest in the land. There is no allegation in the complaint that would support a judgment against defendant for any definite sum of money, or for an accounting to the estate. The evidence discloses an entirely different state of facts from that sued upon. This court can do no more than reverse the judgment and remand the cause, with leave to plaintiff to

take such further proceedings as she may be advised.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with leave to plaintiff to proceed further in the case as she may be advised.

(131 Cal. 226)

CITY OF OAKLAND v. SOUTHERN PAC. CO. (S. F. 1,664.)¹

(Supreme Court of California. Dec. 29, 1900.)

TAXATION—POWERS OF BOARD OF EQUALIZATION—INCREASE IN ASSESSMENT—EVIDENCE OF VALUE—NECESSITY.

Pol. Code, § 3673, authorizes boards of equalization to increase or lower the entire assessment roll so as to equalize the assessment of the property contained therein, and section 3677 provides that the assessor and any deputy whose testimony is needed must be present, and may make any statement or introduce witnesses on questions before the board, and section 3679 declares that the board must use the abstract of mortgages prepared by the county recorder, and other information it may gain from the records of the county recorder or elsewhere. *Held*, that the plaintiff, as a board of equalization, had no power, in the absence of evidence of the value of defendant's property, to raise defendant's assessment.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by the city of Oakland against the Southern Pacific Company. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. A. Dow, for appellant. H. S. Brown, for respondent.

PER CURIAM. This action was brought to recover taxes claimed to be due plaintiff by defendant upon property owned by it on the first Monday of March, 1894. Findings were filed, and judgment entered for defendant. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The amount of taxes that were due by defendant, according to the assessment as made by the city assessor, at the rate as fixed by the proper authorities, has been paid, and therefore the same is not involved in this action. The council of plaintiff, sitting as a board of equalization, after notice to defendant, but without evidence or testimony of any kind as to the value of defendant's property described in its assessment, increased and raised the assessment as made by the assessor \$681,500, which amount was, by resolution, directed to be added to the assessed valuation of the property which had been so assessed by the assessor. The main question in the case is as to whether or not the board of equalization had power to so increase the assessment without hearing or taking any evidence

whatever. The board of equalization, being an inferior tribunal or body created by statute, has such jurisdiction and powers as are given to it by statute, and none others. The powers of the board in regard to the equalization of taxes are prescribed by the Political Code, § 3672 et seq. It is provided in section 3673: "The board has power after giving notice in such manner as it may by rule prescribe, to increase or lower the entire assessment roll or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money." Section 3677: "During the session of the board the assessor and any deputy whose testimony is needed must be present, and may make any statement, or introduce and examine witnesses, on questions before the board." It is, by section 3678, made the duty of the recorder annually to transmit to the assessor a complete abstract of all mortgages, deeds of trust, contracts, and other obligations by which any debt is secured, remaining unsatisfied on the records of his office, not barred by the statute of limitations, on the first Monday of March of each year. Section 3679: "The board must use the abstract, and all other information it may gain from the records of the county recorder or elsewhere, in equalizing the assessment of the property of the county, and may require the assessor to enter upon the assessment book any property which has not been assessed." The board of equalization, in passing upon a question as to whether an assessment is too high or too low, acts in a judicial capacity, and its decision is an adjudication, and as clearly so as a judgment for the recovery of the tax. *People v. Goldtree*, 44 Cal. 325.

The assessor is the officer expressly authorized by law to fix the value of all property for the purposes of taxation. His valuation is presumed to be correct, but the sections of the Code cited provide a remedy for the correction of errors of judgment or mistakes made by him in his valuations. He is not required to hear evidence, but must use his best judgment in the first place, and fix the actual cash value of the property according to the rules laid down for his guidance. In so doing he should use his knowledge of values and of comparative values, with the aim and purpose of assessing all property at its full cash value, no matter who the owner thereof may be. The legislature evidently intended to provide, not a tribunal to reassess the property, but a body clothed with the authority to hear and determine if the assessor has equally and impartially performed his duty. The board so created has not the power, of its own volition, and on its opinion or the opinion of its members, without hearing evidence, to reassess the property. If it had such power, there should be some tribunal to correct the

assessments so made by the board. In the early case of *People v. Reynolds*, 28 Cal. 112, it is said: "When the party interested appears in answer to the notice or summons, he is entitled to be informed of the matters which he may be required to meet; and until a case be established authorizing an addition to be made to the assessed valuation of the property, he will have nothing to rebut, but may rest securely upon the assessed valuation. The board have no more right to add to the assessed valuation of the property, without evidence authorizing them to do so, than a court or jury have to find facts and determine the rights of litigants without evidence. If boards of equalization may arbitrarily, and of their own mere caprice, increase the assessed valuation of property, then they possess a power without prescribed limits which may be used for purposes of the grossest oppression and injustice." The above decision was made under the revenue act of 1861 (St. 1861, p. 427), which provided: "The board of equalization shall have power to determine all complaints made in regard to the assessed value of any property, and may change and correct any valuation, either by adding thereto or deducting therefrom, if they deem the sum fixed in the assessment roll too small or too great, whether said sum was fixed by the owner or the assessor." The act of 1861 would seem to give the board more extensive powers than any change in the section has since given it. When the Codes were adopted, the substance of the act of 1861 in regard to powers of the board was enacted in section 3673, Pol. Code, and read: "The board has power to determine all complaints in regard to the assessed value of property, and may, except as prohibited in this title, correct any valuation by adding or deducting such sum as may be necessary to make it conform to the actual cash value." The section was amended in 1880 as it now reads, and has ever since stood in its present form. It is argued that the amendment of 1880 dropped from the section the words "all complaints in regard to the assessed value of property," and that the board may now, after giving notice, raise an assessment without any formal complaint being filed; hence, if no complaint is necessary, no evidence is required. We do not think it was the intention to dispense with evidence. In *City and County of San Francisco v. Flood*, 64 Cal. 508, 2 Pac. 267, decided in January, 1884, it is said: "The action of the board in dealing with the valuation of the property listed in the roll is based upon evidence which may be adduced before the board. Sections 3673, 3677, Pol. Code. As to increase of amount of valuation or reduction, the board can only act on evidence. We cannot see how it could act otherwise." In *Hagenmeyer v. Board*, 82 Cal. 218, 23 Pac. 16, it is said: "The record does not show by affirmative proof that the board did not act

upon evidence before it. Therefore its order in the premises is conclusive that it did act upon such evidence as was necessary." In *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 325, 32 Pac. 314, it is said: "The board had no power to order a new assessment to be made without evidence." Under the above decisions it has become the settled rule in this state that the board can only act upon evidence in raising or lowering an assessment. We are aware that a different rule has been announced in some states, but generally the rule in such cases has been based upon the peculiar wording of the statute under which the decision has been rendered. But, when such is not the case, we think the rule as herein announced the better and safer one. It is claimed that the record shows that there was evidence taken before the board. Counsel, in his brief, under this claim says: "Mr. Ryan was called upon to testify, but refused to make any statement why the assessment should not be increased. Mr. Martin, in behalf of the defendant, testified simply that the assessment, as it then stood, was too high." We have examined the record, and do not find that Mr. Martin was ever sworn as a witness, or that he testified before the board. The finding of the court is: "That said resolution was adopted without the taking or hearing of any evidence or testimony whatever as to the value of said property, and no evidence or testimony of any kind whatever was taken, or heard, or considered." The finding is supported by the testimony in the record. The judgment and order are affirmed.

(131 Cal. 230)

OVEREND v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 1,680.)

(Supreme Court of California. Dec. 31, 1900.)

CONTEMPT—REFUSAL OF WITNESS TO ANSWER QUESTION—QUESTION FOR COURT—CRIMINATING QUESTION—WAIVER—COMMITMENT—VALIDITY OF ORDER.

1. A witness is guilty of contempt for arbitrarily refusing to answer a question on the ground that it tends to incriminate him, since the question whether such question would tend to convict the witness of a felony is for the court.

2. A witness cannot be adjudged guilty of contempt for refusing to answer a criminating question in a criminal case because he testified to such facts on a preliminary examination, since his act in so doing was not a waiver of such objection.

3. Under Code Civ. Proc. § 1211, requiring an order of commitment for a contempt committed in the presence of the court to recite the facts, an order committing a witness for contempt in refusing to answer a question is void where it does not recite the question which the witness refused to answer.

4. Under Code Civ. Proc. § 1211, requiring an order of commitment for a contempt committed in the presence of the court to recite the facts, an order committing a witness for a contempt in refusing to answer a question is void, where it does not recite facts showing the jurisdiction of the court.

5. The refusal of one from whom property has been embezzled to state whether he knows the defendant, who is charged therewith, will authorize a commitment for contempt, since such question is material, as tending to identify the defendant, and an answer thereto does not tend to incriminate the witness.

6. A judgment committing a witness for contempt is not void, as being double, in providing that he be punished by fine and imprisonment for a certain time, and also that he be imprisoned until he answers a certain question, which latter part has been held void, since the first part is separate and independent from the last.

7. Where certiorari is brought to review three separate commitments for contempt, the objection that all were based on a single contempt, which would only sustain one judgment, is without merit, where two of the commitments are declared invalid.

Department 1.

Original certiorari by Alfred Overend against the superior court of the city and county of San Francisco; Wallace, Judge. Writ sustained in part, and dismissed in part.

J. J. Guilfoyle (F. W. Van Reynegom, of counsel), for petitioner. Jones & O'Donnell, for respondent.

GAROUTTE, J. This is an original proceeding in certiorari to annul three certain orders or judgments made by the trial court. The facts are these: On June 15, 1898, at 10 a. m., one Minnie Campbell was upon trial in the superior court charged with the commission of a felony. Petitioner, Overend, was called and sworn as a witness; whereupon he refused to answer any questions, upon the ground that his evidence would tend to criminate him. The court then made an order which recited that the witness was the prosecuting witness in the case, and that he had appeared at the preliminary examination of defendant, and testified fully, without objection; that he had been ordered by the court to answer the questions which had been addressed to him, and had refused; and thereupon it was adjudged that he was guilty of contempt in refusing to obey the order of the court, and as a punishment he was "committed to the county jail of the city and county of San Francisco until two o'clock p. m., and, moreover, that he pay a fine of five hundred dollars for his contempt in that behalf." At 2:30 p. m. of the same day the trial was resumed, and Overend was again called to the witness stand, and asked the following question: "Do you know the defendant, Minnie Campbell?" and he again refused to answer, upon the ground that his answer might tend to convict him of a felony. The witness further stated that he would refuse to answer any and all questions that might be propounded to him as a witness in the case; whereupon petitioner was adjudged guilty of contempt, and ordered to be punished by paying a fine of \$500, and be imprisoned in the county jail of the city and county of San Francisco until 10 o'clock a. m., June 16, 1898. At 10 o'clock a. m., June 16th, petitioner was again called to the stand

to testify, and was asked the following question: "Do you know the defendant, Minnie Campbell?" He again refused to answer the question, upon the ground that his answer might tend to convict him of a felony, and further stated that he would refuse to answer any and all questions which might be propounded to him as a witness in said case; whereupon the court made an order reciting the facts found in the first order made; also reciting the question asked and the refusal to answer it; that it was indispensable to the prosecution to prove that petitioner did know the defendant, Minnie Campbell; and that, if petitioner should answer the question, "Do you know the defendant, Minnie Campbell?" he would not thereby give any evidence which would tend to convict him of a felony; and, by reason of his refusal to answer the aforesaid question, the petitioner was declared guilty of a contempt of court, and was ordered to pay a fine of \$500, and be imprisoned in the county jail of the city and county of San Francisco for the period of five days. The court at this time, and as a part of the same judgment, also ordered petitioner to be confined in the aforesaid jail until he answered the question, "Do you know the defendant, Minnie Campbell?" This latter part of the judgment has been declared void by this court. *Ex parte Overend*, 122 Cal. 201, 54 Pac. 740.

1. It may be declared well settled that the witness cannot constitute himself an arbitrary or exclusive judge as to whether or not the evidence called for by the question would tend to convict him of a felony. It is a matter which the trial court is to decide, and even its action may be reviewed upon appeal to this court. It is said in *Whart. Cr. Ev. § 469*: "The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer. * * * But, in order to claim the protection of the court, the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection. It is not, indeed, enough for the witness to say that the answer will criminate him. It must appear to the court, from all the circumstances, that there is a real danger, though this the judge, as we have seen, is allowed to gather from the whole case, as well as from the general conception of the relations of the witness. Upon the facts thus developed, it is the province of the court to determine whether a direct answer to a question may criminate." It is said in *Ex parte Stice* by this court in bank (70 Cal. 53, 11 Pac. 459): "Whether the answer to this question would be or might be of such tendency the court in which the trial is proceeding must adjudge, * * * and it cannot be called on to do so in advance of the question being put. To hold that the reason stated above would justify a person called in refusing to be sworn would be to make such a person, and not the court, the final

judge, and exclude the court from any consideration of the matter whatever. Such is not and cannot be the law." In the case of *In re Rogers* (Cal.) 62 Pac. 47, it is decided: "As to the relevancy and pertinency of the questions propounded, it is sufficient to say that the decision of that matter rests with the judge, and not with the witness, but the decision of the judge at nisi prius is reviewable by this tribunal under the writ. *Ex parte Zeelandelaar*, 71 Cal. 238, 12 Pac. 259. Otherwise, the production of evidence would cease to be under the control of the court, and would depend upon the opinion of the witnesses."

2. It appears that the trial court based its judgments of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable. This question of waiving the privilege is discussed and decided in *Temple v. Com.*, 75 Va. 896, and *Cullen's Case*, 24 Grat. 624. It is said in those cases that the witness' statements elsewhere have nothing to do with the question.

3. Section 1211, Code Civ. Proc., declares: "When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer." It has been held by this court and other courts, with entire unanimity, that when the contempt is a constructive contempt, namely, committed without the presence of the court, then the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt, and, if it does not, then the court is wanting in jurisdiction, and the order of contempt is void. In the case of a contempt committed in the presence of the court, the section says that the order adjudicating the contempt must contain a recital of the facts. This provision can only mean that the order must contain a recital of those facts which make out a case of contempt; that is, a recital of those facts which in a case of constructive contempt the law says must be incorporated in an affidavit. In *People v. Turner*, 1 Cal. 155, it is said: "We think it follows, from the distinction above considered, that the final order of the court by which a party is adjudged to have been guilty of a

contempt should always show, upon its face, the facts upon which the exercise of the power is based and the adjudication is made." In *Ex parte Rowe*, 7 Cal. 183, we find this language: "If, then, we have the right to set aside the order of the inferior court in a case of contempt, it would seem clear that the warrant of commitment should state all the material facts upon which the action of the court is predicated. In the present case it should have been stated that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions propounded to him, stating them; that he refused to answer; that the facts were thereupon presented to the court by the grand jury, and the prisoner required by the court to answer, which, being refused, he was committed for contempt." Again, in *Batchelder v. Moore*, 42 Cal. 415, the court said: "The power of a court to punish for alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized. for mere presumptions and intendments are not to be indulged in their support." In *Ex parte Zeelandelaar*, 71 Cal. 239, 12 Pac. 259, Justice Sharpstein said: "In order to show a legal cause for the imprisonment of the petitioner, the return in this case should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, as this is not shown by the return, no legal cause for the imprisonment of the petitioner is shown, and he should be discharged." This conclusion of the justice, in substance, was indorsed by the other members of the court. In *Schwarz v. Superior Court*, 111 Cal. 112, 43 Pac. 580, we find this declaration: "The offense being criminal in its nature, both the charge, and the finding and judgment of the court thereon, are to be strictly construed in favor of the accused."

4. Let us try this case in the crucible furnished by the law as declared in the foregoing authorities. The questions asked a witness must be pertinent and material to the issue. The court has no power to compel a witness to answer any others, and the refusal to answer a question not pertinent and material to the issue is no contempt of the court. Yet the first order of contempt made by the trial court in this proceeding which is before us for review does not state the question or questions asked of the witness. It follows that this court does not know anything about either their materiality or pertinency to the issue on trial. As far as this court knows, the questions asked may only have had the purpose of eliciting evidence wholly foreign to any issue bearing upon the

case. There is not even a recital in the order of contempt that the questions and answers thereto were material and pertinent to the issue. The section of the Code quoted requires the facts to be stated, and that requirement demands the question or questions addressed to the witness to be stated in the order. In a proceeding for contempt, the jurisdiction of the court to make the order must affirmatively appear. The cases stated so declare the rule. Here there is no affirmative showing of jurisdiction, because it is not shown that the questions were material and pertinent. For this reason this order adjudging defendant guilty of contempt is void, and should be annulled.

5. We pass to the order of contempt made at 2:20 p. m. of the same day by the court. The minutes of the court show that the witness was asked the question, "Do you know the defendant, Minnie Campbell?" The minutes further show that petitioner refused to answer the question. As to this contempt, the order made by the court adjudging it contains no recital of any jurisdictional facts whatever. The statute says the facts showing the contempt must appear upon the face of the order. For this reason we hold the second order of contempt void.

6. As to the third order of contempt made, the jurisdictional facts therein recited are fully sufficient to invest the court with jurisdiction to make it, and, that being so, the questions are at once presented: First, was the question asked material and pertinent to the issue? and, second, would the answer to the question tend to convict the defendant of a felony? Minnie Campbell was upon trial charged with embezzlement. Overend, petitioner, was the party whose property she was charged with having embezzled. Under these circumstances, the question, "Do you know the defendant, Minnie Campbell?" was material and pertinent to the issue as a means of identifying the defendant. Petitioner's testimony to this point was probably absolutely necessary in order that the charge might be established. Second, would the answer to the question, "Do you know the defendant, Minnie Campbell?" tend to convict the witness of a felony? If his answer was "No," it certainly could not have any such effect; and, if his answer was "Yes," we see nothing in that evidence which would tend in any material degree to convict the witness of a felony. If this question and answer, standing alone, would have such a tendency, we can hardly imagine any question and answer but that would have the same tendency. A mere acquaintance with defendant, Minnie Campbell, of itself, certainly could not tend to convict the witness of a felony. It was not for the witness to surmise, "Another question is going to follow which will tend to convict me of a felony, and therefore I will refuse to answer this one." He cannot know that a second question will be asked at all. It is only when the important question—

some question tending to criminate—is asked that he may plead this privilege. Perchance it never will be asked.

Some point is also made by petitioner that the evidence discloses that during the progress of the trial he asked the prosecuting officer to dismiss the charge against the defendant, Minnie Campbell. But we attach no importance to this fact. There is nothing to indicate that this act of petitioner was in any way criminal, even conceding that a criminal proposition of that character, made to the prosecuting officer, would have justified this witness in refusing to answer the question, "Do you know the defendant Minnie Campbell?"

We attach no importance to the claim that the judgment, under the third order, was in the nature of a double judgment, and therefore void. The court has already decided in *Ex parte Overend*, supra, that the second portion of the judgment was void. The part remaining, being separate and independent, can therefore stand as a valid and binding judgment.

It is also claimed that these various refusals to testify constitute but a single, continuing contempt, which may only be satisfied by a single judgment. *Ex parte Stice*, supra, appears to declare a contrary doctrine. But regardless of that decision, there being but one valid order of contempt made by the trial court, this contention, for that reason, fails of merit.

For the foregoing reasons, the court concludes that the first and second orders of contempt are void, and they are hereby annulled and set aside. The third order of contempt made is valid and binding, and as to it this writ will be dismissed.

We concur: VAN DYKE, J.; HARRISON, J.

(24 Mont. 575)

MURPHY et al. v. PATTERSON.

(Supreme Court of Montana. Jan. 7, 1901.)

PARTNERSHIP — REFERENCE — FINDINGS — CONCLUSIVENESS — FINDINGS AS SPECIAL VERDICT — JUDGMENT ROLL — PARTNERSHIP AGREEMENT — PROPER CREDITS — FINDINGS.

1. Attorneys in an action for the dissolution of a partnership stipulated that the case should be submitted to a referee, who should have power to take testimony, and report findings thereon, and to state a complete account between the parties, and that the cause, together with such report and testimony, and the books of account of the firm, might be argued before and submitted to the court. *Held*, that the court was not required to enter a formal order setting aside the findings of the referee before proceeding to determine the case on the evidence, findings, and reports submitted, since the referee was not authorized by the stipulation to hear and determine the issues, and his findings were advisory only, and not conclusive on the court.

2. Code Civ. Proc. § 1141, provides that, when a reference is to report the facts, the findings reported shall have the effect of a special verdict. *Held*, that where the reference provided that a referee should take testimony,

and state a complete account between the parties, but did not authorize him to hear and determine the issues, his findings cannot be given the effect of a special verdict, since the scope of the referee's authority must be determined by the terms of the order of reference.

3. Under Code Civ. Proc. § 1196, providing that the findings of the court or referee must be included by the clerk in the judgment roll, findings of fact under an order of reference to hear testimony and report findings of fact did not become a part of the judgment roll, since section 1196 only refers to findings under a reference to hear and determine the issues raised by the pleadings.

4. Defendant, in 1879, agreed to give his time to the management of a partnership for five years for \$25 per month and one-fourth of the profits, such profits to be credited as payments for a one-fourth interest in the business, valued at a certain sum. In 1884 it was agreed that defendant should continue managing the business for \$100 per month, and be entitled to a one-fourth interest therein, and was debited on the partnership books \$3,116, the difference between one-fourth of the preceding five years' profits and the value of one-fourth of the business. *Held*, that findings that a new partnership was formed in 1884, and that defendant was not entitled, on dissolution of the partnership in 1894, to credit for one-fourth of the profits from 1879 to 1884, were proper, since he received credit for such profits by becoming owner of one-fourth of the business.

Appeal from district court, Chouteau county; Dudley Du Bose, Judge.

Action by James T. Murphy and another against George D. Patterson. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Action for dissolution of partnership and an accounting. Under stipulation of parties, cause was referred to David G. Brown as referee to take testimony, state an account between the partners, and report to the court testimony taken with certain findings of fact thereon. Stipulation further provided that a decree of dissolution might be entered by the court, all objections to such dissolution being waived; that either party might take exceptions to the report of the referee, or to any finding of the referee, the same as if the reference had been made by the court of its own motion; and that the decree or any order of the court in the premises might be made either by the court or the judge in chambers. Thereafter testimony was taken before the referee. To the introduction of any evidence relating to the value of the property of Greenleaf & Co. in July, 1884, plaintiffs objected on the ground that under the agreement of July 1, 1879, made a part of defendant's answer, defendant was to have for his services for the five years it was in force one-fourth of the profits, and was to purchase a one-fourth interest in the original plant, fixed in such agreement at \$12,465.60; and the books of the partnership show that this agreement was carried out, that none of the profits were withdrawn, but were reinvested in partnership assets, and that defendant, not having paid for his interest in the original plant, was charged with \$3,095 therefor as an original item, thus leaving the interest of each

partner to be determined on the final settlement of the affairs of the partnership. Defendant's testimony was directed solely to the values of cattle and sheep in 1884, and was admitted subject to the above objection. Defendant introduced no evidence tending in any way to prove the affirmative matters of his answer, nor as to the formation of the partnership, the terms thereof, nor as to his indebtedness to the firm. The other facts material to the questions presented are stated in the opinion.

Toole & Wallace and Walsh & Newman, for appellant. H. G. McIntire and Massena Bullard, for respondents.

WORD, J. (after stating the facts). The first question we will consider is whether or not the court below erred when it disregarded the findings of the referee, and made its own findings of fact and conclusions of law. Counsel for appellant argue that under the stipulation entered into between the parties to the action, and by virtue of which the cause was referred, Brown, the referee, was empowered to hear, try, and determine the issues presented, and to make his findings of fact, and report the same to the court; and that under these circumstances the referee became a special tribunal, and therefore "his findings of fact could not be set aside or disregarded by the court, and a judgment entered inconsistent therewith." If this position of appellant were supported by the terms of the stipulations before us, we would be disposed to agree with counsel, and to follow the authorities cited by them. Under the stipulation of February 23, 1894, as we view it, the referee was not empowered to hear, try, and determine the issues, but rather to take the testimony, and report the same, together with his findings of fact thereon, to the court; that he should state an account between the parties; and that, when completed, his examination and report were to be filed, and either party should have the right to bring the same on to be heard before the court or judge upon 10 days' notice. The language of the stipulation is that the referee shall have power "to take testimony," and "to state a complete account" between the parties. Nowhere in the stipulation is the referee authorized to "hear, try, and determine" the issues between the parties, as was the fact in a majority of the cases cited by counsel upon this proposition. Thus, in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, we find the parties consented that the case should be referred to a master "to hear the evidence and decide all the issues" between them. So, in *Davis v. Schwartz*, 155 U. S. 512, 15 Sup. Ct. 237, 39 L. Ed. 289, by consent of parties, the case was referred to a master to hear the causes, and report, not the evidence merely, but his findings of facts and his conclusions of law. And in *Shutt Investment Co. v. City of Pueblo* (Colo.

App.) 54 Pac. 644,—an action for damages to real property,—it was agreed that the finding and report by commissioners selected by the parties of the amount of damages sustained, if any, should be final and conclusive. Under section 1180 of the Code of Civil Procedure "a reference may be ordered upon the agreement of the parties, filed with the clerk or entered in the minutes: (1) To try any or all of the issues in an action or proceeding, whether of fact or law, and to report a finding and judgment thereon; (2) to ascertain a fact necessary to enable the court to determine an action or proceeding." If the reference was made under the authority of this section, the words of the stipulation and the interpretation given it by the parties indicate that the purpose of the reference was not to have the issues tried, and to have reported findings, and a judgment thereon, but rather to ascertain certain facts necessary to enable the court to determine the action. But, in our opinion, the reference more properly falls under the provisions of section 1181 of the Code of Civil Procedure, though made with the consent of the parties. Weight is given to this construction by the stipulation of February 24, 1897, wherein the parties agreed "that this cause, together with the reports of the referee herein, and the testimony taken before the referee, and the books of account of the firm sought to be dissolved, may be argued and submitted to said court at the present term thereof for its consideration and determination," etc.; thus, in effect, declaring that it was not the referee, but the court, which was to consider and determine the issues. Authority for such interpretation of these agreements of parties is found in *Bradshaw v. Morse*, 20 Mont. 214, 50 Pac. 53. In that case—an action for an accounting—the court, of its own motion, referred the cause to a referee to take the testimony of the witnesses, to state an account between the parties, and to report the same to the court, with his findings thereon. There, as here, it was argued that the whole case was given to the referee for determination, "and that, as the whole issue was submitted by order of reference to the referee, the findings of the referee became the findings of the court, and that the court could not modify or correct the report of the referee except on motion for a new trial; in other words, that the court was bound to enter judgment in accordance with the findings of the referee, and could only disapprove, correct, or modify the same on a motion for new trial after judgment." This court held, however, that under the terms of the order the referee was given "no authority to try and determine the whole issue or case. He was not clothed with the power of a tribunal to that extent by the terms of the order of reference." "Under the terms of the order of reference, the findings which the referee was authorized to make to the court

could only be advisory." See, also, *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Quinby v. Conlon*, 104 U. S. 420, 26 L. Ed. 800; *Hardware Co. v. Wolter*, 91 Mo. 484, 3 S. W. 865; *Bremmerman v. Jennings*, 101 Ind. 253; *Best v. Pike*, 93 Wis. 408, 67 N. W. 697. And so, in the case before us, under the order of reference, of which the first stipulation of the parties was a part, the referee had no power to decide any of the issues made by the pleadings. His findings were, therefore, not conclusive upon the court, but advisory merely; and, being advisory, it was not necessary for the court to make a formal order setting aside the findings of the referee before it could proceed to make findings of its own; and by taking such action the court, in effect, set aside the conclusions drawn by the referee from the testimony. All the evidence, both the original and supplemental reports of the referee, together with his findings and the objections and exceptions of the parties thereto, were before the court for consideration and determination; and, in so far as any action of the court below was concerned, it was as if the case had been argued and submitted to the court upon the pleadings and evidence in the first instance. The court was not bound by any act of the referee. With all the facts before it, and with the findings of the referee advisory only, we are cited to no decision which, under an order of reference similar to the one before us, holds that the court in an equity case must formally reject or adopt as its own the findings of a master or referee. On the other hand, where the purpose of the reference was—as we hold it was in this case—to have the referee report certain facts, or the facts upon certain issues, for the information of the court, so that it could intelligently act and adjudge the rights of the parties, or where the matter referred to the referee is collateral to the main issue,—as, for instance, to state an account between the parties,—then the findings of the referee are not binding, but advisory merely, and so may be disregarded by the court in reaching its decision upon the merits. *Bradshaw v. Morse*, supra; *Kimberly v. Arms*, supra; *Hardware Co. v. Wolter*, supra; *Erisman v. Kerwin* (Okla.) 56 Pac. 858; *Field v. Romero* (N. M.) 41 Pac. 517; *Palmer v. Palmer*, 13 How. Prac. 363; *Muhlenbrinck v. Pooler*, 40 Hun, 528; *Harris v. Refining Co.*, 41 Cal. 404.

Counsel for appellant say that the findings of the referee, under section 1141 of the Code of Civil Procedure, have the force and effect of a special verdict. We are of opinion that the reference contemplated by this section is one where the referee is called upon to hear and try the issue, and report the facts thereon; and not one like that in the case at bar, where the referee was not to try and determine, but to take the testimony, and report the same, with certain findings thereon, for the information of the court. Section

1141, *supra*, is to be read in the light of those sections of the Code immediately preceding. And, even when the referee is to report the facts, the force to be given to such report must depend, not only upon the nature of the action, but upon the terms of the order of reference, for "the terms of the order of reference determine the scope of the referee's authority." *Bradshaw v. Morse*, *supra*. Entertaining these views, we cannot give to section 1141, *supra*, the broad construction placed upon it by counsel for appellant.

Appellant's counsel next contend that the findings of the referee are, by section 1196 of the Code of Civil Procedure, made a part of the judgment roll. The "finding" referred to in this section of the Code is the "finding of the referee" designated in section 1140 of the Code of Civil Procedure; that is, one upon the whole issue. *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. 1021. Holding, as we do, that the court was not required to enter a formal order setting aside the findings of the referee before proceeding to determine the case upon the evidence, findings, and reports submitted, we have before us but one set of findings,—those of the court below,—and these we will now consider. Inasmuch as counsel entertain widely different views in regard to the terms of the partnership formed in July, 1884, an examination of the conditions then existing becomes material. Under the agreement of July 1, 1879, to continue in force for five years from date, *Greenleaf & Co.* contracted to give the appellant, Patterson, one-fourth of the profits of their live-stock business. In consideration thereof Patterson was to devote his entire time and attention to the care and management of this business. Out of his share of the profits he was to buy and pay for a one-fourth interest in the sheep and other property belonging to said firm, the basis of purchase being the value of the property on July 1, 1879, stated in the agreement to be \$12,465.60. Patterson was to pay for said one-fourth interest as rapidly as any of the profits of the business were realized and determined. *Greenleaf & Co.* were to furnish Patterson a sum not exceeding \$25 per month. Such sum was to be an advance to him, and was to be paid back by him out of his share of the profits as they should be determined. On all sums furnished him in excess of \$200 per annum Patterson was to pay the current rate of interest. Five years from the date of the agreement a final settlement of all accounts was to be had, and final profits were to be arrived at; the basis of calculation being the value of the company property at that time. All profits arising from the business during the five years covered by the agreement were to be reinvested in live stock. The agreement further provided that a settlement of all accounts and a statement of the business of the firm should be had on the 1st day of July of each year, or as soon

thereafter as practicable. At the hearing before the referee the defendant offered no evidence in support of the allegations in his answer. His testimony, and that of the witnesses called in his behalf, was directed solely to the question of the value of the company property in 1884. John T. Murphy, one of the plaintiffs, upon matters other than the value of the property in 1884, testified, in substance, as follows: "Patterson was familiar with the books. In 1884, Patterson, being unable to pay for one-fourth of the original plant, it (\$3,095) was charged to him by agreement. The other partners agreed to carry it on the books as a debit against him. It was at his request and his agreement and consent. The contract expired July 15, 1884, and was not completed in the particular that the plant was wound up, and sold out, and valued, and profits arrived at, but simply by agreement the business was continued, he taken in as a partner, and given one-fourth of the plant. He was paying for one-fourth of the original plant, he being taken in as a partner, and acquiring one-fourth of the whole plant by paying for one-quarter of the original plant. The profits remained intact; nothing was taken out by any member of the firm; and we agreed to loan him the amount on the books to buy one-fourth of the original plant. The books were written up on that basis, and the business continued under that agreement; and the further agreement was entered into that he was to have \$100 per month for his personal attention to the business. The daily detail books were kept by Mr. Patterson, and they were written up at the end of the year, and copied off by my bookkeeper. Patterson had full knowledge of and participated in it. The books were written up from the original entries, all except the closing entries,—the computation of interest, or something of that kind, at the close of the year. He was usually present at the annual settlements. The subject of interest was discussed between us. We agreed to carry him for the amount he owed on the purchase price of the original plant at 10 per cent. Any other sums he was to pay 12 per cent. on. This was by agreement with Patterson. The books have been kept in harmony with the agreement. A settlement and adjustment of the accounts was had, and a trial balance struck with Patterson, and with his concurrence and assistance, at least once a year; I representing myself, Chipman, and *Greenleaf*. This testimony applies to each of the annual statements and trial balances that appear in the books." It further appeared on the cross-examination of the witness Murphy that no settlement was had in 1884, since this would have required the selling out of the property of *Greenleaf & Co.*, and the winding up of the business; that Patterson never was given credit in dollars and cents for his five-years service as a matter of bookkeeping, but that Patterson certainly understood that

he became possessed of one-fourth of all the property of the concern after he was charged with one-fourth of the value of the property as of 1879. The books of the company, as kept by Patterson himself, show that yearly settlements of his account with the firm of George D. Patterson & Co. were had, and that the amount due from him to the firm, while only \$6,040.19 in July, 1884, was the sum of \$15,967.93 on January 27, 1894. The referee, after hearing the testimony and examining the books of the partnership, found that the said partnership owed George D. Patterson the sum of \$8,257.70, with interest from January 27, 1894, the date the receiver of the partnership property was appointed; that no settlement was ever had between the parties of the transactions under the contract of 1879, nor was there ever any balancing of accounts under the partnership formed and existing after the termination of said contract. Upon the matter being referred back to the referee for a further report, he found, in addition to the above findings, that the co-partnership was indebted to John T. Murphy in the sum of \$677.79, and to Henry L. Chipman in the sum of \$52.49; that the interests of the several partners were: Murphy one-half, Patterson one-quarter, Chipman one-quarter; that Murphy and Chipman were not entitled to have credited to them their respective shares of the net profits of the business at the end of the five years mentioned in the contract of 1879, for the reason that said contract provided that all profits shall be reinvested in live stock, and that under said contract Patterson was entitled to a credit of one-quarter of said profits at that time as his salary as superintendent; that the quarter of the profits thus appropriated became expenses, and so could not be reckoned among the profits. The court, however, refused to accept or adopt the findings of the referee either as to the indebtedness of the firm to Patterson, or as to the absence of any settlement between the partners, or as to the credit given Patterson for one-quarter of the profits as salary, but, on the other hand, found that the partnership was formed in 1884; that Murphy bought out the interest of Greenleaf in 1888; that, in addition to his one-fourth interest in said partnership, defendant was to receive \$100 per month for his personal attention to the business of the firm; that at the time said co-partnership was originally formed each partner contributed one-fourth of the assets; that defendant Patterson contributed his one-fourth in the shape of the profits coming to him under the contract of 1879 and one-fourth of the original plant, such one-fourth being \$3,116.40, for which he was debited on the books of the co-partnership, he not having paid for same; that, in addition to such debit of \$3,116.40, defendant Patterson also owed the partnership at the time it was formed in 1884 the further sum of \$2,941.55 for moneys theretofore advanced to him,

which sum was also charged against him on the books of the firm. The court further found that each year from and after the formation of the partnership a settlement and adjustment of the business of the previous year was had between Patterson and Murphy; that at the times these yearly settlements occurred Patterson would be debited with what he had drawn out of the business, and a balance ascertained in the accounts of Patterson and the other partners with the partnership; that on the 27th day of January, 1894, Patterson was indebted to said firm in the sum of \$15,967.93, together with interest on \$12,872.31 thereof from said date at the rate of 12 per cent. per annum, with annual rests, and interest on the sum of \$3,095.62 thereof from said date at the rate of 10 per cent. per annum, with annual rests,—the principal and interest amounting on March 13, 1897, to the sum of \$22,515.63, wholly unpaid. As a legal conclusion the court found said Patterson to be indebted to said firm in the sum of \$22,515.63 on March 13, 1897, and that said sum constituted a part of the assets of said firm. The other findings and conclusions of the court we need not now consider.

Counsel for appellant attack these findings and conclusions on the ground, among others, that they are unwarranted by the facts now before us. After a careful consideration of the whole record, we cannot agree with counsel, but are forced to the conclusion that the deductions drawn by the court below from the evidence are sound, and in accordance with the acts and intention of all the parties. The primary error in the calculations of the referee, and to which his mistake in finding that there was due from the firm to Patterson the sum of \$8,257.70 may be attributed, was in giving Patterson credit for the sum of \$8,605.76 as of the time the partnership was formed, to wit, July 15, 1884. Appellant says that under the agreement of 1879 he was to have one-quarter of the profits at the end of five years. This is true, but it is also true that he was to buy a quarter interest in the original plant at a stated price, that he was to pay for this interest out of the profits as they were realized and determined, and that at the end of the five years—the life of the contract—a final settlement of all accounts was to be made, and final profits arrived at and determined. The evidence shows that at no time during this five-year period were any of the profits of the business determined, nor did Patterson pay any part of the amount he owed for his quarter interest in the original plant, or of the moneys that had been advanced to him. And when the contract of 1879 was at an end, although under its terms he was entitled to one-quarter of the profits which had accrued, Patterson nowhere claims he asked for the settlement of accounts provided for in the contract. Had he done so, and had the profits of the firm been sold, and the moneys

realized therefrom divided, he would have had a balance in his favor. But another course was adopted. A new partnership was formed. Of this new partnership Patterson became a member. Of its profits he was entitled to one-fourth under the contract of 1879, and of its property he became a quarter owner by buying such interest from the other members of the firm, who were the sole owners of the original plant. This quarter interest in the plant Patterson did not pay for in cash. With the consent of all the parties, the agreed value thereof was charged against him on the books of the company. With this charge against him, and with the debit for moneys theretofore advanced to him, Patterson became a member of the firm of George D. Patterson & Co. When the last-named firm was formed, appellant says that, in addition to the quarter interest in the original plant, he was entitled to a quarter interest of the profits then existing and, after this interest in the profits had been set aside and credited to him, to a quarter interest in the profits then remaining. The evidence, the acts of the parties, the statements contained in the books, the annual settlements participated in by Patterson, are all against this contention. The testimony of Murphy is clear and explicit on this point, and we refer to it without further comment. When Patterson took charge of the books of the firm, or at least when he was present at the first yearly settlement and adjustment of the accounts of the partnership, he must then have known that upon the partnership books he was debited with the amount of money advanced to him, and with the value of his interest in the original plant. If, as he now claims, he should have been credited with a quarter of the profits existing in 1884, why did he not at that time insist upon such credit? Or if it was the understanding of the parties that out of his share in the profits he was to pay what was due from him to the firm, and be given credit for any balance in his favor, Patterson was in a position to ask that this be done. But for 10 years the books, of which he had knowledge, because kept by him, were permitted to show a charge against himself, bearing interest, increasing with each year; and yet nowhere do we find, either in his answer, or his testimony, or on the books, any credit claimed by Patterson other than that of being a quarter owner in the firm property. The fact that after the partnership of 1884 was formed Patterson was allowed and received \$100 per month for his services as manager, together with provisions for himself and family, tends to bear out the testimony of the witness Murphy in effect that the partnership of 1884 was a new agreement, and that no attempt was made to carry out all the terms and conditions of the contract of 1879. Another circumstance leading to the same conclusion is this: In 1884 it is admitted that Greenleaf & Co. owned the whole of the orig-

inal plant. Under the contract of 1879 the money Patterson was to pay for his one-fourth interest therein would have gone to the members of the firm of Greenleaf & Co. It appears from the evidence, however, that it was agreed the value of this quarter interest should be charged to Patterson on the books of the new firm, instead of remaining a debt due to the members of the old firm of Greenleaf & Co.,—a course manifestly to the advantage of Patterson, since, under the plan pursued, he is only called upon to pay three-quarters of the purchase price, with interest, of his quarter interest in the original plant. Unaided by the facts before us, it would be difficult to give force and effect to all the terms of the contract of 1879, since there is a conflict between certain of its provisions, while others, as we have shown, were never acted on or carried out. In the light of events subsequent to the formation of the contract of partnership of 1884, we cannot but feel that the findings of the court below are in accord with the evidence and understanding of the parties, and so will not be disturbed on this appeal.

The other errors urged not being sufficient to warrant a reversal, the judgment and order appealed from are accordingly affirmed.

BRANTLY, C. J., concurs. PIGOTT, J., having been of counsel, did not hear the argument, and takes no part in this decision.

(24 Mont. 591.)

MURPHY et al. v. PATTERSON.

(Supreme Court of Montana. Jan. 7, 1901.)
PARTNERSHIP—RECEIVER'S SALE—CONFIRMATION—APPEAL—QUESTIONS RAISED—JUDGMENTS—JURISDICTION OF COURT.

1. Where a decree determining partnership accounts is rendered after the dissolution of the firm, and the receiver therefor is thereafter ordered to sell the partnership property, an appeal from an order confirming such sale does not raise any question concerning the order of sale, since such order is a special order, made after final judgment, from which an appeal is authorized by Code Civ. Proc. § 1720.

2. An appeal from a final decree in an accounting between partners after an order dissolving the firm does not divest the court of the power to order the receiver to sell the partnership property, and to confirm such sale, since the appeal bond, though operating as a supersedeas, only stays the action of the court as to the matters included in the judgment, which does not embrace the disposition of the partnership property.

3. Under Code Civ. Proc. § 778, requiring the court to disregard any defect in the proceedings which does not affect the substantial rights of the parties, an order confirming a receiver's sale of partnership property will not be set aside on an appeal therefrom, where it is not shown that the property was not sold at its full value, or that the appellant was prejudiced thereby.

Appeal from district court, Choteau county; Dudley Du Bose, Judge.

Suit by John T. Murphy and others against George D. Patterson for the dissolution of a partnership and for an accounting. From an

order confirming a receiver's sale of partnership property, defendant appeals. Affirmed.

Walsh & Newman and Toole & Wallace, for appellant. H. G. McIntire and M. Bullard, for respondents.

WORD, J. Appeal from an order confirming sale of partnership property. Sale was by receiver under an order of sale made after final judgment. The order of sale and the order appealed from were made in the case of *Murphy v. Patterson* (this day decided) 63 Pac. 375. No appeal was taken from the order of sale, which was an appealable order, since it was a special order made after final judgment. Code Civ. Proc. § 1722, subsec. 2. In the absence of such appeal, questions properly presentable on an appeal from the order of sale cannot now be considered. Id. § 1720. This holding disposes of the material questions raised on this appeal.

An examination of the principal case shows that the court, with the consent of parties, had made an order dissolving the partnership. An accounting was necessary to determine the interests of the parties in the partnership property. This property was in the hands of a receiver,—was in the custody of the court. After the court had made its findings, and rendered judgment, an appeal was taken from such judgment to this court. Conceding that the bond on appeal in this case operated as a supersedeas, the only effect of the appeal was to stay action of the court below as to those matters included in the judgment. In all other matters wherein the rights of the parties under the judgment would not be affected the court below was left free to act. *State v. Second Judicial District Court*, 22 Mont. 241, 56 Pac. 281. When the appeal from the judgment in the principal case was taken to this court, the partnership property was still in the hands of the court through its receiver. The object and purpose of appointing a receiver of the partnership property is to preserve the firm property until the cause can be determined. The court, through its officer, the receiver, has charge of the firm assets, not in behalf of either party, but for the common benefit of all. *Wolbert v. Harris*, 7 N. J. Eq. 603. Nor is it the province of a court of equity through its receiver to conduct the business of a co-partnership. "Its legitimate province is to adjust the rights and settle the disagreements of parties growing out of such transactions." *Allen v. Hawley*, 6 Fla. 164; *Wolbert v. Harris*, supra; *Jackson v. De Forest*, 14 How. Prac. 81. The court below, having appointed a receiver to take possession of the property, was vested with the power of selling the property in the hands of the receiver when such a course became necessary to preserve the interests of all the parties. *Allen v. Hawley*, supra; *Jackson v. De Forest*, supra; *Forsaith Mach. Co. v. Hope Mills Lumber Co.*, 109 N. C. 580, 13 S. E. 869. In the

matter before us we have seen that the partnership had been dissolved; that an accounting had been ordered, and under it the rights of the parties in the assets of the firm determined. No matter what the respective interests of the several partners in the partnership property should finally be adjudged to be, a sale of all the assets of the firm had to be made at some time, so that the money realized therefrom might be divided in accordance with the determined interests of the parties. From aught that appears in the record before us, the court below, acting within the powers vested in it as a court of equity, and with due regard for the best interest of all the parties, ordered the receiver to sell the partnership property, and to hold the proceeds of such sale until the rights of the partners therein should finally be adjudicated. Nowhere in the record is it intimated that the amount realized from the sale of the partnership property was not the full value thereof. Nor was it urged as an objection to the confirmation of the sale. Nor does the record show that in directing the sale of the firm property and the retention of the proceeds until the interests of the parties therein should be ascertained the rights of the appellant were prejudiced in the slightest degree. Appellant does not presume to say that, if another sale of the partnership property were ordered, he would reap any benefit whatever. But, since he has not appealed from the order of sale, appellant must rely for a reversal on what he claims was a failure of the receiver in making the sale to conform in all respects to the order of the court directing the sale of the firm property. No error in this regard that we can now consider in any way affects the substantial rights of the appellant. This alone would warrant this court in affirming the order appealed from. Code Civ. Proc. § 778; *Cunningham v. Bostwick*, 7 Colo. App. 169, 175, 43 Pac. 151. Holding that the order of sale cannot now be complained of, and that there was no error affecting the substantial rights of the parties in the proceedings had under such order, the order appealed from is accordingly affirmed. Affirmed.

BRANTLY, C. J., concurs. PIGOTT, J., having been of counsel, did not hear the argument, and takes no part in this decision.

(7 Idaho, 408)

NUMBERS v. ROCKY MOUNTAIN BELL TEL. CO.

(Supreme Court of Idaho. Dec. 14, 1900.)

APPEAL FROM JUSTICE'S COURT—UNDERTAKING—EXCEPTIONS FOR INSUFFICIENCY—BOND OF SURETY COMPANY—NOTICE.

1. On appeal from a justice court to the district court, respondent excepted to the sufficiency of the sureties. Within five days thereafter appellant filed a new undertaking on appeal, in lieu of the original, executed by a surety company, but did not give the respondent notice

of the filing of said new undertaking, and failed to file with said new undertaking documentary evidence showing that the surety company had complied with the provisions of the act of February 23, 1899, authorizing such surety companies to execute such undertakings. *Held*, that such appeal to the district court was ineffectual, and was properly dismissed by the district court on motion.

2. When an undertaking on appeal from a justice's judgment to the district court is excepted to on the ground of insufficiency, the appellant may, in lieu of justification of sureties, file the undertaking of a surety company; but such undertaking must be accompanied with documentary evidence showing prima facie that such surety company has qualified to do business in Idaho by complying with the requirements of the act of February 23, 1899, and that the execution of such undertaking has been authorized by the surety company, executed by agents or officers authorized to execute it, and notice of filing such undertaking and evidence given to the respondent.

(Syllabus by the Court.)

Appeal from district court, Washington county; George H. Stewart, Judge.

Action by J. R. Numbers against the Rocky Mountain Bell Telephone Company. From a judgment of the district court dismissing an appeal from the judgment of a justice court, defendant appeals. Affirmed.

Hugh E. McElroy and W. E. Borah, for appellant. Geo. P. Rhea, for respondent.

QUARLES, J. This action was commenced by the respondent against the appellant in the justice's court of West Weiser precinct, in and for Washington county; and on the 26th day of January, 1900, judgment was made and entered therein in favor of the respondent and against the appellant for \$102.06 damages and costs, taxed at \$2.40. Thereafter, and on February 21, 1900, the appellant served and filed notice of appeal, and executed and filed undertaking on appeal in said justice's court, appealing therefrom to the district court from said justice's judgment. Thereafter, February 23, 1900, the respondent served and filed exceptions to the sufficiency of said undertaking in said justice's court, under the provisions of section 4842 of the Revised Statutes, which, *inter alia*, provides that "the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge from whom the appeal is taken, within five days thereafter, upon notice to the adverse party to the amount stated in their affidavit, the appeal must be regarded as if no such undertaking had been given." Thereafter, and on February 17, 1900, the appellant filed a new undertaking, in words and figures as follows, to wit: "Whereas the defendant desires to give an undertaking for payment of costs on appeal and stay of proceedings, as provided to be given in section 4842 of the Revised Statutes of the state of Idaho: Now, therefore, we, the undersigned sureties, do hereby obligate ourselves, jointly and severally, to the

said plaintiff, under said statutory obligations, in the sum of two hundred and fifty (\$250) dollars. This is given in lieu of original undertaking excepted to. Dated Boise, Idaho, February 28th, 1900. By Dudley Holland, Mgr. Fidelity and Deposit Company of Maryland. By H. C. Wyman, Its Attorney in Fact, and Member of Local Board. [Seal.]" This undertaking was stamped with a three-cent internal revenue stamp, which was canceled, and attested by Sherman G. King, general agent. The above appears from the transcript before us to have been all of the proceedings in the justice's court. March 13, 1900, the respondent moved to dismiss the appeal in the district court upon the following grounds: "(1) That the undertakings for an appeal filed by the defendant in said action are insufficient to justify an appeal as required by law, and are not such undertakings as are required to be given by section 4842 of the Revised Statutes of Idaho. (2) That said appeal, and proceedings in procuring said appeal, is irregular and imperfect, as appears from the transcript of the justice of the peace before whom said cause was tried, and the notices and undertakings filed before said justice, all of which are now filed in this court, and are a part of the record and files in this case, and the affidavit of Geo. P. Rhea, attorney for plaintiff, and to which plaintiff refers in support of this motion." The affidavit referred to, among other things, contains the following: "That said defendant failed to notify this affiant or the plaintiff, in person, of the filing of said last-named undertaking, failed to serve said plaintiff or this affiant with a notice that the sureties on either of said undertakings would appear before said court or justice and justify as such sureties, and wholly failed to justify before said justice or this court or any other court, as appears from the record and files in this case." Thereafter, and on March 15, 1900, the appellant filed in the district court a certified copy of resolutions of the Fidelity & Deposit Company of Maryland authorizing the execution of similar undertakings by said H. C. Wyman, for and on behalf of said company, in the state of Idaho; also, the certificate of M. Patrie, secretary of state of the state of Idaho, showing that said company had duly qualified to do business as a surety company under the act of February 23, 1899, entitled "An act regulating surety companies and authorizing the giving and guaranteeing of judicial, official and other bonds by such companies." Upon hearing the motion to dismiss, the district court granted said motion, and made and entered judgment dismissing the said appeal, and the appellant appeals therefrom to this court.

The transcript does not disclose the particular ground upon which the district court dismissed the appeal from the justice's court. But we are satisfied that the action of the district court was correct. That portion of section 4842, Rev. St., quoted above, provides

that, where the undertaking has been excepted to in the justice's court on the ground of insufficiency, the sureties to the undertaking, or other sureties, shall justify before the justice within five days after the service of such exceptions. Said section also requires the adverse party, the appellant in the justice's court, to notify the adverse party, the respondent, that such sureties would justify before the justice. Applying the provisions of said section to the case at bar, we are of the opinion that the failure of the appellant to notify the respondent of the filing of the new undertaking, with prima facie evidence of its sufficiency, within five days after the service of the respondent's exceptions to the sufficiency of the original undertaking upon appeal, rendered the appeal from the justice's court to the district court ineffectual.

It is argued on behalf of the appellant that the execution of said surety bond in lieu of the original undertaking on appeal answered the requirements of the statute as to justification of sureties upon the original undertaking or new sureties, for which reason the district court erred in dismissing the appeal. We do not think so. Under the provisions of the act of February 23, 1899 (see Acts 1899, p. 337), surety companies who comply with the requirements of said act are qualified to execute undertakings upon appeal. But when an undertaking executed by such surety company is offered in an inferior court in lieu of an original undertaking on appeal from such court to the district court, which has been excepted to on the ground of insufficiency, it must be accompanied by prima facie evidence showing that the surety company which executes it has complied with the provisions of the act of February 23, 1899. The new undertaking executed by the surety company in question in this case, unaccompanied as it was by any evidence showing prima facie that said surety company was authorized to execute such undertaking, and without notice of the filing of same to the respondent, did not comply with the requirements of section 4842, Rev. St.

As to the sufficiency of the new undertaking, in substance, we deem it unnecessary to express an opinion. We think it best, however, to suggest that said section 4842, Rev. St., requires, in cases of appeal from justices' courts to the district court, where execution of the judgment is to be stayed, two obligations (maybe in the same undertaking),—one, in the sum of \$100, to cover costs of appeal; the other, for double the amount of the judgment and costs in the justice court, to secure the payment of whatever judgment and costs may finally be recovered by the respondent against the appellant. Query: The undertaking in question being insufficient in amount to cover both of said obligations, can it be ascertained with certainty, from the undertaking itself, that the surety undertook that the defendant would discharge the first obligation? For the reasons above given, the

judgment of the lower court is affirmed. Costs of appeal awarded to respondent.

HUSTON, C. J., and SULLIVAN, J., concur.

(7 Idaho, 370)

SALISBURY v. LANE.

(Supreme Court of Idaho. Dec. 8, 1900.)

ASSESSMENT OF MINES—TAXATION—EXEMPTIONS FROM TAXATION—STATUTORY CONSTRUCTION.

1. Mines and mineral lands, the title to which is in the private owner or claimant, and not in the United States government, are, under the revenue laws of Idaho, subject to assessment for taxation.

2. Revenue statutes are to be liberally construed, under section 4, Rev. St. Idaho, so as to effect the object of such statutes, and promote justice, while exceptions contained in such statutes are to be strictly construed.

3. A construction of a statute to raise revenue which extends the terms of a proviso therein contained, making exemptions, so as to exclude from taxation a large proportion of property in the state, and which is owned and held by private persons for their individual benefit, the title thereto not being in the United States government, tends to defeat the object of such statute (raising revenue), and does not promote justice, and therefore violates the provisions of section 4, Rev. St., which provides that statutes must be "liberally construed, with a view to effect their objects and to promote justice."

4. It is the policy of the revenue laws of Idaho to tax all private property the title to which is not in the United States government, and this policy should not be abridged by judicial construction.

5. Courts should not, by technical or strained construction, extend the exemptions of property from taxation.

6. To exempt certain private property from taxation under a statute making all private property taxable, the exemption must be in terms so specific and certain as to admit of no doubt.

Sullivan, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Action by O. J. Salisbury against Carl Lane. Judgment for plaintiff. Defendant appeals. Reversed.

W. E. Borah, for appellant. Johnson & Johnson, for respondent.

HUSTON, C. J. This is a submission of a controversy without action. It is unnecessary to set forth the entire stipulation of facts, as shown by the transcript. The question submitted to the court upon this agreed case is as follows: "Were mining claims, for which United States patents had been issued, exempt from taxation in 1898 when the mining claims hereinbefore mentioned were assessed?" This submission involves simply the construction of subdivision 7, § 1401, Rev. St. Said section provides that "the following property is exempt from taxation: * * * Seventh. Mining claims, but machinery, property and improvements upon or appurtenant to mining claims shall

not be so exempt." The tenth subdivision of said section includes "possessory rights to public lands." It is not, as we consider it, necessary to enter into a philological discussion of the origin or general meaning of the term "mining claim." What does the term mean as used in the statute under consideration? The organic act of the territory of Idaho contains a provision similar, if not exact, with that of most of the territories. Section 1851, Rev. St. U. S., provides: "The legislative power of every territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents." Primarily, the title to all lands in this country is in the government, and until the government has parted with the title it remains "the property of the United States," and as such is not subject to taxation. And it was in recognition of this law that the first legislature of the territory exempted "mining claims," i. e. claims asserted under the mining laws of the United States, to certain lands of the government supposed to contain mineral deposits. These claims might, by compliance with the provisions of the United States laws, ripen into a title, at the option of the locator or claimant; but, so long as the title remained in the government, they were exempt from taxation by the territory or the state. When, however, the title passed from the government by the issue of patent, they were no longer within the purview of the provisions of the federal law. They were no longer the property of the United States, but became incorporated into the general property of the citizen or citizens of the territory or state, and were a part of "all property * * * subject to taxation," under the provisions of section 1400, Rev. St., unless exempted by the express provisions of some statute of the state. The claim, which was an inchoate right had by the acts of the claimant, confirmed by grant of the government, ripened into complete title. The title of the holder of mining property under a patent from the United States government is in no way different from the title by patent to any other lands granted by the United States. "Twas mine; 'tis thine." By virtue of the paramount law, while it was the property of the United States it was exempt from taxation by the local law. When it passed from the United States to the citizen, it became subject to the same general law as that of all other property of the citizen.

Section 1400, Rev. St., which is the existing law in this state, provides that "all property in this territory [state] not exempt under the laws of the United States, except as enumerated in the next section, is subject to

taxation as in this title provided; but nothing in this title shall be construed to require or permit double taxation." The seventh subdivision of section 1401 is as follows (after defining exemptions): "Seventh. Mining claims, but machinery, property and improvements upon or appurtenant to mining claims shall not be so exempt." Is not the intention of the legislature clearly apparent in the language of this section? All property which the legislature was authorized to tax they would tax, in obedience to the recognized principle that taxation should, so far as practicable, be equal. The mining industry was the dominant industry of the territory, and yet it is contended that it was the intention of the legislature to exempt it from taxation. If this is a correct theory of taxation, it would be entirely proper for our next legislature to exempt sheep from taxation, because the sheep industry has become dominant in this state. We are not in accord with the position taken by counsel for respondent that, in construing statutes in pari materia, we must follow the word, and not the purpose, of the law. All statutes pertaining to revenue are to be construed most strictly in favor of the object of the statute; that is, in favor of the purpose of the statute. Statutes of exemption are to be strictly construed against exemption and in favor of revenue. Statutes providing for liens are to be construed in favor of the purpose of the statute; that is, to secure to the lienholder or claimant the right intended by the statute to be secured to him. If it was the intention of the legislature to exempt from taxation the most valuable property in the state, such intention should have been clearly and unequivocally expressed in the statute, and, not being so expressed, we cannot think that the courts would be justified in reaching so inequitable a conclusion by construction.

The constitution of Nevada (article 10) prescribes the taxation of "all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed." It is evident that the makers of the constitution of Nevada, as well as the people who adopted it, recognized a distinction between mining claims and mines. In *State v. Kruttschnitt*, 4 Nev. 178, the court says: "Whenever the interpretation of a statute or a constitution in a certain way will result in manifest injustice, courts will always scrutinize the statute or constitution closely, to see if it will not admit of some other interpretation." The formulators of the constitution of Idaho, with an experience of more than a quarter of a century before them, declined to follow Nevada, and provide by a provision in the fundamental law of the state for the exemption from taxation of what was known and recognized as among the most, if not the most, valuable property in the state, when the same had become a legitimate subject

of taxation. Of course, so long as the title remains in the government, "mines and mining claims," like any other claim to land, are not the subject of local taxation; but when they cease to be property of the United States,—when the fee has passed from the United States to the citizen,—then they are, as all other property of the citizen is, subject to taxation, unless exempted by positive and unequivocal law. It is true that many of the richest producing mines in the country are held as "mining claims," the owners thereof electing, presumably for the very purpose of evading local taxation, to so hold them, rather than perfect title in themselves by securing patents thereto. But this is an option resulting from the policy of the federal law,—a matter which we are not permitted to consider. Uniformity of taxation is an elementary principle, recognized by the constitution. "The legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory shall continue until changed by the legislature of the state." Const. Idaho, art. 7, § 5.

It will not do, in the consideration of this case, to place too much reliance upon the decisions in California and Nevada. The conditions are so very different. We have no law in this state subjecting the product of mines to taxation, and, if the contention of respondent is to obtain, the result is that all mining property in the state escapes taxation, except the "machinery and improvements thereon," and this in the face of the fact, well known to all, that the heaviest burden of the expense of the state government comes from the mining counties, not only in the protection of property, but in the punishment of crime.

It is objected that many patented mines are nonproductive. So, also, is much other property in the state. But the law provides (section 1, p. 215, Laws 1899): "All taxable property must be assessed at its full cash value." If A. owns 160 acres of land, all of which is under improvement, and from which he is receiving a large yearly revenue, it is not presumable that B., who owns 160 acres of sage-brush land adjoining him, none or but a very small part of which is under improvement, and from which B. is receiving no revenue whatever, will be assessed at the same value as that of A. And it is presumable that the like rule will obtain in regard to mines, certainly if regard is had to the law. That the legislature has the absolute authority to exempt all mines and mining property from taxation is unquestioned, but such intention should be expressed in direct and unequivocal terms. Questions of such importance, involving such vital consequences to the state and to the people, ought not to be left to the fallibility of construction. The judgment of the district court is reversed, and cause remanded, with instruc-

tions to enter judgment in favor of the defendant dismissing the action, with costs of appeal to appellant.

QUARLES, J. I concur in the views so ably expressed by Mr. Chief Justice HUSTON. The theory of the lower court and that urged here by counsel for respondent, in my opinion, overlooks well-established rules of construction in construing our revenue statutes. As suggested in the opinion formulated by Mr. Chief Justice HUSTON, the only question to be determined here is, what did the legislature intend to be understood by the use of the term "mining claims" in our revenue statutes? Title 10 of the Revised Statutes is entitled "Revenue." The first chapter of that title is entitled "Property Liable to Taxation." The first section of the title aforesaid, and of the first chapter thereof, is section 1400, which is as follows: "All property in this territory [state] not exempt under the laws of the United States, except as enumerated in the next section, is subject to taxation as in this title provided; but nothing in this title shall be construed to require or permit double taxation." The following section (1401) is as follows: "The following property is exempt from taxation: First. All property used exclusively for public schools and such as may belong to the United States, this territory or to any county or municipal corporation or school district within this territory. Second. Churches, chapels, and others buildings, with the lots of ground appurtenant thereto, and used therewith belonging to any church organization or society and used for religious worship, and from which no rent is derived; with their furniture and equipments; also public cemeteries. Third. Buildings or parts of buildings owned and used by the order of Masons or Odd Fellows or by any other benevolent or charitable society exclusively for the purposes of their order, and their furniture and equipments. Fourth. The property of resident widows and orphan children, not to exceed the amount of one thousand dollars to any one family; when their total assessment is less than five thousand dollars. Fifth. Growing crops. Sixth. Capital stock of corporations where the property of the corporation has been assessed. Seventh. Mining claims, but machinery, property and improvements upon or appurtenant to mining claims shall not be so exempt. Eighth. Public and private libraries. Ninth. Tools of a mechanic, farmer, miner or prospector and household furniture of a family or householder, not exceeding in value two hundred dollars. Tenth. Possessory rights to public lands." Section 1403, found in said title, and which is the third section thereof, is as follows: "Whenever the terms mentioned in this section are employed in this title, they are employed in the sense hereafter affixed to them: First. The term 'property' includes moneys, credits, bonds, stocks, dues, fran-

chises and all other matters and things, real, personal and mixed, capable of private ownership. Second. The term 'real estate' includes: (1) The possession of, claim to, ownership of, or right to, the possession of land; (2) all mines, mineral and quarries in and under the land, and all rights and privileges appertaining thereto; (3) improvements. Third. The term 'improvements' includes: (1) All buildings, structures, fixtures, fences and improvements erected upon or affixed to the land; (2) all fruit, nut-bearing or ornamental trees and vines not of natural growth. Fourth. The term 'personal property' includes everything which is the subject of ownership not included within the meaning of the term 'real estate.' Fifth. The terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent creditor. Sixth. The term 'credit' means those solvent debts, owing to the person, firm, corporation or association assessed. The term 'debts' means those liabilities owing by the person, firm, corporation or association assessed to bona fide residents of this territory, or firms, associations or corporations doing business therein."

Without specifying or enumerating the well-known rules of statutory construction which must be followed in deciding the question before us, I will make some general observations relative to the question here. Title 10, supra, is, strictly speaking, a revenue statute. Its object and purpose is to raise revenue. Within the meaning of the various sections found in that title, the word "real estate" includes possessory claims to the public lands of the United States, whether those lands are mineral or nonmineral. It is so expressly declared. "All mines, minerals and quarries in and under the land" are real estate, in the language of the statute, and the same is "property," and so declared to be. What property is taxable? The statute says: "All property in this territory [state] not exempt under the laws of the United States, except as enumerated in the next section, is subject to taxation." Careful reading of the whole of title 10, and all amendatory acts relating thereto, shows, to my mind, that it was the intention of the legislature to tax all property in this state, except such as is used for public schools, and public property belonging to the United States or this state or any political division thereof; such as belongs to, and is used by, churches and benevolent societies solely for religious or benevolent purposes, and public cemeteries; such as is used by charitable institutions, Masons, and Odd Fellows, etc., exclusively for purposes of their order; property of resident widows and orphan children to the extent of \$1,000, when their total assessment is less than \$5,000; growing crops; capital stock of corporations, where the property of the corporation has been assessed; mining claims, libraries, and possessory

rights to public lands. The legislature evidently intended to tax all private property except where otherwise specified in the statute. It certainly intended to tax all private real property which was used by the owner thereof for his own private purposes, the title being in himself. But it was certainly intended to exclude from assessment for taxation all real estate the title to which might be in the United States government. To my mind, in using the terms "mining claims" and "possessory rights to public lands," the legislature intended to exempt both mining property and agricultural land the title to which was in the United States government.

The act of congress quoted in the opinion of Mr. Chief Justice HUSTON prohibits the taxation of property belonging to the United States. The location of a mining claim under the laws of the United States, if properly made, makes the locator the owner of such mining claim as against all the world except the United States. To become the owner of such mining claim as against the United States, the locator must comply with the conditions required of him by the act of congress by making \$500 worth of improvements upon the mining claim, etc., and then apply for patent, and comply with all the regulations prescribed by law. When the locator does this, he is then entitled to, and receives, a patent for his mining claim, and becomes the private owner thereof, against the government and all the world.

Keeping in mind the object and purpose of the statute under consideration,—the raising of revenue,—and keeping in mind the policy of said statutes in taxing all private property used for the purposes of the private owner, and the policy of the statute exempting all property the title to which is in the United States, it is clear to my mind that by the term "mining claims," as used in said statute, only mining property, the title to which remains in the government, was intended to be exempted from taxation.

We are cited by counsel for respondent to a number of sections in the Revised Statutes where the term "mining claims" is used as illustrating the meaning of the term as used in the revenue statute. We are cited to section 4542, Rev. St., in this connection. That section authorizes the court or judge thereof to order a survey of "any real property or mining claim, including ledges thereof," which the claimant believes to be in the possession of another either by surface or underground holdings or workings, etc. To my mind, the term "mining claim," as used in that section, was not intended to include mining property the title to which was in the claimant; for, if the use of this term "mining claim" had been omitted entirely from said section, the language therein used would have authorized such survey upon a mining claim held subject to the paramount title of the United States.

We are referred by counsel for respondent

to section 5125, Rev. St., relating to laborers' liens, where the expression, "who performs labor in any mining claim," is used as illustrative of the intent with which the term "mining claim" is used in our revenue law. But this section of the Revised Statutes was expressly repealed by the legislature in 1893, and a new statute upon this subject enacted, wherein this language is used by the legislature, "or performs labor in any mine or mining claim"; and by this new statute, even in our mechanic's lien law, it appears that the legislature had in view a distinction between mining property held by the private owner under title in himself and the mere location of mining property held subject to the paramount title of the United States government.

We are also referred to section 4, Rev. St., which provides that "the Revised Statutes establish the law of this [state] respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice." To my mind, counsel for respondent fail to apply the rule of construction established in this state by this statute as it was intended to be applied. The object of the statute under consideration is to raise revenue. In this connection, it is well to say that, by all rules of statutory construction, sections 1400, 1401, Rev. St., must be regarded as one statute, of which section 1400 states the rule, and section 1401 states exceptions thereto. Counsel for respondent, in applying the rule of construction established by section 4, supra, applies that rule to section 1401, and not to section 1400, supra. In other words, the rule of liberal construction is applied by counsel for respondent, not to the rule of the statute, but to a proviso creating an exception to the rule enunciated in the statute. The rule of construction applied by counsel for respondent to the statute under consideration has a tendency to defeat the object of the statute (the raising of revenue), by enlarging, through interpretation or construction by the court, the exceptions to the rule taxing all property. The construction contended for by respondent does not "promote justice." More than that, to my mind, it contravenes the policy of our revenue statutes. The legislature, in the enactment of the statutes in question, has shown no intention of adopting a policy which exempts the mining industry from its just proportion and share of the burdens of taxation. This is apparent from the fact that improvements upon possessory claims where the title is in the United States government, whether a "mining claim" or a possessory claim upon agricultural lands, are, by the provisions of said statutes, made taxable. If it was intended to favor the mining industry, why tax its improvements upon mining claims? A careful study of the statute makes it clear to my mind that the intention of the legisla-

ture was that all real estate to which title is held by private parties, and used for individual purposes of the owner, should bear its proportion of taxation, whether mineral or nonmineral.

The rule is well established that in construing revenue statutes the exceptions thereto exempting property must be strictly construed. This rule does not conflict with, but carries out the intention of, section 4, Rev. St., cited supra, establishing the rule of liberal construction in this state. But the rule of construction contended for by the respondent violates these rules of construction, as it tends to defeat, to some extent, the raising of revenue, and, instead of promoting justice, promotes injustice. There is no justice nor reason in exempting mines owned by private individuals, and held or worked for their especial benefit, from taxation. I do not believe that the legislature intended so to do, and I am unwilling that this court shall, by construction, exempt a large proportion of the property in this state which is owned by private individuals, and held and operated for the benefit of such private owners, from taxation.

SULLIVAN, J. I cannot concur in the conclusion reached by my associates. In the question submitted for decision herein the expression "mining claims" is used twice, and applied to patented mining land. The question is as follows: "Were mining claims for which United States patents had been issued exempt from taxation in 1898, when the mining claims hereinbefore mentioned were assessed?" The decision must turn upon the meaning of the term "mining claims" as used in section 1401, Rev. St. Counsel who prepared and submitted to this court the above-quoted question uses therein that term twice, and each time applies it to patented mining land. It is but proper to state here that Mr. Borah, who presented this case on the part of the respondent in this court, did not appear for him in the court below, and signed the stipulated facts on which appears the foregoing question. I am of the opinion that the legislature that enacted said section 1401 and other sections of our Revised Statutes, and the several legislatures that have amended and re-enacted said section, intended to and did apply said term to patented as well as unpatented mining claims. It is suggested in the opinion of Chief Justice HUSTON that it was in recognition of the provisions of section 1851, Rev. St. U. S., that mining claims the title to which was in the United States were exempted from taxation by the provision of said section 1401, as property belonging to the United States was not subject to taxation. On an examination of subdivision 1 of said section, it will be observed that all property belonging to the United States is exempted from taxation by its provisions. That being true, and unpatented mining claims being property of the United States,

and exempted from taxation by the provisions of said subsection 1, why exempt the same property the second time in the same section? First, all property belonging to the United States, and, second, unpatented mining claims, which are property belonging to the United States, are exempted, according to the interpretation of my associates. While tax-exemption laws should not be extended to property that was not intended to be exempted from taxation by the legislature, yet such laws ought to be so interpreted as to exempt all property that was intended to be exempted. Counsel for the respective parties in their briefs have spent some time in discussing the proper construction and interpretation of exemption laws. While technically there is a clear distinction between "construction" and "interpretation," the real legislative intent or meaning should be ascertained if possible. "Interpretation differs from construction, in that the former is the art of finding out the true sense of any form of words,—that is, the sense which their author intended to convey,—and of enabling others to derive from them the same idea which the author intended to convey." Cooley, Const. Lim. (6th Ed.) 51; 23 Am. & Eng. Enc. Law, p. 296. It is said, in the concurring opinion of Mr. Justice QUARLES, that the rule is well established that, in construing revenue statutes, the provisions thereof exempting property from taxation must be strictly construed, and that rule in no wise conflicts with the rule of liberal construction established by the provisions of section 4, Rev. St. Idaho. That, to me, is a novel proposition. Stated in another form, it is that the rule of strict construction is not in conflict with the rule of liberal construction, as contemplated by the provisions of section 4. The learned judge holds that the rule construing exemptions in revenue statutes in this state is that exemption provisions must be strictly construed. The rule established by the provisions of said section 4 makes no distinction whatever in the application of the rule of liberal construction. The language of that section is as follows: "The Revised Statutes establish the law of this state respecting the subject to which they relate, and their provisions and all proceedings under them are to be liberally construed," etc. All of their provisions must be liberally construed, not a part of them.

My associates hold that provisions concerning exemptions from taxation must be strictly construed, thus holding that, where said section declares that the provisions of the Revised Statutes must be liberally construed, the expression "their provisions" only means a part of the provisions of the Revised Statutes, and not all of them. The object of said section 1401 was to exempt property from taxation, and that was to promote justice. It is stated that, if patented mining claims are exempted from taxation, great injustice would be done. Whether that be true or not, it is not the duty of this court to run

a race of opinions with the legislative branch as to whether certain laws are just or unjust. The legislature is the sole judge of that question. It is proper to suppose that the legislature intended to and did promote justice by exempting certain property from taxation. Said section 1401 ought to be so interpreted as to include all property clearly intended by the lawmaking power to be exempted from taxation and no more.

Much has been said by counsel as to the meaning of the term "mining claims." Under the revenue laws of Arizona it is held that that term does not include patented mining ground; that a mining claim, after the patent of the United States is issued conveying it, then, under the laws of that territory, becomes "lands" or "real estate." See Waller v. Hughes (Ariz.) 11 Pac. 122. The statute of Arizona defining the words "land" and "real estate" is different from ours, and, if it were not, that case would not be decisive of the one at bar. The supreme court of the United States in *Smelting Co. v. Kemp*, 104 U. S. 649, 26 L. Ed. 875, defines a "mining claim" as a parcel of land containing precious metal in its soil or rock. It is said in 1 Lindl. Mines, § 327: "The words 'mining claims' have no reference to the different stages in the acquisition of the government title. They include all mines, whether patented or not patented, if acquired under the mining laws." I am of the opinion that the several legislatures of this state who have used that term in laws enacted by them intended to and did include both patented and unpatented mineral land. We find that term used several times in our Revised Statutes. It is used in section 3300 in defining a mining partnership; in section 4542 in relation to obtaining an order for survey or inspection of premises in dispute; in section 4547 in regard to proof in actions respecting mining claims; in section 5125 in respect to liens. It is evident that the meaning of the term "mining claims," as used in the four sections above cited, includes patented as well as unpatented mining ground. The Revised Statutes of Idaho of 1887 contain the laws enacted at the 14th session of our territorial legislature, and it is above shown that the legislature used the term "mining claims" in at least five different sections of the Revised Statutes, and there is no intimation that it was intended that said term should be given any different meaning in one section than should be given to it in another. In *Pitte v. Shipley*, 40 Cal. 160, it is said: "It is a familiar principle of construction that a word repeatedly used in a statute will be presumed to bear the same construction throughout the statute, unless there is something to show that there is another meaning intended." *Suth. St. Const.* § 255. The Revised Statutes were passed as a single act. My associates hold that in section 1401 the term "mining claim" means only unpatented mineral land. To apply that restricted meaning to it as used in sections 3300, 4542, 4547, 5125, Rev. St.,

would certainly violate the plain intent of the legislature in enacting said sections. The judicial decisions of this court speak of unpatented and patented "mining claims" (*Mining Co. v. Winchell* [Idaho] 59 Pac. 533; *Mining Co. v. Clark* [Idaho] 54 Pac. 1007), and it is a part of the history of this state that mining contracts, bonds, and deeds concerning patented mining claims entered into and made in this state, use the expression "mining claims," and that said expression is in common use among lawyers and laymen, when referring to patented mining ground in this state. I have no doubt that the legislature understood and used the expression "mining claims" as used by our court, mining men, and the public generally in this state, and by Mr. Lindley in his work on Mines, where he says that the term "mining claims" "includes all mines, whether patented or not patented, if acquired under the mining laws." The justice or injustice of exempting patented mining claims from taxation is a question with which this court has nothing to do. That is a matter for the legislative branch of our state government to determine. Courts have no authority to override the legislative judgment on questions of expediency or abstract justice in the enactment of a law. The judgment of the court below ought to be affirmed.

(24 Mont. 566)

STATE ex rel. DEMPSEY v. DISTRICT
COURT OF SECOND JUDICIAL DIST. et al.

(Supreme Court of Montana. Jan. 4, 1901.)

MANDAMUS—TRANSCRIPT OF EVIDENCE—ORDER FOR TRANSCRIPT—STENOGRAPHER'S DELAY—BILL OF EXCEPTIONS—SETTLING—TIME.

1. Where a defendant convicted of a crime was too poor to pay for a transcript of the proceedings of his trial, and an order was made as authorized by Code, § 373, directing the official stenographer to furnish defendant with a copy of the evidence, to be paid for by the county, in order that he might prepare a bill of exceptions, and, after numerous extensions of the time for the settling of the bill of exceptions, the stenographer failed to furnish the transcript, and the court refused to make an order compelling the furnishing of such transcript, the supreme court would not compel obedience to the order to furnish the transcript by mandamus, since the court making the order alone had authority to punish the stenographer's contempt.

2. The supreme court could not by mandamus compel the lower court to enter an order extending the time in which to prepare a bill of exceptions, such matter falling entirely within the discretion of the trial court.

Mandamus by the state of Montana, on the relation of Peter Dempsey, against the district court of the Second judicial district for Silverbow county and others, to compel the stenographer of such court to furnish relator a transcript of record of his trial, and to compel the court to extend the time for settlement of bill of exceptions. Writ denied.

T. A. Morrin and W. W. Likens, for relator.

BRANTLY, C. J. On May 12, 1900, one Thomas E. Morrin, attorney at law, was appointed by the above-entitled court to defend the relator herein, who was charged with the crime of murder. The trial was subsequently had on July 2d and 3d, and resulted in a verdict of murder of the first degree. A motion for a new trial was made and overruled on July 18th. Thereafter, on August 30th, an inquisition was had to determine the sanity of the relator, under sections 2248-2251, Pen. Code, which resulted in a verdict that he was sane. On September 4th judgment was pronounced upon the verdict finding the relator guilty of murder, and immediately thereafter an appeal was taken to this court. On the same date, the relator being without means, the court made an order, under authority of section 373 of the Code of Civil Procedure, directing William W. Wilson, the official stenographer of that department of the court, to furnish to the relator, without expense to him, a copy of the evidence taken at the trial, to enable him to prepare bills of exception. The same order was made as to the evidence heard upon the inquisition into relator's sanity. At the same time an order was made extending the time for the preparation of the bills of exception. This order was renewed from time to time, the last renewal extending the time up to and including December 31st. The defendant, Wilson, up to that date, had wholly failed and neglected, and still fails and neglects, to comply with the order made on September 5th, despite repeated demands made upon him in that behalf, and despite the fact that the attention of the court and its judge has been repeatedly called to his delinquency. The said Wilson has never at any time complied with the provisions of section 372, Id., requiring him, immediately after the close of the trial of each case, to write out at length "all objections made, the rulings, decisions and opinions of the court, and the exceptions taken during the trial, or hearing," and to file the same with the clerk. On December 31st an application was made to the Honorable William Clancy, as judge of said court, for an order to compel the said Wilson forthwith to furnish the transcripts of evidence required by the order of September 5th, and also for an order further extending the time for the preparation of bills of exception. This application the said judge refused to grant. Upon these facts, we are asked for a writ of mandamus to compel the said Wilson to furnish the transcripts ordered by the district court on September 5th; to require the said court and its judge to enter an order granting such further time as may be reasonable and proper to enable the relator to prepare and serve his bills of exception; and to require the said court and its judge to desist from proceeding further in the

premises until the time granted by this court shall have expired.

The application must be denied. We are not asked, nor was the district court asked, to compel the defendant, Wilson, to perform the duty required of him under section 372, supra. If this were the ground of complaint, we should feel inclined to issue the writ; for though an application in this behalf should properly be addressed to the district court, owing to the importance to litigants of having the requirements of the section complied with by the stenographer, we entertained an application under somewhat similar circumstances in *State v. Supple*, 22 Mont. 184, 56 Pac. 20. What we are asked to do here is to require an officer of the district court to obey an order made by that court, on the ground that the court and its judge refuse to compel obedience. In other words, the district court, upon proper application, on September 5th, made an order which is authorized by section 373, supra. The stenographer failed to obey it. Upon the facts made to appear to us, he has been and still is in contempt. To punish this contempt, and thus enforce obedience, belongs to the authority making the order, and not to this court. We have no more power to interfere to compel obedience to this order than we have to punish the contempt. The proper course, and the only course, open to relator was and is, upon a proper showing, to enforce the order by proceedings in contempt, which would be more adequate and speedy than the writ now sought. If the court or its judge should then refuse to proceed, this court would feel justified in interfering. Until this remedy has been exhausted, we have no authority to act in the premises.

In the second place, we are asked to compel the defendant court and its judge to enter an order extending the time within which to prepare bills of exception. This is a matter which falls entirely within the discretion of the trial court and its judge, and we cannot control this discretion by mandamus. We think that the district judge, when it was made to appear to him that his stenographer failed to comply with the order of September 5th, should have acted promptly and enforced obedience, especially when the relator is under judgment inflicting the death penalty: A proper amount of self-respect, and a due regard for the position he occupies, and the rights of the relator, imperiled, as they are, by the gross and wholly unwarranted neglect of the court officer, it would seem, could permit no other course. It is fair to say, however, that we have only so much of the case as the relator has seen fit to lay before us. These considerations being conclusive as to this application, we deem it unnecessary to notice the double and rather inconsistent nature of relief demanded. The application is denied.

PIGOTT and WORD, JJ., concur.

(24 Mont. 433)

STATE ex rel. CLARKE v. MORAN, County Clerk, etc.

(Supreme Court of Montana. Oct. 29, 1901.)

ELECTIONS—PARTIES—FACTIONS—CONVENTIONS—UNAUTHORIZED TICKET—INJUNCTIONS—SUPREME COURT—ORIGINAL JURISDICTION—CIVIL AND POLITICAL RIGHTS—COUNTY CLERK—EXCESS OF DUTY.

1. Where a county clerk was about to print on an official ballot a ticket not lawfully authorized, the supreme court had original jurisdiction to issue a writ of injunction to restrain such officer from thus exceeding his powers, since substantial civil rights of citizens and candidates, and not their political rights alone, were involved.

2. Where a county clerk was about to print an unauthorized ticket on an official ballot, the proper remedy to restrain such officer from exceeding his authority was by injunction, and not mandamus, since a ministerial officer could not be restrained from such excess by mandamus.

3. Where a county clerk was about to print an unauthorized ticket on an official ballot, the interests of the whole people of the state in a proper enforcement of the election laws, and in the proper selection of legislators for the state, would thereby be affected, and hence the state was a proper party to institute proceedings to prevent such action.

4. Where a county clerk was about to print an unauthorized ticket on an official ballot, such action would affect both the public and the candidates, and hence it was proper for a candidate to sue in the name of the state to restrain the clerk from exceeding his duty, since there would thus be some one answerable for the propriety of the suit and for its costs.

5. A regular convention of the Republican party of a county was called by the proper party authorities. A rival convention was called without authority. Each claimed to represent the party, but, after the delegates elected by the latter had been refused recognition by the state convention of the party, no longer assuming to represent the regular organization, they adopted the name "Eight-Hour Republican Party," and nominated a ticket. *Held*, that a demurrer to a petition for an injunction restraining the county clerk from placing their ticket on the official ballot was properly overruled, since the convention adopting such ticket was not composed of delegates selected under the regular Republican party call, and its delegates could act for no other party, having been elected as delegates to a Republican convention.

Pigott, J., dissenting.

Injunction by the state, on relation of George A. Clarke, against John Moran, county clerk and recorder. Granted.

Original application for an injunction to restrain John E. Moran, clerk of Silverbow county, from printing upon the official ballot a ticket designated as the "Eight-Hour Republican Party" ticket, which named candidates for county and judicial offices, and for members of the legislative assembly, for Silverbow county. The petition states the following facts: On August 27, 1900, there assembled in the city of Butte, pursuant to a call of the regularly constituted authorities of the Republican party, a convention of the party for the purpose of naming party candidates for county and judicial offices and for members of the legislative assembly. This convention made its nominations, and, through

its chairman and secretary, filed the proper certificate with the county clerk. The petitioner herein was one of the nominees of this convention for the office of representative in the legislature. On the 16th of the same month a convention was called by one John Bevan and one W. H. Nichols, signing themselves, respectively, as chairman and secretary, and claiming to represent the regular party organization, to assemble in Butte on August 25th for the purpose of making the party nominations. Another purpose of this convention was to select delegates to represent the party in the state convention, which was to sit at the city of Helena on September 5th. In the call of this convention apportionment of delegates was made among the various precincts, but there was an omission to designate places for holding primaries in 14 out of 48 precincts in the county. The convention assembled pursuant to the call, and organized by selecting Samuel H. Treloar and Joseph M. Pyle as chairman and secretary, adopted a platform commending the national administration and declaring in favor of its policies, and, after selecting delegates to the state convention, adjourned subject to the call of the chairman and secretary. The delegates so selected sought admittance into the state convention, but were repudiated on the ground that they had been selected by a convention called without authority, and had no right to represent the party. Delegates selected by the convention of August 27th were seated in their stead. On September 26th, Samuel H. Treloar and Joseph M. Pyle, as chairman and secretary of the convention of August 25th, published in the Butte Miner, a daily newspaper, the following notice: "Notice. The Republican convention which was held on August 25th, and which was adjourned subject to the call of the chair, is hereby called to reconvene on Wednesday, 26th inst., at 12 o'clock noon, at Sutton's Family Theater, to transact such business as may come before it." At the hour fixed a portion of the delegates assembled. A full list of candidates for county and judicial offices and for the legislative assembly was named, after the adoption of the following resolution: "We adopt as our party name that of Eight-Hour Republican Party, and that it be used at the head of our ticket." A certificate was properly executed and filed with the defendant as clerk of the county, under the designation stated in the resolution. It is further alleged, in substance, that the persons composing the convention last mentioned claimed to represent the regular Republicans of Silverbow county; that their convention was called as a Republican convention; that, notwithstanding these claims, when they found that they were not recognized as such representatives by the state convention, they thereupon, under the resolution aforesaid, without further consultation of the people, and without any call or caucuses or primaries for any "Eight-Hour Republican Party" convention, assumed

to nominate a ticket under that designation, when, as a matter of fact, no such party had ever had any existence in Silverbow county or the state of Montana; that such designation is not of special significance or distinctive of any principle, inasmuch as all the conventions of all parties in the state of Montana, and especially the Republican county convention of Silver Bow county, have adopted resolutions favoring an eight-hour day for labor; that the ticket thus named was intended and designed to injure the regular Republican ticket by drawing votes therefrom to the Democratic and Populist fusion ticket; and that the defendant, unless restrained from so doing, will print said ticket upon the official ballot, to the injury of petitioner and those in like situation with him. The petition was filed by consent of the attorney general. Thereupon an order to show cause was issued, returnable on October 24th. The defendant interposed a demurrer to the petition, and rested upon the questions thus raised. The grounds of the demurrer are (1) that this court has no jurisdiction of the subject-matter of the action; (2) that the state has no legal capacity to sue; and (3) that the petition does not state facts sufficient to state a cause of action.

W. H. De Witt and M. J. Cavanaugh, for relator. N. W. McConnell and J. B. Clayberg, for respondent.

BRANTLY, C. J. (after stating the facts). 1. The argument of counsel upon the first ground of the demurrer is that this court, in injunction proceedings, sits as a court of equity, and that as such its powers are limited to the protection of civil rights only; that the rights involved herein are purely political; and that this court, therefore, has no power to consider or adjudge them, whether the relator be aggrieved or not. Although this court, in the exercise of its original jurisdiction, under article 8, § 3, of the constitution, has frequently granted writs of injunction to restrain ministerial officers from violation of their duties in connection with the administration of the election laws (*State v. Rotwitt*, 18 Mont. 502, 46 Pac. 370; *Same v. Tooker*, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; *Same v. Johnson*, 18 Mont. 548, 46 Pac. 533, 34 L. R. A. 313; *Same v. Bailey*, 18 Mont. 554, 46 Pac. 1116; *Same v. Johnson*, 18 Mont. 556, 46 Pac. 440; *Same v. Reek*, 18 Mont. 557, 46 Pac. 438; *Same v. Fisher*, 18 Mont. 560, 46 Pac. 1116), the first question presented by the demurrer has never been decided. The power of this court to issue any original writ was challenged in *Re MacKnight*, 11 Mont. 126, 27 Pac. 336, but it was there held that the provision in the section cited: "Said court shall have power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and injunction, and such other original and remedial writs

as may be necessary or proper to the complete exercise of its appellate jurisdiction,"—is a clear grant of original jurisdiction. The purposes for which the grant was made are not discussed, Mr. Justice Harwood contenting himself by saying: "The writs named are defined in law, and their use in the administration of justice is fixed by long usage and well-settled principles." This is well said of all the other writs, except injunction, for they are all common-law writs of well-defined and well-known functions. It is also true as applied to the writ of injunction, used, as it ordinarily is, as a judicial writ by courts of equity in aid of jurisdiction, and not as a foundation of jurisdiction. But when we examine the constitution for other provisions throwing light upon the purpose for which the power to issue this writ was conferred upon this court, and the nature of the relief to be granted by it, we find that we are entirely in the dark; for there is no other jurisdiction granted anywhere which this writ may aid, and no suggestion outside of the use of the word itself, and the associations in which it is found, to aid us in declaring and defining its uses; for in view of other provisions (Const. art. 8, § 11), giving the district courts original jurisdiction "in all cases at law and in equity," and to this court appellate jurisdiction in the same class of cases (article 8, § 3), we must conclude that, whatever may be its appropriate functions, it is not intended to be used as a judicial writ in ordinary equity proceedings for the protection or enforcement of private rights. The contrary assumption would render the jurisdiction of this court merely concurrent with that of the district courts, and its appellate jurisdiction of no practical use. Fortunately, however, pressed for time as we are in a decision of this and other important questions pending before this court, we find the nature and functions of this writ discussed and defined by the court of another state having a similar constitutional provision. In *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425, an application was made to the supreme court for a writ of injunction to restrain the defendant railroad companies from exacting tolls for the carriage of passengers in excess of the rates provided by law. After calling attention to the fact that this nonjurisdictional writ is grouped with other jurisdictional writs, the court proceeds to discuss the anomalous character thus impliedly given it, and concludes: "And, plainly recognizing the intention of the constitution to vest in this court one jurisdiction, by several writs, to be put to several uses, for one consistent, congruous, harmonious purpose, we must look at the writ of injunction in the light of that purpose, and seek its use in the kindred uses of the other writs associated with it. *Noscitur a sociis* is an old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this

consideration. Lord Bacon gives the same rule in a more detailed form, more emphatic here. '*Copulatio verborum indicat acceptionem in eodem sensu.*' Here are several writs of defined and certain application classed with one of vague import. We are to be guided in the application of the uncertain by its certain associates. The joinder of the doubtful writ with the defined writs operates to interpret and restrict its use, so as to be accepted in the sense of its associates; so that it and they may harmonize in their use for the common purpose for which it is manifest that they were all given. And thus, in this use and for this purpose, the constitution puts the writ of injunction to prerogative uses, and makes it a quasi prerogative writ."

Thus, along with the common-law prerogative writs of well-defined uses, we have a new prerogative, or quasi prerogative, writ, to be applied to uses for which we find it most appropriate; and the result of that case is that this writ is the equity arm of the court's original jurisdiction, and that it, with the other writs granted, fully arm and equip the court as a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people. The writ is made correlative with that of mandamus, and thus it may be resorted to to restrain excess, just as the writ of mandamus may be used in the same class of cases to compel action and supply defects. The language of the Wisconsin court is: "And it is very safe to assume that the constitution gives injunction to restrain excess in the same class of cases as it gives mandamus to supply defect; the use of the one writ or the other in each case turning solely on the accident of overaction or shortcoming of the defendant. And it may be that, where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose." And these views are adverted to and approved in subsequent cases by the same court. *Attorney General v. City of Eau Claire*, 37 Wis. 400; *State v. Cunningham*, 81 Wis. 504, 51 N. W. 724, 15 L. R. A. 561; *Id.*, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, and cases cited. See, also, *Wheeler v. Irrigation Co.*, 9 Colo. 248, 11 Pac. 103; *State v. Archibald* (N. D.) 66 N. W. 234.

The execution of the election laws, defendant insists, is a pure exercise of political power, and it therefore does not fall within the jurisdiction of this court to interfere with a public officer in the discharge of his duties under them. In other words, as no property rights are involved which may be injured by a wrong on his part, this court has no power to restrain him by means of the writ of injunction, but the relator must be aided, if at all, by means of the writ of mandamus. The same question was presented and urged

in the case of *State v. Cunningham*, 81 Wis. 504, 51 N. W. 724, 15 L. R. A. 561. In that case an application was made upon the relation of Adams county for an injunction to restrain the secretary of state from giving notice to proceed to the election of members of the legislative assembly under the apportionment act of 1891, on the ground that the act was unconstitutional and void. The relief was granted, the court holding that the controversy presented involved the preservation of a constitutional legislature as well as of the rights of the people of the state to equal representation in the legislative assembly, and as such fell within the original prerogative jurisdiction of the court. Mr. Justice Pinney, in a concurring opinion, says in this connection: "It may well be conceded that courts of equity would not, by reason of their original jurisdiction, have authority to interfere by injunction in a case such as this; but it is to be borne in mind that the writ of injunction, under our constitution, is put to prerogative uses, of a strictly judicial nature, as a remedy of a preventive character in case of threatened public wrong to the sovereignty of the state, and affecting its prerogatives and franchises and the liberties of the people, their rights being protected in this court by information in the name of the state, on relation of the attorney general." And again, in another place, he says: "The truth is that the power of the respondent to notify elections is in no just sense whatever political, and, in view of the purely ministerial nature of his duty, it is a misuse of terms to assert that his power or duty is in any sense political. The act he is required as a ministerial officer to assist in executing, by giving the notice, is the result of legislative power, and therefore, it may be said, of political power; but this does not make the act required of the respondent, in giving or refusing to give the notices, which is a mere consequence of the exercise of political power, a political act, so as to prevent judicial examination of his conduct in acting, or refusing to act, for that reason, if the law is void for conflict with the constitution." So, in the present case, though the question is presented in a different way. It is not here a question whether a law is unconstitutional, and the defendant should be restrained from proceeding under it, but a case where, as we shall presently see, he is proceeding under a valid election law to act in excess of duty. He is proceeding to print upon the official ballot a ticket which he has no authority of law to print upon it. The relator is a candidate for public office. He is entitled to have his name appear upon the ballot under the proper designation equally with his associates. Equally with them and all the other voters in the county he is entitled to vote, and to the use of a ballot for this purpose, with the tickets, and those only, upon which the law authorizes to go upon it. He is entitled to insist that the defendant shall not only do his duty

in causing to be printed the tickets properly nominated, but he, in common with all the other voters, may also insist that their rights may not be impeded, and perhaps imperiled, by having the ballot weighted down by other tickets which can serve no purpose other than to delay, mislead, and confuse them in the exercise of their rights at the ballot box. The right to vote and to be a candidate for office are political rights. The duties of the defendant to prepare and print the ballot have to do with these political rights, for they are the media through which the citizen may properly and safely express his will in the choice of those who shall serve the public. They are the result of the action of political power, and are themselves only other modes by which the same power is given expression. They nevertheless involve substantial rights, which are the subject of judicial examination, protection, and enforcement, just as are all other rights which are guaranteed and protected by law.

It is claimed in this case that mandamus is a proper remedy, and therefore that injunction is not. With this contention we do not agree. There is not here presented a case in which there is a default in the performance of duties required by law, but one in which the defendant is proceeding to do what the law does not permit. To restrain this excess, as prohibition may not go to a ministerial officer (*State v. Hogan* [Mont.] 62 Pac. 493), injunction is best suited.

2. It is urged by counsel that the state has no legal capacity to sue in this case, because it appears that the public has no interest in this controversy. The argument is that this court should exercise its original jurisdiction under the writ of injunction only in cases *publici juris*, and that the facts stated in the petition show that only private rights are involved, or, at most, that only the people of Silverbow county are interested. Our attention is called to section 23 of the Code of Civil Procedure, which provides "that * * * no action to obtain an injunction must be commenced in the supreme court, except in cases where the state is a party, or in which the public is interested, or the rights of the public are involved, but the proper district court has jurisdiction of all injunctions, and the commencement of all actions therefor, except as in this section provided. * * * "Waiving the question as to the power of the legislature to prescribe the cases in which this court may issue an injunction, the argument might be of force if only the election of local officers in Silverbow county were involved in this case. It might then be urged, though we do not say effectively,—for it is not necessary to decide the point,—that the case affects only the people of that county, and the controversy should be left to the district court in the ordinary course of litigation. The facts stated present a case affecting directly the interests of the whole people of the state. In our representative form of

government, the whole people are interested in having the election laws enforced, to the end that the best possible results may be obtained. Especially is this true when we are engaged in the selection of men to whom we, at the same time, intrust the power to enact laws for the state, to otherwise regulate public affairs, and to provide for the collection, appropriation, and disbursement of the public revenues. Not only is every patriotic citizen interested in the selection of suitable candidates for members of the lawmaking body, but every citizen in the state has a direct personal interest in the proper conduct of the election by which a choice of candidates is made. Each county elects its own members of this body, but, in doing so, it acts on behalf of the whole people, and the state is just as vitally interested in the ultimate result as if all the legislators were chosen by the people at large. While, in settling such controversies, the court protects the personal rights of the candidates, it also performs the much more important function of restraining a public officer to the bounds of duty, and preserves the ballot from unlawful interference by sinister influences, the object of which is to injuriously affect the result to accomplish selfish ends. So it is that, conceding the power of the legislature to lay down a rule limiting the classes of cases in which this court may issue the writ, this case falls clearly within the class of those in which the public is interested or the rights of the public are involved, and the objection that it is one in which the court has no jurisdiction is not sustained. It is proper that the proceeding should be instituted in the name of the state. It is none the less proper that in a case like the present, where public and private rights meet, the proceeding should be instituted upon the relation of an elector who seeks redress for himself and the great body of electors to which he belongs. It is not for the attorney general to determine whether such a proceeding shall be instituted, but for the court to say whether it will entertain it when the case is presented for its consideration. A relator is not indispensable, but it is desirable that some one should stand to answer for the propriety of the suit, and be chargeable with costs if it be determined that the relief sought should be denied. *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145; *Id.*, 81 Wis. 504, 51 N. W. 724, 15 L. R. A. 561; *State v. Doyle*, 40 Wis. 185; *Merrill*, Mand. § 233. The relator in the present case has such an interest in the case, both as a citizen and a candidate, that this court may in its discretion, and at the relator's instance, restrain the defendant from a violation of his duty. The writ has heretofore been issued by this court on the relation of private parties, as appears from *State v. Rotwitt*, *supra*, and the other cases cited, though the propriety of the practice was not considered in any of them.

3. The facts stated in the petition are

clearly sufficient to warrant the relief sought. It appears that a regular convention of the Republican party was called by the proper party authorities in Silverbow county, to assemble in the city of Butte on August 27, 1900. This is not controverted. No other persons belonging to the party, although they assumed to act for it, were clothed with authority to assume control of the party machinery and act for it. So long as this fact remains, the members of the Republican party of that county, and also this court, are concluded by it. *State v. Hogan*, 62 Pac. 583; *Same v. Martin*, *Id.* 588; *Same v. Smart*, *Id.* 591. For there can be only one regular organization of a party under a particular designation representing a party principle. It is said by defendant that sufficient appears from the petition to show that there were two rival factions in the party; that the name "Eight-Hour Republican Party" was assumed in order to give the dissenting faction a distinguishing designation, for the information of the electors; and that this case falls clearly within the principle of *State v. Johnson*, 18 Mont. 556, 46 Pac. 440. Passing over the allegation of the relator that, as a matter of fact, all the parties in their county platforms favored an eight-hour day for labor, and that the designation assumed is not distinctive of any principle, we do not think this contention sustained. There were rival conventions, the one called by authority, and the other without it. Each claimed to represent the party. The subsequent behavior of the convention of August 25th demonstrates the fact, however, that it did not, after the meeting of the state convention, any longer assume to represent the regular organization. If authorized to act at all, the delegates composing it were authorized to act as Republicans; for they were selected, so far as selections were made at the county primaries, as delegates to a Republican convention. They had no authority to name any other than a Republican ticket. The somewhat summary proceedings of September 26th were taken without consultation with the party electors in the county, and, so far as appears in this proceeding, the delegates assumed power to act as they did in venturing to adopt a name and to nominate a ticket, and to this extent acted for themselves only. The case does not, therefore, fall within the principle of the case cited, but is governed by the principle of *State v. Hogan*, cited; and *Same v. Tooker*, 18 Mont. 541, 46 Pac. 530, 34 L. R. A. 315; *Same v. Johnson*, 18 Mont. 548, 46 Pac. 533, 34 L. R. A. 313; and *Same v. Bailey*, 18 Mont. 554, 46 Pac. 1116. The convention not being composed of delegates selected under the regular party call, it had no authority to act in any capacity for the Republican party. The delegates could acquire no authority to act for any one else until the electors were again consulted, and a representative body selected from among those electors who entertained

political opinions in sympathy with those entertained by themselves. It seems that the whole purpose sought was the naming of a different Republican ticket from that named by the regular convention, and to secure it a place upon the ballot to the detriment of the regular ticket. The demurrer is therefore overruled. The defendant having stated to the court at the hearing that he does not care to resist the issuance of the writ in case the questions presented by the demurrer are decided adversely, it is accordingly ordered that the defendant be enjoined and restrained from printing upon the official ballot the "Eight-Hour Republican" party ticket, and that the defendant be adjudged to pay the costs of this proceeding. Writ granted.

WORD, J., concurs.

PIGOTT, J. I dissent. In my opinion, mandamus, not injunction, is the remedy to compel the county clerk to certify the proper list of nominations. His ministerial duty, the performance of which the law requires, is to include in the list the names of those candidates who have been nominated conformable to the statute in that behalf enacted, and the names of no others. Injunction will not lie when the remedy at law is plain, speedy, and adequate. In the case at bar injunction is used to accomplish the precise result that mandamus would effect. The extraordinary jurisdiction of the chancery arm of the court should never be exercised except in those cases where the remedy which the legal arm of the court can give is inadequate. I am of the opinion, also, that section 3 of article 8 of the constitution does not grant to this court authority to issue the writ of injunction as a jurisdictional writ. I think the writ of injunction mentioned in the section is a writ which may be issued only in a pending suit. It is a remedy in an action. At the time the constitution was adopted, there was no such writ of injunction as the one issued in the present proceeding, nor was such a writ known to courts of chancery. While I concur in the disposition of the case upon the merits, I dissent from the holding that there is a jurisdictional writ of injunction provided for by the constitution, and from the holding that mandamus is not the remedy.

(24 Mont. 539)

STATE ex rel. WHITESIDE v. DISTRICT COURT OF FIRST JUDICIAL DIST.

(Supreme Court of Montana. Dec. 24, 1900.)

COMMITMENT BY NOTARY PUBLIC—DISCHARGE UNDER HABEAS CORPUS—JURISDICTION OF DISTRICT COURT—REVIEW BY CERTIORARI—SUPREME COURT—SUPERVISORY CONTROL—EXERCISE UNDER ORIGINAL WRIT—LEGISLATIVE AUTHORITY—NECESSITY.

1. Const. art. 8, § 11, confers on the district court and the judges thereof power to issue, hear, and determine writs of habeas corpus on

petition of any person in actual custody in their respective districts. Pen. Code, § 2740, provides that every person unlawfully imprisoned may prosecute a writ of habeas corpus to inquire into the cause of his imprisonment, and section 2742 authorizes the district courts, on petition by any person restrained of his liberty in their respective counties or districts, to grant a writ of habeas corpus. Code Civ. Proc. § 1941, authorizes the supreme court to grant a writ of certiorari when an inferior tribunal exercising judicial functions has exceeded its jurisdiction. *Held*, that where a witness, who was committed by a notary public, was discharged under a writ of habeas corpus issued by the district court of the district wherein the commitment was made, the supreme court has no power under a writ of certiorari to review the action of the district court, since the district court had authority to make the discharge, and was acting within the bounds of its appropriate jurisdiction.

2. Const. art. 8, § 2, provides that the supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have general supervisory control over all inferior courts, and shall have power in its discretion to issue, hear, and determine writs of certiorari and other original writs. *Held*, that the supreme court has no authority, by virtue of its supervisory control, to vacate under a writ of certiorari an order of the district court discharging a prisoner in habeas corpus proceedings, since the supervisory control constitutes a grant of power independent of the court's appellate jurisdiction or power to issue original writs, and cannot be exercised under an original writ.

3. Const. art. 8, § 2, confers on the supreme court a general supervisory control over all inferior courts under such regulations and limitations as may be prescribed by law. Code Civ. Proc. § 205, provides that, when jurisdiction is conferred on a court or judicial officer by the constitution, or this Code, or any other statutes, all the means necessary to carry it into effect are also given; and in the exercise of its jurisdiction, if the course of proceeding be not specifically pointed out by the Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code. *Held*, that the contention that the supervisory control of the supreme court was dormant because there was no legislation prescribing the mode of its exercise cannot be sustained, since section 205 was sufficient legislation on the subject.

Application by the state, on the relation of Fred Whiteside, for a writ of certiorari to review the action of the district court of Lewis and Clarke county in releasing George L. Ramsey on a writ of habeas corpus. Application dismissed.

Original application for writ of certiorari. On September 20, 1899, an action was pending in the district court of Silverbow county, in which the relator herein, as plaintiff, sought to recover from the Miner Publishing Company and others damages for an alleged libel. On that day notice was given by plaintiff, under the provisions of section 3342 of the Code of Civil Procedure, that the depositions of certain witnesses residing at Helena, in Lewis and Clarke county, would be taken by Albert I. Loeb, a notary public at Helena, to be used on the trial of the cause. The notary thereupon issued a subpoena requiring one George L. Ramsey to attend before him

on October 2, 1899, the time fixed by the notice, to give his deposition, and also to bring certain books of the Union Bank & Trust Company, of which the witness was cashier. The witness attended, but failed to bring the books, giving as his excuse that their absence from the bank at that time would disturb and hinder the business for the day, and that he thought that he could give all the information desired of him without them. Thereupon counsel for plaintiff proceeded to question the witness, who gave his answers promptly and readily. Presently the following questions were put and answers made: "Q. I think you stated, Mr. Ramsey, that you have in your bank a record showing large bills which have passed through your bank, and that you denominate that the 'Large Bills Register'? A. Yes, sir. Q. I will ask you, Mr. Ramsey, if you can state from your own knowledge, irrespective of your register of which you have spoken, what, if any, one thousand dollar bills came into your bank since the first day of January, 1899, and prior to the first day of June, 1899, and, if so, who paid the bills in, and to whom they went out, and in what transaction. (Objected to as immaterial and irrelevant.) A. I could not give it to you in detail, of course, because there was a great many of them through us all the time. If you confine the query to the members of the legislature, I can answer the question. Q. I am not confining it to the members of the legislature. A. I couldn't remember them all in detail. There is a great many of them. We get them from various sources, and pay them out, of course, all along. I would like to state, however, that none of them were received from members of the legislature or paid to members of the legislature. Q. I will ask you, Mr. Ramsey, now if you will bring your 'large bills register' and the 'out of town drafts' and 'checks' register before I can ask you any further questions?" The books mentioned in the last question were among those which the witness had been required by the subpoena to bring. After consultation with counsel, the witness refused to produce them on the grounds: (1) That they were not shown to be material; (2) that they were not shown to have been kept with the knowledge or under the direction of any party to the suit, and anything contained in them was hearsay; and (3) that they were the private records of the bank, and that he did not feel that it was proper, or that he could be compelled, to produce them for the inspection of parties to controversies with which the bank had no connection. Upon request of counsel for plaintiff, the notary informed the witness that the parties would not be permitted to inspect the books; that he was required to bring them solely for his own use to aid him in stating particularly the matters about which it was desired to question him, and that he was required forthwith to comply with the command of the subpoena. The wit-

ness refused to obey the order, and was thereupon committed to the custody of the sheriff of Lewis and Clarke county, to be imprisoned until he should signify a willingness to do so. On October 3, 1899, upon application to the district court of Lewis and Clarke county, the witness was discharged under a writ of habeas corpus. The purpose of this proceeding is to have the order of the district court annulled on the ground that it was made in excess of jurisdiction.

T. J. Walsh and W. S. Hartman, for relator. Corbett & Lee, Cullen, Day & Cullen, and Jesse B. Roote (Clayberg & Gunn, of counsel), for respondent.

BRANTLY, C. J. (after stating the facts). 1. As was declared in *State v. District Court of Second Judicial Dist.*, 24 Mont. —, 62 Pac. 820, under a proper construction of section 1941 of the Code of Civil Procedure there are three indispensable requisites to the granting of the writ: (1) Excess of jurisdiction in the court making the order complained of; (2) absence of the right of appeal; and (3) lack of any plain, speedy, and adequate remedy other than certiorari. Under Const. art. 8, § 11, and the provisions of Pen. Code, §§ 2740, 2742, the witness, Ramsey, had the right to apply to the district court of Lewis and Clarke county, or to either of its judges, to have the cause of his imprisonment inquired into; and it was within the power of that court or its judge (it was likewise its or his duty) upon proper application to undertake the inquiry, and to direct the prisoner to be released, or remanded, in conformity with the conclusion reached upon his rights as they were made to appear. Jurisdiction means the power to hear and determine the particular case presented for consideration, as well as to make such orders and to render such a judgment therein as the law authorizes in the class of cases to which it belongs. *State v. District Court of Second Judicial Dist.*, supra. In brief, it is the power to hear and determine the questions coram iudice in the particular case. It therefore follows that the conclusion reached and the judgment rendered in the particular case may be either right or wrong, and still jurisdiction be in no wise exceeded (*State v. Board of Com'rs of Ravalli Co.*, 21 Mont. 469, 54 Pac. 939); otherwise, the making of an erroneous order or judgment in any case would be an excess of jurisdiction in the sense that it would be the determination of a question coram non iudice. The district court was called upon to decide upon the legality of the imprisonment of Ramsey. Having issued the writ, and caused the complainant to be produced before it, it was authorized and required to pass upon the question thus presented; and it is immaterial, upon this inquiry, whether it decided the question right or wrong. The order having been made that the complainant be released, this was an adjudication that the imprison-

ment was unlawful; and this adjudication, though not binding as a precedent upon any other court, was final and conclusive for all purposes upon this application (*Grady v. Superior Court*, 64 Cal. 155, 30 Pac. 615; *Ex parte Jilz*, 64 Mo. 205; *Case of Yates*, 6 Johns. 337); and it makes no difference whether the order was based upon the ground that the notary had no power to commit the witness, or whether, upon the merits of the case, no contempt was committed. Therefore, while no appeal might be taken from the order (*State v. Kennle*, 24 Mont. —, 60 Pac. 589), and there was no other plain, speedy, and adequate remedy, still the order was not in excess of jurisdiction in the sense that it was a decision of a matter *coram non iudice*. Counsel for plaintiff argues that this conclusion should not be reached, for the reason that it might lead to deplorable results. He instances the judge of the Third district, in which our state prison is situated, and points out how this judge might, under a misapprehension of the law, release many of the convicted criminals confined therein, thus setting at naught the solemn adjudications of guilt by the other district courts throughout the state and by this court. As a case in point, he cites *State v. Brantly*, 20 Mont. 173, 50 Pac. 410, in which he says a gross wrong would have been done but for the timely interposition of this court by means of certiorari to annul the order of release made by the district court. We think, however, that the fears of counsel are more imaginary than real. As we shall presently see, this court has ample power, under its constitutional grant of supervisory control over the district courts, to prevent any such disaster. Besides, we must presume that the district courts will do their duty, and that the cases where gross and palpable wrong is done or attempted are and will be rare exceptions, and not the rule. We may not, therefore, lay down a rule which implies that those courts are not sensible of their important duties, and are not disposed to administer the law in accordance with the principles of reason and justice. Furthermore, a different conclusion would deprive these courts in a large measure of the power granted to them under the constitution, and would lay down the rule that, in habeas corpus proceedings at least, they must decide right always or be held to have exceeded their jurisdiction. In our opinion, the case of *State v. Brantly* was decided upon a misconception of the functions of the writ of certiorari. The decision is based upon the theory that the district court exceeded its jurisdiction, because, it being made to appear that the prisoner, Day, was held by virtue of process issued upon a final judgment of a court of competent criminal jurisdiction, that court presumed to decide the contrary. This was tantamount to a declaration that the latter court should not have entertained the application of the prisoner at all. It is proper to say, however, that no

question was made by counsel at the hearing in this court as to the propriety of the proceeding; the court assuming that, if the district court was in the wrong, it exceeded its jurisdiction. Under the weight of authority the case was correctly decided upon the question considered, and, had the annulment of the order of release been accomplished by an exercise of the constitutional power of supervisory control, such action might have been justified under the rule laid down in some of the cases cited by counsel on the hearing of this case. *Ex parte Good*, 19 Ark. 410; *State v. Herndon*, 107 N. C. 934, 12 S. E. 268; *Ex parte Croom*, 19 Ala. 561; *In re Knox*, 64 Ala. 463; *In re Booth*, 3 Wis. 1; *Field v. Putman*, 22 Ga. 93. But these cases were decided under constitutional and statutory provisions materially different from ours, and are not deemed of binding authority. The writ, used as it was in *State v. Brantly*, was wrested from its legitimate functions, and made to accomplish an object for which it is inappropriate; for the case is rested expressly upon the ground that the district court had no jurisdiction to order the prisoner released.

2. What has been said in the foregoing paragraph disposes of this case, and we would rest here were it not for the fact that counsel for relator so earnestly insists that, though we should reach the conclusion stated, we should nevertheless, in this case, annul the order of the district court by the exercise of our supervisory power, on the ground that it was made in violation of law. The defendant interposes the objection that the clause of the constitution conferring upon this court a supervisory control over inferior courts is not self-executing; that this power must, by the express provision of the constitution, be exercised "under such regulations and limitations as may be prescribed by law," and not otherwise; and that, as the legislature has prescribed certain regulations and limitations under which the writ of certiorari may be used to inquire into questions of jurisdiction only, we may not pervert the writ from this use to review and correct mere errors appearing upon the record certified to this court. The contention is also made that a notary has no power to commit a witness for contempt. This brings to our attention the power and jurisdiction of this court as declared in sections 2, 3, art. 8, Const., which follow:

"Sec. 2. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law.

"Sec. 3. The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and de-

termine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. When a jury is required in the supreme court to determine an issue of fact, said court shall have power to summon such jury in such manner as may be provided by law. Each of the justices of the supreme court shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme court, or before any district court of the state, or any judge thereof; and such writs may be heard and determined by the justice or court, or judge, before whom they are made returnable. Each of the justices of the supreme court may also issue and hear and determine writs of certiorari in proceedings for contempt in the district court, and such other writs as he may be authorized by law to issue."

Upon a proper construction of these sections depends the disposition of counsel's contention. As we understand them, they confer upon this court: (1) Appellate jurisdiction, which is coextensive with the state; (2) a general supervisory control over all inferior courts; (3) discretionary power to issue, hear, and determine the various writs enumerated; and (4) the power to issue, hear, and determine such other original and remedial writs as may be necessary and proper to a complete exercise of the appellate jurisdiction. The fourth power enumerated seems to be entirely unnecessary, and appears to have been added out of abundance of caution, so that this court might not be embarrassed by any question as to a want of means to aid in the complete exercise of its appellate jurisdiction. To this provision we shall refer later. We shall most conveniently consider first briefly the nature and purposes of these powers. Though there has been no decision in this state defining the limits to which the review on appeal shall go, the practice and procedure provided by law and the character of relief uniformly granted by this court thereunder since its creation have established the proposition that this court has no power to try questions of fact, and render thereon such judgment as should have been rendered by the trial court. This was declared to be the rule by the territorial supreme court to which, under section 9 of the organic act, "writs of error, bills of exceptions, and appeals," were allowed under such regulations as may be prescribed by law. *Barkley v. Tieleke*, 2 Mont. 435; *Chumascro v. Vial*, 3 Mont. 376; *Ingalls v. Austin*, 8 Mont. 333, 20 Pac. 637. At the time of the adoption of the constitution in 1889 substantially the same procedure which had been provided by the legislature under the practice act at the time of these decisions was continued in

force by that instrument. (Schedule 1.) It was re-enacted substantially in the Code of 1895, and the decisions thereunder have been in conformity with the rule declared in the early cases. *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, citing the foregoing cases; *Root v. Davis*, 10 Mont. 228, 25 Pac. 105; *Bank v. Greenhood*, 16 Mont. 395, 41 Pac. 250, 851; *Pearson v. Harper*, 16 Mont. 143, 40 Pac. 171; *State v. Hurst*, 23 Mont. 484, 59 Pac. 911. For more than 10 years this court has proceeded upon the assumption that, while it derives its appellate powers from the constitution, these powers are in no respect different in extent from those possessed by its predecessor, the territorial court, and that they are to be interpreted and applied in the light of the conditions existent at the date of adoption of that instrument; in other words, the extent of the power and the character of relief granted has become established and defined by uniform contemporaneous construction. *Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865; *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.

The grant of the appellate jurisdiction from its very nature implies also all the instrumentalities necessary to make it effective. "It is an established doctrine that one of the essential attributes of appellate jurisdiction and one of the inherent powers of an appellate court is the right to make use of all the writs known to the common law, and, if necessary, to invent new writs or proceedings in order to suitably exercise the jurisdiction conferred." *Wheeler v. Irrigation Co.*, 9 Colo. 248, 11 Pac. 103. We cite to this point also: *Attorney General v. Chicago & N. W. Ry. Co.*, 33 Wis. 425; *State v. Archibald* (N. D.) 66 N. W. 234; *U. S. v. Dubuque Co. Com'rs*, 1 Morris, 31. The phrase, "and shall have a general supervisory control over all inferior courts," contains a clear grant of power. It is also distinct and separate from the appellate jurisdiction. This is made manifest by the language used. This clause and the one conferring appellate jurisdiction are co-ordinate, each being independent of the other, neither limiting nor qualifying in any way the meaning of the other, and both being qualified to the same extent by the concluding clause, "under such regulations and limitations as may be prescribed by law." Any other view would lead to the conclusion either that the second clause was intended as a mere qualification of the first (which the situation of the clauses in the sentence will not permit), or that the latter clause is a mere nudum verbum (which would be violative of the familiar canon of construction that a statute or constitution must be so construed that every word of it may be made operative, if it is practicable to make it so). *State v. Hogan*, 22 Mont. 384, 56 Pac. 818; *Cooley, Const. Lim.* 72; *Hyatt v. Allen*, 54 Cal. 353; *Story, Const. Law*, § 451. A similar clause is found in the constitutions of many of the states of the Union, and, we believe,

the courts unanimously agree that the various constitutional conventions used the language purposely to confer a power separate and independent of any other power to meet exigencies to which the ordinary appellate powers of the court are not commensurate. *Attorney General v. Blossom*, 1 Wis. 317; *Same v. Chicago & N. W. Ry. Co.*, 35 Wis. 425; *State v. Johnson* (Wis.) 79 N. W. 1081; *Wheeler v. Irrigation Co.*, 9 Colo. 248, 11 Pac. 103; *City of Huron v. Campbell* (S. D.) 53 N. W. 182; *Vine v. Jones* (S. D.) 82 N. W. 82; *State v. Archibald* (N. D.) 65 N. W. 234; *State v. Lazarus*, 36 La. Ann. 578; *In re Ingersoll*, 50 La. Ann. 748, 23 South. 889; *Ex parte Croom*, 19 Ala. 561; *People v. Court of Appeals* (Colo. Sup.) 61 Pac. 592; *People v. Richmond*, 18 Colo. 278, 26 Pac. 929. It is well said of this power in the last case cited: "It is hardly necessary to add that the 'superintending control' given by the constitutional provision now under consideration refers primarily to courts, not to parties or cases. Its purpose is to keep the courts themselves 'within bounds,' and to insure the harmonious working of our judicial system. It was not designed to secure the review of judgments in connection with ordinary appellate jurisdiction; and, in so far as the rights of suitors in particular causes may be affected, the effect is incidental purely. To say the 'superintending control' was intended to include ordinary appellate power is to render the preceding clauses superfluous in so far as they constitute a grant of such power." Nor is this power to be confounded with the other original jurisdiction conferred by the third grant. This clause was examined by this court in *Re MacKnight*, 11 Mont. 126, 27 Pac. 336. In that case the contention was made that the authorization to issue the six writs enumerated was not intended as a grant of original jurisdiction, but that they should be issued in aid of appellate jurisdiction only. It was there pointed out, however, that the argument of counsel was not only inconsistent with the nature of the writs themselves as original writs, always used for certain well-known and well-defined purposes, but that the writs themselves—some of them at least—are wholly unsuited for the performance of the office to which it was sought to limit them. The argument in the opinion as to the well-defined character of these writs and the purposes for which they have ever been used—that is, as original prerogative writs—is conclusive as to the character of the power this court should exercise through them, except as to the writ of injunction. This appears to have been intended for some undefined use different from its appropriate function under the old equity practice. The fact that this writ is enumerated with five other writs totally different in their nature and functions, with no appropriate jurisdiction conferred there or elsewhere in the constitution indicating that it was intended to be used as an aid

to jurisdiction, rather than as the foundation of jurisdiction, just as its associates were intended to be used, seems to have escaped the attention of the court entirely. The peculiarity of the provision in including the injunction in this list of original writs, and the functions thus assigned to it, standing, as it does, divorced from its old associates, is fully considered in *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 423. It is there held that it is assigned a new duty, and is to be used as a prerogative or quasi prerogative writ where it is a proper remedy in matters public juris at the instance of the attorney general, but not in suits between private parties. The same was said of all these writs in *Attorney General v. Blossom*, 1 Wis. 317, and these cases were followed by Mr. Justice Corliss in *State v. Archibald* (N. D.) 66 N. W. 234. The writ of injunction has heretofore issued from this court as an original writ at the instance of private parties in election cases, as the only suitable remedy, though the propriety of the practice was never settled by express adjudication until the decision in *State v. Moran* (at the present term) 63 Pac. 390; *State v. Rotwitt*, 18 Mont. 502, 46 Pac. 370; *Same v. Tooker*, 18 Mont. 540, 46 Pac. 530; *Same v. Johnson*, 18 Mont. 548, 46 Pac. 533; *Same v. Bailey*, 18 Mont. 554, 46 Pac. 1116; *Same v. Johnson*, 18 Mont. 556, 46 Pac. 440; *Same v. Reek*, 18 Mont. 557, 46 Pac. 438; *Same v. Fisher*, 18 Mont. 560, 46 Pac. 1117. But, whatever may be its legitimate uses, the briefest examination of it and all the others shows that they are intended to be used by this court in its discretion as original writs, each in its appropriate function, and not merely as instrumentalities for the exercise of any other jurisdiction. They are unsuitable as a class for supervisory purposes within the meaning of the provision. All, except the writ of injunction, had well-defined uses at the common law, and all, except this and the writ of quo warranto, had been in use under the territorial government performing their common-law functions for many years at the time the constitution was adopted. None of them, except certiorari and prohibition, go exclusively to courts, or tribunals, or officers exercising judicial functions, and these two have always been limited to an inquiry into questions of jurisdiction only. *State v. District Court*, 24 Mont. —, 62 Pac. 820; *Same v. Hogan*, 24 Mont. —, 62 Pac. 493; *Same v. District Court*, 22 Mont. 220, 56 Pac. 219. They are in no sense of the term writs suitable for the purpose of correction and revision upon mere errors in procedure. The writ of habeas corpus never goes to courts, but to individuals only, to inquire into the legality of the imprisonment complained of. The writ of quo warranto also goes to an individual to inquire by what authority he usurps an office or exercises a public franchise. Mandamus compels the performance of an act on the part of a tribunal, board,

or person which the law enjoins as a duty resulting from an office, trust, or station, but is never used to correct errors merely, or to control discretion. The writ of injunction also goes to persons, and not to courts, whether it be limited to questions publici juris or extended to the adjustment of private rights. While this court may use any of these writs which are appropriate as aids in the exercise of its other powers, it may not pervert them from their legitimate uses, or restrict their uses to purposes for which they were not intended. The constitution confers powers to be exercised by them, and we must not prescribe limits where there are none, nor assume authority where none is conferred. We are authorized to issue these writs, in our discretion, for whatever purpose they are suitable, without limitation or qualification. Both the other grants are "under such regulations and limitations as may be prescribed by law." As the appellate jurisdiction was granted for the purpose of revision and correction, and the original jurisdiction under these writs was granted to enable us to render such relief as is appropriate under them, so the supervisory power was granted to meet emergencies to which those other powers and instrumentalities are not commensurate. It is independent of both, and was designed to infringe upon the functions of neither. It has its own appropriate functions, and, without undertaking to define particularly what these functions are, we think one of them is to enable this court to control the course of litigation in the inferior courts where these courts are proceeding within the jurisdiction, but by a mistake of law, or willful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate. Under such circumstances, the case being exigent, no relief could be granted under the other powers of this court, and a denial of a speedy remedy would be tantamount to a denial of justice. Cases may arise also where some relief could be granted under some one of the other original writs named; but such relief would not be complete and adequate because of some error which could not be corrected by means of the limited functions of the particular writ, while the supervisory power is unlimited in the means at our disposal for its appropriate exercise.

This brings us to the consideration of the question whether the power is dormant, under the restrictions of the clause, "under such regulations and limitations as may be prescribed by law," in the absence of procedure provided by the legislature. While the legislature cannot decrease the powers granted by the constitution, this clause evidently intended that that body should provide the mode of procedure to be employed, by which, and the limitations as to time within which, both these powers should be invoked; for, though the power of the court is plenary, it cannot be exercised until a mode for its exercise has

been provided. Yet, by this statement we do not concede that the legislature, by failure to act, can render these powers of no avail. It is a question worth consideration whether, in the absence of action on its part, this court has the power to establish rules for the exercise of its appellate and supervisory powers. Some procedure must be provided by which the individual litigant may avail himself of the relief which the court has power to grant. It is in this sense that an appeal is the creature of the statute, and that the right to it does not exist unless it is provided for. *Hayne*, New Trial & App. § 181; *Appeal of Houghton*, 42 Cal. 52. This holding we believe to be sound, and in conformity with the weight of authority. *Story*, Const. § 1773; *In re Rules Relative to Original Cases* (Neb.) 58 N. W. 945; *Works*, Jur. 170; *Teas v. Robinson*, 11 Tex. 777; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929. By analogy the same observations apply to our supervisory power. But conceding, for the sake of argument, that this court has no power to proceed in the absence of legislative action, we find ample provision in the Code for the exercise of this power. Section 205 of the Code of Civil Procedure provides: "When jurisdiction is, by the constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." The legislature having fully provided for appeals, and recognizing the difficulty to be met with in defining the supervisory power and the mode of its exercise, thus left it to this court upon proper occasion to adopt such means as would seem to it to meet the exigencies of the case; for there is no other jurisdiction vested in this court for which ample provision is not made either by law or the constitution itself, and the section is of no significance unless it has reference to the jurisdiction in question. At any rate, the provision is broad enough to cover the exercise of the power, and we hold that, if any legislation is needed, this section is ample to authorize its use in its utmost vigor. As we have seen, however, the writ of certiorari is not a suitable means for the exercise of supervisory control in this case, for the reason that there has been no excess of jurisdiction. This precludes any relief under this writ. It must be conceded that in *State v. District Court*, 22 Mont. 220, 56 Pac. 219, there is an intimation contrary to the view we here take, but the statement in that case containing this intimation is a dictum, not necessary nor pertinent to the question there under discussion. The question, therefore, arises, what is the proper instrument by which to exercise this power? The only answer is that it must be

framed when the case properly arises, and, for want of a better name, may be denominated a supervisory writ. It must be suitable, not only to examine into questions of jurisdiction, but it must also extend to the review of errors of law and abuses of discretion within the limits of jurisdiction. Upon the facts of the case presented, the supervisory writ, or one of the others, might be granted, according to the relief to which the applicant might be entitled. The supervisory writ, being broader in its scope, would afford relief by restraining the inferior court to the bounds of jurisdiction, or compelling a performance of duty, as well as by a correction of errors and abuses of discretion requiring prompt action; but relief under any one of the other writs would be confined to the scope of the particular writ.

In reaching these conclusions we have not overlooked the fact that the courts of many of the states, as appears from the cases cited, have frequently used the writs of certiorari and mandamus as supervisory writs. We do not feel inclined to follow them, for this course would, under our view of the well-settled functions of these writs in this jurisdiction, be an unauthorized use of them. It therefore follows that, though the district court may have erred in releasing the witness Ramsey, we have no power to review its action under the writ of certiorari, because it was acting within the bounds of its appropriate jurisdiction, and not in excess thereof. From the foregoing considerations it becomes unnecessary to consider the question whether the notary had power to commit the witness for the alleged contempt. This question is reserved. The writ heretofore issued is vacated, and the application is dismissed, at the cost of the relator. Dismissed

PIGOTT and WORD, JJ., concur.

(24 Mont. 447)

STATE ex rel. LANNEN et al. v. ARMS,
County Clerk.

(Supreme Court of Montana. Nov. 1, 1900.)

ELECTIONS—PARTY CONVENTION—MINORITY—
NOMINATIONS—OFFICIAL BALLOT—
PARTY DESIGNATION.

1. A minority faction of a political party of a county left a convention and formed an organization, and issued a call for a subsequent convention, which apparently excluded those precincts which were represented by the seceding delegates; but primaries were held in every precinct of the county, except six, which were only entitled to seven delegates, and five of such precincts were represented in the convention by delegates elected to the former convention. *Held*, that the convention had in pursuance of such call was a representative body, entitled to have its nominations placed on the official ballot.

2. Where minority delegates elected to a county Democratic convention secede on the ground that the majority faction is dominated by corporate influences, and cause a separate convention to be called, at which a ticket designated as the "Bryan Democratic Ticket" is nominated, such ticket is entitled to a place on

the official ballot under such designation, since there is a sufficient distinctive principle in such designation, in connection with the facts, to warrant the conclusion that the differences are actual and substantial.

Mandamus by the state, on relation of Edward Lannen and others, against Daniel Arms, county clerk and recorder, to restrain defendant from having printed on the official ballot a ticket designated as the "Bryan Democratic Ticket." Petition dismissed.

T. J. Walsh, for relators. N. W. McConnell and J. B. Clayberg, for respondent.

BRANTLY, C. J. Original application for injunction to restrain the defendant, as clerk of Granite county, from printing upon the official ballot a ticket designated as the "Bryan Democratic Ticket." Under an order to show cause, the defendant appeared and filed an answer admitting many of the allegations of the petition, but controverting others, and setting up matters in avoidance. To this relators interposed a general demurrer, and upon the questions arising out of the facts thus admitted the parties rested. These admitted facts are: The county Democratic convention, under regular call of the central committee, assembled at the court house in the city of Phillipsburg on September 17, 1900, and, after selecting delegates to the state convention to meet in Helena on the 19th, adjourned to October 1st, at which time the relators Lannen and Lucas were selected as candidates for the legislature, and the other relators for the various county offices. A proper certificate of these nominations was filed with defendant. There were two factions in this convention, the points of difference between them growing out of charges by 19 of the 43 delegates composing it that the majority faction was dominated by corporate influences which intermeddled in the administration of the affairs of the state. These 19 delegates, being in the minority, withdrew from the convention on September 17th, and, proceeding to the city hall, organized another convention. After appointing delegates to the state convention, a central committee was selected. The convention adopted as its party designation "Bryan Democratic," and thereupon the persons selected as chairman and secretary of the central committee formulated an address to the "Bryan Democrats" of the county. In this address all who believed in the principles of the Kansas City platform of the Democratic party, and who were opposed to corporate control of county politics, were invited to join with that faction at an adjourned meeting of the convention to be held at the opera house on October 2d. Delegates were apportioned among the various precincts in the county, and all precincts not represented in the convention on that day were invited to send delegates. The convention then adjourned to October 2d. In the meantime the call was duly published, and in pursuance thereof primaries were held in

all save 6 small precincts in the county. When the convention assembled on October 2d, full delegations were present from all precincts, except 1, entitled to 1 delegate; and 5 small precincts, entitled to 6 delegates, not holding primaries, were represented by delegates who attended the first convention. The remaining 14 of the 19 bolting delegates attended as members of the delegations from the various precincts in which they were chosen under the regular call. The convention duly organized, and nominated candidates to the legislature and a full county ticket.

The defendant insists that the admitted facts present a case fairly within the principle of *State v. Johnson*, 18 Mont. 556, 46 Pac. 440, and that, as no confusion can possibly arise from the presence of the ticket in question upon the ballot, the contention involved may well be left to the electors to decide. We are not inclined to extend the principle of this case to circumstances not identical with those presented therein. The situation presented in that case was anomalous, and we are inclined to doubt its correctness, in view of conclusions reached in other cases decided at the present term. *State v. Moran*, 63 Pac. 390. But, whether correct or not, we do not think it applicable to the facts presented here. There the convention divided into two factions, and each acted without consulting the electors. In this case the seceding faction, not content to act alone, proceeded to call to their aid representatives of all others in the county who were of like mind. It is true, the call apparently excluded from the convention called for October 2d the electors in those precincts which were represented by the seceding delegates; yet, as a matter of fact, primaries were held in all the precincts in the county, except six, and these were entitled to only seven delegates. All save one of these were represented by the delegates to the former convention. Applying a strictly technical rule, we would be compelled to say that the convention was not a representative body; for, in so far as any of the electors were excluded from representation under the call, the convention, to that extent, was not representative; but adopting a less technical view, and bearing in mind that it is often the case in these political meetings that persons who happen to be present from localities that are unrepresented are permitted to take part, we are inclined to think the assemblage was a fairly representative one, and that the ticket named by it is entitled to a place on the ballot. To state the proposition in a different way, we are not so well satisfied that the meeting was not such a representative one as that the ticket should be omitted from the ballot. We are more inclined to this view for the reason that it permits the people of a particular county to contest the control of their local affairs upon distinctive principles, which are often important, but of local interest only, and do not

concern, except in a very remote way, the public at large. There seems to be enough of a distinctive principle in the designation chosen for the ticket, as interpreted by the circumstances attending the factional strife, to warrant the conclusion that these differences were actual and substantial. In any event, we have concluded that under the facts stated the relators are not entitled to the relief sought. Accordingly the demurrer is overruled and the petition dismissed at the costs of the relators. Dismissed.

PIGOTT and WORD, JJ., concur.

(25 Mont. 1)

STATE ex rel. KING et al. v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al.

(Supreme Court of Montana. Jan. 14, 1901.)

CERTIORARI—COSTS—STENOGRAPHER'S FEES—COSTS OF PRINTING BRIEF.

1. The fee bill of the clerk of the supreme court, as provided by Pol. Code, § 872, making no provision for an appearance fee in special proceedings, none can be charged by the clerk in a certiorari proceeding.

2. Since, under Code Civ. Proc. § 1943, the clerk of the court to which a writ of certiorari is directed must return the transcript required by the writ to the court out of which the writ issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense.

3. The cost of expressing briefs to the supreme court is not properly taxable as part of the costs.

4. Under Code Civ. Proc. § 1866, awarding the legal fees paid stenographers for per diem or for copies as costs to the party entitled to costs, and section 373, prescribing the legal fees of stenographers for copies of the testimony transcribed from their notes, since the clerk cannot transcribe the stenographic notes into longhand the fee paid the stenographer for such transcription is chargeable as part of the costs.

5. The expense of printing briefs in the supreme court is chargeable as part of the costs.

6. Fees paid stenographers in taking dictation of briefs for the supreme court and typewriting them are not taxable to the defeated party.

Certiorari by the state, on the relation of Silas F. King and others, to the district court of the Second Judicial district and the judge thereof. Motion for retaxation of costs. Sustained in part.

McBride & McBride and E. W. Harwood, for relators. McHatton & Cotter, for defendants.

PIGOTT, J. A writ of certiorari was quashed and this proceeding dismissed at the costs of the plaintiffs. 24 Mont. —, 62 Pac. 820. The defendants having filed their memorandum of costs, the plaintiffs object to each item therein contained, and move that it be disallowed upon the ground that it is not a proper charge against them. No suggestion is made that any charge is unreasonable in amount, nor that the expense has not been actually incurred.

The first item is \$5 for the appearance fee of the defendants in this court. Upon the authority of *State v. Second Judicial Dist. Ct.*, 24 Mont. —, 62 Pac. 688, this charge must be rejected. The next items of which complaint is made are charges amounting to 90 cents, paid to an express company for transmitting the return and maps used on the hearing in the district court to illustrate the testimony of witnesses to the office of the clerk of the supreme court. This we believe to be a reasonable and necessary expense incurred for the purpose of lodging the return in the office of the clerk; for in certiorari proceedings the clerk of the court to which the writ is directed must return to the court out of which the writ has issued the transcript required by the writ (section 1943 of the Code of Civil Procedure), and the outlay incident to the carriage should ultimately be borne by the party whose fault occasioned the expense. But the charge of 60 cents for "express on briefs" is not properly taxable, and is stricken out. The next item is "Stenographer's fees, transcript included in return, \$25.00." The plaintiffs, it seems, considered that the evidence taken at the hearing in the district court might, upon their theory of the case, be deemed material here. It further appears that the evidence embodied in the transcript was taken down in shorthand by the official stenographer at the hearing, and was afterwards, by request of the defendants, translated into longhand. A copy of the translated notes of the evidence is included in the transcript certified by the clerk. Section 1866 of the Code of Civil Procedure provides: "A party to whom costs are awarded in an action is entitled to include in his bill of costs, his necessary disbursements as follows: * * * The legal fees paid stenographers for per diem or for copies. * * *" Section 373 of the same Code prescribes the legal fees of stenographers for copies of the testimony and proceedings, written out at length or in narrative form from their notes. Under these circumstances, in view of the inability of the clerk to transcribe the phonographic notes of the official reporter, we think this item should not be stricken out; and *State v. Second Judicial Dist. Ct.*, supra, is to be distinguished in this respect from the present case, for in the former the matters required to be returned by the clerk of the district court were copies, which he could make, of the records in his office. There the fee paid to the clerk was not authorized by law, while here the fee paid to the official stenographer is expressly prescribed by statute. Another item is a charge of \$18 for printing briefs filed in this court. Such charge is taxable, according to the course and practice of the supreme court. *Ryan v. Maxey*, 17 Mont. 164, 42 Pac. 760; *Walte v. Vinson*, 18 Mont. 410, 45 Pac. 552; *State v. Second Judicial Dist. Ct.*, supra. The last item is \$20 paid to a stenographer for taking in shorthand

the dictation of briefs and typewriting them. This is not a legal cost or disbursement taxable to the defeated party. It is disallowed. It is therefore ordered that the following items in the memorandum be disallowed: Appearance fee paid to the clerk of the supreme court, \$5; express on briefs, 60 cents; stenographer's fees in preparing briefs, \$20. The other items, amounting to \$43.90, are allowed, and taxed in favor of the defendants and against the plaintiffs.

BRANTLY, C. J., concurs. MILBURN, J., not sitting.

(28 Colo. 129)

CITY OF DENVER v. HYATT.

(Supreme Court of Colorado. Dec. 17, 1900.)

MUNICIPAL CORPORATIONS—ACTION FOR INJURIES—DEFECTIVE SIDEWALK—PLEADING—EVIDENCE—INSTRUCTIONS—EXCEPTIONS—HARMLESS ERROR—NEGLIGENCE—QUESTION FOR JURY—DAMAGES—EXCESSIVE VERDICT—JURY ACT—CONSTITUTIONALITY.

1. A complaint in an action against a city for injuries caused by defective sidewalk is not demurrable because it fails to aver that the city had notice of the defect, where the complaint shows that the defect was plainly visible, and that it had existed for two months prior to the accident, which was ample time within which the city should have discovered the defect and repaired it.

2. Evidence for plaintiff that there was no light at the intersection of streets adjacent to the place of the accident was properly admitted on the issue of contributory negligence, in an action against a city for injuries caused by defective sidewalk, where it was shown that the accident occurred at night.

3. Trial courts should require counsel to specify alleged errors in instructions given, when exceptions are taken; but where this is not required, and the instructions are paraphrased, a mere exception to each instruction separately is sufficient, if allowed in that form.

4. An instruction in an action against a city for injuries caused by defective sidewalk which stated, in substance, that notice of the defect, only, would be ample to establish negligence on the part of the city, was harmless, where the undisputed evidence showed that the defect was plainly visible and had existed for from a month to a year and a half prior to the accident.

5. The undisputed evidence showed that plaintiff was wholly incapacitated for work from the time of the accident to the time of the trial; that, from her then physical condition, it was probable that she would be prevented from following her occupation for some time to come; and that her ability in that respect might be more or less impaired in the future. The instructions given stated that, in estimating her damages, her loss of time resulting from the injury, and also loss of time which it appeared she would be compelled to sustain in the future, as well as her impaired earning ability in consequence of such injury, both past and future, should be considered, and that her loss of capacity to perform the duties of her occupation, and the earnings which she lost in consequence thereof, were proper elements to consider in estimating the damages. *Held*, that the instructions, when considered in connection with the evidence, did not authorize the recovery of damages for both loss of time and impaired earning ability covering the same period.

6. In an action against a city for injuries received, it was not error to instruct to the ef-

fect that, if plaintiff was predisposed to a disease which was aggravated by reason of the accident, she was entitled to recover damages necessarily resulting from such aggravation, where there was evidence that shortly after the accident, and down to the time of the trial, she suffered serious pains, supposed to have been caused by disease of her internal organs.

7. An instruction, on the question of damages for personal injuries, that the jury should consider, "both in the determination of their verdict and in estimating the amount of plaintiff's damages," any predisposition to disease aggravated by the injury, if such appear to be the fact, is not open to the objection that it authorizes the jury to base their verdict on such fact, instead of the negligence of defendant.

8. The evidence in an action for injuries from a fall caused by a defective sidewalk showed that plaintiff, a nurse, was a healthy, vigorous woman prior to the accident. At the time of the trial she was suffering from a deranged condition of her internal organs, which rendered her practically helpless, which condition was manifest for the first time shortly after the accident. What particular organs were affected was not shown. One witness testified that her condition was caused by the fall. None of the others stated directly that it was not, but they stated that they had never known such condition due to an accident of that kind, and that her condition was not necessarily caused thereby. *Held* sufficient to sustain a finding that her internal injuries were caused by the accident.

9. The question whether a city was negligent in failing to repair a defective sidewalk was properly left to the jury, where the defect was an opening 20 inches long and about 4 inches wide, and had existed for from a month to a year and a half prior to the accident.

10. The jury act of 1899 (page 244), permitting a verdict in a civil case to be returned by three-fourths of the number of jurors sitting in the case, is repugnant to the state constitution (section 23), providing that "a jury in civil cases in all courts may consist of less than twelve men, as may be prescribed by law," which impliedly limits the legislature to the one act of providing for a jury of less than 12, thus preserving the essential feature of unanimity in the rendition of a verdict, as established by the common law.

Appeal from district court, Arapahoe county.

Action by Minnie L. Hyatt against the city of Denver. From a judgment for plaintiff, defendant appeals. Reversed.

This action was commenced by appellee, as plaintiff, to recover from appellant, as defendant, damages for a sprain of her right ankle and back, impairment of her sight, and severe internal injuries, resulting, as it is alleged, from a fall caused by a defective sidewalk. From a verdict in her favor the city appeals. Regarding the time and place of accident, and the period for which the defect in the sidewalk existed, the complaint, *inter alia*, alleged "that on or about the 2d day of May, 1899, and for more than two months next prior thereto, there existed in said sidewalk, along the northeast side of said Twenty-Eighth street, * * * an open, unprotected, and dangerous hole, about twenty inches in length and four inches in width." To this complaint the city filed a general demurrer, which was overruled. The

accident occurred at night. Plaintiff stepped into the hole in the sidewalk in such way that her foot became fastened, which caused her to fall. She testified that at the time of the accident there was no light at the intersection of the streets adjacent to the point where the accident occurred. At the instance of the plaintiff, as appears from instructions numbered 14 to 19, both inclusive, the court instructed the jury, in substance, that a failure on the part of the authorities of the city to exercise reasonable care to keep its sidewalks in a reasonably safe condition for travel was negligence, which would render it liable for damages to any person who, in the exercise of ordinary care and diligence, and without fault on his part, was injured by reason of a defect in the sidewalk of which the authorities had notice, or which had existed for so long a time previous to the injury that they, in the exercise of reasonable care, should have taken notice of such defect, and therefore if it should appear from the evidence that plaintiff, without fault or negligence on her part, received the injuries for which she sued by reason of such a defect in the sidewalk as rendered it dangerous for travel, she would be entitled to a verdict, provided the city had notice of such defect in either of the ways above mentioned; that if it appeared from the evidence that she had a latent disease of any of her abdominal organs, which would not have been made manifest except for the injury sustained by the accident, and that such disease was aggravated by the alleged injury, it was proper to take these matters into consideration in determining the verdict and estimating her damages; that, if the issues were found for plaintiff, she was entitled to recover such damages as would fully compensate her for the injuries sustained, and which she would sustain in the future; that, in estimating her damages, her loss of time, if any, resulting from the injury, and also loss of time which, from the evidence, it appears she will be compelled to sustain in the future, as well as her impaired ability to earn money in consequence of such injuries, both past and future, should be taken into consideration; and that her loss of capacity to perform her duties as nurse, and the earnings which she lost in consequence thereof, are proper elements to consider in estimating the amount of damages to be awarded. The exceptions to these instructions are in the following language: "To the giving of instructions requested by counsel for the plaintiff, * * * and to each and every of said instructions, the defendant, by his counsel, then and there duly and severally objected and excepted." The verdict was in the sum of \$5,000, which, it is urged, is excessive. The immediate result of the accident was a sprained ankle and a bruised back. She also claimed at the time of the trial that the condition of certain abdominal organs was attributable to the ac-

cident. This condition did not exist prior to the accident, but was manifest shortly afterwards. The evidence of the physicians was to the effect that they could not say positively how or what internal organs were affected; that an exploratory incision would be necessary to ascertain what the trouble was, and even that might not disclose it. One physician testified that, in his opinion, her condition internally was caused by the fall. Another physician stated that all of her symptoms, excluding the sprained ankle and back, could be traced to other causes than a fall. Another physician, appointed by the court, gave it as his opinion that plaintiff was suffering from a diseased condition of internal organs, the exact nature of which he could not determine, and that he had never known such a condition as she presented due to an accident; while another physician, also appointed by the court, stated that he was not able to locate her internal injuries to a certainty, and that her present condition was not necessarily attributable to the fall. Prior to the accident she was an active and healthy woman. At the close of the testimony the city requested the following instruction, which was refused: "The jury are instructed that, for want of sufficient evidence of negligence on the part of the defendant city with respect to the alleged defect in the sidewalk, the law of this case is with the defendant, and the verdict should be for the defendant." The evidence regarding the defect in the sidewalk was to the effect that it was caused by the breaking off or decay of a portion of one of the planks of which it was constructed, lying crossways; that the opening thus made was about 20 inches in length and about 3 inches in width. The verdict returned was agreed to by only three-fourths of the number of jurors to whom the cause was submitted. The law which authorizes a verdict so to be returned is as follows: "Section 1. That hereafter, in all civil cases in courts of record which shall be tried by a jury, not less than three-fourths of the number of jurors sitting in such case may concur in and return a verdict therein, and such verdict shall have the same force and effect as though found and returned by all of the jurors sitting in said case. * * *" Laws 1899, p. 244. Section 23, Bill of Rights, provides: "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. * * *" The errors assigned will be considered under the following heads: (1) The overruling of the demurrer to the complaint; (2) the introduction of testimony; (3) instructions given; (4) sufficiency of evidence to sustain the verdict; (5) instructions refused; (6) constitutionality of the act permitting a verdict to be returned by three-fourths of the number of jurors sitting in a case.

J. M. Ellis, City Atty., S. L. Carpenter, Asst. City Atty., and N. B. Bachtell, Asst. City Atty., for appellant. Ben B. Lindsey and Fred W. Parks, amici curiae. Charles H. Toll, D. V. Burns, and C. M. Garwood, for appellee.

GABBERT, J. (after stating the facts). 1. In support of the demurrer to the complaint, it is urged that the latter is insufficient, for the reason that it contained no averment that the city had notice of the condition of the sidewalk at the place where the accident occurred. Notice of such a defect may be either actual or constructive. If the defect, such as is alleged in this case, exists for a sufficient length of time before the happening of an accident therefrom, so that, in the exercise of ordinary diligence by its proper officials, the existence of such defect could have been ascertained by the city, it is presumed in law to have that notice of the defect which is termed "constructive." *City of Denver v. Dean*, 10 Colo. 375, 16 Pac. 30; *Todd v. City of Troy*, 61 N. Y. 506; *City of Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632. The defect alleged to exist in the sidewalk in question was not latent. On the contrary, it was visible. It is charged that it existed for more than two months next prior to the date of the accident of which plaintiff complains. Certainly that was ample time within which the city, through its proper officers, should have discovered the defect and repaired it. The demurrer to the complaint was properly overruled.

2. The accident to plaintiff occurred in the nighttime. In order to entitle her to recover, she must have been in the exercise of due care upon her part. For this reason it was competent for her to show there was no light at the intersection of the streets adjacent to the defective sidewalk, for the purpose of showing the surrounding conditions at that time. Had the light been sufficient to render the defect visible, she might have been guilty of contributory negligence, had she not avoided it. If, on the contrary, it was not visible because of the darkness, it was proper to show this fact, so that the jury might judge of the degree of care which she exercised.

3. Counsel for appellee contend that the character of the exceptions to the instructions which we are asked to review is such that they should not be considered. The instructions were paraphrased. The object of an exception is to invite the attention of the trial judge to an alleged error in an instruction to which it is directed, and where, as in this case, the exception is to each instruction separately, it is sufficient. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384. We have had occasion more than once to criticize exceptions of this character, but, under the practice which has become fixed by repeated decisions, it appears that they are sufficient if allowed in that form. The trial judge ought to be given an opportunity to review and cor-

rect an instruction, if found to be erroneous. A mere exception, while it challenges the correctness of an instruction, does not point out specifically wherein it is incorrect; so that, in justice to the trial judge, for the purpose of giving him an opportunity to correct erroneous instructions, and thus prevent the mischief caused thereby, trial courts, in allowing exceptions to instructions, should require counsel, at the time of taking them, to briefly point out wherein they are erroneous.

The first objection urged by counsel for appellant to the instructions given is that they omitted to state that the defect must have existed such a length of time before the happening of the injury as would give the officers of the municipality sufficient time, by the exercise of ordinary diligence, to repair it; or, stated in substance, that notice of this defect only would be ample to establish that it was guilty of negligence. Mere notice on the part of the city of the existence of the defect in the sidewalk would not be sufficient to render it liable. Its failure to exercise reasonable diligence in repairing such defect after knowledge of its existence would constitute the negligence which would make it responsible. *City of Denver v. Dean*, supra; *Todd v. City of Troy*, supra. Were it not for the undisputed evidence on the question as to length of time this defect existed before the accident to plaintiff, the instructions complained of would be serious error. We find, however, from an examination of the record, that all the witnesses who testified on this subject state positively that the defect had existed for from one month to a year and a half prior to that date; that it was plainly visible. It appears, therefore, that the city not only was bound to take notice of this defective sidewalk, but that, in the exercise of ordinary diligence upon its part, it should have been repaired before the accident to plaintiff occurred; so that the error in the instructions under consideration was without prejudice.

It is contended on behalf of counsel for the city that, under instructions given, the jury was authorized to assess double damages, in that the court directed that plaintiff's loss of time resulting from the injury, loss of time which she might sustain in the future, and her impaired ability to earn money in consequence of such injuries, both past and future, should be taken into consideration in estimating the amount of damages to be awarded. The court also directed the jury that her loss of capacity to perform her duties as nurse, and the amount of earnings which she lost in consequence of the injuries sustained, were proper elements of loss to be considered in estimating the amount of her damages. The instructions complained of are not as clear and definite as they might be, but, when considered in connection with the testimony, we do not believe they are susceptible of the construction that the jury was thereby directed to award dam-

ages for both loss of time and impaired ability to earn money covering the same period. The evidence was undisputed that plaintiff, from the time of the injury down to the trial of this cause, was wholly incapacitated from performing any labor whatever; that, from her then physical condition, it was probable she would be prevented from performing her duties as nurse for some time to come; and that her abilities in this respect might be more or less impaired in the future. So that we think it is fairly deducible from these instructions, when considered in connection with the testimony, that the jury understood she was entitled to recover for her loss of time, both past and future, and her loss resulting from an impaired capacity to perform her duties as nurse after partial recovery; and, in determining the amount to be awarded for these items, her ability to earn money prior to the accident in the performance of her duties as nurse should be taken into consideration.

It is also claimed on behalf of appellant that it was error for the court to instruct to the effect that if it appeared from the evidence that plaintiff had a latent disease, which would not have been made manifest or caused her trouble except for the injury sustained by the fall, or that such condition was aggravated by the alleged injury, they were matters which could be considered by the jury in estimating damages. In support of this contention, *Car Co. v. Barker*, 4 Colo. 344, is cited. In that case it was determined that the plaintiff was not entitled to recover damages for an illness resulting from exposure caused by an accident to the car in which she was riding, for the reason that her then physical condition was the immediate and independent cause of such illness, and therefore not the approximate result of the defendant's negligence. It appears from the evidence that shortly after the accident, and down to the time of the trial, plaintiff had suffered seriously from trouble supposed to have been caused by disease of internal organs. The instruction in question does not pretend to direct the jury that damages should be awarded, except for injuries directly resulting from the accident. They state, in effect, that, if plaintiff was predisposed to a disease which was aggravated or accelerated by reason of the accident, she was entitled to recover the damages necessarily resulting from such aggravation or acceleration; in other words, that to the extent she was caused to suffer from the effects of a latent disease, above that which she would have suffered had it not been for the accident, she was entitled to recover. The sidewalks of the city are for the use of those with organic predisposition to disease as well as for the healthy and robust, and any injuries which the former may sustain by reason of defects in such sidewalks, which result in aggravating an already diseased condition, are results for which the city must respond, if otherwise

liable. *Stewart v. City of Ripon*, 38 Wis. 384; *Railway Co. v. Kemp*, 18 Am. & Eng. R. Cas. 220; *Railroad Co. v. Buck*, 96 Ind. 346; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, 911; 5 Am. & Eng. Enc. Law (1st Ed.) 43. It is also urged that the statement in this instruction that the jury should take into consideration, "both in the determination of your verdict and in estimating the amount of the plaintiff's damages," any predisposition to disease aggravated by the injury, if such appeared to be the fact, is erroneous, for the reason that the jury may have understood therefrom that the determination of the verdict depended upon this fact, instead of the negligence of the city. This is not fairly deducible from the statement complained of, although it would have been better to have limited it to the question of estimating the amount to be awarded. Notwithstanding the negligence of the city, plaintiff could not recover unless she had suffered damages; and therefore, in determining whether the verdict should be for or against her, it was proper to consider what injuries, if any, she had sustained from the source indicated.

4. It is claimed on behalf of appellant that the verdict rendered is excessive, unless the evidence is sufficient to warrant the conclusion that plaintiff suffered internal injuries by reason of the accident. The evidence is clear that at the time of the trial she was suffering severely from some internal difficulties, which were manifest for the first time shortly after the accident. These troubles were of such a serious nature as to render her practically helpless. What particular internal organs were affected is not clear. The physicians called do not agree upon this proposition. Neither are they a unit as to what may have been the proximate cause of this condition. One of the physicians called gave it as his opinion that her internal condition was caused by the fall. None of the others stated directly that it was not, but they stated that they had never known such a condition as she presented due to an accident, or that such condition was not necessarily attributable to the accident. It appears from other evidence that plaintiff prior to the accident was a healthy and vigorous woman, and had never suffered from a deranged condition of any internal organs prior to that time; that shortly after the accident she was affected internally. This fact, in connection with the testimony of the physicians, we think, is amply sufficient to warrant the conclusion by the average layman that the deranged internal condition which she manifested at the trial, and which had existed a long time prior thereto, was caused by the fall.

5. Counsel for the city predicate error on the refusal of the court to peremptorily instruct the jury to return a verdict for the defendant upon the proposition that the shape and size of the break in the sidewalk which

caused the injury was such that the city was not negligent in failing to repair it. It was about 20 inches in length, and of an irregular width, averaging about 3 inches. It is not every defect in a sidewalk which can be made the basis of an action for an injury occasioned by an accident resulting therefrom. The defect must be such that a reasonably prudent person would anticipate danger from its existence. Its character must be determined, in this respect, like any other question of negligence. If it is of such a nature that different minds might honestly draw different conclusions as to its liability to cause an accident, and the dangers which might reasonably be anticipated from its existence, the question of whether or not it is negligence for a municipality to not repair or remove such a defect is a question which should be left to the jury. *Beltz v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; 2 *Thomp. Neg.* 1236; *Railroad Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Shear. & R. Neg.* § 11. Applying this rule to the evidence regarding the character of the defect which caused the accident, we think it was proper for the jury to determine whether the failure on the part of the city to repair it for this reason was negligence or not.

6. The particular reason urged by counsel for respondent against the constitutionality of the jury act of 1899 is that the essential feature of unanimity in the rendition of a verdict, as established by the common law, is preserved by the constitution of the state. We have been greatly aided in the determination of this question by the able brief filed by counsel as amici curiæ, who, although favoring the law, have fully presented the question in all its different phases. We have also had recourse to the concise, but logical, brief and argument of the assistant attorney general, which he furnished the chairman of the senate judiciary committee of the last general assembly in response to an inquiry from that committee regarding the constitutionality of the act in question, and in which he expressed the opinion that the act would not be constitutional. It is urged that the provision of the act permitting a verdict by a less number than the whole is a wise one, and coincides with the views of eminent jurists and others on this subject, and that in this advanced age we should no longer cling to what is termed by some that relic of barbarism and superstition which requires that a verdict must be unanimous. Whether the innovation is wise or not can in no manner aid in the solution of the question presented. The sole inquiry is, does the act conflict with the constitution of the state? The judiciary can only arrest a statute which is unconstitutional. As said by Judge Cooley, "It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." *Cooley, Const. Lim.* (5th Ed.) 202. The tendency of recent years

has been to attempt to remedy existing conditions by legislative acts having in view this worthy object. The result has been that many laws, wise and beneficent in character, when tested by the constitution have been declared invalid, solely because of their conflict with that paramount law. Under our system of government, the source of all power is from the people themselves. In their sovereign capacity the people of this state have adopted a constitution which is intended to place prescribed limitations upon the different branches of the state government, and any law which conflicts with their authority as thus manifested is unconstitutional, no matter what its object may be, for the obvious reason that, if upheld, a principle would be established whereby a constitutional barrier would be removed, which would permit legislation on the same line that might be exceedingly unjust and oppressive. It is no argument to say that the legislature, in its wisdom, would not pass laws other than those which were beneficial, because the test must always be, when the question is raised, does an act conflict with the constitution of the state?

The origin of the right of trial by jury in civil actions, as recognized and established by the common law, is involved in mystery. It has existed for centuries, and is essentially an Anglo-Saxon institution. Why its number, the necessity of unanimity, and other features, became fixed at common law, is not clearly known; but these requisites have always been an object of deep interest, and any encroachment upon them has been regarded with jealousy. *Parsons v. Bedford*, 3 Pet. 441, 7 L. Ed. 732, 8 Curt. 474. It is a privilege which the English-speaking race has come to look upon as a birthright,—so much so that the English colonists settled here with a deep-rooted regard for it. This is evidenced from the fact that all that has been preserved of the legislation of Plymouth Colony for the first five years of its existence is "that all criminal facts, and also all manner of trespasses and debts, between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority in form of a jury, upon their oath." 1 *Palfrey*, New England, 340; *Proff. Jury*, § 82. Ever since the formation of our government it has been guarded with the utmost care. Its omission from the federal constitution at the time of adoption caused much comment and dissatisfaction,—so much so that the First congress proposed an amendment, which was adopted, and which provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Seventh amendment. An examination of various state constitutions (except Wyoming and our own, the provi-

sions of which on the subject are identical, and also except Louisiana) discloses the fact that in 31 of the states the right has been preserved inviolate, as it existed at common law. Except in a few instances, the amount in controversy and the character of the action is the criterion measuring the right to a trial by jury. In 11 of the states the right is modified in one or more of the following features: The legislature is authorized to reduce the number, the constitution provides for less than the common-law number, that a certain proportion may find a verdict, or the legislature is empowered to provide for a jury of less than 12. It will be observed that, although the people in some instances have adopted constitutional provisions whereby the right as it existed at common law has been greatly modified, in no instance have they empowered the legislature to entirely abrogate this right, but have carefully indicated what modifications might be made, or have made them direct. That it has been so carefully guarded was noticed by Judge Caldwell in a recent address, in which he said: "While trial by jury was an undoubted heritage of the people of this country, they were unwilling that such a supreme and vital right should rest on the unwritten or common law. They were stern and inflexible in their demand that the right should be anchored in the constitution in terms so explicit and peremptory as to make any evasion or denial of it impossible, except by overthrowing the constitution itself. When the several provisions of the constitutions are read in connection, we are amazed at their fullness and completeness. No more resolute and inexorable purpose to accomplish a particular end ever found expression on paper." *The American Lawyer*, January, 1900, p. 9. In considering this question the remarks of the court in *Work v. State*, 2 Ohio St. 296, are peculiarly applicable: "An institution that has so long stood the trying tests of time and experience; that has so long been guarded with such scrupulous care, and commanded the admiration of so many of the wise and good,—justly demands our jealous scrutiny when innovations are attempted to be made upon it."

The language of the bill of rights relating to juries in civil actions is that "a jury in civil cases in all courts * * * may consist of less than twelve men, as may be prescribed by law." So far as the constitution of the state is concerned, the authority of the legislature within its sphere is supreme, except as limited by that instrument. *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *Same v. Wright*, 6 Colo. 92; *Same v. Rucker*, 5 Colo. 455; *Same v. Richmond*, 16 Colo. 274, 26 Pac. 929. Such inhibition may be express or by necessary implication. *People v. Wright*, supra; *Cooley*, Const. Lim. (5th Ed.) 208; *Page v. Allen*, 58 Pa. St. 338. There are no express words limiting the authority of the legislature with respect to juries in civil

cases, and the inquiry naturally suggested is, does the language employed impliedly limit the legislature to the one act of providing for a jury of less than 12? Unless it does, the only conclusion which can be reached is that, with respect to juries in civil cases, no limitation whatever is imposed upon the legislature by the constitution of the state, and that it may pass any law on the subject, or take away the right entirely. This serves to illustrate how far-reaching a constitutional question may be. Constitutional inhibitions arising by implication are as effective as though couched in express language. Page v. Allen, *supra*. To illustrate this proposition in a manner suggested by the last authority: The executive power of the state, according to the constitution, is vested in a governor; the legislative, in a senate and house of representatives. It would clearly violate these provisions of the constitution if the general assembly should provide for the election of two governors or two senates and houses of representatives; yet it would be unconstitutional only by implication, there being no express prohibition on the subject. The constitution is to be understood and interpreted in its plain, untechnical sense. Page v. Allen, *supra*. It is a canon of construction that effect must be given every part of the language employed in a law, unless to do otherwise is clearly justified; and the same rule forbids the rejection, as meaningless or superfluous, of any sentence or clause of a written law. *End. Interp. St.* § 23. Applying these principles, what is the plain meaning of the section of the bill of rights under consideration? The legislature was granted authority to pass a law which might provide for a jury in civil cases consisting of less than the common-law number. If it was intended to vest the legislature with supreme control over the subject of juries in civil actions, why grant authority to provide for the number only, instead of employing language which would remove all restrictions whatsoever? To hold that such grant of authority removes all restrictions would be a construction which renders the language employed superfluous,—in fact, would leave it without any effect whatever; whereas, if the intention was to preserve the right in all respects, except as to number, every word employed is given full force, meaning, and effect. So that, reading the section, and applying to the language employed its usual significance, and bearing in mind the doctrine of implication, the conclusion is irresistible that a fair construction of the section is that thereby the right of trial by jury in civil cases, as provided by the common law, is preserved in all its essentials, except the one of number. The constitution being but a limitation upon the authority of the legislature, it was wholly unnecessary to make any provision on the subject of trial by jury in civil cases if it was the intention to adopt a constitution which placed no restrictions upon the power of the legislature to enact laws regarding that right.

Having mentioned it, the plain inference is that thereby it was to be preserved in the modified form designated. It is a familiar maxim of the law that the mention of one thing is the exclusion of the other. This maxim, however, is only applicable under certain conditions, to determine the intention of a law which is not otherwise manifest, one of which is that, if that which is expressed is creative, then it is exclusive. *Suth. St. Const.* § 325. Applying this maxim to the section of the bill of rights in question, the same conclusion is reached. The authority to reduce the number of jurors from 12 is thereby created, and, in the absence of any express declaration of the further intention regarding trial by juries in civil actions, it follows that the legislature was granted no other authority than this, and, impliedly, that all other rights of trial by jury in civil actions were reserved. It is significant to note that section 23 of the bill of rights, as originally prepared, read as follows: "The right of trial by jury as heretofore enjoyed, shall remain inviolate, but a jury for the trial of criminal cases in courts not of record may consist of less than twelve men, as may be prescribed by law. * * *" The committee on revision recommended that it be changed to its present form, which recommendation was adopted. As originally drafted, it is clear that the right of trial by jury was expressly reserved, with all its essential features, with the one exception that in criminal cases in courts not of record a jury might consist of less than the common-law number. After the work of the convention was completed, a committee of that body was appointed to prepare an address to the people, informing them of its salient features. In that address it was stated, "The petit-jury system has been so modified as to permit the organization of a jury of less than twelve men in civil cases, thereby materially reducing the expenses of our courts." This language, especially when taken in connection with the section under consideration as originally framed, clearly expresses the plain import of the words therein employed, and indicates that it was the intention to preserve the right of trial by jury in civil cases with all its essentials, except as expressly modified.

Wyoming has a constitutional provision identical with section 23 of our bill of rights. The supreme court of that state, in *Bank v. Foster*, 61 Pac. 466, has recently held that a jury act similar to our own is unconstitutional. From the opinion of Mr. Justice Corn in that case, in construing the section of the bill of rights relating to jury trials, we quote the following: "In civil cases the language is also express as to the matter of number,—one of the three essentials of a jury trial at common law,—and the legislature is empowered to provide by law for juries consisting of less than twelve. There is no room for construction; but there is no specific mention in

the section, or anywhere in the constitution, of the third essential of unanimity. Is it, then, to be deemed a matter unprovided for, a right not preserved, leaving the legislature at full liberty to enact such laws upon the subject as it may deem proper, unrestrained by the constitution? We do not think so. The whole section must be construed together. The subject of it is the right of trial by jury; and we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out, by way of permission to the legislature, wherein the common-law right might be invaded by statute in civil cases. * * * There is no other reasonable construction; for, if a rule is to be applied, that the legislature have power to enact any laws upon the subject, unless prohibited in express language, then they may entirely abolish the right and practice of trial by jury in civil cases, for they are not expressly prohibited from so doing; yet there appears nowhere in the constitution any intention to abrogate the right, or to substitute any other mode of trial, but the form of statement, when viewed in the light of the surroundings, makes it manifest that the intention was to preserve the right."

We have been referred to decisions of this court wherein language is employed which might indicate a conflict with the conclusion reached in this case. In *Huston v. Wadsworth*, 5 Colo. 213, the question presented was whether or not the provision of the Code was constitutional which authorized a reference when the trial of an issue of fact required the examination of a long account on either side. It was held that no constitutional right was invaded by the Code provision under consideration. It was said that the constitution imposed no restriction upon the legislature in respect to the trial of civil causes by jury. The decision does not appear, however, to have been based upon this proposition, but, rather, upon the conclusion (following New York) that the character of the action was such that a trial by jury could not be demanded by either party as a matter of right. In *Londoner v. People*, 15 Colo. 557, 26 Pac. 135, it was said: "Our constitution does not declare that a jury may either be demanded or denied, as a matter of course, in the trial of civil cases; hence this is a proper subject for statutory regulation." The language of an opinion must always be considered in connection with the facts of that particular case, or the character of the action in which it is employed. That action was a quo warranto proceeding. At common law a jury could not be demanded as a matter of right in every civil action. *Londoner v. People* was not a cause in which either party was entitled to a trial by jury at common law, and the court therefore properly held that, in the absence of constitutional provisions with respect to the trial of all civil cases by jury, it was a proper subject for

regulation by statute, which, so far as that case was concerned, was clearly correct. In *Corthell v. Mead*, 19 Colo. 386, 35 Pac. 741, the court said, "Trial by jury in civil cases is not guaranteed by the constitution of this state." That question was not involved. The only one before the court was whether or not a trial before a jury less than the statutory number called before a justice of the peace was binding; and on this subject the court held that, in the trial of a civil case by a jury before a justice of the peace, the jury may consist of any number of the parties agreed upon or accepted, without objection to the number. In none of the foregoing cases was the question of the extent to which the right of trial by jury in civil actions is preserved by the constitution involved; so that when these cases are reviewed in the light of the questions presented, and the character of the controversy between the parties, they are entirely distinguishable from the case at bar, and do not conflict with the conclusion reached in this case. The judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

(23 Colo. 119)

AMERICAN REFRIGERATOR TRANSIT CO. et al. v. THOMAS, Governor, et al.

(Supreme Court of Colorado. Dec. 17, 1900.)

TAXATION — UNIFORMITY — RETROSPECTIVE OPERATION OF TAX LAWS — CONSTITUTIONALITY — DUE PROCESS OF LAW — PLEADING.

1. Under Sess. Laws 1897, p. 157, declaring that a foreign corporation having capital stock divided into shares shall file its certificate or articles of incorporation, and pay certain fees, as a condition precedent to the exercise of any corporate power or the doing of business in the state, a plea denying the right of certain foreign corporations to maintain an action within the state, failing to allege that the plaintiffs are corporations having capital stock divided into shares, thus bringing them within the class of corporations designated in the statute, is insufficient.

2. Sess. Laws 1897, c. 70, requires the chief officers of every corporation owning railroad cars, other than railroad companies operating a line of railway in the state, to make an annual statement to the board of equalization, showing the aggregate number of miles made by their cars on the railway lines in the state during the preceding year, and a statement of the class of cars used, and provides that the board of equalization shall ascertain from these statements the number of cars required to make the total mileage of each company within the year, and the value of each class of cars used, and the number found necessary to make the total mileage of the cars of each corporation shall be assessed to such company. *Held*, in an action to restrain the assessment of plaintiff's cars, that the act was not unconstitutional, as retrospective in its operation, though the assessments included mileage made before the act took effect, since the cars were subject to taxation under the then existing laws, and the Laws of 1897 merely provided a mode of procedure for the assessment of taxes.

3. Sess. Laws 1897, c. 70, provides for a mode of procedure for the taxation of railroad cars owned by any company or individual other than those operating a line of railway in

the state. Assessments under the act included mileage made by the cars before the act took effect. *Held* that, if the act of the board in making the assessments according to the statute for time preceding its taking effect was unauthorized, it was incumbent on plaintiffs to make such objection, in conformity with Sess. Laws 1891, p. 293, § 2, to the board of equalization, or at least to offer to pay the taxes ascertained to have been due since the act took effect, to entitle them to an injunction restraining the collection of such unauthorized assessment.

4. The act was not unconstitutional, as violating the rule of uniformity, in excepting from its operation cars belonging to companies operating a line of railroad in the state, since adequate procedure for the taxation of such cars was otherwise provided, and the act merely provided a mode of procedure for taxing cars of the particular class.

5. Sess. Laws 1897, c. 70, authorizing taxation of railroad cars owned by private corporations, is not in violation of the fourteenth amendment of the federal constitution, in failing to provide an opportunity to the owners of the cars to be heard before the assessment is made, since such opportunity is afforded by Sess. Laws 1891, p. 293, § 2, providing that, at a certain meeting of the board of equalization, opportunity shall be given "to any taxpayer" to appear before the board and submit any information or objections tending to aid in making an equitable assessment.

Error to district court, Arapahoe county.

Action by the American Refrigerator Transit Company and others against Charles S. Thomas, governor, and others. From a judgment sustaining a demurrer to the complaint, plaintiffs bring error. Affirmed.

On May 9, 1898, the American Refrigerator Transit Company and 12 other foreign companies, as plaintiffs, filed in the district court of Arapahoe county a complaint asking for the issuance of a writ of injunction restraining the defendants therein named, as the state board of equalization, from assessing the cars of any of said 13 foreign companies under the act of 1897 entitled "An act to provide for the assessment and taxation of railroad cars other than those which are the property of railroad companies." Chapter 70, Sess. Laws 1897. The act requires the president or other chief officer of every company or corporation other than a railroad company operating a line of railway, and every firm or individual owning any cars, on or before March 15th in each year, to make to the state board of equalization a statement, under oath, showing the aggregate number of miles made by their cars over the several lines of railway in this state during the year preceding, ending on December 31st, and a further statement showing the average number of miles traveled per day by the cars of a particular class or classes covered by the statement in the ordinary course of business during the year; and also requires the president or other chief officer of every railroad company whose lines run through or into the state, on or before the same date, to furnish to the state board of equalization a similar statement, showing the total number of miles made by such cars over their lines in this state during the year preceding December

31st, and showing separately the name of, and aggregate number of miles traveled over their lines in this state by, the cars of each such company or individual; and provides that the state board of equalization shall ascertain from such statements the number of cars required to make the total mileage of the cars of each company or individual within the year, and that the board shall ascertain and fix a valuation upon each particular class of such cars, and the number so ascertained to be required to make the total mileage of the cars of each company or individual shall be assessed to such companies or individuals, respectively; and for the purpose of this assessment the board is authorized to base the same upon the returns of the several railway companies. On June 7, 1898, the defendants filed their verified plea in bar, in which it was alleged that all said companies were foreign corporations, regularly, continuously, and permanently engaged in the transaction of business in this state; that no one of said companies had a known place of business or an authorized agent within this state, upon whom process may be served; and that no one of said companies had made the necessary filings in the office of the secretary of state or recorder of deeds, or paid the fees required by law of foreign corporations. To this plea the plaintiffs filed a general demurrer, which the court below sustained, and carried the demurrer back, and sustained it, to the complaint, and ordered the complaint dismissed. To review this judgment of the district court, the plaintiffs prosecute this writ of error.

Percy Werner and C. M. Kendall, for plaintiffs in error. B. L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for defendants in error.

GODDARD, J. (after stating the facts).

1. The defendants in error devote their entire brief to a discussion of the alleged error of the trial court in sustaining the demurrer to their plea in bar, and insist that the plaintiffs in error, by failing to comply with the requirements of the constitution and statutes in regard to foreign corporations, and especially their failure to comply with the provisions of the act of April 13, 1897 (Sess. Laws 1897, p. 157), which provides, *inter alia*, that a foreign corporation having capital stock divided into shares shall file its certificate or articles of incorporation, and pay to the secretary of state certain fees, as a condition precedent to the exercise of any corporate power or the doing of any business in the state, cannot maintain this action. We think the demurrer was properly sustained. The plea is insufficient, in failing to allege that the plaintiffs in error are corporations having capital stock divided into shares, thus bringing them within the class of corporations designated in the statute; and, it also appearing from the admitted allegations of the complaint that the business

the plea avers they are regularly, continuously, and permanently transacting in the state is the furnishing, to such shippers as may order the same, their cars, to be used in the carrying on of interstate commerce, it is questionable whether it is within the province of the state legislature to exact conditions upon which they should carry on such business. *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 639.

2. The right of the board of equalization to assess the cars of the plaintiffs in error, when used and employed as they are in this state, was upheld by this court in the case of *Hall v. Transit Co.*, 24 Colo. 291, 51 Pac. 421, and by the supreme court of the United States, on error, in 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899. Mr. Justice Shiras, speaking for a majority of the latter court, after reviewing the authorities on the subject, said: "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed." After the commencement of that case, and pending the review, the legislature passed the act referred to in the foregoing statement. The only question presented in this case that was not urged and settled adversely to plaintiffs in error in the *Hall Case* is whether this act infringes any provision of the constitution. It is claimed that it is retrospective in its operation, and violates the provisions of section 11, art. 2, because it did not go into effect until April 1, 1897, and the board, acting under its provisions, received statements from the railroad companies operating in the state of the mileage made by the cars of plaintiffs in error for the entire year ending December 31, 1897, thereby including mileage made by such cars during January, February, and March, before the act took effect. We do not think this objection tenable. The cars were subject to taxation under the constitution and statutes theretofore in existence; and the act in question merely provides a mode of ascertaining the average number of cars belonging to the respective companies used in this state during the year, and which were liable to taxation for that year, under the then existing laws. Furthermore, if the board was not authorized to resort to this mode to ascertain the average number of cars used during the months preceding the

taking effect of the act, it was incumbent upon the plaintiffs to avail themselves of such objection in the manner provided in section 2, p. 293, Sess. Laws 1891, or at least to offer to pay the taxes upon the average number of cars ascertained to have been employed during the remainder of the year, to entitle them to the relief sought.

3. The further objection that the act violates the rule of uniformity enjoined by section 3, art. 10, of the constitution, in that it excepts from its operation cars belonging to railroad companies operating a line of railroad, is also untenable. As was said in *People v. Henderson*, 12 Colo. 369, 21 Pac. 144: "The uniformity required is a uniformity of taxes, not a uniformity of procedure, or of rules or regulations to govern the levy thereof. To demand absolute uniformity in the latter regard would tend strongly to defeat the prior and supreme requirement. The constitution leaves this matter with the legislature, simply directing that the regulations shall be made by general law, and shall secure just valuations." As before stated, the purpose of the act is to provide a mode or means of ascertaining the average number of cars belonging to plaintiffs in error employed in the state during the year. The particular manner in which their cars are employed gives rise to the necessity, and affords a sufficient reason, for the adoption by the legislature of a distinct method for ascertaining such fact; and the method provided being, in the judgment of that body, adequate, and it being competent for the legislature to adopt such method as it may deem proper for such purpose, unless such method is calculated to produce gross injustice in the assessment the courts will not interfere. We can see no such objection to the method provided. The reason, no doubt, why the act excepts from its provisions cars belonging to railroad companies operating a line of railroad, is because adequate procedure for the taxation of such cars has been otherwise provided.

4. It is also contended that the failure of the act to provide an opportunity to the owners of the cars to be heard before the assessment is made renders the law obnoxious to the fourteenth amendment to the constitution of the United States. While it is true that the act itself does not provide for such a hearing, yet we think that such an opportunity is afforded by the act of 1891, under the first section of which the cars in question are subjected to taxation. Section 2, *inter alia*, provides: "At the April meeting of the board in each year it shall be the duty of the board to afford an opportunity * * * to any tax-payer to appear before the board and submit to it any facts which may tend to inform the board or give it information, to the end that a fair and equitable assessment of such property may be made." Section 6 provides that the board, "at its September meeting, shall also be authorized to

make any necessary change, or to correct any error or mistake made by them in assessing the property required to be assessed by them by sec. one (1) of this act." In the State Railroad Tax Cases, 92 U. S. 575, 610, 23 L. Ed. 669, where the assessment of a board, whose duty was similar to that of the board of equalization in this case, was challenged for want of notice and a hearing, Mr. Justice Miller, who delivered the opinion of the court, said: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked." It is therefore apparent that this objection is without foundation.

The further grounds relied upon by plaintiffs in error as exempting their cars from taxation in this state were answered in the Hall Case, and require no further notice. It follows from the views expressed that the court below properly dismissed the action, and its judgment is accordingly affirmed. Affirmed.

(23 Colo. 167)

IN RE SHELL'S ESTATE.

(Supreme Court of Colorado. Dec. 17, 1900.)

WILLS—UNDUE INFLUENCE—EVIDENCE—PER-
EMPTORY INSTRUCTIONS.

1. Testimony in a will contest that propo-
nent entered the family of testator, caused an
estrangement resulting in a divorce between
testator and the mother of contestants, and
then married him, is too remote to show undue
influence in the execution of a will 16 years
after such occurrence, and 10 years after the
marriage.

2. Aside from its being too remote, such tes-
timony was inadmissible in the absence of a
showing of continuation of undue influence
down to the making of the will, and of the ex-
ercise of undue influence concerning the making
of the will.

3. A will is not unnatural, in giving the tes-
tator's entire property to his second wife, with
request that she should will it to their chil-
dren, to the exclusion of his children by a di-
vorced wife, one of whom (M.) was a cripple;
it not appearing that such infirmity incapacitat-
ed her from earning a living, and the testator
explaining in his will that he had already made
ample provision for all his children, except M.,
who had been a source of much annoyance to
him during all her life, and that he had given
to his first wife property which he expected
her, by her will, to leave to M.

4. Though, on a trial in the district court on
an appeal from the county court in a will con-
test, contestants are entitled to have the is-
sues submitted to a jury, the court, as in an or-
dinary civil action, when the facts require it,
may direct a verdict.

5. Testimony that testator's wife wished it
understood that she preferred that his children
by a former wife would stay away from the
house, and that testator told his family that
he could not come to see them, on account of
his wife,—that she would not let him,—and that
he had said that, if he had it to do over, he
would not marry her, is insufficient to go to
the jury on the question of the wife exercising
an undue influence over testator in relation to
the execution of his will.

Appeal from district court, Arapahoe coun-
ty.

In the matter of the estate of Samuel
Shell, deceased. From a judgment of the
district court affirming a judgment of the
county court admitting the will to probate,
contestants appeal. Affirmed.

George W. Miller and Daniel Sayer, for ap-
pellants. Rising & Marshall, for appellees.

CAMPBELL, C. J. This is an appeal from
a judgment of the district court of Arapa-
hoe county in proceedings on appeal from the
county court in which the will of Samuel
Shell, deceased, was admitted to probate.
Objection to the probate was upon the ground
of the mental incapacity of the testator, and
undue influence over him exercised by his
wife, the proponent and executrix of the will.
On full hearing the instrument was adjudged
valid in both courts. No question is raised
in the briefs as to testator's mental capac-
ity, and under the evidence no reasonable
charge of that kind could be sustained. That
feature of the case is therefore eliminated.
A careful reading of the evidence preserved
in the bill of exceptions satisfies us that there
is no legitimate testimony by a competent
witness, other than that given by Mrs. Chan-
dler, upon which, by the utmost stretch of the
imagination, an argument can be based to
sustain the charge of undue influence; and,
when her testimony is subjected to sound
rules of evidence, it will be found that it is
lacking in essential elements. It is true that
some of the contestants (those directly in-
terested in the will) were produced, and an
attempt (which was thwarted by the ruling
of the court) made to elicit testimony of this
sort; but such testimony, even if admitted,
was incompetent, under our statute, and not
worthy of serious consideration, even if the
ban of the statute did not exclude it. Strict-
ly speaking, "fraud" and "undue influence"
are not synonymous expressions. Undue in-
fluence is, in one sense, a species of fraud;
and while there are sometimes, perhaps
usually, present elements of fraud, undue in-
fluence may exist without any positive fraud
being shown. Opposing counsel do not dif-
fer as to what constitutes undue influence, or
the rule governing the admission of evidence
to sustain it; and it is only respecting the
character and admissibility of evidence in-
troduced and rejected, and the application of
the law to the facts, that they disagree. In
the case of Clough v. Clough, 15 Colo. App.
—, 51 Pac. 513, although the requirements of
the decision may not have called for the an-
nouncement, yet the statement of the rule
found in the opinion governing the admission
of evidence upon such an issue is substan-
tially correct. The court says: "A charge
of undue influence is substantially that of
fraud, and it can seldom be shown by direct
and positive evidence. While it is true that
it must be proved, and not presumed, yet it

can be, and most generally is, proven by evidence of facts and circumstances which, as to themselves, may admit of little dispute, but which are calculated to establish it, and from which it may reasonably and naturally be inferred." And it was also said that a court "should be liberal in admitting evidence of all circumstances, even though slight, which might tend, in conjunction with other circumstances, to throw light upon the relation of the parties, and upon the disputed question of undue influence." Applying this test, we are of opinion that the rulings of the district court in rejecting testimony offered by contestants were clearly right. The witness Mrs. Chandler at one time was a member of the family of the testator. He was divorced from his first wife, by whom he had a family of 10 children. He died December 16, 1897. The will was executed June 26, 1891. The attempt was made to show that while testator was living with his first wife the proponent entered the family circle, and as a result of her machinations an estrangement took place between the husband and first wife, which afterwards led to the divorce, and later to the marriage of proponent and testator. As near as we can ascertain from the meager abstract, the time to which this occurrence relates was about the year 1874 or 1875, and it would seem that the second marriage took place in 1880, or perhaps later. While it is unwise to lay down any hard and fast rule respecting the time to which this class of testimony must relate, we are of opinion that, under the facts of this case, these circumstances were entirely too remote to be brought within the category of evidence tending to establish undue influence. Cases very much in point upon this proposition are *Pierce v. Pierce*, 38 Mich. 412; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61; *In re Langford's Estate*, 108 Cal. 608, 41 Pac. 701; *Webber v. Sullivan*, 58 Iowa, 260, 12 N. W. 319. But, aside from this objection, the testimony was clearly inadmissible because not only was there no offer to show by competent evidence a continuance of any general influence, supposed to be established by this class of testimony, down to or near the time of the execution of the will, but there was no testimony whatever showing that any undue influence was exercised by proponent over the testator concerning the making of the will at or near the date of its execution, or at any other time. Testimony like that rejected, in order to be admissible or to have any weight or significance, must be connected with direct or circumstantial evidence tending to prove that undue influence existed, and that it was exercised at or near the time the will was made. Indeed, none of the proposed evidence tended to show that any influence was exercised at the time the will was executed, and it was properly rejected. Its admission could not be other than prejudicial to the proponent.

2. Another claim of contestants is that the

will itself was unnatural; that is, different from what it might have been expected to be. If the testator had a disposing mind, and was free from undue influence, the mere fact that the will might have been otherwise cannot vacate it. But it is not unnatural. To establish this charge, an attempt was made to show that Martha Finn, a child of testator by his first wife, was a cripple from infancy, and that no provision in the will was made for any of the children of the first marriage, and particularly none for her. The proposition is that the intrinsic character of the will itself may be considered as evidence showing that it was unnatural, and that it was proper to admit extrinsic evidence to that effect. This is true. It is to be observed, however, that it does not appear to what extent this child was crippled, or that her infirmity in any respect incapacitated her from earning a livelihood. It would seem that she was or had been married, and, for aught that appears, her husband was abundantly able to care for her. The will itself contains testator's reasons for not making provision for any of these children. It states that he had already made ample provision for all except his daughter Martha, the alleged cripple, and that as she had been a source of much annoyance to him during all her life, and since he had already given to his first wife property which he expected her, by her will, to give to Martha, he omitted her now from the list of recipients of his bounty. Neither below nor upon this review was an attempt made to controvert these facts, and for the purposes of this case we may presume them to be true. Assuming the truthfulness, therefore, of the facts which actuated testator in not making provision for the children of his first wife, there is nothing about this will that is at all unnatural. Indeed, it was just and praiseworthy. If such provision had already been made for the older children, then it was entirely proper for the testator to give, as he did, his entire property to his second wife, with a request that she should, at her death, give the same to his two minor children, the issue of the second marriage.

3. At the close of the testimony for contestants the court directed the jury to find a verdict for the proponent, and of this action contestants now complain. Under the decision of this court in *Clough v. Clough*, 59 Pac. 736 (s. c. [App.] 51 Pac. 513), it was held that, upon the trial in the district court upon an appeal from the county court in the matter of the probate of a contested will, the contestants were entitled to have the issues submitted to a jury. But it does not follow that in no case is it proper for the court to direct a verdict. The court may, in a proceeding of this sort, as in an ordinary civil action, when the facts of the case require it, direct a verdict, and a failure to do so would be a palpable evasion of duty. If there is no evidence at all to sustain the

charge of undue influence, it would be the clear duty of the court to direct a jury to that effect, and the rule governing in such cases, as stated in *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148, is applicable here. If the evidence, in the most favorable light in which it may reasonably be considered in behalf of the contestants, shows that no undue influence was exercised by proponent, and if the case had been submitted to the jury upon that evidence, and they had returned a verdict in favor of contestants, the court would have been obliged to set it aside as manifestly against the weight of the evidence, then the court might properly in the first instance direct the jury to find in favor of proponent. It is true that if the question depends upon inferences to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent, upright, and reasonable men, then the question should be submitted to the jury under appropriate instructions, even though there be no conflict in the testimony. Tested by these considerations, we are of opinion that this case ought not to have been submitted to the jury. The only evidence bearing upon this question is to be found in the testimony of the witness Chandler. She testifies that some time in 1890 she met the proponent in a store, and asked the latter how her husband was, to which the proponent replied that he was very poorly. Mrs. Chandler then remarked that she would like to visit him, but was given to understand that proponent preferred that his family (of which the witness Chandler seemed to consider herself a member) would stay away from the house, for it made him worse whenever any of them came. Mrs. Chandler also says that at one time she met testator on the street car, and inquired of him as to his health, and asked him if he was coming over to see her, as had been promised, to which he replied that he could not come, on account of his wife, and that she would not let him. Mrs. Chandler also says that at one time Mr. Shell remarked to her that, if he had this thing to do over (meaning the marriage with his second wife), he would not do it again, and that he forgave Mrs. Chandler for marrying contrary to his wish. It strikes us that, if this testimony tends to prove anything, it is that proponent did not wish the witness to interfere with her opportunity of influencing the testator; but the claim is made that it has some tendency to establish the proposition that the proponent not only had the power of unduly influencing the testator, but that she exercised it respecting the will. To this we reply that we consider it too well settled to need the citation of authorities that undue influence cannot be inferred alone from motive or opportunity; that there must also be some testimony, either direct or circumstantial, to show that undue influence not only existed,

but that it was exercised with respect to the making of the will itself. This testimony does not in any degree tend to show that proponent ever exercised any undue influence, or any influence at all, over the testator in relation to the making of the will. It may, and possibly does, tend to show that proponent exercised her influence over testator to dissuade him from associating with witness; and, from an examination of her testimony, we are disposed to believe, and constrained to remark, that this influence, instead of being undue, was wholesome and salutary. Had this testimony been coupled with a legitimate offer to show, either directly or by way of inference from legitimate testimony, that proponent had the opportunity to wield undue influence, or did exercise it, with respect to the making of a will, a different question might arise. True, it is claimed in argument by contestants that an offer was made to show that the influence obtained by proponent over her husband continued to the time of his death; but we find upon examination of the abstract to which counsel refer that no such offer was made, and the contention in that respect is not worthy of serious consideration.

To summarize our conclusion: It is not putting it too strongly to say that the court would have been derelict in duty, had any question of fact been submitted to the jury. There is not a particle of legitimate and competent evidence to sustain the charge of undue influence; and had the cause been submitted, and a verdict for contestants returned, we would have no hesitation in setting it aside upon the ground that there was not a particle of proof to sustain it. In this connection the remarks of Mr. Justice Paxson in *Cauffman v. Long*, 82 Pa. St. 72, are pertinent, and commend themselves to our judgment as a wholesome expression of the law that should control the action of courts in questions of this character: "The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust,—the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern. The law wisely secures equality of distribution where a man dies intestate. But the very object of a will is to produce inequality, and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who

have been affectionate, and to punish those who have been disobedient. It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human nature. It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, but is the uncontrolled act of his own mind, it is not to be set aside in Pennsylvania without sufficient evidence, nor upon any sentimental notions of equality." The foregoing is as applicable in Colorado as in Pennsylvania. The judgment of the court below is right, and should be affirmed.

(37 Colo. 539)

MORGAN et al. v. KING.

(Supreme Court of Colorado. Oct. 15, 1900.)

CORPORATIONS—BANKS AND BANKING—PURCHASES BY DIRECTORS—TRUST FUNDS—FRAUD—STOCKHOLDERS—LACHES—LIMITATION OF ACTIONS—PLEADING—ADMINISTRATORS—PARTIES—HUSBAND AND WIFE—FRAUDULENT CONVEYANCES.

1. Mills' Ann. St. § 2911, provides that actions based on fraud shall be commenced within three years after the discovery thereof. Section 2912 provides that bills of relief, in case of the existence of a trust not cognizable by the courts of common law, shall be filed within five years after the cause thereof shall accrue. *Held*, that an action brought by a stockholder of a bank on May 7, 1896, to set aside a sale of mining stock, made by the bank to some of its directors, December 11, 1891, on the ground of fraud, and within six months after the discovery thereof, was authorized by either statute, and hence plaintiff was not guilty of laches.

2. Where a stockholder of a bank sued to set aside a sale of mining stock by the bank's trustee to some of its directors, for fraud, laches on the part of the plaintiff in not discovering the fraud by examination of the bank's books could not be set up by the directors, who had purchased the stock and received dividends therefrom equal to the purchase price, since they occupied a fiduciary relation towards plaintiff, and were in no way injured by his delay in discovering such facts.

3. Where directors of a bank procured the sale of mining stock held by the bank to themselves, which, in view of their office as directors, they had no right to purchase, and plaintiff, a stockholder, requested the bank to sue to set aside the sale, which the bank refused to do, and two-thirds of the stockholders, which were necessary to elect a new board of directors, were not disinterested, the plaintiff was entitled to sue on his own behalf; he having done all that could be reasonably required to induce the bank to sue, without avail.

4. Where directors of a bank procured the sale of mining stock owned by the bank to such directors in fraud of stockholders, and in violation of their duties as directors, the fact that the stock had paid dividends exceeding the purchase price which the directors paid to the bank showed a substantial loss of profits to

the bank, justifying a stockholder in suing to set aside the sale.

5. Where directors of a bank were enabled to purchase valuable mining stock held by the bank by reason of their position as directors, such purchase was fraudulent, as matter of law, and the fact that the directors acted in good faith was no defense to a stockholder's action to vacate the same.

6. Where a national bank made a loan to a mining company which afterwards became insolvent, and a new corporation was organized to take over its assets, and issued shares which the bank received in payment of its claim, the bank was the owner of such stock, notwithstanding the fact that the national banking act prohibited it from dealing in the stock of other corporations.

7. Mills' Ann. St. § 2911, imposes a limitation within which actions based on fraud must be commenced. Section 2912 limits the time within which actions based on the existence of a trust must be instituted. *Held*, that these sections should be read together,—the former applying to frauds by those not bearing fiduciary relations to the party defrauded, the latter where trust relations exist; and hence an action by a stockholder of a bank to set aside a sale by it to its directors for fraud comes within the provisions of the latter section.

8. Where a motion for judgment on the pleadings was interposed, and the court rendered judgment thereon against defendants, they were not then entitled to amend their answer, without a showing in support of the application, since the amendments came too late.

9. The answer of the administrator of a party defendant, filed after judgment in the pleadings, was properly excluded where deceased had interposed a defense, and had not lacked opportunity to amend it, since, the administrator being properly substituted for deceased, defendant had no right to make a defense for the deceased which he could have made, and did not.

10. Where an administrator was substituted for decedent as a party in an action, he was a proper party defendant, and hence a judgment could be pronounced against him in his representative capacity.

11. Where the director of a bank transferred mining stock which he had purchased from the bank under an abuse of his office to his wife, the wife was not entitled to hold the same, as against stockholders of the bank, in an action to set aside the sale, since she acquired no better title than her husband possessed.

Appeal from district court, Arapahoe county.

Action by Francis G. King against Edward B. Morgan, administrator, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was commenced May 7, 1896, by appellee, as plaintiff in the court below, on behalf of himself and other stockholders of the State National Bank, against appellants, as defendants, except Morgan, administrator, who has been substituted for the original defendant, Samuel B. Morgan, deceased, to set aside a sale by the defendant bank to the defendants McNeil, Toll, Morgan, and Edward L. Raymond, of stock of the defendant mining company, and for an accounting of the money received by these defendants on account of such stock. These defendants were directors of the bank at the time of making such purchase. The facts upon which he relies to maintain this action, as stated in his complaint, so far as it is neces-

sary to notice in order to understand the question to be determined, are substantially as follows:

The plaintiff owns 50 shares of the capital stock of the bank, which consists of 3,000, of the par value of \$100 each, and was such owner at the time of the wrongful acts complained of. The board of directors of the bank consists of 13 members, a majority of whom is necessary to constitute a quorum for the transaction of business. The bank had loaned to the Agassiz Consolidated Mining Company about \$75,000. The latter company, having failed, assigned its property, for the benefit of its several creditors, to an assignee, who caused the property to be sold. At this sale the defendant E. B. Hendrie purchased on behalf of the creditors of the Agassiz Company. Thereafter the defendant corporation, the Wolfstone Consolidated Mining & Milling Company, was created for the purpose of receiving conveyances of the property purchased by Hendrie, as trustee, for the joint benefit of the several creditors of the Agassiz Company, and issuing to them shares of stock proportioned to their interest in the property so purchased. Under this arrangement the shares of the Wolfstone Company stock involved in this action were issued to the defendant Hendrie in trust for the bank. This stock never was issued to the bank, its right and the right of others thereto being still evidenced by such declaration of trust. December 11, 1891, a special meeting of the board of the bank was held, at which 11 members were present, including the directors above named. At this meeting and the one held the following day, at which the same directors were present, an arrangement was effected whereby the mining stock was sold to Morgan for the sum of \$86,000, payment therefor to be made in four equal installments, of 6, 12, 18, and 24 months, to be represented by promissory notes acceptable to the bank. The defendants Toll, McNeil, Edward L. Raymond, and Quentin, who was also a director and present at the above meetings, were interested in this sale as purchasers. Thereafter the sale was consummated, and the individual defendants who were then directors, except Quentin, executed and delivered their notes to the bank in accordance with the terms of purchase by Morgan. These notes were held by McNeil, and not entered on the records of the bank. About June 29, 1893, the dividends upon the mining stock had discharged them, except a small balance, for which the obligors gave their notes, which were duly entered on the books of the bank. The Wolfstone property is very valuable. Since the purchase large bodies of valuable ore have been discovered and extracted by lessees under leases obtained from the Wolfstone Company prior to the sale of the stock in question. The dividends to the purchasers of the stock are largely in excess of the sum paid therefor. After the sale it was agreed between the purchasers that Hendrie should

continue to hold the stock in trust for their benefit. Raymond has transferred his interest to his wife, without consideration, who took it charged with knowledge of the above facts. The directors making the purchase are charged with actual, active fraud in connection with the transaction. The sufficiency of the averments in this respect is not challenged, and it is unnecessary to state them, either in substance or detail. Plaintiff had no notice or knowledge of the facts upon which he predicates his cause of action until within six months prior to the time he brought this suit. No meeting of stockholders of the bank for the purpose of electing directors has been called or held since the annual meeting of 1894. The number of directors has been reduced to eight, and consists of the defendants McNeil, Toll, Morgan, Raymond, and four others. The only officer of the bank is the defendant McNeil, as president. By the articles of association of the bank it is provided that an annual meeting of the shareholders, for the election of directors, shall be held annually on a specified day each year. In the event of an election not being held on that day, it may be held on any other designated by the board of directors. If they fail to fix a date, the shareholders representing two-thirds of the shares of stock of the bank may do so. The defendants McNeil, Morgan, Toll, Raymond, and Quentin are the owners of and control more than one-third of the shares of the capital stock of the bank. On the 4th day of March, 1896, a special meeting of the directors of the bank was called for the purpose of acting upon the request of certain shareholders to bring an action to recover its interests in the Wolfstone stock, at which meeting there were present, as directors, the defendants McNeil, Toll, Morgan, Gilluly, Lewis, and Hallack. At this meeting plaintiff and other stockholders presented a written statement to the board, setting forth, in substance, as it is alleged, the facts as above stated relative to the sale of the Wolfstone stock, with the request that the board authorize and direct an action to be brought by the bank against the defendants who, as directors, participated in the transaction, and others who had become interested in the stock of the Wolfstone Company. Upon the presentation of this statement and request, it was moved by Lewis, and seconded by Hallack, that an action be brought. The defendant Toll, as a substitute for this motion, moved that the stockholders presenting the request be required to present to the president of the board the written statement of certain of the directors, who were present when the sale of the stock was consummated, but who had no personal interest in the purchase, with reference to the matters and things set forth in the request. The president called for a vote upon the substitute, and of those present but three voted, namely, McNeil, Morgan, and Toll, who voted in favor of the

substitute. The president declared the substitute adopted, and refused to call for a vote upon the motion of Lewis. Director Gillyuly refused to take any affirmative action for the reason that his personal and business relations with one or more of the defendants charged with having fraudulently obtained from the bank the stock in question would not permit his acting in the matter. Director Hendrie also refused to act for a like reason. To this complaint the defendants, except the Raymonds, filed a general demurrer, which was overruled. Thereafter the defendants answered, from which it appears they admit the purchase of the stock in question by the defendants Morgan, Toll, McNeill, and Raymond, substantially as charged in the complaint, as to time, parties, and terms, but deny the averments of the complaint by which it is sought to establish that they were guilty of any actual, active fraud in effecting such purchase. On behalf of the Raymonds it is averred that Mrs. Raymond has purchased the interest in the stock belonging to her husband, for a full consideration, without any notice whatsoever of any of the facts set forth in the complaint. It is also averred that many of the shares purchased by McNeill and Morgan had been sold or pledged for a valuable consideration prior to the time this suit was instituted. The defendants admit that prior to the time this case was commenced a sum considerably in excess of the amount paid for the stock had been paid in dividends thereon, which they have received. They also aver that plaintiff had full notice of the facts and circumstances of the sale to them more than three years prior to the commencement of this action. As a further defense, they plead that plaintiff's cause of action accrued more than three years before he brought his suit.

Upon the filing of these answers, plaintiff moved for an interlocutory decree, for the reason that it appeared from the complaint and answers that the defendants Morgan, McNeill, the Raymonds, Toll, Quentin, and Hendrie hold and possess the stock in question in trust for the State National Bank and its stockholders, and also requested that a referee be appointed by the court, to ascertain the sums of money received by the defendants, or either of them, as dividends on account of such stock. Thereafter the defendant Samuel B. Morgan died; and, on motion of the plaintiff, Edward B. Morgan, his administrator, was substituted in his place as a defendant, and the action ordered continued in his name. Plaintiff then filed another motion for an interlocutory decree, in the same form as theretofore filed, except that the name of the administrator was inserted in place of Morgan, deceased. The motion was sustained. After the court announced its judgment on the motion for an interlocutory decree, the defendants, except Morgan, administrator, and the two corpora-

tions, moved for leave to file an amendment to their answers, in which was given what purported to be a history of the transaction with the Agassiz Company, and other facts stated from which the conclusion might be deduced that the purchase by the defendant directors was in good faith, for a full consideration, and for the benefit of the bank. The defendant Morgan, as administrator, moved for leave to file a similar answer, and averred that deceased had sold certain shares of the stock to parties named. He also sought to raise the question that there was a misjoinder of parties in this suit, and that, not having pleaded prior to the date when judgment was ordered on the pleadings, he should now be permitted to answer. No showing was made in support of either application. The administrator had appeared and participated in the argument of motion for the interlocutory decree. Each of these amendments was refused. Upon the coming in of the referee's report, a judgment was entered annulling the sale of the Wolfstone stock to the defendant directors, and for the amount against the several defendants, except the corporations and Hendrie, trustee, respectively received, over and above the amounts of the original indebtedness to the bank as it existed at the time of the purchase, and against Hendrie, trustee, for the amount of dividends in his hands received on account of such stock. From this judgment the defendants appeal. To reverse this judgment and the interlocutory decree, counsel for defendants rely upon the following propositions, which, for convenience, will be considered in the order named: (1) That the complaint does not state facts sufficient to constitute a cause of action in this: (a) Because it appears that the plaintiff was guilty of laches: (b) that plaintiff did not state the necessary facts entitling him to maintain this action on behalf of himself and other stockholders; (c) that he failed to show any injury which would justify the exercise of equitable jurisdiction. (2) That the motion for judgment on the pleadings should not have been sustained, because the averments of actual, active fraud in the complaint were denied by the answers. (3) That the action was barred by the statute of limitations. (4) That the defendants McNeill, Toll, Raymond, Quentin, and Hendrie should have been allowed to amend their answers. (5) That the defendant Morgan, as administrator, should have been allowed to plead. (6) No judgment should have been entered against the administrator in his representative capacity, and against the other defendants as individuals.

Thomas, Bryant & Lee, Willard Teller, J. F. Valle, Rogers, Cuthbert & Ellis, Wm. R. Barbour, and Charles H. Toll, for appellants. Platt Rogers, John F. Shafroth, and George Rogers, for appellee.

GABBERT, J. (after stating the facts). 1. In considering the demurrer to the complaint,

we shall determine its sufficiency only in the particulars argued by counsel for the defendants. The first of these relates to the question of laches. The sale of the stock took place about December 11, 1891. This action was commenced May 7, 1896. Plaintiff avers he had no knowledge regarding this sale, or of the frauds charged, until within a few months prior to the time he brought this suit. It appears, therefore, to have been brought within the statutory period for relief upon the ground of fraud, under section 2911, Mills' Ann. St., which provides that actions based upon fraud shall be commenced within three years after the discovery by the aggrieved party of the facts constituting such fraud. If section 2912, *Id.*, controls, then it was brought in time; for that section provides that bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not provided for in the chapter on limitations, shall be filed within five years after the cause thereof shall accrue. The pertinent question, then, is, does it appear upon the face of the complaint that plaintiff has been guilty of such delay in bringing his action that it would be inequitable and unjust to the defendant directors to permit him to now prosecute it? 12 Am. & Eng. Enc. Law, 545; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90, 23 Pac. 908; *Id.*, 12 Colo. 46, 20 Pac. 771; *Hamilton v. Dooly* (Utah) 49 Pac. 769; *Dunne v. Statesbury*, 16 Colo. 89, 26 Pac. 333. It is contended by counsel for defendants that it appears from the allegations of the complaint that plaintiff has been negligent in ascertaining the facts upon which he now relies to avoid the sale of the Wolfstone stock, and that by the exercise of a reasonable degree of diligence upon his part these facts could have been ascertained at a much earlier date than they were; that an examination of the records of the bank would have disclosed the transaction of which he now complains; and that it would be inequitable to permit him to maintain this action, although brought within the statutory period. Considerable stress is also laid upon the fact that mining stock is of an uncertain and fluctuating value. A party cannot be negligent in ascertaining facts upon which he bases his right of action in cases of the character under consideration. This, however, is but a general rule, for the laches which will bar a recovery in a particular case depends to a considerable extent upon the character and nature of the circumstances connected with the transaction. *Brown v. Wilson*, 21 Colo. 309, 40 Pac. 688; *Sullivan v. Railroad Co.*, 94 U. S. 806, 24 L. Ed. 324; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383. The reason that the doctrine of laches obtains and may be interposed as a defense in actions of this kind is that parties against whom a suit is brought shall not be injuriously affected by delay in bringing it, or their position altered

to their prejudice thereby. 12 Am. & Eng. Enc. Law, 544, 549; *Old Colony Trust Co. v. Dubuque Light & Traction Co.* (C. C.) 89 Fed. 794; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Chase v. Chase* (R. I.) 37 Atl. 804. According to the averments of the complaint, the transaction would not have been disclosed by any examination of the records of the bank. Conceding, however, that by the exercise of ordinary diligence upon the part of the plaintiff, in connection with the affairs of the bank, he could have acquainted himself with the sale, we are not aware of any rule of law which would require him to take these steps. He certainly was not required to assume that the agents of the bank charged with the management of its affairs would make a wrongful disposition of its assets, nor does the law impose upon him any obligation to examine into the affairs of the bank for this purpose. If, in fact, the defendant directors have been wrongdoers, their relation to the plaintiff and the bank was such that they are not in a position to impose upon the plaintiff any considerable degree of vigilance in ferreting out their wrongs, as a condition precedent to his right to maintain an action against them on account of their wrongful acts. *Fitzgerald v. Construction Co.* (Neb.) 62 N. W. 899; *Jenkins v. Hammerschlag* (Sup.) 56 N. Y. Supp. 534; *Light Co. v. Lahey* (Ala.) 25 South. 1006. It does not appear that defendants have been misled to their injury by the failure of plaintiff to acquaint himself with the facts connected with the transaction at an earlier date. They have expended no money in the development of the Wolfstone property, or incurred any obligations in connection with the stock, further than giving their notes for its purchase. This has all been fully repaid in the way of dividends. Its value has not been enhanced by the expenditure of any money or effort on their part. The stock is still held in trust. Their position is such that they can be placed in statu quo. Their liability upon the notes which they gave the bank for the stock was not increased by any act on the part of plaintiff. In brief, none of the reasons which would permit them to invoke the doctrine of laches as a defense to this action appear upon the face of the complaint, either affirmatively or by implication. The usual rule is that an action cannot be maintained by stockholders on behalf of the corporation unless it appears that the party bringing the action has exhausted the means of putting the corporation in motion. 4 *Thomp. Corp.* §§ 4499, 4500; *Dimpfell v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121. Where, however, the cause of action sought to be maintained on the part of a stockholder belongs to the corporate entity, it is only necessary to show that unless the action is permitted there will be a failure of justice, and that the corporation actually or virtually refuses to institute the action which the stockholder seeks to maintain. -Miller

v. Murray, 17 Colo. 408, 30 Pac. 46; Majors v. Taussig, 20 Colo. 44, 36 Pac. 816; Jones v. Mining Co., 20 Colo. 417, 38 Pac. 700. The showing which he must make is largely dependent upon the attitude assumed by the directors of the corporation, and their connection with the wrongs sought to be redressed. 2 Beach, Corp. § 886. From the averments of the complaint it is clear that plaintiff has brought himself within these general rules. He has made a request upon the board of directors to bring this action; has advised them regarding the matters of which he complains, and on account of which he says a suit should have been instituted in the name of the bank. A motion to authorize the latter to bring one was met by a substitute declared carried. The directors to whom his communication was addressed, while not affirmatively refusing to direct an action to be brought in the name of the bank, have impliedly done so. One-half of the board, as it existed at the time this request was presented, were directors who were interested in the purchase, and therefore would object to any such action being brought. They represent more than one-third of the entire capital stock of the bank. It is not to be presumed that they would have called a special meeting of the stockholders, if requested, for the purpose of electing a new directory. Any further efforts on behalf of the plaintiff, according to his statements, for the purpose of inducing an action in the name of the bank, would have been unavailing. The law does not require steps to be taken which it is manifest would be useless. *Landis v. Hotel Co.* (N. J. Ch.) 31 Atl. 755; *Smith v. Dorn* (Cal.) 30 Pac. 1024; *Higgins v. Lansingh* (Ill. Sup.) 40 N. E. 362; *Knoop v. Bohmrich* (N. J. Ch.) 23 Atl. 118. The alleged fraudulent conduct on the part of the defendants who purchased the stock has worked a substantial injury to the corporation, for the reason that, except for this fraud, the bank would have realized a much larger sum from the dividends paid on the Wolfstone stock than the amount received as a consideration for its sale. For this reason the injury shown, which resulted from the alleged frauds perpetrated by the purchasing directors, justifies the exercise of equitable jurisdiction to undo the wrong. 4 *Thomp. Corp.* § 4492.

2. The cause of action in this case is based upon two grounds, which, under the rules of pleading, should have been stated in two counts. The first ground is that the directors purchasing were guilty of a constructive fraud, by reason of their relationship to the bank at the time of such purchase; and, second, guilty of actual active fraud in effecting the purchase from their co-directors of the stock in question. The facts upon which plaintiff relied to establish the constructive fraud were not denied. Those tending to show actual fraud were. On the part of counsel for appellee it is contended that, as the

facts constituting the constructive fraud were admitted, the motion was properly sustained. Their reason for this position is, as stated in their brief: "The directors were trustees. The assets, including the stock in question, were a trust fund. The stockholders were beneficiaries or cestuis que trustent. In their dealings with the assets, the directors were subject to all the rules of equity applicable to trusts and trustees. In the absence of authority from the stockholders, they were absolutely incapacitated from selling the assets to themselves, or to one or more of their number, either directly or indirectly." On the part of the defendants, their counsel contend that as to directors the above doctrine does not apply, and that the transaction could not be avoided in the absence of proofs tending to establish actual fraud, or at least that they should have been permitted to show, or to amend their pleadings so as to show, that the transaction was bona fide. The first question which is naturally presented is, what are the legal relations between the directors of a corporation and its stockholders? Upon this proposition the courts have universally held that the relationship to the legal entity which they represent and its shareholders is fiduciary, and treat them as trustees in this respect. 3 *Thomp. Corp.* §§ 4009, 4010; 2 *Cooke, Corp.* § 648; 1 *Perry, Trusts* (4th Ed.) 207; *Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Butts v. Wood*, 37 N. Y. 317. Such being the relationship between the defendant directors and the stockholders of the bank, the familiar rule is invoked that a trustee cannot become the purchaser of trust property. This proposition is not seriously controverted by counsel for defendants, but they insist that, on account of the interest which the directors have in the corporation they represent, and incidentally their interest in the subject-matter of the trust which it is their duty to execute, as also the exigencies which have arisen by reason of the multiplication of corporations, and that a large part of the business of the country is now carried on by this means, the ordinary rules governing trustees, as between themselves and their cestuis que trustent, have been relaxed. In support of this proposition many authorities have been cited. A careful examination and analysis of these cases make it clear that, as to transactions of the character under consideration, there has been no relaxation whatever of the rule prohibiting directors of corporations from purchasing trust property. In other words, not a single one of the cases relied upon to support the proposition as to the purchase by directors of their co-directors of property of the corporation which they represent has held that the legality of the transaction, when attacked by the corporation or a shareholder (and the directors are not the sole stockholders of the corporation), depends upon the good faith of the purchasers, or that they can be per-

mitted to make a showing to that effect as a defense to an action based upon a constructive fraud. It would be impracticable to notice these cases in detail, but it is sufficient to say that the facts in these several cases were essentially different from those now under consideration, in these particulars: That the contract entered into between the corporation and certain directors through other directors was of an entirely different nature from that in the case at bar; that the contract was entered into with the whole body of the corporation, namely, its shareholders; that, while in some instances the bona fides of the transaction was considered, the decision was based upon circumstances intervening between the date of the contract and the time when an action was commenced to avoid it; or, finally, that the validity of the transaction was questioned by a third party.

From an examination of the authorities cited on behalf of appellee, we are convinced that as applied to the facts of the case at bar, namely, a consideration of the relationship of the directors purchasing to the bank at the time they made this purchase, the rule contended for by his counsel has not been relaxed in the slightest degree. In 1 Perry, Trusts (4th Ed.) § 207, it is said: "The directors of corporations are trustees and agents of the shareholders and of the corporation, and the same rules are applied to the contracts of directors with the corporation as are applied to the dealings of other parties holding a fiduciary relation to each other." In the same section, in discussing contracts of trustees with the corporation, it is said: "Contracts of trustees are of two classes. One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void, from the fact that no man can contract with himself." Cook, Stock, Stockh. Corp. Law, § 653, says: "The law is well settled that a director's purchase of property from a corporation is voidable, at the option of the corporation, even though the directors paid fully as much as or more than the property is worth." Many quotations of a similar character from the text writers and the opinions might be made. The reason why the rule obtains as between trustees and cestui que trust is that a person cannot be a purchaser of property, and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty, "and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle." Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482. This prohibitory rule was adopted to prevent fraud and remove the temptations which might be offered in case a trustee was himself permitted to purchase the subject-matter of his trust. If persons occupying a fiduciary relation should be per-

mitted to take advantage of knowledge acquired in that capacity, it is easy to understand that self-interest might prompt them to conceal their information, and not to exercise it for the benefit of persons relying upon their integrity. Again, if this were not the rule, it is evident how difficult it would be for the cestui que trust to show actual fraud in order to avoid the transaction, or how comparatively easy it might be for the trustee to show the bona fides of the transaction, when in fact, if the truth were known, it was tainted with fraud. The fact that the number of corporations has rapidly increased within the past few years, and a large volume of the business of the country is now carried on in this way, is no reason why the strict rule, as between trustees and cestui que trust, as applied to the facts in this case, should be modified in any particular. On the contrary, the very fact that a large amount of capital is invested in corporations; that shareholders are scattered, who must depend entirely upon the integrity of the directors; that the latter are the managers, and familiar with its assets, their values, and the opportunities which the corporation may have to make profits in certain directions,—demand that the rule should be enforced with all its rigor; otherwise, the opportunities to commit frauds through channels which the policy of the law requires shall remain closed would be augmented, because of the increased relations of trustee and cestui que trust. Any deviation from this doctrine would result in placing the affairs of a corporation practically at the mercy of the few who happened to be selected as its directors. They could speculate with its assets with impunity, and in many instances would be able to render it impossible for their beneficiaries to establish that they had been guilty of any breach of trust in so doing. As clearly supporting the views above expressed, the following authorities are cited: 1 Perry, Trusts (4th Ed.) § 427; 2 Pom. Eq. Jur. §§ 957, 958; Mor. Priv. Corp. § 517; Story, Ag. (8th Ed.) §§ 210, 211; Story, Eq. Jur. § 322; 3 Thomp. Corp. § 4010; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Davoue v. Fanning, 2 Johns. Ch. 252; Iron Co. v. Sherman, 30 Barb. 553; Munson v. Railway Co. (N. Y. App.) 8 N. E. 355; Duncomb v. Railroad Co., 84 N. Y. 190; People v. Township Board of Overysel, 11 Mich. 222; Railway Co. v. Dewey, 14 Mich. 477; Cook v. Mill Co., 43 Wis. 433; Goodin v. Canal Co., 18 Ohio St. 169; Gerry v. Bank (Mont.) 47 Pac. 810; Higgins v. Lansingh, supra; Underh. Trusts (Am. Ed.) 325; Stanley v. Luse (Or.) 58 Pac. 75; Schetter v. Improvement Co. (Or.) 24 Pac. 25. Applying these principles and reasons, it is clear that the purchase of the stock in question cannot be upheld, even though the defendants were able to show that the transaction was entirely free from fraud, was entered into in good faith by all concerned, and was in fact for the interest of the bank. The stock belonged to the bank; none of the shareholders,

except the directors participating in the transaction, were consulted regarding its sale; part of the directors attempted to sell to others; and a stockholder attacks the validity of the contract thus made.

On behalf of defendants it is also urged that the bank held the mining stock as collateral security for the payment of its indebtedness against the Agassiz Company; that it was prohibited from purchasing such stock, and, even if it was the owner, it could not hold it for a longer period than six months, if it could realize the actual cost, which in this instance was the amount of the indebtedness of the Agassiz Company. It certainly was the owner of this stock. The inception of the transaction by which it became the owner was a loan to the Agassiz Company. The latter made an assignment for the benefit of its creditors. The assignee sold the property to the defendant Hendrie, as trustee, for the benefit of the creditors. Later the Wolfstone Company purchased the property, issuing in payment therefor shares of its capital stock to Hendrie as trustee. Under this arrangement the stock in question was held by the trustee for the benefit of the bank. That this made it the owner of such stock is beyond dispute. It became such by the transfer of the property of the Agassiz Company, in which it was interested as a creditor of the latter. Whether the transaction satisfied the indebtedness of the Agassiz Company in whole or in part, or how the bank may have treated the matter in this respect, is immaterial in this suit. Such question might properly have been raised by the Agassiz Company in the event the bank was attempting to enforce its claim against this company on account of the original loan. The act of congress under which the bank was organized prohibits national banks from dealing in the stocks of other incorporated companies, but does permit them to take such stock when pledged as collateral for a loan, or in compromise of a pre-existing indebtedness. The provision relative to real estate, except such as the bank may hold for its immediate accommodation, in which to transact its business, is similar. Being the owner of an interest in the mining property assigned by the Agassiz Company, it had a right, by virtue of its incidental powers, to exchange this property for any other species which it might think was more desirable. Concede, however, that under its charter it had no authority to become the owner of this stock; that cannot affect this transaction. It was in fact such owner, and, if its directors had violated the law by making the exchange they did, they would not be justified in dealing with this stock in any manner different from that required if the transaction had in all respects been regular. It is asserted that under the act of congress relative to national banks, and the laws of this state, the bank could not hold the stock, beyond a specified period, if it was possible to

realize its actual cost. Concede this is a correct proposition; it cannot avail the defendants. In disposing of property which, under the laws governing banking corporations, it is the duty of such concerns to convert into money, the same conditions under which the purchase of such property may be made by directors applies as in other cases. If it is the duty of the directors to make such sale, this is a circumstance which might have been given great weight in determining the bona fides of the transaction, if they had made the purchase from the stockholders instead of dealing with the directors only.

3. In his complaint, plaintiff pleaded facts from which it appeared that the action was brought within three years after the date of the discovery of the frauds charged. An issue having been made upon this question, it becomes necessary to determine which section of our statute of limitations applies. Section 2911, Mills' Ann. St., provides: "Bills for relief on the ground of fraud shall be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards." Section 2912, *Id.*, reads: "Bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after." It is conceded that the action was brought within five years after the purchase was consummated. In the abstract, section 2911, *supra*, imposes a limitation within which actions based upon fraud must be commenced. Section 2912, *supra*, limits the time within which actions based upon the existence of a trust must be instituted. There is no other provision limiting the time within which this action should have been commenced, unless it is section 2911, *supra*. These two sections must be construed together, and when so read it is evident that, where the relation of trustee and cestui que trust exists, it was the intention of the legislature to give the latter the right to bring an action against the former which involved a trust at any time within five years after his right to do so accrued; but in other cases based upon fraud, where the subject-matter of the action did not involve a trust, the action must be brought within three years. In brief, the former section applies to frauds perpetrated by those not bearing a fiduciary relation to the party defrauded; the latter, to cases where the trust relation exists between the parties to the action. *Wilson v. Brookshire* (Ind. Sup.) 25 N. E. 131, 9 L. R. A. 792.

4. After the court announced its judgment on the motion for an interlocutory decree, the defendants, except the bank and the mining company, tendered an amendment to their answers, which was refused. These defendants cannot complain of this action of the trial court, for two reasons: (1) For reasons already given, these answers did not

present any defense. (2) They were tendered too late. A defendant against whom a motion for judgment on the pleadings is interposed is not entitled to amend his answer as of course after the court has announced a judgment adverse to him upon such motion. The defendants should at least have made a showing in support of their application to amend their answers. Section 75, Code. This they did not do.

5. The foregoing disposes of the contention of the defendant Morgan, as administrator, that he should have been allowed to plead, except as to the questions raised by his answer that he was a defendant in his administrative capacity, while the others appeared individually, and that a part of the stock in controversy had been disposed of by deceased prior to the time this suit was commenced. This defendant appeared by counsel and participated in the presentation of the motion for the interlocutory decree. If he desired to amend his answer, he should have applied for leave so to do at this time or before. The action commenced against deceased did not abate by reason of his death. It became the duty of the administrator to defend. Under our Code (section 15) he was properly made a party defendant. The misjoinder which may be taken advantage of by demurrer if it appears upon the face of the complaint, or by answer if not, does not apply to cases where an administrator is substituted in place of a deceased defendant. The original answer filed by deceased asserted that a part of his stock had been sold or pledged. To whatever extent this plea constituted a defense, it could be asserted under the original answer of deceased as fully as that tendered by the administrator, upon the trial of the questions remaining undisposed of after the interlocutory decree was ordered. The title to the stock was still in Hendrie, trustee, and, if the parties purchasing did not see fit to make a defense, the administrator could not make one for them.

6. The administrator being a proper party defendant, it necessarily follows that a judgment could be pronounced against him in his representative capacity.

One further question is presented for determination, namely, could a judgment properly be entered against Mrs. Raymond; she having denied that she purchased her shares of stock with notice of the facts which rendered the purchase by her vendor illegal? She only purchased the equitable title, for that was the only title vested in her husband. One who purchases an imperfect or inchoate title must stand or fall by the title of his vendor. *Sergeant v. Ingersoll*, 7 Pa. St. 340; *Shirras v. Calg*, 7 Cranch, 35, 3 L. Ed. 260; *Wade*, Notice, § 18.

This disposes of all the questions presented by counsel for defendants, and, finding no error in the record, the judgment of the district court must be affirmed, and it is so ordered. Affirmed.

On Petition for Rehearing.

(Dec. 17, 1900.)

PER CURIAM. On the part of the appellant administrator it is insisted that he could not be joined with his co-defendants, for the reason that an administrator cannot be joined with other defendants who are sued in their individual capacity. We think this contention was fully answered in the main opinion. Another reason, however, exists why this appellant is precluded from raising this question at this time. He was duly substituted defendant in his representative capacity. Thereafter, on March 2, 1898, the record recited, under the caption, "*King v. Morgan, Administrator, et al.*," that the cause was heard on the motion of plaintiff for an interlocutory decree, and that the parties to the action appeared by their respective attorneys. This certainly indicates that the administrator was present by counsel. The following day, according to the record, the motion was sustained, and an order entered that a decree be prepared accordingly. March 10, 1898, he applied for leave to answer the complaint. The application was taken under advisement, and denied April 6th. No rule had been entered requiring him to plead, but appearing and participating in the argument on a motion for a judgment on the pleadings must be regarded not only a waiver on his part to plead, but a waiver of the right to raise the question of misjoinder. In the original opinion an expression was used which might indicate that the application of the administrator was for leave to file an amended answer. In a sense, this is not correct; and yet the answer he asked leave to file, though the first tendered in his representative capacity, was in fact an amendment to the answer theretofore filed by Samuel B. Morgan, deceased. This application was before the interlocutory decree, in its details, was entered, but after it had been ordered. It came too late.

The objection to the judgment because it is joint is not tenable. The interlocutory decree, if objectionable in this respect, is cured by the final decree, which is the controlling one. In the latter the judgment, so far as it affects the administrator, is limited to a specific sum, the same as against the other defendants.

On behalf of the other appellants it is suggested that, according to the opinion, they stand charged with having committed a gross fraud. All questions of fraud in fact, of a character involving moral turpitude, are eliminated from the case. The averments of the complaint on this subject were denied. So far as the decision of the main question is concerned (i. e. the validity of the transaction), it is based entirely upon the proposition that the relation of these appellants to the bank was such that the law inhibited the purchase by them of the subject-matter of controversy.

It is also urged that certain of the directors of the bank, who acted on its behalf in making the sale of the mining stock in question, should not be permitted to participate in any proceeds realized from such stock by the bank, because they themselves were guilty of a wrong, and that the cause should be remanded, with directions to ascertain who are the innocent stockholders, and a decree entered that they alone are entitled to participate in the fruits of the judgment. Without indicating any opinion on the question of law suggested, it is sufficient to say that this order cannot be made, for several reasons: This proposition was not advanced in the original hearing, and cannot be urged on rehearing. *City of Durango v. Chapman*, 60 Pac. 635, 27 Colo. —; *Orman v. Ryan*, 25 Colo. 383, 55 Pac. 168. The object of the action is not to distribute the proceeds realized from the stock among the shareholders of the bank. The directors in question are not parties to this action. The petition for rehearing is denied. Petition denied.

(15 Colo. App. 479)

PATTEN v. AMERICAN NAT. BANK OF DENVER.

(Court of Appeals of Colorado. June 11, 1900.)

INTEREST—MATURITY OF DEBT—INABILITY TO MAKE DEMAND.

The temporary suspension of a bank does not excuse demand by a depositor, so as to mature his accounts and permit recovery of interest, under *Mills' Ann. St. § 2252* (Laws 1889, p. 206, § 2), authorizing such recovery on money due on account from maturity.

Appeal from district court, Arapahoe county.

Action by George W. Patten against the American National Bank of Denver. From a judgment for defendant; plaintiff appeals. Affirmed.

Henry B. Babb, for appellant. T. J. O'Donnell and Milton Smith, for appellee.

WILSON, J. This is an appeal from a judgment on the pleadings in favor of the defendant bank. From these pleadings it appears that on the 22d day of April, 1896, the comptroller of the currency of the United States suspended the current business of the defendant bank, and appointed a temporary receiver, who thereupon took possession of defendant's books, records, and assets; that said temporary receivership and suspension of business continued to the 8th day of January 1897, when the defendant, upon compliance with certain requirements of the comptroller, was permitted to, and did, resume its general banking business, and has ever since continued therein. It further appears that at the time of suspension the plaintiff had about \$700 on general deposit in the bank, subject to check; that no demand therefor was made until the bank resumed business, on January 8, 1897, when

he demanded, through his agent, payment of the principal, with 8 per cent. interest thereon from the time when the suspension of business first occurred. The principal was paid, but the payment of interest was refused. Thereupon he commenced this suit therefor. It has been repeatedly held in this jurisdiction that interest in Colorado is a creature of statute, and regulated thereby, and that, in the absence of contracts to pay the same, it is only recoverable in the cases specifically enumerated in the statute. *Railroad Co. v. Conway*, 8 Colo. 16, 5 Pac. 142; *De Remer v. Parker*, 19 Colo. 246, 34 Pac. 980; *Pettit v. Thalheimer*, 3 Colo. App. 355, 33 Pac. 277. The right, therefore, to recover interest in this state is purely a legal, and in no sense an equitable, one. The section of the interest statute bearing upon the question at issue is as follows: "Creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of eight per centum per annum, for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing, or on any judgment recovered before any court or magistrate authorized to enter up the same within this state, from the day of entering up said judgment until satisfaction thereof be made; also, on money due on mutual settlement of accounts from the date of such settlement on money due on account from the date when the same became due, and on money received to the use of another and detained without the owner's knowledge." Laws 1889, p. 206, § 2; *Mills' Ann. St. § 2252*. If recoverable at all in this case, it is only under that provision of the statute which provides for its allowance on "money due on account from the date when the same became due." All authorities agree that in cases of general deposits in a bank like the one under consideration, unless there be some agreement or usage to the contrary,—and none is pleaded in the case at bar,—the undertaking of the bank is only to repay upon demand. Such an account, therefore, does not become due until demand is made for it, and the bank is not in default, or liable to respond in damages, until such demand and refusal. *Girard Bank v. Bank of Penn Tp.*, 39 Pa. St. 92; *Munnerlyn v. Bank*, 88 Ga. 333, 14 S. E. 554. Hence, under this general rule, the plaintiff was not entitled to receive interest on his deposit, unless the circumstances were such as to legally excuse him from making a demand prior to the time when he did make it. This is the contention of the plaintiff, and presents for determination the sole issue in the case. His argument is that, since a temporary receiver appointed by the government had taken possession of the assets of the bank, a demand would have been unavailing and futile, and that the law does not require a mere idle ceremony. Only one authority directly in point has been cited by counsel on either side, and this is against the posi-

tion of plaintiff. *Sickles v. Herold*, 149 N. Y. 335, 43 N. E. 852.

We think the better reason, especially considering the special provisions of our statute and the decisions thereon of our supreme court, is in favor of the doctrine laid down in this case. It would seem that our statute, because it imposes upon the debtor an additional burden in the way of damages for the withholding of money after it becomes due on account, should be strictly construed. If there be any doubt about the maturity of the debt, this doubt should not, in reason and justice, be resolved against the debtor. If any act was required on the part of the creditor in order to bring about the maturity of the indebtedness, we do not believe he should be excused from the doing of this act merely upon the belief—however well grounded it might be—that the debtor could not satisfy the debt. The object of a demand is not only to secure payment of the account, if possible, but to bring about the maturity of the indebtedness, and thereafter, if payment is refused, to secure the additional right under the law to demand and receive interest—an additional sum of money—as damages for withholding payment. The same rule should apply in the case of a bank as in that of an individual, and it certainly could not reasonably be claimed that in the latter case a demand would be excused on the ground that the debtor was, or was believed to be, unable to pay if demand should be made. It will be observed that in this case the appointment of a receiver was only temporary. There was no allegation of insolvency. On the contrary, the reasonable presumptions arising from the facts stated are to the contrary. It is not to be supposed that the government would have permitted a resumption of business, and that the bank would have continued in business, as alleged, if it had been insolvent. While, as we have said, the right to recover interest in this state is purely a statutory, legal right, and not an equitable one, still, in the determination of whether a given state of facts brings the case within the statute, the results of such a construction might be properly considered. If the doctrine urged by plaintiff is correct, then all the deposits of a bank would, without demand, bear interest, no matter how temporary or of how short a duration the suspension may be. The suspension might be for only a few days or weeks, and the deposits amount to millions of dollars. In such case, the loss to the individual depositor would be trifling, if any,—to many, none at all,—but the burden imposed upon the stockholders of the bank would be unreasonable, inequitable, and onerous in the extreme. The demand was not impossible, because the entity of the corporation was not destroyed by the appointment and possession of the temporary receiver. The proper officers of the bank could still have been reached for the purposes of making a demand. We see no reason, either, why a

demand could not have been made upon the receiver, if he were in charge as alleged in the complaint. The authorities cited by counsel for plaintiff, and bearing upon the principles involved in the case, are all in cases where the bank was insolvent, and, as such, had made an assignment, or had been taken possession of by the proper parties for the purpose of liquidation. We can see some reason why a demand by a depositor in such case should not be necessary to bring about the maturity of his debt. By operation of law in such case, it might be said all the indebtedness of a bank matured upon the coming about of such a state of affairs. The object of the assignment, and of the appointment of a receiver, would be for the express purpose of winding up the affairs of the bank and discharging all of its indebtedness,—to the extent, at least, its assets would allow. This, however, is not the case presented here, and we express no opinion upon it. If a demand should be excused on the assumption that the debtor would be unable to pay, why might it not, with equal propriety, be assumed that, by a failure to demand, the creditor elected that he would not declare the debt to be due, and that he waived any right to demand interest? We do not say that in no case in this state could a debt due upon demand mature until a demand is specifically made, but we do say that the circumstances of this case, as presented by the pleadings, were not sufficient, under our statute and under the general tenor and spirit of its judicial interpretation by our appellate courts, to have excused a demand by plaintiff, and entitle him to receive interest upon his deposit account as claimed by him. For these reasons, the judgment will be affirmed. Affirmed.

On Rehearing.

(Jan. 14, 1901.)

The relation between bank and depositor is that of debtor and creditor, the debt being payable on demand. This relation exists only during the will and pleasure of either party, and, when the creditor desires to terminate it, he must make a demand upon the bank for payment. This is, in effect, a notice of his desire and intention to terminate the relation, and when given at once brings about the maturity of the debt. Upon refusal by the debtor to pay after such notice, the right is then conferred upon the creditor for the first time to maintain an action against the debtor for the recovery of the debt, and, under express provision of the statute, to recover interest thereon from the time of such notice of intention and demand of payment. When the circumstances are such, as is contended in the present case, that the demand would be unavailing because of the inability of the debtor to pay, and would therefore be excused, there still remains the necessity that the creditor should desire and intend to terminate the relation of debtor and creditor by

bringing about the maturity of the debt before interest should begin to run. If he does not desire his money, nor wish to terminate the relation of debtor and creditor, nor effect the maturity of the debt, we know of no law which would force him to do so. Such desire and intention being essential in order to constitute the maturity of the debt, it would seem reasonable that some notice thereof, of some kind or character, should be given to the debtor, so as to fix the time when interest should begin to run, if for no other reason. It could hardly be contended that, because a temporary embarrassment disabled a debtor from making payment, a creditor could come in at any time afterwards, and claim interest from the time of such disability, solely because of such temporary disability. It is a matter of common knowledge that, in the history of the large majority of banks and of business men, there are occasions when, if suddenly called upon to meet their demand obligations, they would be unable to do so. To hold that in such case the law steps in, and says to the debtor, without any act, application, or intervention of the creditor, or without any evidence of an intention on his part to invoke a privilege which the law gives him, "All of your demand obligations are now matured, and shall bear interest henceforth and until paid, if the creditor should at any time hereafter, no matter how remote, demand it," would be an unconscionable hardship, as well as a doctrine destitute of all support, either in reason or legal authority. The creditor may not desire nor need his money, may feel amply secure, and have no intention of terminating the relation of debtor and creditor; but the law, in its kindly solicitude for his interests, says: "You may need it at some future time, and then you may demand and receive interest upon the debt from the time when, if you had desired your money and made a demand for it, the debtor would have been unable to pay. This, too, although the debtor never knew or had reason to suspect that you intended to exact this penalty, and although many times after his temporary embarrassment he could have paid if you had manifested the slightest desire for payment." This occasion might arise, if the principle contended for by the plaintiff were acknowledged. We do not believe, however, that a doctrine which will permit of such results ever was, or ought to be, the law. In our opinion, the only reasonable construction of the law, under like circumstances to the case at bar, is that even though a debtor may be unable to pay, and a demand therefor be excusable to that extent, still there must be some notice to him of some kind, either by the institution of a suit or otherwise, of the creditor's intention to terminate the relation of debtor and creditor by declaring the maturity of the debt, or some act of the creditor evidencing such desire and intention, before he can be allowed to recover interest.

In the case at bar there was no pretense of anything of the kind. During nearly nine months of the alleged temporary inability of the bank to pay, the plaintiff neither commenced suit, nor gave notice in any manner of a desire for payment to any officer of the bank, or to the temporary receiver or custodian of its assets. When he did give such notice for the first time, on January 8, 1897, by the presentation of a check for the full amount of his deposit, the debt was promptly paid. There is no allegation in the complaint that plaintiff desired payment of his deposit at any time before it was paid, or that he would have so desired or requested before such time had the bank been transacting its business as usual. After careful consideration of the able arguments presented by counsel on rehearing, we see no reason to change our views, and the judgment will be affirmed. Affirmed.

(62 Kan. 426)

In re ROBINSON'S FIRST ADDITION TO CITY OF HUTCHINSON.

(Supreme Court of Kansas. Jan. 5, 1901.)

MUNICIPAL CORPORATIONS—LIMITS—EXCLUSION OF PROPERTY—FINDING OF JURY—CONCLUSIVENESS.

Where the owner of a quarter section of farming land petitioned that it be excluded from the limits of a city under Laws 1897, c. 267, providing that if, on the hearing of a petition therefor, the court be satisfied that no public or private right will be injured, it shall order the exclusion of such lands, it was error to refuse to order such exclusion on the ground that rights of bondholders of the city would be injured, the jury, authorized by section 6 of the chapter, having found that no private rights would be injured or endangered thereby.

Error from district court, Reno county; M. P. Simpson, Judge.

Petition by J. W. Burns for the vacation of the streets and alleys of an addition to the city of Hutchinson, and for the exclusion of such addition from the corporate boundaries of the city. From a judgment vacating the streets and alleys, but refusing to exclude the additions from the limits of the city, petitioner brings error. Reversed.

H. Whiteside and W. G. Fairchild, for plaintiff in error. W. H. Lewis, for defendant in error.

PER CURIAM. J. W. Burns filed a petition under chapter 267, Laws 1897, praying for the vacation of the streets and alleys of Robinson's First addition to the city of Hutchinson, and for the exclusion of the addition from the corporate boundaries of the city. The tract in question embraced an entire quarter section. The questions of fact involved were submitted to a jury. Such of these questions as are necessary to quote, with answers thereto, were as follows: "Q. Is the bonded indebtedness of the city of Hutchinson at the present time the sum of \$257,500? A. About \$200,000. Q. How much

of said bonded debt was issued by said city while said addition was a part thereof? A. \$196,500. Q. Will the assessed value of the taxable property of the city be reduced by exclusion of said addition from the city? A. Yes. Q. Is not the object of the owner of this addition, in asking its exclusion from the city, to escape city taxation? A. Yes. Q. Has any party but the plaintiff any private rights in the land in controversy that would be affected by the vacation of said plat in controversy and excluding the same from the boundaries of the city of Hutchinson? A. No. Q. Does the public use any part of the property sought to be vacated for any purpose? A. No. Q. Is the land in controversy, sought to be vacated, of any value except for farming purposes? A. No. Q. Is the land sought to be vacated used other than for farming purposes? A. No. Q. Is not the land sought to be vacated on the outside of and away from any of the resident or business portion of the city of Hutchinson? A. Yes. Q. Will the public suffer any loss or inconvenience other than the loss to the city of taxes? A. No. Q. Has the city ever worked or used any of the streets and alleys sought to be vacated? A. No. Q. Has the city ever taken and asserted any possession over the streets and alleys in Robinson's First addition? A. No. Q. Is the public now using any of the streets and alleys of Robinson's First addition? A. No. Q. Is not the prospect of the public ever using any of the streets and alleys of Robinson's First addition for travel remote and uncertain? A. Yes. Q. Will there be any public right, as defined by the court, injured or endangered by the vacation of Robinson's First addition? A. No. Q. Will there be any public right injured or endangered except the one of taxes which may be levied by the excluding said land from the corporate limits of the city of Hutchinson? A. No. Q. Has any person other than the petitioner any special interest that would be directly injured by the vacation of Robinson's addition and its streets and alleys? A. No. Q. Is there a single resident or business house in said city outside and beyond said addition? A. No. Q. Does any person in said city live outside and beyond said addition? A. No." At the close of the trial the court concluded from the findings of the jury that "the rights of the bondholders of the city would be injured if the premises were excluded from the city, and also that the ability of the city to pay and sell its bonds would be injured"; wherefore it refused to exclude the land from the limits of the city, but ordered that the streets, alleys, etc., be vacated. Error has been prosecuted to this court.

We have a right to complain of counsel on both sides for their meager presentation of the law. The statute provides that, "If the court be satisfied that no public or private right will be injured or endangered, it shall order such corporate boundaries to be chan-

ged by the exclusion of such lands therefrom;" and also it declares that, "The terms 'public loss and inconvenience,' or 'public right,' shall not be construed to extend to the taxes which may be levied upon the land vacated or excluded." So far, then, as concerns the loss of taxation to the city by the exclusion of the tract from its boundaries, the statute decrees it to be remediless; but the court below rested its judgment upon the ground that the private rights of the holders of the city's bonds would be injured. However, the question whether the rights of the bondholders would be injured, and, if they would, whether they are of that class denominated in the statute "private rights," and which the statute seeks to guard, has been discussed by counsel only in the briefest and most general way, and without citation to authorities. In the multiplicity of our labors we cannot find time to brief cases for litigants. We require counsel to do that. Nevertheless, in the best thought we have been able to give to the question, our judgment is that the court below was in error. Section 6 of the statute declares: "Any party to any proceeding herein shall have the right to have any matters of fact in controversy in said proceedings submitted to the determination of a jury in the district court of the county where the property is situate." We construe this statute to mean that the findings of the jury are controlling upon the court, and we think that the implication from the findings made is that no private right would be injured or endangered by the exclusion of the tract. Whether that be so or not, it is difficult to perceive how the exclusion of a quarter section of farming land from the boundaries of a city like Hutchinson would injure or endanger the bondholders' security. The judgment of the court below is reversed, with orders to grant the prayer of the petitioner.

(62 Kan. 867)

FENAUGHTY et al. v. LOOB et al.

(Supreme Court of Kansas. Jan. 5, 1901.)

APPEAL AND ERROR—INCOMPLETE TRANSCRIPT—SPECIAL JUDGE—APPOINTMENT—CASE-MADE—SERVICE—ADDITIONAL TIME—ORDERS AND MOTIONS—DISMISSAL OF APPEAL.

Where the pages of a case-made designated as a transcript of the record did not contain the order providing for the appointment of the special judge who tried the case, or motions and orders allowing additional time for serving a case-made, the appeal will be dismissed because of the incompleteness of the transcript.

Error from district court, Marshall county; F. W. Sturges, Judge pro tem.

Action by Sarah Fenaughty and another against Patrick Loob and another. From a judgment in favor of the latter, the former bring error. Dismissed.

M. W. Terry, T. J. Madden, E. A. Berry, and Gregg & Gregg, for plaintiffs in error. W. W. Redmond and C. T. Mann, for defendants in error.

PER CURIAM. Within the authority of *Columbia Mfg. Co. v. Stoddard Mfg. Co.*, 61 Kan. 640, 60 Pac. 320, the case-made herein was not settled by a judge having authority to settle it, and hence it cannot be considered. The attempt to convert a part of the case-made into a transcript by the attached certificate certifying that certain pages of the case-made contain a transcript of the record of the cause is not a success. An examination of the document presented shows that the designated pages certified as a transcript do not contain all of the record of the proceedings in the case. The order providing for the calling of a special judge and the election of a judge pro tem. to try the cause is not included. Neither are the motions and orders of the court granting additional time in which to serve a case-made, and, instead of these entries, which are properly a part of the record, and should have been included in any transcript made of the same, there are inserted on the designated pages matters which cannot be regarded as a part of the record, and cannot be properly included in any transcript of the same. It is important that the selection or appointment of the pro tem. judge should be affirmatively shown by the record. The transcript being incomplete, there is nothing before the court for consideration, and therefore the proceeding will be dismissed.

(62 Kan. 422)

In re MURPHY.

(Supreme Court of Kansas. Jan. 5, 1901.)

INDUSTRIAL HOME—INCORRIGIBLE INMATE—TRANSFER TO PENITENTIARY.

1. Under the authority conferred by section 14 of chapter 134 of the General Statutes of 1897, the board of managers of the industrial reformatory at Hutchinson may lawfully transfer an incorrigible prisoner from that institution to the penitentiary.

2. The exercise of such power is not a judicial act.

—(Syllabus by the Court.)

Application of Edward Murphy for a writ of habeas corpus. Denied.

O. C. Phillips, for petitioner. A. A. Godard and J. S. West, for respondent.

SMITH, J. This application is based on the following agreed facts: The petitioner was duly convicted of grand larceny in the district court of Leavenworth county, Kan. On the 2d day of February, 1899, he was sentenced by said court to the state industrial reformatory at Hutchinson, Kan., in accordance with section 11 of chapter 134 of the General Statutes of 1897. Thereafter, on the 14th day of September, 1900, the board of managers of said reformatory, in accordance with section 14 of chapter 134 of the General Statutes of 1897, made the following order: "At a meeting of the board of managers of the Kansas state industrial reformatory, held at said reformatory on the 14th day of Sep-

tember, 1900, the following resolution was adopted: 'Whereas, one Edward Murphy, of Leavenworth, Kansas, was sentenced to this institution on the 2d day of February, 1899, by the district court of said county, for the crime of grand larceny; and whereas, the said Edward Murphy is apparently incorrigible, and the board of managers, believing the presence of the said Murphy in this reformatory to be seriously detrimental to the welfare of the institution, have this day, and in accordance with section 14 of chapter 134 of the General Statutes of 1897, ordered the superintendent, J. S. Simmons, to take the said Edward Murphy to the penitentiary at Lansing, Kansas, and turn him over to the warden, there to be dealt with according to law.' In witness whereof, I, J. W. Lingenfelter, secretary of said board, have hereunto set my hand and affixed the seal of said reformatory at Hutchinson, Kansas, this 14th day of September, 1900. [Seal.] J. W. Lingenfelter, Sec." Thereafter the said J. S. Simmons, superintendent of said reformatory, by virtue of the aforesaid order, took the petitioner to the Kansas state penitentiary at Lansing, Kan., and turned him over to J. B. Tomlinson, the warden. Edward Murphy is now there confined under the charge of said J. B. Tomlinson.

The prisoner must be denied a discharge from his imprisonment. When he committed the felony for which he was convicted, and when he was tried and sentenced therefor, the laws in force regulating his punishment and the terms and conditions of the same entered into and became a part of the record of the sentence. *State v. Page*, 60 Kan. 664, 57 Pac. 514. The court might legally, in the first instance, have sentenced the prisoner to the punishment he is now enduring, and would probably have done so had his incorrigibility appeared as it did to the board of managers of the reformatory. Under the decision in *State v. Clark*, 60 Kan. 450, 56 Pac. 767, a person convicted of grand larceny, and sentenced to the reformatory, is deemed infamous to the same degree as if he had been sentenced to the penitentiary. In *State v. Page*, supra, the court said: "It is undeniably true that the whole power to provide for the punishment of offenders belongs to the legislature. It alone has the power to define offenses and affix punishments. Its authority in these respects is exclusive and supreme. Courts are empowered only to ascertain whether an offense has been committed, and, if so, to assess punishment, within the terms of the law, for its commission. It cannot be doubted that the legislature, in virtue of its exclusive and sovereign authority over such matters, may affix conditions to the punishment it ordains, and, among other things, may set to it limits of duration, terminable upon conditions. To these conditions the courts, in assessing punishment, must conform. Into every sentence of conviction the terms and conditions which beforehand the legislature

had prescribed enter as much as though they were written into, and made a formal part of, the record of sentence. Into the before-quoted sentence of conviction the law wrote, as provisos and as constituent parts of it, sections 11 and 20 of the act establishing the state industrial reformatory. *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. It is not, therefore, an interference with judicial authority, nor an assumption of judicial power, for the supervisors of penal institutions to administer the very conditions of punishment or clemency which the law prescribed and itself wrote into the judge's sentence. Where conditions of punishment are beforehand prescribed, and form constituent part of the sentence of conviction, it is not an assumption of judicial power for an administrative officer, acting within the law and the terms of the sentence, to take upon himself the task of ascertaining whether the conditions have been observed." This court has already held that the reformatory is a penal institution. The order made by the board was merely done in administration of such institution, and the transfer was an act which was within the contemplation of the law under which the prisoner was sentenced, and inhered in and became a part of the sentence. The law authorizes the board of managers of the reformatory to employ prisoners sent there at "such labor as will best contribute to their support and reformation." In this case the prisoner could have been detained in the reformatory during the maximum time to which he might have been sentenced to the penitentiary, and required to work during the whole of that period. His situation in the penitentiary differs little from what it would have been in the reformatory, except that in the latter discretion is lodged in the board of managers to discharge him before the expiration of the maximum time to which he might have been sentenced to the penitentiary. It will be noted that under the last clause of section 14 of said chapter 134 of the General Statutes of 1897 it is provided that "such managers may, by written requisition, require the return to the reformatory of any person who has been transferred." It would seem from this that the act of transferring the prisoner to the penitentiary was merely disciplinary in character. It will be presumed that when the prisoner becomes tractable the board of managers, not having lost control over him, will require his return to the reformatory. A claim of illegality in his present detention cannot be founded on the fact that, if he had remained in the reformatory, the discretion of its managers might have been exercised to reduce the period of his imprisonment below the maximum. The happening of such contingency is speculative and uncertain.

The argument that the board of managers, in ordering his transfer to the penitentiary, exercised judicial powers, is not sound. The point made was decided against the peti-

tioner's contention in *State v. Page*, supra. The case of *In re Dumford*, 7 Kan. App. 89, 53 Pac. 92, relied on by counsel for the prisoner, was decided before the case of *State v. Clark*, supra, and proceeded on the theory that a sentence to and confinement in the reformatory did not render the prisoner infamous. The writ will be denied, and the prisoner remanded. All the justices concurring.

(62 Kan. 358)

IRETON v. IRETON et al.

(Supreme Court of Kansas. Jan. 5, 1901.)

NEW TRIAL—EVIDENCE—APPEAL.

1. Upon an application for a new trial because the evidence does not sustain the verdict, it is the duty of the trial court, though not of an appellate court, to hear the evidence, although conflicting; and if the verdict is clearly against the weight of the evidence, and does not meet the approval of the court, it should be set aside.

2. Where a new trial is granted upon a motion alleging several grounds, and the trial court does not state upon what particular ground the motion was sustained, the supreme court will sustain the order if it can be sustained upon any one or more of the grounds assigned in the motion.

(Syllabus by the Court.)

Error from district court, Cowley county; W. T. McBride, Judge.

Action by Henry S. Ireton against Bridget Ireton and others. Judgment for plaintiff. From an order granting a new trial, he brings error. Affirmed.

Madden & Buckman, for plaintiff in error. Pollock & Lafferty, Jackson & Love, and Chas. W. Roberts, for defendants in error.

JOHNSTON, J. This was an action by Henry S. Ireton against Bridget Ireton and other heirs of John Ireton, deceased, to recover a tract of land in Cowley county, and also damages for withholding the possession of the same. The land was purchased by John Ireton, and occupied by him and his family until his death in 1893. Henry S. Ireton, a son of John Ireton by a former wife, claimed title to the property through a conveyance alleged to have been executed by his father and mother on September 4, 1874. He contended that the continued possession of his father was by virtue of a lease executed by him in 1890, giving his father the right of occupancy during his natural life. The contention of the widow and heirs of John Ireton was that the deed had never been delivered, and therefore never became effectual, and, further, that the occupancy of the premises by John Ireton and his family was not under the lease, but by virtue of ownership. The first trial resulted in a verdict in favor of the defendants, but for errors committed the judgment was reversed, and the cause remanded for further trial. *Ireton v. Ireton*, 59 Kan. 92, 52 Pac. 74. At the last trial the verdict of the jury was in favor of the plaintiff for the recovery of the

real estate, and the defendants filed a motion for a new trial, alleging seven different grounds for setting aside the verdict. Among these were that the verdict was not sustained by sufficient evidence and was contrary to law; irregularities in the proceedings of the jury; misconduct on the part of the jury; errors of law occurring on the trial of the case; the fact that the guardians of certain defendants who were minors were not made parties; newly-discovered evidence which could not be produced at the trial. The court sustained the motion setting aside the verdict, and granted a new trial, and of these rulings the plaintiff complains.

The plaintiff in error contends that the motion for a new trial was granted by the court upon the theory that it had erred in refusing to admit in testimony statements made by John Ireton in his lifetime as to the execution and delivery of the deed to his son; that the statements sought to be introduced did not accompany the execution of the conveyance or any act of possession, and therefore, under *Crawford v. Crawford*, 60 Kan. 126, 55 Pac. 842, it is contended that the court's original ruling in excluding the evidence was right, and that therefore error was committed in granting the new trial. The weakness of this contention is that the record does not show that a new trial was awarded upon this ground, nor does it disclose which of the seven different grounds alleged was the basis of the ruling. If it clearly appeared that the ruling rested upon, or, rather, raised, a pure, unmixed question of law, and that it was erroneously made, we would be warranted in reversing the order and in directing an entry of judgment on the verdict; but the record does not show, and the opposing parties do not concede, that the question comes to us in that form. It may have been granted because the court concluded that the evidence did not sustain the verdict. The granting or refusing of a new trial for that reason is so much in the discretion of the trial court that a reviewing court will be slow to interfere with an order which grants a new trial, and especially where the evidence is conflicting. Here the evidence on the main question is voluminous, and to some extent contradictory, and there is room for the inference that the verdict of the jury did not meet with the approval of the court. This court will not disturb a verdict if there is substantial testimony to sustain it, but a different rule applies to a trial court, which has equal opportunity with the jury to observe the manner of the witnesses, and to decide upon their credibility. Where a motion for a new trial is made for the reason that it is contrary to the evidence, it is the duty of the trial court to consider and weigh the evidence on which the verdict rests; and, if the verdict is contrary to the evidence, it should be set aside. It is true, the jurors are the judges of the credibility of witnesses and the triors of the facts, and that the trial

court will not, in doubtful cases, set up his own judgment against theirs, nor interfere with a verdict merely because his judgment inclines against theirs. But these considerations do not warrant him in abdication of the important function of supervising verdicts. If he is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, no duty is clearer than the granting of a new trial. In *McCreary v. Hart*, 39 Kan. 216, 17 Pac. 839, it is said that "where a verdict by the jury is founded on the testimony of a witness directly contradicted by another witness, and the trial court sets the verdict aside, the supreme court will not reverse the decision or order of the trial court granting a new trial." In *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518, it was decided that "a new trial ought always to be granted whenever, in the opinion of the trial court, the party asking for a new trial has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice." A much stronger case for reversal is required where a new trial has been granted by the district court than where one has been refused, and since the motion contains so many grounds, and the court did not state for what particular reason the motion was granted, it cannot be said that the court erred with reference to some pure, simple, unmixed question of law. *Field v. Kinnear*, 5 Kan. 233; *Atyeo v. Kelsey*, 13 Kan. 212; *Day v. Harris*, 23 Kan. 216; *Condell v. Bank*, Id. 597; *City of Sedan v. Church*, 29 Kan. 190; *Brown v. Railroad Co.*, Id. 186; *Mining Co. v. Stoop*, 56 Kan. 426, 43 Pac. 766. If the order of the court granting a new trial can be sustained upon any of the grounds alleged in the motion, this court is bound to sustain it. It follows that the order and judgment of the court must be affirmed. All the justices concurring.

(62 Kan. 412)

WILLIAMS et al. v. HUTCHINSON & S. RY. CO.

(Supreme Court of Kansas. Jan. 5, 1901.)

JUDGMENT—LIEN—EMINENT DOMAIN—COMPENSATION.

1. A judgment is a statutory lien, which may be modified or abolished by the legislature before rights become vested under it, and such a lien may be superseded by the statute authorizing the taking of land on condemnation proceedings for a right of way for a railroad on payment of just compensation to the owner; and, when proceedings are completed and the compensation paid, the railroad company will acquire an easement free from all judgment liens.

2. A judgment creditor is not an owner, within the meaning of the statutes relating to condemnation proceedings.

3. The condition of the prepayment of compensation which has been properly awarded may be waived by the owner, and when it has been waived, and the railroad company, relying on the waiver, proceeds to complete its railroad and expend large sums of money upon

the land so appropriated, the owner will be estopped to reclaim the land or maintain ejectment for its recovery.

(Syllabus by the Court.)

Error from district court, Reno county; M. P. Simpson, Judge.

Action by L. T. Williams and F. L. Martin against the Hutchinson & Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

D. H. Martin and Vandever & Martin, for plaintiffs in error. A. A. Hurd, O. J. Wood, and W. Littlefield, for defendant in error.

JOHNSTON, J. This was ejectment, brought by L. T. Williams and F. L. Martin to recover from the Hutchinson & Southern Railway Company a strip of land 100 feet wide through a farm in Reno county, and which has been occupied by the railway company as a right of way for its railroad since 1889. While Ben. Blanchard owned the land, and in April, 1888, a judgment was obtained against him, which became a lien thereon. An execution sale of the land to satisfy the judgment was made on March 6, 1894, to W. H. Crawford, who conveyed the land to F. L. Martin in August, 1894, and Martin in turn conveyed an undivided one-half interest in the same to L. T. Williams on July 26, 1898. On these proceedings and transfers Williams and Martin based their claim to the land in controversy. The railway company founds its right to the strip of land, which it has occupied as a right of way for the past 11 years, upon condemnation proceedings and the payment of the award to the owner of the land. The plaintiffs challenge the validity of the condemnation proceedings and of the easement acquired by the railway company. The proceedings to condemn the land were instituted May 16, 1889, and the commissioners awarded for the value of the land taken and damaged the sum of \$379.80; but the money so awarded was not paid to the county treasurer within 90 days after the filing of the report of the commissioners, nor until April 8, 1893. The delay in the payment of the award was occasioned by an agreement between the railway company and the owner of the land that payment need not be made until the owner demanded payment thereof.

The trial court, upon the facts presented, rightly held that ejectment could not be maintained, and gave judgment for the defendant. The judgment creditor had no title to or estate in the land when the condemnation proceedings were had; and, within the meaning of the statute regulating such proceedings, he was not an owner. *Railroad Co. v. Wilder*, 17 Kan. 239; *Goodrich v. Commissioners*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113; *Rand v. Railway Co.*, 50 Kan. 114, 31 Pac. 683; *Railroad Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105; *Railroad Co. v. Thayer*, 54 Kan. 259, 38 Pac. 266. Under the decisions cited, it was held that a mortgagee who had

a specific lien upon the land condemned was not an owner of the land, nor of an estate therein, and that railroad companies by condemnation proceedings obtained an easement free from the lien of the mortgage. A judgment is a statutory lien only, and it is within the power of the legislature to abolish the lien before rights become vested under it. It was held in *Watson v. Railroad Co.*, 47 N. Y. 157, that a provision causing a judgment lien which had not ripened into a title to be superseded by taking land under condemnation proceedings on payment of compensation to the owner of the land is valid, and that, when the proceedings are concluded and compensation paid to the owner, the company acquired the easement free from all judgment liens. *Gimbel v. Stolte*, 59 Ind. 446; *Lewis, Em. Dom.* § 325; *Mills, Em. Dom.* § 74. The payment of just compensation to the owner is a condition precedent to obtaining any easement in the land, and as against the owner the proceedings prescribed by statute must be valid. The proceedings in the present case appear to have been regular and sufficient, except that payment of the award was not made within the time prescribed by the statute. The condition of the prepayment of compensation, however, being for the benefit of the owner, he may waive it; and if he does expressly or by clear implication waive prepayment, or allow the damages to remain a debt, and the railroad company, relying on the waiver, proceeds to build its road and expend large sums of money upon the land, the owner is estopped to reclaim the land or to maintain ejectment for its recovery. In *Knapp v. McAuley*, 39 Vt. 275, it was held that "where the owner of land across which a railroad has been surveyed and located consents that the contractors of the road may proceed on the land before his damages are paid, and under an agreement that they shall be subsequently ascertained and paid, and the land is thereupon taken possession of by the railroad company and the road constructed over it, the title to the land passes, and the owner retains no lien upon it for his damages, but must look for payment to the party to whom he gave credit." *Association v. Jones*, 68 Ala. 48; 10 Am. & Eng. Enc. Law (2d Ed.) 1144. Under the authorities cited, it was competent for the owner to enter into an agreement waiving and postponing the payment of the award, and certainly, when the money was paid to and received by the owner, the condemnation proceedings were complete, and all question of title under the proceedings was set at rest. Payment had been made and accepted by the owner before the sale of the land upon execution, and the title of the railroad company was complete long before the purchaser at the execution sale obtained a title to the land. When the sale was made the railroad company had been in possession of the land for about five years, and had expended thousands of dollars in the construction of their road on the

strip in controversy. The owner of the land would be estopped to claim that the proceedings were void because the money was not paid within the time provided by statute, and those who had no title or interest in the land in controversy when the payment was made and title completed were certainly in no condition to maintain ejectment for a recovery of the land. Whatever rights the plaintiffs might have had as against the fund paid, they have no right to recover the land at this late day. For more than nine years before this proceeding was begun the railroad company had entered upon the land, constructed its road at great expense, and had continuously operated the same; and, under such circumstances, even an owner of the land, if no damages had been paid, would be regarded as having acquiesced therein, and would be restricted to a suit for damages. In our view, the condemnation proceedings were sufficient to give an easement to the railway company, and therefore the judgment in favor of the defendant must be affirmed. All the justices concurring.

(62 Kan. 416)

ATCHISON, T. & S. F. RY. CO. v. CONLON
et al.

(Supreme Court of Kansas. Jan. 5, 1901.)

WAY OF NECESSITY—LICENSEE—PRESCRIPTIVE RIGHT.

1. A grantor in a deed excepted from the land conveyed a 100-foot strip through the same theretofore taken by a railroad company under condemnation proceedings, by virtue of which the railroad corporation obtained title in fee. *Held*, that the grantee was not entitled to a way of necessity from one part of her land to another, divided by the strip so condemned.

2. A railroad company constructed a crossing over its track and ties, and put gates in its fences, for the benefit of the owner of land so situated, by whom the same were used in passing from one part of her farm to the other for more than 15 years. During that time the railroad company maintained said crossing and gates. *Held*, that the landowner was a mere licensee, and could not, by use of the crossing for the time stated, obtain a prescriptive right to the same.

(Syllabus by the Court.)

Error from court of appeals, Northern department, Eastern division.

Action by the Atchison, Topeka & Santa Fé Railway Company against Anna Conlon and others. Judgment for defendants was affirmed by the court of appeals, and plaintiff brings error. Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. C. J. Conlon, for defendants in error.

SMITH, J. This was a suit brought by the railway company to enjoin the owner of a farm through which its road runs from removing, breaking down, and opening the fences inclosing the right of way. The facts may be briefly stated: The farm consists of about 200 acres. In August, 1864, the Atchi-

son & Pikes Peak Railroad Company condemned a right of way 100 feet wide over and through it. Thereafter the Central Branch Union Pacific Railroad Company became the successor of the Atchison & Pikes Peak road, and acquired said right of way, and has ever since run its trains over it. At the time this 100-foot strip was so condemned the real estate was owned by James Baldwin. Under the law as it then existed, the railroad company acquired a fee-simple title to the land taken by condemnation for right of way. Chapter 124, Laws 1864; *Railway Co. v. Allen*, 22 Kan. 285. In September, 1870, James Baldwin sold the farm to James Conlon, with the following exception contained in the deed: "The right of way has been given to P. P. Railroad by said Baldwin." In June, 1872, James Conlon conveyed to William Bowen, with the same recital in his deed. On July 26, 1872, Bowen deeded the land to Anna Conlon by similar conveyance. In 1872 the Atchison, Topeka & Santa Fé Railroad Company, of which plaintiff in error is the successor, acquired by condemnation a strip of land 42½ feet wide on the south side of and within the 100-foot strip formerly acquired in fee by the Atchison & Pikes Peak Railroad Company. The Santa Fé road was built in 1873. Before the latter took possession of the 42½-foot strip condemned, the Central Branch Union Pacific Railroad had put in a plank crossing over its rails for the accommodation of Mrs. Conlon, and at about the same time fenced the track, but provided gates through which the owner of the land might go from one part of her farm to the other. Immediately after constructing its road over the land in 1873, the Santa Fé Company laid a crossing of planks over its track and ties directly south of the crossing put in by the Central Branch Company, and corresponding therewith. This crossing was maintained by the plaintiff in error and its predecessor from the time mentioned until May, 1897. In 1882 the Santa Fé Company inclosed its right of way with a lawful fence, and built therein gates opposite the crossing. This crossing has been in use by the owner of the farm since the construction of the railroads, principally for driving cattle from the north to the south side of the land, and vice versa. In February, 1897, the railway company notified Mr. James Conlon, the husband of Anna Conlon, that, unless the gates were kept closed except when in actual use, they would be taken out and the openings shut. In May following the company caused the gates to be nailed up and the crossing removed, notifying Mr. Conlon of its action. Thereupon the latter cut down the wires and left the space open where the gates were located. In her answer and cross petition the defendant below claimed a prescriptive right to use and enjoy the crossing, and the district court found that she was the owner of and entitled to a right of way across the right of way of plaintiff under such title.

This judgment was affirmed by the court of appeals. After the commencement of the suit in the court below, Anna Conlon died, and the action has been revived in the name of her heirs.

It is claimed by counsel for defendants in error that the crossing over the railroad tracks was indispensable to the use of the farm, and constituted a way of necessity. It is unnecessary to dwell on this contention. When James Conlon bought the land his grantor excepted in his deed the 100-foot strip, the fee of which had been taken from him by condemnation proceedings. The grantee obtained no title to it. He was in the same situation as if Baldwin, the grantor, had made two deeds,—one to the ground on the south, and the other to the land on the north, of the right of way. Conlon's deed to William Bowen contained the same exception. The conveyance to Anna Conlon by Bowen also excepted the 100-foot strip. She bought land situated on both sides of a railway, with a fee-simple proprietor owning an estate between the two tracts at the time she took title. No rule of law will permit her to assert a dominant estate, from necessity, in any part of the intervening property.

The question remains whether, under the circumstances of this case, a prescriptive right to the crossing was obtained by a use of the same for more than 15 years. The testimony shows that the railroad company made, in the first instance, and maintained during all the time of its use, a crossing of planks and earth, suitable to the requirements of the landowner. Gates, also, were provided and kept in repair by the company without expense to her. In *Jones, Easem.* § 282, it is said: "If the use of a way over one's land be shown to be permissive only, no right to use it is conferred, though the use may have continued for a century, or any length of time." Defendants in error assert a right of easement based on adverse enjoyment. Unless their ancestor used the crossing under a claim of right, and not as a privilege revocable at the pleasure of the railroad company, they have no defense to the action brought in the district court by plaintiff in error. There was no express contract or agreement between the parties at the time the crossing was first built and put into use by the landowner. The latter did not at the beginning claim adversely to the railroad company, but, on the contrary, the conduct of the parties shows clearly that a permissive privilege was given to her as a licensee merely. This status of the parties originally existing was in no wise subsequently changed, unless the fact of the continued use of the crossing for more than 15 years by Anna Conlon finally expanded into greater rights than she had at the beginning. A presumption of continuance obtains when a state of facts is once shown. In *Dewey v. McLain*, 7 Kan. 126, 133. Mr. Justice Brewer quotes approvingly from *Jackson v. Parker*,

3 Johns. Cas. 124, as follows: "An entry adverse to the lawful possessor is not to be presumed. It must appear by proof. * * * The statute of limitations could not begin to run until the possession of the defendant was avowedly held in opposition to the right of the heirs." In *Kirk v. Smith*, 9 Wheat. 241, 288, 6 L. Ed. 81, 92, Chief Justice Marshall, delivering the opinion, said: "It would shock that sense of right which must be felt equally by legislators and judges if a possession which was permissive and entirely consistent with the title of another should silently bar that title. Several cases have been decided in this court in which the principle seems to have been considered as generally acknowledged, and in the state of Pennsylvania, particularly, it has been expressly recognized. To allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud,—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction." Mere use under a naked license, however long continued, cannot ripen into a prescriptive right. In *Indiana* an appellant alleged in his complaint that for 50 consecutive years a way had existed over the appellee's land; that for 20 years the way had been open to the appellant as an easement, and that he and his grantors had been permitted by the appellee and his grantees to uninterruptedly use the way for 50 years; and that in March, 1883, the appellee wrongfully closed up the way. It was held that under the facts so pleaded the appellant had a mere naked license to use the land, and such license was revocable at the pleasure of the licensor. *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109. In the present case there is an absence of hostility to the rights of the railway company. The facts proven show that the possession and use by Anna Conlon were not adverse in their inception, but, on the contrary, began in a spirit of accommodation to her by the company. The repair of the crossing and the maintenance of gates by the latter for more than 15 years, and the landowner's use of the same, show that the privilege extended in 1873 was recognized as such by her during the time mentioned. *Dewey v. McLain*, supra; *Bennett v. Biddle*, 140 Pa. St. 396, 21 Atl. 363; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506; *Rosseel v. Wickham*, 36 Barb. 386. The judgment of the court of appeals and the district court will be reversed, and a new trial granted. All the justices concurring.

WEAKLEY et al. v. CHERRY TP.

(Supreme Court of Kansas. Jan. 5, 1901.)
REFERENCE—VOLUMINOUS ACCOUNTS—TOWNS
—TREASURER—ACTION ON BOND—PROOF
—MISCONDUCT OF REFEREE.

1. Where, in an action against a township treasurer and his bondsmen, a jury would have had great difficulty in determining the amount of the indebtedness of the treasurer to the

township, because of voluminous book accounts, it was proper to appoint a referee.

2. Where, in an action against a township treasurer and his bondsmen to recover money belonging to the township, the amount for which judgment was rendered was shown to have been received by the treasurer, the judgment was proper, since if any of it did not come into his hands during his last term of office the burden was on defendants to establish such fact.

3. It was not misconduct for a referee, who was appointed to determine the amount of an indebtedness, to look over bank books and checks received in evidence, and talk with the banker who had them in custody, after the hearing, where beyond what was contained in the books such witness' testimony amounted to nothing.

Error from district court, Montgomery county; A. H. Skidmore, Judge.

Action by Cherry township against T. B. Weakley and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

A. B. Clark and P. C. Young, for plaintiffs in error. A. L. Wilson, for defendant in error.

PER CURIAM. There was no error in appointing a referee. It is apparent that a jury would have great difficulty in determining the amount of the indebtedness of the treasurer to the township from the voluminous book accounts gone over by the referee. The evidence is all contained in the case-made brought here. We cannot consider its weight. We think, however, it sustains the findings and judgment.

The amount of money for which judgment was rendered was shown to have been received by the township treasurer. It devolved on the defendants below to establish that the amount did not come into the treasurer's hands during his last term of office. *Board v. Munger*, 24 Kan. 205; *Bernhard v. City of Wyandotte*, 33 Kan. 465, 6 Pac. 617.

It is not shown that the referee was guilty of misconduct. After the hearing before him, he merely looked over bank books and checks which had been received in evidence. The witness with whom he talked was the banker who had custody of the books. Beyond what was contained in the books of the bank, his testimony amounted to nothing. The affidavit for attachment, while not alleging that the trustee was the agent of the township, yet stated facts sufficient to show his authority to make the affidavit. The judgment of the court below will be affirmed.

(62 Kan. 395)

COOPER v. IVES et al.

(Supreme Court of Kansas. Jan. 5, 1901.)
DESCENT OF REALTY—INSOLVENT CORPORATION—LIABILITY OF STOCKHOLDERS.

1. The descent of real property is governed by the laws of inheritance in the state where the land is situated. Title to the same cannot be affected by the decree of a court of another state.

2. A judgment creditor of an insolvent corporation organized under the laws of this state, after execution returned nulla bona, brought a suit here against the widow and sole heir of a deceased stockholder to charge her with the amount of her husband's statutory liability as such stockholder to the value of land inherited by her, and to appropriate the same to its payment. It was shown that the widow was executrix of the estate of the deceased, appointed in New York, where he resided at the time of his death, but that all debts and legacies had been paid. There was no administration in this state. *Held*, that she, in her representative capacity as executrix, was not a necessary party defendant; and *held*, further, that the action could not be defeated by showing that there was sufficient personal property in New York in the hands of the executrix for the payment of the creditor's claim.

3. The case of *McLean v. Webster*, 26 Pac. 10, 45 Kan. 644, followed and applied.

Johnston, J., dissenting.

(Syllabus by the Court.)

Error from district court, Cherokee county; A. H. Skidmore, Judge.

Action by James F. Cooper against Lucina M. Ives and others. Judgment for defendants, and plaintiff brings error. Reversed.

This was an action brought by James F. Cooper, plaintiff below, who is plaintiff in error here, to subject certain real estate in Cherokee county belonging to the estate of Willard Ives, deceased, to the payment of an indebtedness arising out of the fact that the deceased was a stockholder in the Western Farm Mortgage Trust Company, an insolvent corporation organized under the laws of the state. Plaintiff in error recovered a judgment against the trust company, on which execution was issued and returned unsatisfied. Willard Ives in his lifetime was a stockholder in said corporation, holding stock of the par value of \$5,000. He lived in the state of New York, and died in April, 1896. The judgment against the trust company in favor of Cooper was rendered in December, 1896. Ives left a widow, Lucina M. Ives, one of the defendants in error, but no children or direct descendants. The deceased made a will in which he bequeathed about half his estate to charitable and religious societies. Ross C. Scott was appointed executor in the surrogate court of Jefferson county, N. Y. In June, 1898, plaintiff in error filed a petition in the court below making said executor a party, together with Lucina M. Ives, the widow, and a large number of other persons, designated as heirs of the deceased. The petition set up the judgment against the corporation, the issuance and return of the execution thereon, the fact that Ives in his lifetime was the owner of shares of stock aggregating \$5,000, and prayed judgment for that amount against all the defendants. An affidavit for attachment was filed at the beginning of the suit, alleging that all the defendants were nonresidents of the state. The property in controversy was then attached. Service by publication was had on all the defendants. On July 13, 1898, plaintiff below amended his petition by inserting a description of the land owned by

Ives in Cherokee county at the time of his death, and alleging further that no letters testamentary or of administration had been issued on the estate of Willard Ives within the state of Kansas, nor any copy of the appointment of Scott as executor filed in any probate court in this state. The prayer asked that the described real estate be declared subject to the payment of the said indebtedness, and that the same be sold, etc. Publication service was again had on defendants after this amendment was made to the petition. The defendants,—some 46 in all,—with the exception of Ross C. Scott, executor, and Lucina M. Ives, the widow, answered. They alleged that the shares of stock in the trust company upon the death of Ives passed to Scott, the executor, and became assets of the estate; that Ives died in Jefferson county, N. Y., leaving ample personal estate sufficient to pay all his debts, including plaintiff's claim; that the supreme court of New York, sitting in Jefferson county, had, by a judgment and decree in a suit for the construction of the will of said Ives, decided that the answering defendants were entitled to the real estate left by said Ives, including the land described in the petition, and that the construction of the will by the New York court is, by a rule of comity between states, entitled here to full faith and credit; that by reason of said decree the answering defendants are tenants in common of the real estate in Kansas, and that Scott, the executor, has no interest therein. Plaintiff's reply to this answer was in effect a general denial. After the issues were so made up, Ross C. Scott, the executor, died, and Lucina M. Ives, the widow, was appointed executrix in his stead by the surrogate court of Jefferson county, N. Y. Thereon, and on May 25, 1899, plaintiff below filed an amended and supplemental petition, making no change in the parties defendant, except to add the name of Lucina M. Ives, as executrix, and making the religious societies, legatees under the will, defendants. There is an allegation in this pleading that all the legacies and debts of the estate have been paid, except the claim of plaintiff. Service by publication was again had on all the defendants. All of them, with the exception of Lucina M. Ives, personally and as executrix, filed an answer substantially like that made to the first amended petition. In addition they stated that the Western Farm Mortgage Trust Company was indebted to the estate of Ives, deceased, in the sum of about \$4,600 on its guaranty of bonds sold to Ives in his lifetime. In the reply these bonds were alleged to have been paid. On the trial it was shown that all the debts and legacies due from the estate, except plaintiff's, had been discharged, and about \$50,000 paid to Lucina M. Ives, the widow. No administration was had in this state. There was no evidence in support of the set-off pleaded by defendants. After the evidence

on the trial had been introduced, the plaintiff below dismissed his action as to Lucina M. Ives, administratrix of the estate of Willard Ives, deceased. Thereon the court rendered a general judgment in favor of the defendants below. Cooper, the plaintiff in error and plaintiff below, has come here by proceedings in error.

Stebbins & Evans, for plaintiff in error.
R. M. Cheshire, for defendants in error.

SMITH, J. (after stating the facts). Under the statutes of this state, where the real estate in controversy is situated, Lucina M. Ives, the widow of the testator, inherited the whole of it. Gen. St. 1899, § 2459. The descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situated. Woerner, Adm'n, § 168. The decree of the supreme court in Jefferson county, N. Y., in the suit brought by the widow against the legatees and others, in which there is a recital that the defendants below were heirs of Willard Ives, deceased, and entitled to participate in the distribution of his estate, can have no force here. The deceased left surviving him no children, brother, sister, nor descendants of any, nor father or mother, and the decree rendered in the New York court could in no manner affect the descent of the property to the widow, as fixed by our statute; nor could the New York court pass on the title to real estate in Kansas. In the case of *Carpenter v. Strange*, 141 U. S. 87, 105, 11 Sup. Ct. 960, 966, 35 L. Ed. 640, 647, it was held that the supreme court of New York was without power to adjudge the conveyance by a testator to the defendant of lands in Tennessee to be fraudulent and void, and to annul the same. The court said: "The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant,—as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court has no inherent power, by the mere force of its decree, to annul a deed or to establish a title." See, also, *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873.

It is stated by counsel for defendants in error that the ground on which the court below rendered judgment in favor of the parties represented by him was that after the dismissal of the action against the executrix the plaintiff below was in the position of seeking to recover on a stockholder's liability, with no stockholder in court against whom a judgment could be obtained. This brings us to a consideration of the necessity of the presence of the executrix of the estate of Wil-

lard Ives, deceased, before the court in an action to enforce such a liability. It will be observed that Lucina M. Ives, the widow, was a party in her individual capacity only, and was in default for answer. In *McLean v. Webster*, 45 Kan. 644, 26 Pac. 10, a creditor of a decedent, without taking out letters of administration, was allowed to subject real estate in the possession of the heir to the satisfaction of the creditor's claim, there being no other debts against the estate. The petition in the *McLean* Case described the land which descended to the heir, and prayed that the same be held subject to the payment of the debt sued on. There was an attachment in that case, as in this, ancillary to the main action. In both cases the allegations in the petitions and the relief demanded were intended to operate as an equitable attachment of the real estate sought to be appropriated. The decision in the *McLean* Case proceeds on the principle that the heir at law or devisee is personally liable for the debts of the ancestor to the value of the property received by him. See, also, *Rohrbaugh v. Hamblin*, 57 Kan. 393, 46 Pac. 705.

Counsel for defendants in error lays stress on the statutory provision that permits stockholders to be charged by motion, or that permits the plaintiff in the execution to proceed by action to charge the stockholders with the amount of his judgment. Gen. St. 1889, § 1192. The relation between a stockholder and the corporation is contractual. *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. If, in the present case, the creditor had held the note of Ives, the stockholder, for the amount of his statutory liability, and had brought an action thereon to subject this land to its payment, his right to recover would have been sustained, under the authority of *McLean v. Webster*, supra. The obligation is as much contractual in its nature in this as in the supposed case. There was no person interested in the estate of Willard Ives, deceased, except Lucina M. Ives, his widow, to whom this land descended. There was nothing more to be done by her, as executrix, in the way of administering the trust. All the debts and legacies were paid, and she retained the bare title of executrix, with nothing further to administer on. Had this corporation been a going concern, dividends earned on its stock could safely have been paid to her as an individual, free from all liability of the corporation to a subsequently appointed executor. *Vail v. Anderson*, 61 Minn. 552, 64 N. W. 47. At the time this action was tried below, Mrs. Ives, in her representative capacity, was a mere trustee, nominally for creditors and legatees, but in fact for herself alone. She was the sole beneficiary. In the case of *Railway Co. v. Mills*, 57 Kan. 687, 47 Pac. 834, a widow, appointed administratrix of the estate of her dead husband in Missouri, in such capacity brought suit in our courts against a railway company for wrongfully causing her husband's death, which occurred in this state.

Under the statutes of Missouri, recovery in such actions is limited to the wife of the deceased, where such relation exists. There being an allegation in the petition that she was the widow, it was held that the right of action was not limited to her in her representative capacity, but that she could recover in her character as widow. As before stated, the heir at law inheriting property is chargeable with the debts of the ancestor to the value of the property received. Under this rule, Mrs. Ives, being the sole heir under our law, can be held liable as an individual up to the value of the property. It is not necessary that the liability should be fixed by a judgment against the representative of the dead stockholder in such case. The present action assimilates itself to that of a proceeding in rem. In no event can the inheritor be compelled to pay more than the value of the property. We can see no good reason for requiring the executrix of the deceased stockholder to be made a party, inasmuch as the relief sought is against the heir alone, by reason of her heirship, for an amount measured by the worth of what she inherited from the stockholder. We think judgment should have been entered against Mrs. Ives in the court below. It follows from what has been said that the land having been attached at the commencement of the action as the property of Lucina M. Ives, and she being liable to the extent stated for the debt of the decedent, the court did not err in overruling the motion to dissolve the attachment.

Counsel for defendants in error urges that the plaintiff below ought not to be allowed to proceed against real estate in Kansas, because there was personal property in the hands of the executrix in New York which should have been first exhausted. We cannot concur with him in this contention. In *Woerner*, Adm'n (2d Ed.) § 158, it is said: "But the administration in each state is wholly independent, whether in the hands of the same or of different executors or administrators, in no wise impaired, abridged, or affected by a previous, and a fortiori by a subsequent, grant of administration in another state." In the case of *Rosenthal v. Renick*, 44 Ill. 203, it was held that a citizen of another state, where the administration had been granted, might come to the state of Illinois and cause administration to be taken out there, a claim to be allowed, and real estate sold for its payment, and that it was not necessary to show that the personal estate in the other state had been exhausted. So, in *Lawrence's Appeal*, 49 Conn. 411, a part of the syllabus reads: "Held to be no objection to an order for the sale of real estate here to pay debts that there was personal property in the state of principal administration sufficient for their payment, and that a court of probate had no right, as a matter of discretion, to refuse to order a sale of real estate here in view of the personal property there." The claim that the liability must be enforced

by a receiver of the insolvent corporation, as provided by sections 14 and 15 of chapter 10 of the Laws of 1898, has been decided against the contention of defendants in error in the case of *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. The judgment of the court below will be reversed, with directions to the district court to proceed further in accordance with this opinion.

DOTTER, C. J., concurring.

JOHNSTON, J. (dissenting). I am unable to concur in the judgment of reversal. The plaintiff was seeking to establish a stockholder's liability, without having the stockholder in court to answer, or against whom a judgment might be rendered. The liability to which a stockholder is subjected is rigorous enough, without adjudging such liability against him when he is not a party to the proceeding. The legal title to the stock upon which a liability was sought to be established was in the executrix, and not in the heir. The statute in terms authorizes the corporation creditor to proceed against the stockholder, and against no one else. It has been held that the stockholder's liability being unequal, limited, and several, each stockholder must be sued separately. *Abbey v. Dry-Goods Co.*, 44 Kan. 415, 24 Pac. 426. And, instead of overlooking such serious departures from statutory methods, "the general rule is (from which we think there is no dissent) that, if a statute prescribes a special mode of enforcing the individual liability of the stockholders of corporations, that mode, and that alone, can be pursued. The liability can be enforced in no other way." *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. The necessity of the presence of the stockholder is sharply presented, because the plaintiff, having the executrix in court, voluntarily dismissed her from the proceedings, and immediately asked the court to adjudge a liability on the stock which she held in the capacity of executrix, and in no other. The estate of Ives was unsettled, and the debt, or at least this claim against Ives as stockholder, was unpaid. While inherited property may be chargeable with the debts of an ancestor, the claim in question is not a liability against the heir or any one else until it is established against the stockholder as the statute prescribes. The stockholder not being in court, I think the district court ruled correctly in giving judgment against the plaintiff.

62 Kan. 234)

BATTEY v. EUREKA BANK OF EUREKA et al.

(Supreme Court of Kansas. Jan. 5, 1901.)

BANKS—LOANS TO STOCKHOLDERS—LIENS ON STOCK.

1. While the officers of the state bank are prohibited from making loans or discounts to a stockholder on the security of stock in the

bank, and while the bank cannot thereafter become the purchaser or holder of loans on such stock unless it shall become necessary to prevent loss upon a debt previously contracted in good faith, yet, if a stockholder has become liable to the bank as principal, surety, or otherwise on debts not incurred on such security, it will be entitled to a lien on his stock for such debts as are due and unpaid, and while such liability continues.

2. The clause of the banking statute, "a debt previously contracted in good faith," means loans and discounts honestly made in the belief that they were safe investments for the bank, and were made without fraud, pretense, or any purpose to injure the bank.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by the Eureka Bank of Eureka and others against R. T. Battey. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lambert & Huggins and Cunningham & Hamer, for plaintiff in error. W. S. Marlin, L. B. Kellogg, and C. B. Graves, for defendants in error.

JOHNSTON, J. The principal question presented for decision is whether the Eureka Bank is entitled to a lien upon the capital stock of the bank owned by William Martindale for an indebtedness owing by him to the bank. The Eureka Bank is a corporation organized under the laws of the state, with a capital stock of \$50,000, divided into 500 shares. William Martindale, who was the owner of 298 of these shares, was a member of its board of directors, and its president. Edwin Tucker was cashier of the bank, and in the active management of its affairs. On July 30, 1898, Martindale applied to Tucker for a loan of \$10,000 from the bank, which was given to him on his unsecured individual note. On August 8, 1898, Martindale obtained a second loan from the bank upon his individual note for \$9,848. At the same time Martindale was a stockholder and managing officer of the First National Bank of Emporia, Kan., where he resided, and besides he held large investments in lands and other property, and was generally regarded to be a man of wealth. On November 16, 1898, the First National Bank of Emporia failed, and its property and business affairs passed into the hands of a receiver. By an agreement between the creditors and Martindale, his property was turned over to a trustee to be appointed by the judge of the federal court; but in the agreement it was stipulated that collateral securities or liens upon the bank stock or other property held by any creditor on November 16, 1898, were not to be disturbed, waived, or in any way affected by the agreement. In pursuance of the agreement, R. T. Battey was appointed as trustee, and to him Martindale and his wife joined in a deed of trust, which, among other things, conveyed 298 shares of Eureka Bank stock, "subject to lien of Eureka Bank thereon for a stockholder's indebtedness to

the bank." The trustee obtained possession of the certificates of stock for the 298 shares in the Eureka Bank, and demanded of the officers of the bank that they transfer the same to him as such trustee; but the bank, claiming a lien on the stock for the indebtedness of Martindale, refused to make the transfer until the indebtedness was paid. The bank brought an action against Martindale on the notes heretofore described, as well as other obligations of smaller amounts, and asked to have his indebtedness enforced as a lien against the bank stock in question. The receiver of the First National Bank of Emporia and R. T. Battey, as trustees, were made defendants, and an order was asked requiring them to surrender to the Eureka Bank the shares of stock in the bank which they had obtained from Martindale. Upon the testimony the bank recovered a judgment against Martindale for the amount of his indebtedness to it, and such indebtedness was held to be a lien on the bank stock which stood on the books in the name of Martindale.

The trustee challenges so much of the judgment as gives the bank a lien on the Martindale stock. It is to be noted that the agreement under which the trustee was appointed provided that liens on bank stock should not be deemed to be waived or affected by the agreement, and also in the deed conveying his property to Battey Martindale specially excepted liens of the Eureka Bank on the stock in question. Battey took no more than the deed of trust conveyed to him. He was not an assignee in bankruptcy or under the general assignment laws, but was a trustee of an express trust, and his right in the Martindale property was measured by the terms of the instrument by which Martindale conveyed the property to him. He was to take that property, convert it into money, and apply it among the creditors of Martindale as the federal court might direct. By the preliminary agreement and the deed of trust he had notice that liens on the stock were claimed, and also that Martindale recognized the existence of a lien in favor of the Eureka Bank upon the stock in question; and of necessity the stock passed into his hands subject to the rights and equities of the bank. Without settling the question of estoppel asserted against Battey, we pass to the question of the validity of the lien asserted by the bank. This question is determined by the provisions of the bank act. By one section it is provided that: "The shares of stock of an incorporated bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws thereof may direct; but no transfer of stock shall be valid against a bank so long as the registered holder thereof shall be liable as principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid, nor in such case shall any dividend, interest or profit be paid on such stock

so long as such liabilities continue, but all such dividends, interests or profit shall be retained by the bank and applied to the discharge of such liabilities; and no stock shall be transferred on the books of any bank without the consent of the board of directors, where the registered holder thereof is in debt to the bank for any matured and unpaid obligation; and no transfer of stock shall be made when the bank is in a failing condition, or when its capital is impaired. All transfers of stock shall be certified to the bank commissioner immediately." Gen. St. 1890, § 458. There was a by-law of the bank which expressly provided that the bank shall have a first and prior lien upon the stock for debts due to the bank by the owners of such stock. The statute already quoted, independent of the by-laws, clearly gives the bank a lien upon the stock when the stockholder is liable as principal debtor, surety, or otherwise to the bank for any debt due and unpaid. If an indebted stockholder were to transfer his stock free from any lien or claim of the bank, it might result in an impairment of the capital; and so, to protect the capital and customers of the bank, the legislature created a lien, and placed a limitation in the statute which prevents the stockholder from transferring his stock to even a bona fide purchaser while his liability to the bank continues. The statute goes further than the giving of a lien to the bank, as it prohibits payment to the stockholder of any dividend, interest, or profit on the stock while he is liable to the bank for indebtedness of any kind. The legislature of Michigan passed a statute containing a provision almost identical with the one under consideration, and the supreme court of that state held that it created a lien in favor of the bank against which a bona fide purchaser of the stock was not protected. *Michigan Trust Co. v. State Bank of Michigan*, 111 Mich. 306, 69 N. W. 645; *Citizens' State Bank of Monroeville v. Kalamazoo Co. Bank*, 111 Mich. 313, 69 N. W. 663; *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 71 N. W. 453. If the section quoted stood alone, all would concede the existence of the lien; but the contention is that another section of the act necessarily denies a lien to the bank. It provides that: "No bank shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling goods, chattels, wares and merchandise, and shall not invest any of its funds in the stock of any other bank or corporation, nor make any loans or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months of the time of its purchase, be sold or disposed of at public or private sale. After the expiration of six months any such stock shall not be considered as a part of

the assets of any bank: provided, that it may hold and sell all kinds of property which may come into its possession as collateral security for loans or any ordinary collection of debts, in the manner prescribed by law: provided, further, that any goods or chattels coming into the possession of any bank as aforesaid shall be disposed of as soon as possible, and shall not be considered as a part of the bank's assets after the expiration of six months from the date of acquiring same." Gen. St. 1899, § 417. This section, standing by itself, might perhaps be interpreted as prohibiting a bank acquiring a lien upon the stock of its debtors. A somewhat similar provision in the national banking act of 1864 was so viewed by the supreme court of the United States. *Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Bullard v. Bank*, 18 Wall. 589, 21 L. Ed. 923. These decisions were made under an act which did not expressly give a lien, as is done in our statute. On the other hand, the national banking act of 1863, which gave a bank a lien on the stock of its debtors, was modified by the act of 1864, and in place of the lien provided in the former act there was substituted the prohibition against a bank making a loan on the shares of its own capital stock. As was remarked in *Bank v. Lanier*, supra: "Congress evidently intended, by leaving out of the act of 1864 the thirty-sixth section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were, in effect, notified that thereafter they must deal with their shareholders as they dealt with other people." The striking out of the section giving a lien, and the substitution of the prohibitory provision, clearly evidenced the intention of congress, and hence by-laws of banks attempting to create liens on stock were held to be in conflict with the act, and therefore void. Our statute presents a very different aspect. As has been seen, it expressly gives a lien on the stock of an indebted stockholder, and in another section of the act, passed at the same time, it declares that a bank cannot "make any loans or discounts on the security of the shares of its own capital stock, * * * unless such security * * * shall be necessary to prevent loss upon a debt previously contracted in good faith." What, then, was the legislative purpose in regard to creating liens on the capital stock of banks? These provisions, being included in the same act, should be reconciled, and, if possible, both given force and effect. In our view, an absolute prohibition of liens on bank stock was not within the legislative intention, and, further, that there is room for the operation of both sections. Considered together, they mean that a bank is prohibited from making a loan or discount in the first instance on the security of its own stock, and that it shall not thereafter become the purchaser or the holder of loans on stock unless it shall become necessary to

prevent loss upon a debt previously contracted in good faith. It would result in this: that, while the officers of the bank could not accept stock as a specific security for a loan or discount when the debt was first contracted, they might afterwards accept the stock as security if the debt had been previously contracted in good faith. This provision, as will be observed, is mainly an admonition to the officers, and the leading purpose was to prevent a bank from using its money in trade or commerce, buying or selling merchandise, or in the purchase of stock of other banks or corporations, or dealing in its own stock; and the only penalty provided in the section is that such stock, when secured by it, shall not be considered as a part of the assets of the bank after the expiration of six months. It will be noted that there is nothing in the statute itself which renders a security taken by the officers of a bank in violation of the provision unenforceable. And when the section is considered in connection with the other one, which absolutely gives the lien, it furnishes strong reasons for the application of the doctrine that a contract made contrary to such a statute is not unenforceable in the absence of a declaration in the statute itself prohibiting its enforcement. The national banking act forbids the loaning of money by national banks upon mortgages upon real estate, but it has been held that, where such a loan was made, the mortgage was good and enforceable, notwithstanding the violation of this provision; that the disregard of the prohibitory clause did not vitiate the security taken for the loan, but only laid the bank taking it open to proceedings at the instance of the government. *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107. In *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. Ed. 648, the company was sued by the bank for money which was loaned to it, and they set up as a bar that the loan was made in violation of the banking law, because it exceeded one-tenth of the bank's paid-up capital stock; but the court held that the violation of the prohibition did not affect the validity of the loan, and that the violation could only be questioned by the government. In *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956, the bank certified a check for a customer who did not have a deposit to meet the check, and received therefor bonds as collateral security. This was in violation of the banking law, and the right of the bank to hold its lien on the bonds was contested because of the violation. The court held that the bank could hold the bonds notwithstanding the certification was made in contravention of the act of congress, and in its decision said: "Moreover, it has been held repeatedly by this court that, where the provisions of the national banking act prohibited certain acts by the banks or their officers without imposing any penalties or for-

feitures applicable to particular transactions which have been executed, their validity can only be questioned by the United States, and not by private parties." If, however, we should disregard the absence of a prohibition in the statute itself prohibiting the enforcement of a security taken in violation of the act, and should accept the view of the plaintiff in error, we would be unable to grant him the relief which he asks. If the section expressly authorizing a lien is to be regarded as modified by the prohibition, it would result in the view that a bank could never have a lien where a loan was contracted on the specific security of its own capital stock, and could never afterwards claim a valid lien on stock except to prevent loss upon a debt previously contracted in good faith. In the first place, it must be held that the loans were not made by the Eureka Bank to Martindale on the security of the stock which he owned. The certificate was not given to Tucker, the cashier, nor was any reference made to the stock at the time the loans were negotiated. It is true that Tucker admitted that he had in mind at the time that Martindale was a stockholder, and that he might not have loaned him so large an amount if it had not been for his connection with the bank. He claimed, however, that the reason that the money was loaned upon his individual note was the fact that Martindale was a large owner of real estate and other banking interests, and was regarded by him to be a man of great wealth. The district court concluded from the testimony that the loan was not made upon the faith of the stock as a specific security, but was based rather on the personal credit of Martindale; and we think the testimony sustains this conclusion.

Was the debt contracted in good faith? A greater amount was loaned to Martindale than is permitted to be loaned to a single individual under the by-laws and banking rules; and, besides, no security was taken, which is not in accord with the usages and requirements of banking. The nonobservance of these usages, rules, and requirements does not necessarily imply dishonesty and bad faith on the part of the cashier. Good faith in this connection means that the loans were honestly made by Tucker in the belief that they were safe investments for the bank, and that there was an absence of fraud, pretense, or any purpose to wrong the bank. *Docter v. Furch*, 91 Wis. 464, 65 N. W. 161; *Winters v. Haines*, 84 Ill. 585; 14 Am. & Eng. Enc. Law (2d Ed.) 1078. If the loans were fraudulently and collusively made, and the claim that Martindale was financially sound and abundantly able to meet the loans was not in fact believed, but was a mere pretense, there would be a lack of good faith, which would condemn the transaction. Under the testimony and the finding of the trial court, however, it must be held that the loans were honestly made by the cashier in the belief that Martindale was not only solvent, but

that he was financially strong, and that the loans made to him were safe investments; and, further, that they were made without any intent to wrong the bank, or any one else, and therefore, under the rules heretofore stated, were made in good faith. None of the errors assigned can be sustained, and therefore the judgment of the district court will be affirmed.

SMITH, J., concurring.

DOSTER, C. J. I concur in the decision made in this case, and in all of the opinion except that portion which applies the doctrine of the federal courts that securities which the statute prohibits a bank from taking may nevertheless be taken and enforced. However, I have not given sufficient thought to such doctrine to enable me to reject it as unsound, but it does not readily commend itself to me, although repeatedly announced by such high authority as the supreme court of the United States, and, as I think, concurred in by the courts of some of the states. I therefore, for the present, withhold my assent from it. I think the evidence failed to show that the bank made its loan to Mr. Martindale upon the security of its stock owned by him, and for that reason concur in the decision.

(62 Kan. 343)

MITCHELL et al. v. SIMPSON.

(Supreme Court of Kansas. Jan. 5, 1901.)

EQUITY—ADVICE OF JURY—FRAUDULENT CONVEYANCES—CONSIDERATION.

1. In an equity case the court may take the advice of different juries at different times as to the issues of fact involved, by submitting to them questions for their consideration and answer.

2. A daughter remained for several years after attaining her majority in the family of her parents, and performed services therein without an agreement for compensation; but finally the father agreed with her that, if she would continue to remain and take charge of the household, he would pay her not only for what services she might thereafter perform, but for what she had already performed, to which proposition she assented, and with which she complied. Several years thereafter the father conveyed land to the daughter in fulfillment of the agreement. *Held*, that the conveyance was upon sufficient legal consideration, and will be upheld, though prejudicial to the father's other creditors.

(Syllabus by the Court.)

Error from district court, Bourbon county; W. L. Simons, Judge.

Action by F. J. Simpson against C. W. Mitchell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John H. Crain, for plaintiffs in error. W. R. Biddle and J. I. Sheppard, for defendant in error.

DOSTER, C. J. This was an action brought by the defendant in error, as plaintiff, against the plaintiffs in error, as defendants, to en-

join the sale under execution of a tract of land. Judgment was rendered perpetually enjoining the sale, and the defendants have prosecuted error to this court. Summarized, the facts were that the plaintiff below, F. J. Simpson, or Miss Jessie Simpson, as she is sometimes designated in the record, became of age in 1883. After attaining her majority she continued to live with her father and mother as a member of the family, performing in it the ordinary household duties, but receiving no compensation therefor other than her maintenance. In 1891 her mother became ill, and died in about a year thereafter. During the mother's illness the daughter, at the solicitation of her parents, agreed to remain at home and take care of the household; the father promising, if she would do so, to pay her for her future labor, and also for what she had already done. To this she assented, and thereafter remained at home in charge of the household until her mother's death, and also from thence on until the events subsequently narrated. The mother at the time of her death owned 600 acres of land, but made no devise of it. At her death one half of this land went to the husband and father, under the statute of descents and distributions, and the other half to the children, of whom there were several, Miss Jessie being the oldest. In 1894 the father, William Simpson, became indebted as surety for another to the State Bank of Ft. Scott. The indebtedness was not paid, and in 1896 judgment for the amount of it was recovered. A few months preceding the recovery of the judgment, Simpson conveyed his half interest in the land which had belonged to his wife to the daughter Miss Jessie, in fulfillment of the promise he had made to pay her for remaining at home and for the household services rendered by her. In the meantime the State Bank had gone into the hands of a receiver, who, conceiving the conveyance from the father to the daughter to be without consideration and fraudulent, caused execution to be issued upon the judgment and levied upon the land. To enjoin the sale of the land upon the execution and levy, the action in the court below was brought. A jury was called to consider certain matters of fact in issue, and to advise the court thereon, but not to render a general verdict. It was asked the following questions, and made the following answers: "Question 1. Were the deeds in question, or either of them, made by William Simpson to F. J. Simpson for the purpose of hindering, delaying, or defrauding the receiver of the State Bank of Ft. Scott? Answer. No. Question 2. Did F. J. Simpson receive said deeds, or either of them, with the purpose of aiding or assisting her father in hindering, delaying, or defrauding said receiver? Answer. No. Question 3. Did F. J. Simpson at or before the date of said deeds have knowledge of the purpose of her father by making said deeds to hinder, delay, or defraud his cred-

itors? Answer. No. Question 4. Did F. J. Simpson at or before the date of said deeds have the means or opportunity of ascertaining that it was the purpose of her father in making said deeds to hinder, delay, or defraud his creditors? Answer. No. Question 5. What consideration, if any, did F. J. Simpson pay her father for the deeds in question? Answer. By her labor." Upon the return of the above interrogatories and answers, the court, desiring to be further advised upon other matters in issue, of its own motion ordered a continuance of the case, and at the succeeding term submitted other questions to another jury, which, with the answers thereto, were as follows: "Question 1. What was the real estate conveyed to plaintiff worth? Answer to Question 1. \$3,450. Question 2. What was the amount or value of the consideration which said plaintiff paid for the land so conveyed? Answer to Question 2. \$1,500." The court thereupon rendered judgment for the plaintiff "upon the pleadings, evidence, and answers of the jury to the special questions propounded to them." From this judgment, as before stated, error has been prosecuted.

The first error assigned is the submission of issuable facts to two different juries. This method of practice has not heretofore been called to our attention, nor have any cases in other states approving or disapproving it been cited to us. We are unable to perceive in it, alone, any prejudicial error. The case was one in equity. Neither of the parties was entitled to a jury. The court might have heard it without a jury. It was the common practice of the equity courts before the adoption of the Code to take the advice of a jury as to difficult questions of fact, especially in cases involving charges of fraud, and the practice of doing so still prevails under the reformed procedure. However, in such cases the courts are not bound to rest their conclusions upon the findings of fact made by the jury, but may disregard them wholly, if not consistent with their view of the evidence. It would seem to follow, therefore, that, until the court feels sufficiently enlightened upon the meritorious issues of the case, it may continue to ask the advice of jurors concerning them; and, unless it be shown that prejudice to a suitor has resulted from so doing, the bare fact that the court submitted some of the issuable facts to one jury, and others to another one, will not constitute reversible error. It may be remarked in this connection that the fact that the case was partially tried at one term of court and concluded at another one, while mentioned by plaintiffs in error as an incident of the proceedings, is not asserted to be in itself a ground of error. It is the fact that it was tried at different times, not that those times were different terms, of which complaint is made.

The plaintiffs in error objected in the court below to the sufficiency of the consideration

for the deed to the land from the father to the daughter. This they did by objections to evidence, by requests for instructions to the jury which were not given, and objections to instructions which were given. In support of their claim of error they urge the familiar doctrine that a child who after attaining its majority continues to reside with its parents, and to perform for them household or other labor, is presumed to do so as a member of the family, and is not entitled to payment therefor to the prejudice of the parents' creditors, unless it be shown that the services were performed in pursuance to a contract for compensation. That such is the rule will not be questioned, but under the facts of the case, as specially found by the jury and approved by the court, and likewise as generally found by the court itself as to matters not specially submitted to the jury, the case of the young woman falls within the exception to the rule which allows compensation, and not within the general rule which disallows it. That is to say, there was an agreement by the father to pay the daughter for the services. As previously stated, before the recovery of the judgment upon which the execution in question was issued, and to induce the daughter to remain in the household and continue her services, the father promised to pay her not only for what labor she might thereafter perform, but for what she had already performed since attaining her majority. That a parent may compensate an adult child for remaining in the family and performing labor therein cannot be questioned. We think it never has been questioned. That, after an adult child has performed services without an agreement for compensation, the parent, as an inducement for it to remain in the service of the family, may lawfully promise to pay for what before that time had been performed without an agreement, cannot, as we think, be questioned. Of course, in such last-mentioned case the agreement to pay for past services must not be a device to defraud creditors. It must be bona fide. If bona fide, the transaction is unassailable. In the case under consideration the court below found it to be bona fide, and it is therefore unassailable, because the consideration to pay for the past services was not the performance of those services, but it was the agreement to remain in further service. The facts in the case of *Graves v. Davenport* (D. C.) 50 Fed. 881, were quite similar to the facts in this case, and in that the agreement between the parent and child was upheld. Other cases not entirely similar, but sufficiently so to indicate the just rule, are *Howard v. Rynearsen*, 50 Mich. 309, 15 N. W. 486; *Bank v. Weston*, 103 Iowa, 736, 72 N. W. 542.

Another assignment of error is that the judgment of the court below was contrary to the evidence. The argument under this assignment specialized some claimed contradictory evidence of the defendant and her

witnesses, and some facts and circumstances supposed to be indicative of fraud, one of which was a disproportion between the value of plaintiff's services and the value of the land deeded to her. As to all of these matters the plaintiffs in error are concluded by the findings of the jury and the court. The judgment of the court below is affirmed. All the justices concurring.

(62 Kan. 405)

CONSOLIDATED MINING & PROSPECTING CO. v. HUFF.

(Supreme Court of Kansas. Jan. 5, 1901.)

CONDITIONAL JUDGMENT—PLEADING—ISSUES.

1. A judgment against a corporation, which orders the defendant to issue certificates of stock to the plaintiff, and place them in the hands of the clerk of the court within a certain time after it shall be served with a copy of the order, and which finds the value of the stock to be a certain sum, and further directs that in default of the defendant's compliance with the order for the issuance and delivery of the certificates the plaintiff have judgment for the value of the stock, is conditional in form and effect, and as to the money award contained in it should be vacated, and entered only upon proof of the defendant's noncompliance with the main order.

2. An allegation, in a petition to recover the value of shares of stock in a corporation, that the corporation stock "is divided into one hundred thousand shares, of the par value of one dollar each," does not tender an issue of fact as to the market value of the stock or any special value possessed by it.

(Syllabus by the Court.)

Error from district court, Cherokee county; A. H. Skidmore, Judge.

Action by W. W. Huff against the Consolidated Mining & Prospecting Company. Judgment for plaintiff, and defendant brings error. Modified.

Sapp & Wilson and S. E. Cheeseman, for plaintiff in error. Blue & Glasse, for defendant in error.

DOSTER, C. J. This was an action brought by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, to compel the issuance and delivery of certain shares of stock in the defendant corporation, or, in the alternative, for their value. Judgment was rendered for the plaintiff in the words following: "It is therefore considered, ordered, adjudged, and decreed by the court that this plaintiff have issued and delivered to him by the defendant herein, the Consolidated Mining & Prospecting Company, twenty-four thousand shares of stock, of the par value of one (\$1.00) dollar each, same being made payable to the order of W. W. Huff, within ten days after a certified copy of this decree is served by the sheriff of Cherokee county, Kansas, upon the present president and secretary of the defendant corporation, the Consolidated Mining & Prospecting Company. Delivery of said stock to plaintiff herein, in compliance with this order, shall be made within the time re-

quired by this order by the defendant corporation depositing with and in the hands of the clerk of this court said twenty-four thousand shares of stock, to be by said clerk of this court delivered to plaintiff or his attorneys of record; and, if compliance with this order be made in manner aforesaid, then the subsequent part of this decree to be null and void, and of no binding force or effect; but if the defendant corporation, the Consolidated Mining & Prospecting Company, fail to comply with the terms of this order, as hereinbefore stated, that then and in that event plaintiff have and recover against the defendant, the Consolidated Mining & Prospecting Company, a judgment for the value of said stock, amounting to the sum of forty-eight hundred (\$4,800.00) dollars, with interest at six per cent. per annum from the 17th day of January, 1900, said judgment to be entered as of the date of January 17, 1900, with costs of suit, taxed at the sum of \$—, and that execution issue therefor." Error has been prosecuted to this court.

Can a judgment conditional in form like the above be upheld? The defendant in error contends that the judgment is not conditional, but is alternative, in form, and that it was rightfully rendered and entered in such form, and in support of the contention he cites principally to judgments in replevin. Such kinds of judgments are allowable by statute in such kinds of cases, and they do not, therefore, constitute precedents for judgments the form and regularity of which depend upon general principles of practice. The view of the defendant in error as to the character of the judgment is incorrect. The judgment is not alternative. It is conditional. It first orders the issuance and delivery of the certificates of stock within a time stated. It then declares that, "if compliance with this order be made in manner aforesaid, then the subsequent part of this decree to be null and void and of no binding force or effect." The said subsequent part of the decree is that, "if the defendant fail to comply with the terms of this order as hereinbefore stated, then and in that event plaintiff have and recover against the defendant a judgment for the value of said stock, amounting to the sum of \$4,800.00; said judgment to be entered as of the date of January 17, 1900." This money judgment is plainly conditional in existence and effect upon the failure of the defendant to comply with the previous order, and, as will be observed, a compliance with that order was to be evidenced by depositing the certificates of stock with the clerk. Such judgment, therefore, could have no operation or effect, except in the contingency of the defendant's failure to deliver the certificates. Now, in the language of the Code, "a judgment is the final determination of the rights of the parties"; and, as ruled by this court in *Brown v. Smelting Co.*, 32 Kan. 528, 4 Pac. 1013 (although not in a case like the

present one), "a final judgment is one which finally decides and disposes of all the merits of the case, and reserves no further question or direction for the future or further action of the court." The judgment in question reserved further action either to the court or to the clerk. Some one must be authorized to determine whether the defendant had complied with the precedent order of the court. The defendant could not be put in default of compliance with the order until a copy of such order was served upon it, and, had a copy of the order been served upon it, questions might have arisen as to the regularity of the service, the correctness of the copy, and also as to whether compliance had been made with the order. Had the order been duly served, a question might have arisen between the defendant and the clerk into whose hands the certificates were to be placed as to whether the papers placed in his hands were of the character to which the plaintiff was entitled and which the court had ordered to be delivered; and in such event, if the order be valid, the clerk must be invested with the judicial power to determine the defendant's default, and not only to enter, but to render, judgment against it, because, as will be observed, the above-quoted judgment for the value of the stock is not a judgment in present, but is a direction to enter judgment in futuro, to wit, as of January 17, if the main order be not complied with, and it is in that respect an attempt to shift to the clerk the judicial powers of the court. It is impossible to sanction the conditional portion of this judgment. Judgments must be certain. Their validity and binding force must rest upon facts existing at the time of their rendition. They cannot rest upon what may or may not occur after their rendition. They take their validity from the action of the court, and not from what persons may or may not do after the court has rendered them. The decisions of the courts of other states are to the effect of the one we make. "It is a general rule that judgments must not be conditioned upon any contingency, and it has been held that an alternative or conditional judgment is wholly void." 11 Enc. Pl. & Prac. 964. The case of *Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414, is quite like the present one. In that case it was ruled that "where a judge granted a judgment for plaintiff in an action for the possession of land, to be stricken out if defendant filed a proper bond in 30 days after adjournment of court, the judgment was void." It is perhaps not necessary to go to the extent of that case, and hold the conditional portion of the judgment void, but it certainly can be held irregular and voidable upon direct attack. *Farmer v. Samuel*, 4 Litt. 187, is also quite similar to the present case. In that it was remarked: "The impropriety of leaving a decree conditional, or to be enforced conditionally, and of leaving the question whether the condition is or

is not complied with, to the parties themselves, or the clerk of the court, must be apparent to every reflecting mind. It was proper that the chancellor should compel the complainant to do equity, before he received it, by paying the money; but it was incumbent upon him to see it done. Who, in this instance, was to decide that the tender was sufficient or that a payment was made? It was certainly improper to refer to the decision of the clerk the genuineness and validity of a receipt. In short, no decree but a positive one ought to be rendered before the court dismisses the parties without day."

There are, however, decisions which seem to lend countenance to conditional judgments, but they are the exceptional cases noted under the text above quoted from the Encyclopedia of Pleading and Practice. They are out of harmony with the prevailing view, and contrary to sound reason. A case cited to us is *Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047. It was a case in equity in which the complainants, stockholders in a corporation, filed a bill to compel the company to cancel on its books an unauthorized transfer of their stock, and to reissue to them shareholders' certificates, or, upon failure of the company to do so, for a decree for the value of their stock. The court held that the complainants were entitled to a decree canceling the unauthorized transfer of the stock, or to an alternative decree for its value. But what form these decrees took, and at what time it was proper to enter the alternative decree, was neither stated nor discussed. We do not doubt that equity may entertain the complaint of a corporation shareholder for the transfer to him of the stock to which he is entitled, and the issuance of certificates evidencing the fact, or, in the alternative, for the value of the stock, because equity has power, as ancillary to its main jurisdiction, to award compensation in money. Hence it would be proper in the present case to adjudge that the plaintiff have the stock to which he showed himself entitled, and, on failure of the company to issue it to him, that he have judgment for its value; but that judgment for its value should not be a judgment rendered by the court in advance of knowledge of the defendant's default of compliance with the main order, nor conditional upon the defendant's noncompliance with it, but such judgment should be rendered upon the fact of defendant's noncompliance with the order, duly proved and judicially found. To this end, the court, as in all equity proceedings, having once acquired jurisdiction of the case, is entitled to retain it until just relief can be fully had.

Another claim of error is that the plaintiff's petition did not tender an issue as to the value of the stock, and therefore that the court could not rightfully enter upon an inquiry as to that matter. This claim we think is correct. The only allegation as to

values contained in the petition was that the capital stock of the company was "divided into one hundred thousand shares, of the par value of one dollar each." This was not an allegation of either market value or special value.

Other claims of error are made, but, inasmuch as they may not again arise, we deem it unnecessary to give them consideration. It is ordered that the judgment of the court below be modified by vacating that portion of it which finds the value of the stock, and which conditionally awards to the plaintiff its adjudged value, and that further proceedings be had in accordance with the views expressed in this opinion. All the justices concurring.

MISSOURI PACIFIC RY. CO. v. PRESTON.

(Supreme Court of Kansas. Jan. 5, 1901.)

APPEAL—SETTLING CASE—JUDGE PRO TEM.—CHANGE OF VENUE—BURDEN OF PROOF.

1. After judgment for the plaintiff, a judge pro tem., who presided at the trial, made an order granting time to defendant to make and serve a case for this court. No specific time was fixed for settlement, nor any time limited for the giving of the notice therefor. The case was settled and signed after the expiration of the period fixed for serving the case and suggesting amendments. *Held*, following *Columbia Mfg. Co. v. Stoddard Mfg. Co.*, 60 Pac. 320, 61 Kan. 640, that a motion to strike out the case-made will be sustained.

2. A judge of another district, called on to sit in the stead of a disqualified judge, who, appearing in response to the request, is chosen by the bar, under the direction of the court, as a judge pro tem., and takes the prescribed oath, acts thereafter in the capacity of judge pro tem., and does not derive his authority under chapter 108 of the Laws of 1897. In *re Hewes*, 62 Pac. 673, 62 Kan. —, followed.

3. A motion made by defendant for a change of venue on the ground of the disqualification of the regular judge was overruled. The judge of another district was called in, who presided at a trial, resulting in a disagreement of the jury. Thereafter a pro tem. judge was chosen, and a second trial had. There was no objection from the defendant at either trial to the jurisdiction of the court, or the authority of the judge to sit. *Held*, that the claim of right to a change of venue was waived.

4. A pro tem. judge was selected by the bar to try this cause, who took and subscribed an oath that he would faithfully perform the duties of such judge at the regular May term, 1899. The case was continued until the October term. *Held*, applying section 1887 of the General Statutes of 1899, that his power to proceed with the cause at the October term was not impaired.

5. Plaintiff alleged in her petition that she received personal injuries through the fault of the defendant, without any negligence or want of care by her contributing thereto. *Held*, that such averment did not shift the burden of proof onto the plaintiff to show an absence of contributory negligence on her part.

6. A complaint that excessive damages were awarded cannot be considered in the absence of the evidence on which the verdict and judgment were based.

Doster, C. J., dissenting from fourth paragraph of syllabus and corresponding portion of the opinion.

(Syllabus by the Court.)

Error from district court, Marshall county.

Action by Stella M. Preston against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Waggener, Horton & Orr, E. A. Berry, Wm. J. Gregg, and Edward D. Osborn, for plaintiff. Irish & Brock and W. W. Redmond, for defendant.

SMITH, J. This was an action for personal injuries. There were a verdict and a judgment for \$5,000 against the defendant below. The railway company has attached to its petition in error a case-made purporting to contain the evidence introduced on the trial, and also a certified transcript of the record. The defendant in error has presented a motion to strike out the case-made, for the reason that the same was settled and signed by the trial judge after his term of office had expired. It appears that the regular judge of the district court for the Twenty-First judicial district, in which Marshall county is situated, was disqualified to sit in the cause. Hon. F. W. Sturgis, judge of the Twelfth judicial district, was called on to attend and sit in his stead. He responded to the request, and, being present, under direction of the court the members of the bar proceeded by ballot to elect a judge pro tem. to try this and other cases, and Judge Sturgis was unanimously chosen. He qualified by taking the oath. After the trial, resulting in a verdict for the plaintiff below, a motion for a new trial was overruled on the 13th day of October, 1899. The following order was then entered of record: "Upon application of the defendant, the court, for good cause shown, did by order extend the time until and including the 15th day of March, 1900, within which said defendant may prepare and serve a case-made herein for the supreme court in the above-entitled cause, on said plaintiff or her attorneys, and the plaintiff was allowed twenty days thereafter within which to suggest and serve amendments thereto; said case-made to be signed on ten days' notice in writing by either party." The case-made was served on counsel for plaintiff below on the 21st day of February, 1900; and on the 11th day of April following a notice was served on them fixing the 23d day of April, 1900, as the time when the case-made would be presented for signing and settling, and the same was settled and signed on said date. The motion to strike out the case-made must be sustained. The facts are identical with those in *Columbia Mfg. Co. v. Stoddard Mfg. Co.*, 61 Kan. 640, 60 Pac. 320. The claim that Judge Sturgis derived his power to sit by virtue of chapter 108 of the Laws of 1897, providing for the interchange of judges, is without merit. The point made was decided against

the contention of plaintiff in error in *Re Hewes*, 62 Kan. —, 62 Pac. 673. It was there held that the authority of a judge similarly situated was derivable from his election as judge pro tem. We can consider, therefore, only such errors assigned as appear to be matters of record, and which are brought to our attention in the transcript.

The railway company, defendant below, in February, 1899, before the first trial of the case, filed a motion for a change of venue, based on two grounds: First, that the regular presiding judge was interested and had been of counsel in the cause; and, second, that, by reason of the bias and prejudice of the inhabitants of Marshall county, it could not have a fair trial in that county. In ruling on this motion the court held that the railway company was entitled to a change of venue, for the reason that the presiding judge had been of counsel in the case, but overruled the application on the second ground. The journal entry showing the action of the court on this motion states: "The court finds that the defendant is entitled to a change of venue on the ground that the presiding judge was of counsel in this case. The court finds that the defendant is not entitled to a change upon the second count set forth in the motion for a change of venue. To the ruling of the court the defendant thereupon duly excepted. The court thereafter announced that by reason of a promise made by Judge Charles W. Smith, of Stockton, Kansas, to appear and try the causes in which the presiding judge is disqualified to sit, that this case would not be sent to another county, but that Hon. C. W. Smith, of the Thirty-Fourth district of Kansas, would be required to appear and try this cause." Thereafter Judge Smith appeared, and was selected by the bar as judge pro tem. to try this and other cases. He qualified by taking the oath, and a trial was had before him without any objection on the part of the railway company. The jury having disagreed, Judge Sturgis was called in, as before stated, and the cause proceeded to trial again, without any objection being made by the defendant below to the jurisdiction of the court or the authority of the judge to act. Under these circumstances, it seems quite clear that there was a waiver of the claim for a change of venue. 4 Enc. Pl. & Prac. p. 440, note 2.

It is further contended by counsel for plaintiff in error that under section 20 of article 3 of the constitution, which requires the selection of a pro tem. judge by the bar, he can be chosen only in the manner thus pointed out. It appears that after the mistrial before Judge Smith, and on the 23d day of May, at the regular May term, 1899, Judge Sturgis was selected by the bar as judge pro tem. He took and subscribed an oath of office to the effect that he would

faithfully perform the duties of such judge at the regular May term, 1899. At said May term the case was, on the application of the railway company, continued until the October term, 1899. The record shows that "both plaintiff and defendant agreeing thereto, and consent to the trial thereof by said judge." It is insisted that this consent did not confer jurisdiction, in the face of the constitutional provision above mentioned, and that, under the terms of the oath of office taken by Judge Sturgis, his duties were limited to the regular May term, 1899, and could not be extended beyond that time by agreement. This claim is not well founded. The ending of the term at which he was selected, and during which he qualified, did not divest him of power to proceed and try the controversy committed to him as judge pro tem. The authority which he exercised is conferred by statute. Gen. St. 1899, § 1887. See, also, *Small v. Reeves* (Ky.) 37 S. W. 682.

Several instructions are complained of, but, as the evidence is not before us, we can only consider such of them as show abstract propositions of law to have been presented erroneously to the jury under the issues made by the pleadings. *Town of Leroy v. McConnell*, 8 Kan. 273; *Railroad Co. v. Owen*, Id. 409; *State v. English*, 34 Kan. 629, 9 Pac. 761; *Stetler v. King*, 43 Kan. 316, 23 Pac. 558; *Gray v. City of Emporia*, 43 Kan. 704, 23 Pac. 944. Adhering to the rule laid down in the above cases, we find but one of the instructions refused which can properly be considered. Defendant below requested the court to charge that, the plaintiff having alleged in her petition that the injuries received by her were sustained wholly on account of the negligence of the defendant, and without any fault or want of care on her part contributing thereto, by virtue of this averment the burden of proof was shifted to the plaintiff, and that it was incumbent on her to establish by a preponderance of the evidence not only that the defendant was guilty of one or more of the acts of negligence alleged, but that she herself was without fault or negligence approximately contributing thereto. It is the settled doctrine in this state that contributory negligence is an affirmative defense. *Railroad Co. v. Phillibert*, 25 Kan. 582; *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408. The allegation of an exercise of due care on the part of the plaintiff was unnecessary. *Carrier v. Railway Co.*, 61 Kan. 447, 59 Pac. 1075. Without such averment there was a presumption that plaintiff below was not guilty of contributory negligence, and the language employed in the petition added nothing to the force of that presumption.

We have examined the findings of the jury, and think they fairly support the verdict. The complaint of excessive damages cannot be considered, in the absence of the evidence on which the conclusion of the jury was

based. The judgment of the court below will be affirmed.

JOHNSTON, J., concurring.

DOSTER, C. J. I dissent from the view that the powers of a judge pro tem. extend from the term at which he was elected to the succeeding terms. There is nothing in the statute which enables me to take such a view. It is silent upon the subject. The statute containing neither express statement nor implication regulative of the matter, I think it should be held that the duration of office of a judge pro tem. is limited to the term at which he was elected, and does not extend beyond such term, except for the purpose of settling and signing cases-made. If this be the correct view, then the only authority possessed by Judge Sturgis to try the case was derived from the consent given by the parties. This consent was not binding upon them. The parties to a case cannot confer upon any one the power to adjudicate their controversies and render judgments against them. Judicial power must be conferred by law. It is not derivable from consent. In that particular the case of *Higby v. Ayres*, 14 Kan. 331, is grossly erroneous. As a rule, a mere question of practice, unlike one of substantive law, is too unimportant to justify a dissent; but a question which involves the constitution and the powers of judicial tribunals, although arising as one of practice, constitutes an exception, and should be carefully considered.

RANDOLPH et al. v. SPRAGUE.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

HOMESTEAD—CONVEYANCE—JUDGMENT LIENS.

Where a husband against whom a judgment has been obtained acquires realty which is actually occupied by him as a homestead, and subsequently conveys it, the purchaser acquires title free from any lien of such judgment.

Error from district court, Lyon county.

Action by E. F. Sprague against W. A. Randolph and another to restrain the sale under execution of certain realty. From a judgment for plaintiff, defendants bring error. Affirmed.

H. D. Dickson and Madden Bros., for plaintiffs in error. Chas. B. Graves, for defendant in error.

PER CURIAM. This case was commenced in the district court of Lyon county, and was submitted to the court upon the following agreed statement of facts: "First. On the 1st day of August, 1887, the defendant W. A. Randolph obtained a judgment in the said district court against one J. H. Wilhite for the sum of \$820, which judgment was when this suit was commenced, and now is, a valid

and subsisting judgment against said Wilhite to the amount of more than one hundred dollars. Second. On the — day of November, 1898, the said defendant W. A. Randolph caused an execution to be issued upon said judgment, which was placed in the hands of the defendant Thomas O'Connor, who was and is sheriff of said Lyon county, Kansas; and the said sheriff at the instance and request of the said W. A. Randolph levied said execution upon the lots in controversy, to wit, lots 120, 122, and the south half of lot 124, on Mechanic street, in the city of Emporia, Lyon county, Kansas; and at the time this said suit was commenced said sheriff was about to sell said lots under said levy, and he would have sold the same by virtue of said execution and levy had he not been restrained by the injunction in said suit. Third. On and prior to the 26th day of March, 1892, the aforesaid property was owned by one I. C. Martin, and at said date there was a mortgage upon said property for the sum of \$2,350, which mortgage was thereon in said amount at the time said property was conveyed to the plaintiff herein, as hereinafter stated. Fourth. On and prior to said March 26, 1892, the aforesaid J. H. Wilhite was a resident of the state of Kansas, Lyon county, and of the said city of Emporia. He was also the head of a family, having a wife and minor children living together with him as his family in said city, county, and state. Fifth. On and prior to the 26th day of March, 1892, the said J. H. Wilhite did not own or occupy any homestead, but lived in a rented house in said city of Emporia. On the said 26th day of March, 1892, the said J. H. Wilhite, for the purpose of acquiring a homestead, and with the intent to use and occupy the same as and for his homestead with his family, traded horses, estimated in the trade to be of the value of \$475, to said I. C. Martin for the property aforesaid; and for said consideration said Martin conveyed said property to said J. H. Wilhite, subject to the mortgage aforesaid, and the said Wilhite immediately after said trade moved upon said property with his said family, and afterwards actually used and occupied it as a homestead for his said family. Sixth. Afterwards, and while said J. H. Wilhite was in the occupancy of said property as aforesaid, he conveyed the same to the plaintiff herein, who has ever since been and now is the owner thereof and in the possession thereof. The said conveyance from Wilhite to Sprague was made June 20, 1893. Said Wilhite occupied said premises as aforesaid continuously from the time he took possession from said Martin as aforesaid until he surrendered possession to the plaintiff as aforesaid. Seventh. While the said J. H. Wilhite was in the possession and occupancy of said property as aforesaid, and a short time before he conveyed said property as aforesaid, he received a back pension, in the sum of \$1,040; and for the purpose of securing for himself and family another home-

stead, which would be free and clear of incumbrance, he on June 1, 1893, with \$900 of said pension money, purchased twelve acres of land in said Lyon county, and received a warranty deed therefor, which was recorded the same day. At the time of said purchase it was his intention to make said twelve acres his future homestead, which intention he continued to entertain, and carried it out by moving upon said twelve acres with his family and making it his home. At the time of said purchase he was unable to take immediate possession of said twelve acres, because the dwelling house thereon was out of repair, there was no barn thereon, and it required other repairs which he desired to make. For the purpose of obtaining these needed repairs upon the said twelve acres, he on June 20, 1893, sold and conveyed by quitclaim deed to the plaintiff herein the lots aforesaid; and the plaintiff, in consideration of said conveyance, furnished labor and materials for and made the repairs aforesaid, to the value of \$275, as estimated in said trade, and said plaintiff took said lots subject to the aforesaid mortgage of \$2,350. Immediately after the completion of said improvements the said Wilhite removed from said lots to said twelve acres with his family, and surrendered possession of said lots to this plaintiff, who has ever since been in possession thereof. Eighth. The said lots levied upon by said sheriff as aforesaid are situated within the corporate limits of said city of Emporia, and are less than one acre. The residence thereon was the only homestead the said J. H. Wilhite or his family had, after the purchase thereof, until the said twelve acres became his homestead. Said Wilhite removed from said lots to said twelve acres on the — day of July, 1893, which has ever since been and now is his homestead and the residence of himself and family."

On the 20th day of June, 1893, J. H. Wilhite sold and conveyed the premises in controversy to the defendant in error. The only question presented for the consideration of this court is, did this conveyance carry title to the defendant in error free from said judgment? It is contended by defendant in error that he purchased the property of Wilhite while it was actually occupied by him as a homestead, and while it was free from any lien, and that he, therefore, took a clear title. This contention is in harmony with the agreed statement of facts and the decisions of our supreme court. *Morris v. Ward*, 5 Kan. 239; *German Ins. Co. v. Nichols, Shephard & Co.*, 41 Kan. 136, 21 Pac. 111; *Monroe v. May*, 9 Kan. 466; *Wea Gas, Coal & Oil Co. v. Franklin Land Co.*, 54 Kan. 533, 33 Pac. 790; *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697; *Roser v. Bank*, 56 Kan. 129, 42 Pac. 341. Other authorities applicable to the facts in this case may be cited. *Winter v. Ritchie*, 57 Kan. 214, 45 Pac. 395; *Elwell v. Hitchcock*, 41 Kan. 132, 21 Pac. 109; *German Ins. Co. v. Nichols, Shephard & Co.*, 41 Kan. 136,

31 Pac. 111. Applying the authorities cited to the facts as agreed upon, the judgment of the district court will be affirmed.

STATE v. START et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

CRIMINAL LAW—INSTRUCTIONS—REFUSAL.

Instructions which are sufficiently covered by the charge are properly refused.

Appeal from district court, Rush county.

Charles Start and Milton Shepard were convicted of petit larceny, and they appeal. Affirmed.

H. Fierce, J. W. McCormick, S. I. Hale, and G. Polk Cline, for appellants. H. L. Anderson, Co. Atty., and A. A. Godard, Atty. Gen., for the State.

PER CURIAM. The appellants, in their brief, set forth the following statement of facts: "At the May term of the district court of Rush county, Kansas, the defendants were found guilty of petit larceny. They were tried on an information charging them with grand larceny, alleged to have been committed in Rush county, February 13, 1900, and sentenced to pay a fine of \$100, and to be confined in the county jail one year. The property alleged to have been stolen was a saddle, claimed to be the property of Hugh Moran; all of which more fully appears in the information, to which reference is herein made. The defendants and the Moran boys were old acquaintances, and had known each other from childhood. On the night in question, Start and Shepard came to the store of John Moran, and were in and about the store nearly all night, and a number of other persons were also there. Start and Shepard came there on horseback. Shepard was riding barebacked. They hitched their horses near the store, and went in. In the meantime William rode up, dismounted, tied his horse, and went into the store. Charles Start took a saddle off Wm. Moran's horse, and placed it on Milton Shepard's. This was done in the presence of Robert Black. It was all done openly. There was no attempt at concealment. At the time he took the saddle, Start said, 'They did not need the saddle, but they were going to have it to ride on;' and further said, 'I am not stealing it;' and, after placing the saddle upon Shepard's horse, Start went into the store with Black, to where the Moran brothers were, and asked Shepard if he was ready to go to the dance, at the time remarking that he (Shepard) would not have to go bareback. The appellants have never denied the taking of the saddle, but, on the contrary, admit that Start took the saddle, and placed it upon Shepard's horse. But they deny that such taking was with the intent to steal it, and they claim that the taking was for the purpose of temporary use only by Shepard to ride to a dance; and they claimed in the court below—

and they now claim in this court—that the elements of larceny in such taking are wholly wanting, and that, therefore, their conviction should not stand."

The only error complained of is the refusal to give certain instructions and in overruling a motion for a new trial. The instructions given, after statement of case by the trial court, are as follows: "No. 1. The jury are instructed that section 82 of chapter 100 of the General Statutes of 1897, being the crimes and punishment act, provides: 'Every person who shall be convicted of feloniously stealing, taking and carrying away, of any money, goods, rights in action, or other personal property, or valuable thing whatsoever, of the value of twenty dollars or more, shall be deemed guilty of grand larceny.' No. 2. The same chapter provides: 'That any person convicted of grand larceny shall be punished by confinement and hard labor not exceeding five years.' No. 3. The jury are instructed that section 93 of the crimes and punishment act provides: 'That every person who shall steal, take and carry away any money, or personal property, or effects of another, under the value of twenty dollars,—not being a subject of grand larceny without regard to value,—shall be deemed guilty of petty larceny and upon conviction shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment.' No. 4. The jury are instructed that unless you find from the evidence that the value of the saddle was twenty dollars or more, you cannot convict the defendant of grand larceny. No. 5. The jury are instructed that if they find the value of the saddle was less than twenty dollars, the crime, if any, would be petty larceny. No. 5½. The jury are instructed that the information in this case charges grand larceny. There is also included in the charge of grand larceny the lesser offense of petty larceny, and the defendants can be convicted of petty larceny under the information, if the evidence so warrants. No. 6. The jury are instructed that if you find from the evidence that on the 13th day of February, 1900, in Rush county, Kansas, that Milton Shepard and Charles Start did unlawfully, feloniously steal, take, and carry away, with the intent to steal, one double-clinch, leather, man's riding saddle, and you further find from the evidence that the said saddle was the property of Hugh Moran, and you further find that the value of said saddle was twenty dollars or more, then, in that case, the defendants would be guilty of grand larceny as charged, and you should so find. No. 7. The jury are instructed that, to constitute the offense charged in this case, the intent alleged in the information is necessary to be proved. But direct and positive testimony is not necessary to prove the intent; it may be inferred from the evidence if there is any fact proved which satisfies the jury beyond a reasonable doubt of its existence. No. 8. The jury are in-

structed that if you find from the evidence that the saddle described in the information was stolen, and that the defendants were found in the possession of the property soon after it was stolen, then such possession is, in law, a strong criminating circumstance tending to show the guilt of the defendants, unless the evidence and the facts and circumstances proved show that they may have come honestly into the possession of the same. No. 9. When there is a reasonable doubt upon any material fact necessary to be established, then you must acquit; for the defendant is entitled to the benefit of every reasonable doubt. It follows, of course, that each and every ingredient and element that is necessary to constitute the offense charged must be established beyond a reasonable doubt, before you can convict the defendant. No. 10. A reasonable doubt does not mean a mere possible doubt, or one that is sought after, or one that is the result of sympathy, or of a desire to find a doubt. Everything pertaining to human affairs is susceptible to doubt. There is nothing human concerning which there could not be a possible or imaginary doubt. If, after a careful examination of all the evidence in the case, you do not have an abiding conviction to a moral certainty of the defendant's guilt, then you have a reasonable doubt of his guilt; and such a doubt as entitled the defendant to an acquittal. You need not be in absolute certainty of his guilt; but you should be morally certain of his guilt. If you are certain enough of the existence of a fact to act upon it in matters of the highest importance to yourselves, then you are morally certain of the existence of the fact; but, so long as this moral certainty is not reached, a reasonable doubt remains. No. 11. The defendant is presumed to be innocent of the charge made against him, and each and every one of said charges; innocent of the acts charged to have been done, and innocent of the guilty intent charged. This presumption continues until the contrary is proven by the evidence, and until each and every ingredient necessary to constitute the crime charged is proven by such evidence. The burden of proof rests upon the state to establish to your satisfaction every such necessary ingredient, and this burden of proof does not shift from the state to the defendant. No. 12. The jury are instructed that larceny is the felonious stealing, taking, and carrying away of personal property of another. No. 13. The jury are instructed that among the material averments contained in the information necessary to be proved in order to warrant a conviction is the one that the property alleged to have been stolen had some value. No. 14. The court instructs the jury that every unlawful taking and carrying away of the personal goods of another will not amount to larceny. To constitute larceny, the felonious intent must be shown to have accompanied the original taking; that is, the saddle must have

been taken with the intent to steal the same. No. 15. The jury are instructed that the possession of stolen property recently after the theft by the person charged, if unexplained, is a circumstance tending to prove guilt; and if the jury believes from the evidence that the defendants, Milton Shepard and Charles Start, were found with the stolen property in their possession, then, in determining the weight to be attached to that circumstance as tending to prove guilt, the jury shall consider all the circumstances attending such possession. No. 16. The defendant is a competent witness in his own behalf, and the same tests should be applied by you to his testimony that you would apply to the testimony of any witness. No. 17. Gentlemen of the jury, you are the exclusive judges of the facts established by the evidence, and of the credibility of the witnesses, and of the weight which you will give the testimony of each of them. In deliberating on and considering your verdict, you can take into consideration not only the testimony of the witnesses as given in the case, but also their manner and appearance upon the stand, their manner of testifying, their candor and fairness, their want of interest in the result of your verdict, if any such has been proven, their means of knowing the facts whereof they have testified; and from these and all circumstances appearing on this trial you are to determine what weight you will give the testimony of each of them. In your deliberations upon your verdict in this case you can also call to your aid such knowledge as is common to mankind in general. If you believe that any witness that testified in this case willfully and corruptly testified to any material matter, you are at liberty to wholly disregard the testimony of such witness. Candidly consider the evidence, free from passion and prejudice, fear or favor, and arrive at your verdict from all the evidence submitted to you and from the law as the court has given it to you. You will now be addressed by counsel for the state and the defendant, to whose arguments you should give careful attention. It is their duty to keep fairly within the evidence and the instructions of the court, and to endeavor to assist you in arriving at a correct verdict. After the arguments of counsel, you will retire to your jury room, taking with you these instructions, blank paper for balloting purposes, and forms of verdict provided by the court. You will there designate one of your number as foreman, who will sign the verdict when you arrive at one, after which you will return into court." The following instructions were refused: "Larceny is the stealing, taking, and carrying away of the personal goods of another without his consent, with an intent to convert the same to one's own use, and deprive the owner permanently of his property. Trespass is the willful violation of the rights of another. Every larceny implies a trespass, but every trespass does not imply a larceny.

To take and carry away the goods of another, by force or otherwise, without the consent of the owner, is not larceny, unless done with the intent to deprive the owner of his property permanently. If taken as jest or as an act of mischief, without any design to convert the same to one's own use and to deprive the owner of his property permanently, is simply a trespass, and not a larceny. In this case, if the defendants took and carried away the saddle described in the information, and converted the same to their own use, or intended to convert the same to their own use, without the consent of the owner, they should be found guilty; but if they took possession of said property only as a jest, or took it temporarily, intending to return it, or took it as an act of mischief, with no design to convert the same to their own use and deprive the owner permanently of his property, the jury should find the defendants not guilty. If the jury entertain a reasonable doubt as to whether the saddle described in the complaint was taken with a felonious intent, as defined in this instruction, they should find the defendants not guilty." "Refused for the reason that it is covered sufficiently in the instructions given the jury and excepted to. W. S. Andrews, Judge."

From our examination of the record, we are satisfied that the trial court stated to the jury the matters of law which were necessary for their information in giving their verdict. There is no error so prejudicial to the rights of the appellants that it would justify this court in reversing the case. The judgment of the district court is affirmed.

WEBSTER v. BOARD OF COM'RS OF HASKELL COUNTY.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

On rehearing. Affirmed.

For former opinion, see 53 Pac. 529.

PER CURIAM. This is an action by Charles E. Webster upon county warrants aggregating \$1,340; each warrant being in the usual form, and containing the words, "For lease of court house." Judgment was in favor of the defendant board for costs. On proceedings in error in this court the judgment was affirmed. Webster v. Board, 7 Kan. App. 764, 53 Pac. 529. The warrants were given for a payment in advance of the rent of a building for court-house purposes for a term of 30 years. In deciding the case we said: "It did not require notice to Webster to render the warrants invalid, and he is not now suing upon the lease. Independently of the lease, there was a liability on the part of the county commissioners to pay rent as upon an implied contract for the property while it was occupied for county purposes; and, under proper pleadings, Webster might have recovered the rental from

the date of the lease until entry of the judgment in the injunction action. As this action is predicated upon the warrants, and not upon the contract, express or implied, to pay rent, it seems clear that the judgment of the trial court was correct, under the pleadings." It has been earnestly argued on the rehearing by counsel for plaintiff in error that the petition may properly be considered as stating a cause of action against the county commissioners for rental due the plaintiff. The pleadings will not bear this construction, and the point was not raised on the first hearing. We adhere to our former views. The judgment of the district court will be affirmed.

(10 Kan. App. 572)

HOLYOKE ENVELOPE CO. v. HEAGLER et al.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

FRAUDULENT CONVEYANCE—LIABILITIES OF GRANTEE—GARNISHMENT.

Where the greater part of the consideration paid for the transfer of a stock of goods by an insolvent firm was the satisfaction of indebtedness due from the deceased father of a member of the firm, and where the firm itself had not become, as a matter of law, liable for the payment of such indebtedness, *held*, that the purchaser of the goods was liable in garnishment proceedings to general creditors of such firm to the extent of the amount of such indebtedness.

(Syllabus by the Court.)

Error from district court, Lyon county.

Action by the Holyoke Envelope Company against W. R. Heagler and others. John Blank was summoned as garnishee. From a judgment of a justice discharging the garnishee, plaintiff brings error to the district court, and from an affirmance thereof brings error. Reversed.

W. T. McCarty and J. G. Hutchinson, for plaintiff in error. J. Harvey Frith, for defendants in error.

MILTON, J. Heagler & Co., a firm composed of W. R. Heagler and B. B. Heagler, his wife, transferred by bill of sale their entire stock of goods to John Blank for an expressed consideration of \$989.52, and Blank thereupon entered into possession of the goods. Heagler & Co. being insolvent and owing numerous creditors, and the plaintiff in error having obtained a judgment upon a claim against the firm, it caused Blank to be summoned as garnishee; and a trial was had under the statutes as to the truth of the answer of the garnishee, in which he denied having property belonging to Heagler & Co., and denied owing them any sum whatever. The justice discharged the garnishee, and the plaintiff in error thereupon filed its petition in error in the district court of Lyon county, which, after a hearing, affirmed the order of the justice of the peace.

It appears that \$608.50 of the consideration which John Blank purported to pay for the

stock of goods was by cancellation of indebtedness due Blank from John Bay, deceased, father of Mrs. Heagler, and that Heagler & Co. were insolvent. It was not proven that Heagler & Co. ever had become, as a matter of law, liable for the payment of the said indebtedness. It must therefore be held that, to the extent of the amount of such indebtedness, John Blank was, by reason of the possession of the goods transferred to him by Heagler & Co., liable to the general creditors of the firm. We see no reason to doubt that such liability could properly be ascertained and declared in the garnishment proceedings before the justice of the peace, the amount of the plaintiff's claim being within the jurisdiction of the court. The judgment of the district court affirming the order of the justice of the peace is erroneous, and will accordingly be reversed.

SUESS v. BOARD OF COM'RS OF LANE COUNTY.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

DEMURRER TO EVIDENCE.

Where the plaintiff's evidence tended to prove his cause of action as alleged in the petition, it was error to sustain the defendant's demurrer to such evidence.
(Syllabus by the Court.)

Error from district court, Lane county; J. S. Simmons, Judge pro tem.

Action by Henry C. Suess against the board of commissioners of Lane county. Judgment for defendant, and plaintiff brings error. Reversed.

Miller & Hoskinson, for plaintiff in error.
V. H. Grinstead, for defendant in error.

PER CURIAM. The plaintiff in error, a physician, sued the defendants in error to recover the sum of \$401 for medical services and medicines furnished by the plaintiff in the summer of 1896 to the family of one Willard McDaniel, a resident of Cleveland township, in Lane county; the plaintiff claiming that such services were rendered under an employment by William Green, trustee of said township, and that McDaniel and his family were "poor and indigent persons, lawfully settled therein." The family consisted of several members, all of whom were seized with typhoid fever, and required almost constant attendance on the part of the plaintiff for several weeks. The principal issues arising under the pleadings were whether McDaniel and his family were poor persons, within the meaning of the statute, and entitled to public aid, and whether the plaintiff was actually employed by the township trustee to perform the said services. The court sustained the defendant's demurrer to the plaintiff's evidence, discharged the jury, and rendered judgment against the plaintiff for costs. A careful consideration of the facts

set forth in the record has led us to conclude that the evidence demurred to tended to prove the affirmative of the aforesaid issues, and that the court erred in sustaining the demurrer. The judgment of the district court will be reversed, and the cause remanded for a new trial.

SCOTT, Constable, et al. v. BROWN.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.)

APPEAL—BRIEF CONTAINING ABUSIVE LANGUAGE STRICKEN FROM FILE.

Where a brief contains abusive language, it will be stricken from the files by the appellate court.

Error from district court, Cowley county; J. A. Burnette, Judge.

Action by J. W. Brown against M. M. Scott and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Dalton & Dalton, for plaintiffs in error.
Madden & Buckman, for defendant in error.

PER CURIAM. This is an action commenced by defendant in error (plaintiff below) to recover the possession of certain personal property. For abusive language used by counsel for plaintiffs in error their brief is stricken from the files. We have considered the case upon its merits, as presented by the record, and conclude that the trial court committed no error that would justify a reversal. The judgment of the district court is affirmed.

ISENHART v. HAZEN.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.)

PARTNERSHIP OF ATTORNEYS—DISSOLUTION—FEES EARNED—RIGHT THERETO—ACTION FOR ACCOUNTING—CHANGE OF VENUE—JURISDICTION—DISQUALIFICATION OF JUDGE—WAIVER—ACCOUNTING—COSTS.

1. Under Gen. St. 1897, c. 95, § 51, authorizing a change of venue of an action when the judge is disqualified, a change of venue granted by a judge who is a party to an action confers jurisdiction on the court to which the case is changed.

2. A showing that a judge is a particular friend of the plaintiff, and might be unconsciously prejudiced against the defendant, is not sufficient to authorize a change of venue.

3. Where a party consents to a case being sent to a referee after his motion for a change of venue has been overruled, he waives the error in the ruling on the motion.

4. A lawyer who voluntarily abandons a partnership and becomes a judge is not entitled to any fees earned by his former partner for services rendered after the dissolution in cases commenced either before or after the dissolution of the partnership.

5. A lawyer who voluntarily abandons a partnership and becomes a judge is not chargeable with any of the expenses of his partner, after the dissolution, in prosecuting cases commenced before the partnership was dissolved.

6. Where a lawyer voluntarily abandons a partnership and becomes a judge, money afterwards collected by him or paid to him by his

former partner as his share of the fees earned after the dissolution of the partnership in cases commenced before the dissolution cannot be recovered by the partner in an action for an accounting.

7. Where each of two partners asks for an accounting and for a reference, and the referee finds that an accounting and division of the partnership effects is necessary, the costs may properly be divided between the parties.

Mahan, P. J., dissenting.

Error from district court, Wabaunsee county; William Thomson, Judge.

Suit by Z. T. Hazen against S. B. Isenhardt for the appointment of a receiver for partnership property and for an accounting. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

John Martin, W. E. Atchison, and S. B. Isenhardt, for plaintiff in error. Safford & Williams, for defendant in error.

PER CURIAM. This action was commenced in the district court of Shawnee county by Z. T. Hazen against S. B. Isenhardt for the appointment of a receiver to take charge of the partnership property of the late firm of Hazen & Isenhardt, and for an accounting. The defendant also prayed for an accounting and for judgment for such amount as should be found due him. The defendant asked for a change of venue for the reason that the plaintiff was judge of the district court of that county, and also filed a request for the election of a judge pro tem. to pass upon such application. Afterwards the court, Z. T. Hazen presiding, made an order that the venue in the cause be changed to Wabaunsee county, and the clerk was directed to transmit the necessary transcript and papers to the clerk of the district court of that county. The defendant afterwards filed a motion to set aside the order granting a change of venue. At the same time he renewed his motion that a judge pro tem. be elected to pass upon such application. No action was taken upon this motion and application. The defendant objected to the jurisdiction of the district court of Wabaunsee county, alleging that the order changing the venue was made without notice, in his absence, without his knowledge, in disregard of his rights; that thereupon (1) the court had no jurisdiction of the subject-matter of the action; (2) that the court had no jurisdiction of the person of the defendant. This motion was overruled. Thereafter defendant filed a motion for a change of venue upon the grounds that there was a very close personal friendship existing between Hazen and the judge of the district court of Wabaunsee county, and that for that reason the court might unconsciously, not intending to do so, be influenced or biased against the defendant in such manner as to prevent defendant from having a fair and impartial trial. This motion was overruled. Afterwards, on the 3d day of May, 1898, the district court of Wabaunsee county, by and with

the consent of both plaintiff and defendant, appointed Hon. M. T. Campbell, as referee to try the cause, and make special findings of fact and conclusions of law. The referee heard the cause, and made special findings of fact and conclusions of law. Both the plaintiff and defendant filed exceptions and motions for a new trial. Judgment was rendered for defendant against the plaintiff in the sum of \$216.11, and that the costs of this action be equally divided between the plaintiff and defendant. The defendant, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court.

The record and assignments of error present but two questions: First. Had the district court of Wabaunsee county jurisdiction to hear and determine the case? Second. Is the judgment sustained by the findings of fact? As a rule, if the judge is disqualified for any cause, a change of venue is a matter of right, and upon suggestion of the disqualification he should change the place of trial of his own motion. The disqualification does not ipso facto work a change, but the judge retains jurisdiction for various purposes; among others, to change the venue. 4 Enc. Pl. & Prac. p. 409. The fact that the ground assigned for the change of venue is disqualification of the judge will not of necessity preclude his granting the order. Notwithstanding such fact he may make the order for the change of venue, the right being a statutory right, and no discretion involved therein, except for the purpose of transferring the cause for trial to some county where such objection does not exist. In this case that would be to some county near and convenient, where the judge is not interested, or disqualified from hearing the case. 4 Enc. Pl. & Prac. p. 464; Gen. St. 1897, c. 95, § 51. There is nothing in *Tootle v. Barkley*, 60 Kan. 446, 56 Pac. 755, inconsistent with this. In that case the trial court exercised a judicial function in passing upon the application for a review of a dormant judgment, but in the case at bar there is no apparent reason why the judge, although disqualified to hear and determine any phase of the case, should not make the order allowing the change of venue. In fact the statute seems to imply that he shall make the order changing the venue, or that he designate some judge who is not under disability to hear the cause. Of course, if there was any legal reason why the judge presiding at the place to which the venue is changed should not hear and determine the cause, another change of venue could be had. In the case at bar there was an application for a second change of venue. However, there was no sufficient legal showing made to entitle the party to such change. In addition, after this second application was overruled, the party consented to the appointment of a referee to try the case. The court had jurisdiction of the cause and of the parties.

The findings and conclusions of the referee are as follows: "First. Plaintiff and defendant entered into a partnership in the city of Topeka, Kansas, in the year 1882, for the practice of law, without any agreement as to the duration of said partnership, and were to devote all of their time, skill, and attention to the business, and share equally in the profits and losses thereof. Second. Said partnership continued, each party doing his full share to make it successful, till the 15th day of December, 1892, when plaintiff, having in the preceding month been elected judge of the Third judicial district of Kansas, voluntarily withdrew from the firm to prepare for the duties of said judgeship, and on that date said partnership was dissolved, without any express agreement between the parties in regard thereto, or in regard to the unfinished business of said firm. And plaintiff qualified as district judge on the 9th day of January, 1893, and has been the duly qualified and acting judge of said judicial district ever since. Third. The only book accounts kept by the firm were the accounts between themselves, and these were kept in three books, one of which was designated as Hazen's individual account book, in which were entered all expenses paid by him; and one as Isenhardt's individual account book, in which were entered all moneys received by him, and all expenses paid by him; and one was designated as the firm book, in which were entered the aggregate receipts and expenses of the two partners,—or, in other words, the receipts and expenditures of the firm. And the intention and practice of the parties during the whole of their partnership was to divide receipts and expenses as soon thereafter as practicable. Nearly all the entries in the books were made by Isenhardt; their custom being to meet at their office desk from time to time, and each name over what he had received and paid out since the last entries were made, giving dates, as nearly as could be remembered, and Isenhardt would then enter the amounts in the three books above named, generally, but not always, as of the date they were so entered; so that the dates in the books are not necessarily the actual dates of the receipts or expenditures there noted. The balance in favor of either party at such times would be equally divided, and in this way the partnership profits and losses were intended to be kept equally divided all the time. And this was supposed to be the status of their accounts and business at the date of the dissolution of their partnership, but in fact, as developed by the evidence, Hazen was then indebted to the firm in the sum of \$226.44. Fourth. After the dissolution, clients of the old firm would pay fees on business that had been commenced by the firm, sometimes to Isenhardt, who retained the books, and sometimes to Hazen, who was then judge of the court, and who would report the fact to Isenhardt from time to time as formerly, and the

latter would make the entries in the books of such receipts, just the same as he did before the dissolution; the last entry so made being dated 26th of November, 1895, of a fee of \$25, received by defendant. And it was the intention of the parties to keep, and they did, so far as practicable, keep, these fees equally divided as collected, as was their custom before the dissolution; but nothing was said at the time or times of such division of receipts about the divisions of any expenses incurred by Isenhardt after such dissolution. And he made no entries in the books of such expenses, accruing after the dissolution, as office rent, coal, and other running expenses of the office, as he had done before the dissolution, except office rent for January and February, 1893 (\$25), and a ton of coal (\$10), which entries were treated as correct by both parties at the time they were made on February 14, 1893. Fifth. After the dissolution of the partnership, Isenhardt continued the law business on his own behalf at the old office of the firm for some time, and gradually bought out all of Hazen's interest in the partnership books and office furniture, except the safe, some session laws, and atlas, and spool case, which continued in Isenhardt's possession, while Hazen occupied a separate office furnished him by the county. And while then practicing law in his individual capacity Isenhardt continued, with the consent of the old firm clients, to care for and properly attend to all unfinished business which had been begun by Hazen & Isenhardt, and in the prosecution of said unfinished firm business nearly three-fourths of his time was occupied the first year, nearly one-half of his time the second year, and nearly one-third of his time the third year. And in the prosecution of said unfinished business was also involved a part of the expenses incident to the running of his office, such as rent, fuel, light, typewriter, clerk hire, and telephone. The portion of such expenses above named incident to the prosecution of the unfinished business of the firm the first year was \$250, the second year \$150, and the third year \$50. All other expense incident to the prosecution of such unfinished business, such as stamps, stationery, traveling expenses, etc., did not exceed \$25; and (except as heretofore stated in regard to January and February, 1893, rent and ton of coal) no book accounts were kept by Isenhardt of any portion of such office expenses as chargeable against the firm of Hazen & Isenhardt, nor did he keep any book account of the value of his individual services in said cases after such dissolution as distinguished from the value of the services of the firm. Since the commencement of this action the receiver therein, and the same person making this report, has taken possession of said safe, session laws, atlas, and spool case. Sixth. There never was any express agreement between plaintiff and defendant for compensation to Isenhardt for extra services

in looking after said unfinished business of the firm, and no mention of anything of the kind was ever made by either party at any of the times when a division of fees was made between them. Seventh. The estrangement between plaintiff and defendant originated in December, 1893, in connection with the disposition of the cases in the Shawnee county district court popularly known as 'The Topeka Club Cases,' when Judge Hazen sentenced Dick Hodgins; and up to that time there never had been any trouble of any kind or character or a word of disagreement between them. Eighth. At the time of the dissolution of the partnership there were fees amounting to \$629.50 earned by and due to the firm of Hazen & Isenhardt in cases then disposed of. These fees were afterwards collected by the parties, and divided between them; the intention being to divide them equally as collected. Besides these fees, there have been fees collected by the parties in cases that were commenced by the firm, and some work done on them before its dissolution, amounting in all to \$1,485. These fees have also been divided between the parties, the intention at the time of division being to divide them equally, but in fact, as it afterwards developed, Hazen got \$50.79 more of them than Isenhardt. Of the \$1,485 the firm earned \$703 before its dissolution, and Isenhardt earned \$782 after the dissolution. The above—making a total of \$2,114.50—are all the fees collected by the parties since the dissolution of their partnership as shown by their books. But, besides the amount the books so show, plaintiff collected for the firm certain fees amounting in all to \$175, and Isenhardt collected, and not shown by the books, \$20, making a total of fees collected by both parties on firm cases since the dissolution of their partnership of \$2,309.50, of which Hazen has received and retained \$1,370.87 and Isenhardt has received and retained \$938.63, leaving a balance in Hazen's hands of \$432.23. Ninth. There are still a number of cases that were commenced by the firm, and that have been prosecuted to completion by Isenhardt, in which no fees have been collected by either party, and in some of them never will be; but the evidence shows, if collected, would amount to \$2,650. Of this amount the firm earned one-third before its dissolution, and Isenhardt the balance after such dissolution. Tenth. Isenhardt's first demand upon Hazen for compensation for extra services was made in March, 1896, by letter in response to letters written to him by Hazen. They had never spoken to each other since the disposition of the Topeka Club cases, and the sentencing by Judge Hazen of Dick Hodgins in December, 1895. This action was commenced June 2, 1896. Eleventh. At the time when fees collected by either of them after the dissolution were divided between them, Hazen did not know that Isenhardt had any charges, or intended to make any claim against him for extra

services, but retained and received at such times the proportion of the fees he did so retain and receive under the belief that the same belonged to him, just as he had formerly done during the partnership. Twelfth. Owing to the unsettled condition of the partnership business, and the different views entertained by said parties in regard thereto, said plaintiff, at the time this action was commenced, was entitled to an accounting, and an accounting between them was necessary to the closing up of their partnership business. Thirteen. Among the cases commenced by Hazen & Isenhardt was one of Greaud vs. Greaud, in which most of the services were performed by Isenhardt after the dissolution, and in which the fee charged was one hundred (\$100) dollars. For this fee Isenhardt took from their client, after the dissolution, a note and mortgage payable to Hazen & Isenhardt, and the last twenty dollars (\$20) collected on said note and mortgage are the twenty dollars (\$20) mentioned in finding nine as being collected by Isenhardt, 'and not shown by the books.' Said books at the time of said collection, and until taken possession of by the referee in this case, were in the hands of plaintiff." Conclusions of law: "First. Hazen, by voluntarily abandoning the partnership and accepting the judgeship, not only incapacitated himself from rendering any further professional services in the partnership cases, but also from receiving any fees earned by Isenhardt for services rendered after the dissolution. Second. Hazen is entitled to one-half of all fees earned by the firm up to its dissolution, but he has no legal claim on any portion of the fees earned by Isenhardt after the dissolution. Third. The portion of all fees earned by Isenhardt individually after the dissolution of the partnership belonged to him individually, and is not subject to an accounting in this action, and Hazen is in no way responsible for any of the expenses incident thereto. Fourth. That portion of the fees voluntarily paid by Isenhardt to Hazen, and also that portion collected by Hazen and retained by him with Isenhardt's full knowledge and consent at the times of their division of fees, cannot be recovered back by Isenhardt in this action. Fifth. Outside of such fees, Hazen has in his hands belonging to the old firm of Hazen & Isenhardt the sum of \$452.23, and is indebted to Isenhardt in the sum of one-half thereof, less one-half of the \$20 collected by Isenhardt, and not shown on the books. Sixth. Defendant should have judgment against plaintiff for the sum of \$216.11, and for costs of suit."

The trial court approved the findings, but modified the conclusion of law in respect to the payment of costs by dividing the costs equally between the parties. Both plaintiff and defendant asked for the appointment of a receiver, an accounting, and for dissolution of the partnership effects. Besides the referee found that an accounting and division

of the partnership effects was necessary. From the findings of fact the conclusions of law as modified by the trial court are correct. The judgment is affirmed.

MAHAN, P. J. (dissenting). The sixth finding of fact of the referee who tried the cause is that the defendant in error has \$391 of money belonging to the plaintiff in error, the same being money paid to the defendant by the plaintiff and by clients of theirs, which was money of the plaintiff in fact and in equity. The referee's fourth conclusion of law is that the conscience of the plaintiff (defendant in error) is not affected by this receipt and retention of a fund that belongs to his partner, because the partner did not at the time object. It was not allowed as a part of a settlement or compromise of any disagreement or controversy. The utmost that can be said of it is that it was a mutual mistake. The court approved this conclusion, and refused to correct the account by allowing any part of this item. My understanding of the rule is that he who goes into a court of equity seeking its aid to enforce claims against his adversary must purge his own conscience, and be prepared to do equity by his adversary. To do this he could not be permitted to fall short of surrendering to his adversary that which he had received and retained by mistake. The account and judgment should be corrected by allowing to the plaintiff in error this item of \$391.

(10 Kan. App. 565)

HULL v. JOHNSON, Sheriff.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

TAXATION—PERSONAL PROPERTY.

Under the provisions of section 1, c. 248, Laws 1899, which provides that, "when any personal property shall be located in any county of this state after the first day of March of any year which shall acquire an actual situs therein before the first day of September, such property is taxable therein for that year, and shall be assessed and placed on the tax roll and the tax collected as provided by this act," it is held that cattle brought into this state from the state of Texas in May, 1899, by the plaintiff, a resident of Greenwood county, and which were thereafter assessed by the assessor of the township in which they were located, were taxable for the year 1899.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. W. Shinn, Judge.

Action by F. H. Hull against William Johnson, sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

W. S. Marlin and R. P. Kelley, for plaintiff in error. L. H. Johnson, for defendant in error.

MILTON, J. This action was brought by the plaintiff in error against the defendant in error, as sheriff of Greenwood county, to enjoin proceedings under a tax warrant for

the collection of a tax on certain cattle which were purchased by the plaintiff and brought into Greenwood county from the state of Texas about the — day of May, 1899. The property was assessed under the provisions of chapter 248, Laws 1899, entitled "An act providing for the assessment and taxation of property in certain cases." Sections 1-3 of the act read:

"Section 1. When any personal property shall be located in any county in this state after the first day of March of any year, which shall acquire an actual situs therein before the 1st day of September, such property is taxable therein for that year and shall be assessed and placed on the tax roll and tax collected as provided by this act.

"Sec. 2. Whenever any live stock shall be located in this state for the purpose of grazing it shall be deemed to have acquired an actual situs therein as contemplated by this act.

"Sec. 3. When any person, association or corporation shall settle or organize in any county in this state and bring personal property therein after the first day of March and prior to the first day of September in any year, it shall be the duty of the assessors to list and return such property for taxation that year, unless the owner thereof shall show to the assessors, under oath, that the same property has been listed for taxation for that year in some other county in this state. If such property is brought within any county after the assessor has made his returns for that year to the county clerk, the assessor shall at once assess such property and return the same to the county clerk, and the same shall be entered by the county clerk on the tax books and collected as in other cases. The persons so assessed shall have the right, if assessed after the first Monday in June, to appear before the county clerk at any time before the taxes become due, and the county clerk shall equalize such person's taxes as provided by law in section 93, article 7, chapter 158, of the General Statutes of Kansas."

The remaining provisions of the act relate to the collection of taxes levied under the preceding section.

The defendant filed a general demurrer to the petition, and the demurrer was sustained, and a judgment for costs entered against the plaintiff. The petition alleged that the plaintiff was at the commencement of the action, and for several years theretofore had been, an actual resident of Eureka township, in Greenwood county, and engaged in farming, and in feeding and selling live stock; that he listed for assessment and taxation with the assessor of the said township all the personal property owned by him on March 1, 1899, and subsequently paid all the taxes based on such assessment; that, after such assessment was made, plaintiff borrowed money by pledging as security therefor certain cattle which had been so listed by him for taxation, and with the money thus borrowed, in May, 1899,

bought and shipped into Greenwood county from the state of Texas 350 head of cattle; that such cattle were thereafter assessed by the assessor of the said township at the value of \$1,700, and the assessment returned to the county clerk; and that the tax, the collection of which the plaintiff seeks to enjoin, was based upon the assessment so made and returned.

It is contended by the plaintiff in error that chapter 248, *supra*, if section 1 thereof be given full force and effect, is in conflict with the provisions of the constitution of this state and with the constitution of the United States. It is further contended that section 1, to be upheld, must be construed as operating only in the manner and under the conditions stated in section 3. In considering the questions arising in the present case it has been found that chapter 248 is, except in some unimportant particulars, copied verbatim from article 5, c. 45, Laws Okl. 1895, and that the last-named act has received consideration by the supreme court of Oklahoma in three cases, namely, *Cattle Co. v. Williamson*, 5 Okl. 488, 49 Pac. 937; *Wilson v. Wiggins*, 7 Okl. 522, 54 Pac. 717; *Collins v. Green*, 62 Pac. 813. In all these cases the property taxed was cattle. In the first-named case it was held that, the proof showing that cattle owned in another state or territory actually ranged and grazed in a certain county in Oklahoma during the entire year, such cattle had a situs for the purpose of taxation in that county. In the case of *Wilson v. Wiggins* the plaintiff resided in Kansas, and brought cattle from Texas into Woodward county, Okl., for grazing purposes after the 1st of March. On the 1st day of August the cattle were listed for taxation by the assessor of the township where the same were located, and the tax sought to be enjoined was levied on the basis of such assessment. The court construed the act there in question so that the provisions of section 3 exempting property under the circumstances and in the manner stated therein from taxation should apply "equally to all the classes of property subjected to taxation by the various sections of the act, regardless of whether the owner is a person settled in, or an association or corporation organized in, the county where said property is sought to be taxed." It was also held that the property made subject to taxation by the provisions of section 1 shall be listed, assessed, and placed on the tax roll in accordance with the provisions of section 3. In the case of *Collins v. Green* the court held that the first two sections of the said act are plain, and mean precisely what the language imports, and are not susceptible of any other construction, and that section 1 fixes the general rule for the taxation of all property brought into the territory between the dates named therein, while the first sentence of section 3 makes an exception to such general rule. The construction given in the case of *Wilson v. Wiggins*, su-

pra, to the first three sections of the act, was expressly disaffirmed; and it was held that the legislature intended to say "that if any person, association, or corporation shall settle in any county in this territory and bring personal property herein after the first day of March and prior to the first day of September, such property shall not be taxed if the owner thereof will show to the assessor, under oath, that the same property has been listed for taxation for the same year in some other state, or county in this territory." The court further said: "It is sufficient in this case to say that section 1 of the transient property act is general, and includes within its provisions all of the property brought into the territory, whether by resident or nonresident, while the first sentence of section 3 of that article is an exception to the general rule provided in section 1; and, if the general rule and the exception cannot stand together, the exception must fall, leaving the general statute in full force and effect." We concur in the foregoing views so far as the same are applicable in the present case. The plaintiff herein does not come within exception of section 3. It is not necessary to hold that the act is invalid because it discriminates in favor of the persons named in section 3, since if the general rule for taxation established by section 1, and the exception thereto as stated in section 3, cannot both stand, the exception falls. If the legislature intended that all persons whose property may be assessed for taxation under the provisions of section 1 may obtain exemption by making the proof required under section 3, it would doubtless have so declared, and not have employed language which cannot by any reasonable construction be given such effect. It must be held, therefore, that the legislature intended to establish a new rule governing the taxation of personal property, so that when such property shall be located in any county in this state after the 1st day of March, and shall acquire an actual situs therein before the 1st day of September, it is taxable therein for that year. It specifically declares that, if live stock is located in this state for the purpose of grazing, it shall be deemed to have acquired an actual situs therein. All the sections of the act, except sections 2 and 3, appear to be general in their nature. The present act does not attempt to repeal directly any other laws concerning taxation, and we discover no necessary conflict between this act and such other laws. The objection that it is unequal in its operation, for the reason that under the provisions of sections 4, 6, and 8, the tax of a person assessed hereunder might become due and payable at once, and before the tax on property assessed as of March 1st becomes due, does not appear to be well founded, for the reason already stated,—that the provisions of the present act are, with the exception noted, general in their nature, and, as far as they provide new methods and pro-

ceedings for the collection of taxes in certain cases, must be held as supplementing the existing laws. We are not prepared to say that a clear case of unconstitutional double taxation is presented by the facts in the plaintiff's petition. It cannot escape notice that the act in question is defectively constructed, especially in section 3, but it has not sufficiently appeared that it is unconstitutional or invalid to warrant a reversal of the judgment of the trial court.

Since the foregoing was written we have read the per curiam decision of the supreme court in the case of Conklin v. City of Hutchinson (Kan. Sup.) 62 Pac. 1012, which was an action to enjoin the assessment, levy, and collection of taxes on the plaintiff's real estate, amounting to less than \$100. It was held that the supreme court could not take jurisdiction of the cause on proceedings in error, the amount involved being insufficient, although the journal entry of judgment contained a statement "that the constitution of the state of Kansas is involved." The court also declared that, since it appeared from the record that the amount involved was less than \$100, the court of appeals could not take jurisdiction. The petition in error was accordingly dismissed. Following that decision, the present proceedings should be dismissed; but, to avoid a possible misconstruction of the decision, we shall, for the reasons already stated, affirm the judgment of the trial court.

SELLERS v. BELL.

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.)

VENDOR AND PURCHASER—INVALID CONTRACT—RECOVERY OF MONEY PAID.

Where a contract for sale of land is void either for want of power to make it, or because the manner of contracting is not that pointed out by the statute, or for any other legal reason, the party receiving benefits therefrom will be required to account to the party from whom such benefits had been received.

Error from district court, Miami county; John T. Burris, Judge.

Action by A. K. Sellers against Sarah Bell. Judgment for defendant, and plaintiff brings error. Reversed.

B. F. Simpson and N. W. Wells, for plaintiff in error. J. E. Maxwell, for defendant in error.

PER CURIAM. The plaintiff in error filed his petition in the district court of Miami county, and for his first cause of action says: "That on or about the 28th day of February, 1896, John W. Bell was the duly appointed and legally constituted agent and attorney in fact for the defendant, Sarah P. Bell, fully authorized and empowered to sell and convey that tract of land, comprising about 312 acres, lying north of the city of Paola, Miami

county, Kansas, familiarly known in that vicinity as the 'Seth Clover Farm.' Said authority was in writing, in the form of a power of attorney, a copy of which power of attorney is hereto attached, made a part hereof, and for identity marked 'Exhibit A.' (2) That on or about said date the plaintiff and the defendant, through her aforesaid agent and attorney in fact, John W. Bell, made and entered into an agreement for the sale by the defendant, and purchase by the plaintiff, of the said farm, and the plaintiff paid the said defendant, through her said attorney in fact, John W. Bell, the sum of \$1,000, which payment was in a check payable to the order of the defendant's said agent and attorney in fact, upon which check a memorandum of the agreement of sale and purchase was written; and the said defendant, through her said agent and attorney in fact, accepted the said check as a payment of the sum of \$1,000 on the said sale and purchase, and the said agent and attorney in fact indorsed the said check, and signed the said memorandum of agreement, by writing his name, to wit, 'John W. Bell,' upon the back of said check, and the said defendant received the money on the said check. A copy of the said check, with the memorandum of agreement and the indorsement of the same, is hereto attached, and fully made a part hereof, and is for identity marked 'Exhibit B.' (3) That thereafter the said defendant, Sarah P. Bell, failed, refused, and neglected to convey to the said plaintiff the said farm, or any part thereof, but before the commencement of this action the said defendant, Sarah P. Bell, sold and conveyed and yielded up the possession of the said farm to another, all without the knowledge or consent of this plaintiff, and the said defendant has voluntarily placed herself, and the title to the said farm, in such condition that it is now impossible for her to comply with the terms of the agreement; that the defendant retained the said \$1,000 so paid as aforesaid, and the whole of the same, and has never returned the same to this plaintiff, and the same is now due and payable to this plaintiff. (4) That the defendant is a nonresident of the state of Kansas, and is the owner of or has an equitable ownership in, the following described real estate in the city of Paola, Miami county, Kansas, to wit: Commencing forty-two feet west of the southeast corner of lot number seven, in block number thirty-two, in the city of Paola; thence west, twenty feet, to a stake; thence north, one hundred and twenty-seven and one-half feet, to a stake; thence east, twenty feet, to a stake; thence south, one hundred and twenty-seven and one-half feet, to the place of beginning. (5) That the plaintiff, at the same time he commences this action, commences ancillary proceedings in the nature of attachment for the purpose of securing an attachment upon the said real estate, and for the purpose of subjecting the said real estate to the payment of the said

debt." To this cause of action a demurrer was filed and sustained by the trial court.

Counsel for plaintiff in error in their brief say: "The error complained of is the ruling of the court below on the demurrer to the first cause of action. We do not claim now, nor did we claim in the court below, that the check was a sufficient memorandum in writing to take the contract out of the statute of frauds. We do not bring this action to enforce specific performance of the contract. We sue to recover the purchase money we paid, because the defendant in error refused to stand by the contract, and finally, by her own act, made it impossible for us to enforce her to carry out the contract. The precise question presented by this demurrer is this: If, for any reason, a contract for the purchase and sale of land is invalid or defeated by the act of the vendor, can the purchaser recover the money had and received by the vendor? We say, 'Yes,' and the authorities seem to sustain this view. It may be confidently asserted as the law of this state that where a contract is void either for the want of power to make it by either party, or because the manner of contracting is not the mode pointed out by the statute, or for any other legal reason, the party receiving benefits from such attempted contract will be required to account to the party from whom such benefits have been received. *Brown v. City of Atchison*, 39 Kan. 39, 17 Pac. 465; *City of Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674; *Columbus Waterworks Co. v. City of Columbus*, 46 Kan. 666, 26 Pac. 1046; *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608, citing *Gregg v. Hamilton*, 12 Kan. 333; *Holcomb v. Dowell*, 15 Kan. 378; *Nay v. Mोगrain*, 24 Kan. 75; *Becker v. Mason*, 30 Kan. 703, 2 Pac. 850; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Newkirk v. Marshall*, 35 Kan. 78, 10 Pac. 571.

In our opinion, the contention of plaintiff in error is fully sustained by the authorities. The judgment of the district court will be reversed.

(10 Kan. App. 510)

ATCHISON, T. & S. F. RY. CO. v. MOORE.
(Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.)

ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—DIRECTING VERDICT.

"Where a traveler on a country highway comes to a railway crossing with which he is familiar, and knows that a train is about due at that point, and is liable to pass at any time, it becomes his duty, as an act of ordinary prudence, to look and listen for its approach; and if the sense of sight be unavailing because of obstructions to the view, and the sense of hearing be unavailing because of preventing noises, it becomes his duty, as a further act of ordinary prudence, to stop, in order to better enable him to look and listen before entering upon the crossing; and in such a case, if, by stopping, he can see or hear the approaching train, but fails to do so, his negligence in such respect should be declared as a matter of law, and not left to the determina-

tion of the jury as a question of fact." *Railroad Co. v. Willey*, 58 Pac. 472, 60 Kan. 819.
(Syllabus by the Court.)

Error from district court, Allen county; L. Stillwell, Judge.

Action by George F. Moore against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. A. Hurd, for plaintiff in error. A. H. Campbell, for defendant in error.

SCHOONOVER, J. Defendant in error brought this action in the district court of Allen county against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the destruction of personal property and for personal injuries sustained by him by reason of a collision between one of the railroad company's trains and his team and wagon at a public crossing. The case was tried to a jury, which returned a verdict in favor of plaintiff. Judgment was rendered upon the verdict in favor of plaintiff, and the railroad company brings the case here.

In addition to their general verdict, the jury returned answers to special questions submitted by counsel for the railroad company. The railroad company filed a motion asking judgment upon the special findings. The court overruled the motion, and it is of this ruling that the plaintiff in error complains. The special findings, so far as material to the questions to be determined, are as follows: "(2) State what time of day the accident occurred. Ans. Between one and two o'clock p. m." "(4) Was the train running on schedule time at the time of accident? Ans. Yes. (5) Was the engineer in charge of engine hauling that collided with plaintiff's wagon a competent, experienced, and skillful engineer? Ans. Yes." "(26) Did the plaintiff stop before attempting to cross the track? Ans. No. (27) When the plaintiff, with the team, drove on the right of way from the east, and before his team reached the railroad track, if he had looked south, could he have seen the approaching train? Ans. Yes." "(30) If the plaintiff had listened before attempting to cross the railroad track, could he have heard the approaching train? Ans. No. (31) If you answer the preceding question, No. 30, in the negative, then state fully why he could not have heard it. Ans. On account of the noise of his wagon." "(34) Was the plaintiff well acquainted with the crossing? Ans. Yes. (35) Did he cross it frequently? Ans. Yes. (36) Was plaintiff well acquainted with the time passenger train passed the crossing where the accident occurred? Ans. Yes. (37) Did the passenger train that struck plaintiff's wagon pass the point of accident at the usual time? Ans. Yes." "(42) Did the plaintiff, before attempting to cross the railroad crossing where the accident occurred, take any precaution to prevent the accident to himself?

Ans. Yes. (43) If you answer the preceding question in the affirmative, then state what was done. **Ans.** Looked and listened." It is not urged that the special findings show that the railroad company was not negligent. Plaintiff in error rests its case upon the proposition that the findings show contributory negligence upon the part of the defendant in error. It is contended by plaintiff in error that defendant in error failed to stop, look, and listen before attempting to cross the track, and that he was, therefore, guilty of contributory negligence. In support of this proposition the cases of *Railroad Co. v. Holland*, 60 Kan. 209, 56 Pac. 6, and *Same v. Willey*, 60 Kan. 810, 58 Pac. 472, are cited. The first paragraph of the *Holland Case* is as follows: "A person who sees a railroad track upon which trains may pass at any time is already warned of danger, and it is the imperative duty of one about to cross the tracks of a railroad at least to look and listen for approaching trains. If he fails to look, when, by looking, he could see a coming train, and there is no excuse for such failure, he will be deemed guilty of negligence per se, and not entitled to recover for injuries sustained in a collision with a train, although those in charge of the train failed to give any signal of its approach." In the *Willey Case*, the syllabus is as follows: "When a traveler on a country highway comes to a railway crossing with which he is familiar, knowing that a train is about due at that point, and liable to pass at any time, it becomes his duty, as an act of ordinary prudence, to look and listen for its approach; and if the sense of sight be unavailing because of obstructions to the view, and the sense of hearing unavailing because of preventing noises, it becomes his duty, as a further act of ordinary prudence, to stop, in order to better enable him to look and listen, before entering upon the crossing; and in such a case, if, by stopping, he can see or hear the approaching train, but fails to do so, his negligence in such respect should be declared a matter of law, and not left to the determination of the jury as a question of fact." The evidence is not incorporated in the record, and every reasonable presumption must, therefore, be indulged in favor of the general verdict. *Railroad Co. v. Kemper* (Ind. Sup.) 53 N. E. 935; *Hobb v. Stone Co.* (Ind. App.) 53 N. E. 1065. In answer to question No. 42 the jury found that, before attempting to drive upon the track, the plaintiff looked and listened. In reply to question No. 27 the jury declared that when the plaintiff drove upon the right of way, and before he reached the track, if he had looked south, he could have seen the approaching train. Here is an apparent conflict; but, applying the rule that every reasonable presumption must be indulged in favor of the general verdict, we must assume that plaintiff could not, at all times, while passing from the line of the right of way to the

track, see the train. There may have been obstructions which prevented him from seeing the track except at some particular point, and it may be true that plaintiff did look and listen, though not at that particular place. But, under the rule laid down in the case of *Railroad Co. v. Willey*, supra, if the senses of sight and hearing were unavailing because of obstructions and preventing noises it became the duty of the plaintiff to stop, in order to better enable him to look and listen, before entering upon the crossing. In answer to question No. 26 the jury found that plaintiff did not stop before attempting to drive upon the track, and in reply to questions 30 and 31 that he could not hear the approaching train because of the noise made by his wagon. Under these circumstances it became his duty to stop. If there were no objects which obstructed the view, then the jury's finding that plaintiff looked and listened before attempting to drive upon the track is manifestly untrue, for the jury also found that plaintiff's eyesight was good, and that the day was clear. Assuming that there were obstructions, it became the plaintiff's duty to stop. We think that the motion of defendant below for judgment upon the special findings should be sustained, and the judgment of the district court will therefore be reversed, and the case remanded, with instructions to enter judgment for defendant.

(10 Kan. App. 538)

FRAZIER v. JEAKINS.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

GUARDIAN—SALE OF WARD'S LAND—RIGHT TO PURCHASE.

Since, under the law of this state, the wife's interest during marriage in the real estate of her husband, while a contingent one, is unquestionably property, the statutory incapacity of a guardian to become a purchaser at the sale of the ward's property is held to exclude the husband of a guardian from becoming such a purchaser.

(Syllabus by the Court.)

Error from district court, Butler county; C. W. Shinn, Judge.

Action by Clara A. Jeakins against N. F. Frazier. Judgment for plaintiff. Defendant brings error. Affirmed.

Buck & Spencer, for plaintiff in error. Redden & Kramer, for defendant in error.

MILTON, J. This is an action in ejectment brought by Clara A. Jeakins in due time after attaining her majority to recover the possession of an undivided one-twelfth interest in certain lands in Butler county, Kan., and the rents and profits thereof. The plaintiff claimed title as one of the heirs of her mother, Serena J. Jeakins, who died in that county, intestate, in 1883. Her husband and six children survived her, and one child died in infancy. In December, 1885, Mrs. Pernilly Scheel, a sister of Mrs. Jeakins, was duly

appointed guardian of the minor children of the deceased. The several interests of Mr. Jenkins and of the children, except those of the plaintiff and her sister, Effie, were purchased by Mrs. Scheel between February 1, 1886, and October 22, 1889, inclusive. At the time such interests were conveyed, it appears to have been the understanding that each of the children owned an undivided one-twelfth of the property. On November 5, 1891, Mrs. Scheel, as guardian of the persons and estates of Clara and Effie Jenkins, and acting under an order of the probate court, sold the undivided interests of the said wards at private sale to Carl Scheel for three-fourths of the appraised value of such interests, and on the same day Mrs. Scheel executed a deed therefor to the purchaser. In November, 1894, Mrs. Scheel and Carl Scheel, her husband, conveyed the entire property, by deed of warranty, to the defendant below. This action was begun on January 26, 1897. The petition was in the ordinary form in ejectment, and the answer contained a general denial only. The defendant admitted knowledge of the fact that his title rested in part on the guardian's deed, and of the further fact that Carl Scheel and Permilly Scheel were husband and wife at the time that deed was made. It was not denied that they had borne that relation for many years prior thereto. The defendant paid full value for the land, and had occupied it for a little more than two years prior to the commencement of this action. The verdict was in favor of the plaintiff for the recovery of an undivided one-fourteenth interest in the land described in the petition, and for \$90, her portion of the rents and profits.

While numerous questions are discussed by counsel, we find only one question for decision, and that is whether the court erred in instructing the jury as follows: "(4) Under the law of this state a guardian has no right to directly or indirectly become the purchaser of real estate of the ward, sold by such guardian. And in this case, if the land of the plaintiff was sold at guardian's sale to Carl Scheel, and said Carl Scheel at the time of the guardian's sale was the husband of the guardian, then the sale would be void as between the said Carl Scheel and this plaintiff; and if defendant, at the time he purchased the land, knew that Carl Scheel was, at the time of the guardian's sale, the husband of Permilly Scheel, the defendant's title would be void as against plaintiff. (5) The purchaser of land must look to the title papers under which he purchased, and he is chargeable with notice of the facts appearing upon their face, and also with knowledge of the facts suggested therein which he might, with the exercise of reasonable prudence and diligence, have ascertained. And in this case, if you believe the facts recited in defendant's title papers were such as would have suggested to a reasonable man that Carl Scheel and Permilly Scheel were

husband and wife at the time of the purchase at guardian's sale by Carl Scheel, then defendant would be chargeable with notice of that fact. (6) The conveyance from Permilly Scheel, guardian, to Carl Scheel, and from Permilly Scheel and Carl Scheel to defendant, are prima facie valid, and the burden of proof is upon the plaintiff to show that defendant, at the time he received the conveyance from Permilly Scheel and Carl Scheel, knew that at the time of the guardian's sale said Permilly Scheel and Carl Scheel were husband and wife, or that the recitals in defendant's title papers were such as to suggest that fact to a reasonable man, and such as would have put a person of ordinary prudence upon inquiry as to that fact; and, unless plaintiff does show these facts, you should find for defendant." The statute provides that the same rules that are prescribed in the sale of real property by executors and administrators shall be observed in sales by guardians, and as to sales by executors and administrators it is provided that the executor or administrator shall not, directly or indirectly, become the purchaser of the real estate sold; also that the executor or administrator shall make return of the proceedings under the order of sale to the court, which report shall be verified by affidavit, stating that he did not, directly or indirectly, purchase such real estate, or any part thereof, or any interest therein, and that he is not interested in the property sold except as stated in the report. Such an affidavit, made by Mrs. Scheel, accompanied her report of the sale in the present case. She was then the owner of ten-twelfths of the land in question, and her husband, through that sale and the deed made thereunder, became the owner of the remaining two-twelfths. It does not appear from the record that the fact of their relationship was known to or considered by the probate court. It is clear that, if Mrs. Scheel was directly or indirectly interested in the property sold by her as guardian to her husband, such sale was clearly illegal, and an illegal sale made by a guardian of a ward's property cannot be upheld as against the claim of the ward, seasonably made, unless it appears that the rights of innocent third persons would be injuriously affected by setting aside the sale. In the case of *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52, which was a case where the wife of an executor had purchased through a third person certain land belonging to the trust property sold at the executor's sale, the court said: "The incapacity of the trustee to become the purchaser at his own sale rests upon the ground of public policy. It is wholly immaterial whether the property brings its full value. *Culver v. Culver*, 11 N. J. Eq. 215; *Mulford v. Bowen*, 9 N. J. Eq. 797. The exclusion of the wife as a purchaser, where the husband sells as a trustee, is not so much for the reason that he may subsequently become entitled to some in-

terest in her land as on account of the unity that exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes the husband himself." See, also, *Davoue v. Fanning*, 2 Johns. Ch. 251. In the present case the purchaser of the ward's interest in the land was the husband of the guardian who made the sale, and by such purchase he became a tenant in common with his wife, the guardian, in the ownership of the estate, of which they held apparently the entire title. We think the guardian thus became interested in the property sold beyond the law's permission. As to the general incapacity of one who sells property in the discharge of a trust to purchase the same, directly or indirectly, see the following: *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Gardner v. Ogden*, 22 N. Y. 327; *Riddle v. Roll*, 24 Ohio St. 572; *Land Co. v. Eastman*, 80 Ga. 690, 6 S. E. 586; *Hoffman v. Harrington*, 28 Mich. 90. The decision by the supreme court of this state in the case of *Webb v. Branner*, 59 Kan. 190, 52 Pac. 429, rests on the same principle that underlies the foregoing. In that case the action was by a ward to recover an undivided interest in a lot in the city of Topeka. The facts in the record showed that the administrator, who was also the guardian of the plaintiff, had, by means of a third person, become the purchaser of the property; the intermediary having paid no consideration at the administrator's sale. The court said: "It was shown that a fair price was obtained for the lot, but, there being a manifest conflict between the duties of the trustee and his personal interests, the courts, for the purpose of removing all opportunities for frauds, generally hold such transfers to be void, whether they appear to be fair or not. The general rule is that the trustee is disabled from purchasing trust property, whether the purchase was made directly by himself or through another; and, besides, we have legislative prohibition." In addition to the foregoing it may properly be observed that in this state the husband and wife have an interest, either direct or indirect, in each other's real estate. In the case of *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, it was said: "A wife residing in this state is entitled, upon the death of her husband, to the half of all the real estate owned by him during marriage which has not been sold on judicial sale, and is not necessary for the payment of debts, and of which the wife has made no conveyance; so that there is no inchoate interest to the extent of one-half given to the wife in the real estate of her husband. It is true that this interest in the real estate of her husband is inchoate and uncertain, yet, according to the authorities, it possesses the element of property. * * * We now go further, and declare that, although the wife's right and interest in the real estate of her husband not occupied as a homestead is in-

choate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband for its protection, and for relief from fraudulent alienation by her husband." In *Munger v. Baldridge*, 41 Kan. 236, 243, 21 Pac. 159, where the wife had given the husband a power of attorney authorizing him to convey her inchoate interest in his real estate, the court said: "The interest of a wife in the real estate of her husband during marriage is a contingent one, it is true; but it is unquestionably property, and no reason has been advanced why she may not employ the husband to act for her, and, in conjunction with himself, convey it away." In *Warner v. Broquet*, 54 Kan. 650, 39 Pac. 228, it was declared that both husband and wife have an interest, either direct or indirect, in each other's real estate. The facts in the record show that Frazier purchased the land from Mrs. Scheel and her husband with knowledge that the latter's interest therein had been acquired under the sale made by Mrs. Scheel as guardian, and that his grantors were husband and wife at the time of that sale. His title papers also were sufficient to charge him with notice of the transaction whereby Carl Scheel became the purchaser of an interest in the land. "A purchaser of land must look to the title papers under which he purchases; and he is chargeable with notice of the facts appearing upon their face, and also with the knowledge of all facts suggested therein, and which, with the exercise of reasonable and prudent diligence, he might have ascertained." *Knowles v. Williams*, 58 Kan. 221, 48 Pac. 856. In view of all of the foregoing, we hold that the court did not err in giving or refusing instructions, that the verdict and the judgment thereon are supported by the proven facts and by the law, and that the question as to the jurisdiction of the court to render the judgment does not properly arise upon the record. The judgment of the district court is affirmed.

BURNETT et al. v. HINSHAW.

(Court of Appeals of Kansas, Southern Department., W. D. Jan. 12, 1901.)

DIRECTING VERDICT.

Where there was some competent evidence tending to prove the defense as alleged, it was error to sustain a demurrer to the evidence.

Error from district court, Reno county.

Action by W. H. Hinshaw against J. O. Burnett and others. Judgment for plaintiff. Defendants bring error. Reversed.

Wm. G. Fairchild, for plaintiffs in error.
W. M. Whitelaw, for defendant in error.

PER CURIAM. This action was commenced in the district court of Reno county by W. H. Hinshaw, defendant in error, against plaintiffs in error, defendants below, upon

their liability as guarantors on a certain promissory note for \$3,000. The defendants below set up in their answer two defenses: First, a release evidenced by two alleged executory contracts set forth in their answer; second, that W. H. Hinshaw had become a holder of stock in the Sylvia Milling & Grain Company, and therefore could not sue the defendants below, they being, as claimed, joint stockholders with the plaintiff. The plaintiff, Hinshaw, filed a verified reply. The burden of proof being on the defendants below, they introduced their evidence, and rested. The plaintiff, Hinshaw, demurred to the evidence of defendants below, for the reason that it failed to show facts sufficient to constitute a defense to Hinshaw's claim against them. The trial court sustained the demurrer to the evidence, withdrew the consideration of the case from the jury, and rendered judgment for Hinshaw in the sum of \$1,281.25 and costs, of which plaintiffs in error complain. We cannot give a synopsis of the evidence in this opinion, but, from our examination of the record, we conclude that there was introduced some competent testimony tending to prove the defense as alleged, and, as against a demurrer, under proper instructions, the issue should have been submitted to the jury. The judgment of the district court is reversed.

REA-PATTERSON MILL. CO. v. MYRICK.
(Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.)

DAMAGES—EXCESSIVE VERDICT—APPEAL.

Error in an excessive verdict, in an action for breach of contract, may be cured by a remission of the excess.

Error from district court, Montgomery county; A. H. Skidmore, Judge.

Action by W. A. Myrick against the Rea-Patterson Milling Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ergebright & Banks, for plaintiff in error.
T. H. Stanford, for defendant in error.

PER CURIAM. This was an action brought by defendant in error, as plaintiff, in the district court of Montgomery county, against plaintiff in error, to recover damages for the breach of a contract of hiring. The case was tried to a jury, which returned a verdict in plaintiff's favor for \$2,183. Upon application of plaintiff, \$239 of this amount was by the court remitted, judgment being entered for the balance. Defendant brings the case here.

It is first contended by plaintiff in error that "the verdict is not supported by sufficient evidence, and is contrary to the evidence." As to this assignment of error, it is sufficient for us to say that there was some competent evidence to support the verdict, and under the well-settled rule, both of this court and the

supreme court, the verdict will not be disturbed.

It is next contended that "the jury was actuated by passion and prejudice against the defendant in the rendition of an excessive verdict." Counsel for plaintiff in error insist that, because the jury returned a verdict for an amount in excess of the amount shown by evidence to be due defendant, it was clear that such verdict was tainted with passion and prejudice, and that the court should therefore have granted a new trial. While it is true that the jury brought in a verdict in excess of the amount shown by evidence to be due the plaintiff, we cannot say that this fact, of itself, is sufficient to show that the jury was actuated by passion and prejudice. Our supreme court has in some instances held an excessive verdict to be evidence of prejudice and passion. An examination of the cases will show, however, the verdict was in every instance grossly excessive, and the trial court recognized this fact by remitting a large part of the verdict. We cannot say that the verdict in this case was grossly excessive. We think that the error was cured by the remission of the excess, and we so hold. See the cases of Railroad Co. v. Richards, 58 Kan. 344, 49 Pac. 436; Drumm v. Cessnum, 58 Kan. 332, 49 Pac. 78; Railroad Co. v. Dwell, 44 Kan. 395, 24 Pac. 500; Railroad Co. v. Cone, 37 Kan. 578, 15 Pac. 499; Steinbuchel v. Wright, 43 Kan. 307, 23 Pac. 560; Cattle Co. v. Mann, 130 U. S. 60, 9 Sup. Ct. 458, 32 L. Ed. 854.

Complaint is also made of a certain instruction of the court, but, viewed in the light of the entire charge, we do not think that the instruction was prejudicial. The judgment of the district court is affirmed.

(131 Cal. 187)

CITIZENS' BANK OF LOS ANGELES v. LOS ANGELES IRON & STEEL CO. et al. (L. A. 759.)

(Supreme Court of California. Dec. 29, 1900.)

TRUST DEED SECURING BONDS—FORECLOSURE BY SINGLE BONDHOLDER—CONDITIONS PRECEDENT—DEMAND ON TRUSTEE—OFFER OF INDEMNITY—NECESSITY—COMPLAINT—AVERMENTS—AMBIGUITY—REVIEW—ACTION ON NEGOTIABLE BONDS—DEMAND FOR PAYMENT—NECESSITY—PLEADING.

1. On the foreclosure of a trust deed the complaint alleged that plaintiff was the owner of some of the bonds and coupons secured thereby. The trustee stated in his answer that it refused to sue solely because a majority of the bondholders had not requested it in writing, and an issue raised as to plaintiff's alleged ownership was determined in plaintiff's favor. Held, that the failure to allege that plaintiff notified the trustee of the number of bonds held by it when it demanded foreclosure was not such an uncertainty in the complaint as would justify reversal of the judgment on the merits because a demurrer for uncertainty and ambiguity was overruled.

2. Where demand on the trustee to foreclose a trust deed is made by an owner of bonds secured thereby, an offer to indemnify him is unnecessary if the trustee makes no demand therefor.

3. The complaint in an action to foreclose a trust deed brought by a bondholder secured thereby, in his own behalf as well as in behalf of all the other bondholders, need not set forth the several owners of the bonds, if it appears that they are unknown to him.

4. By Civ. Code, § 3130, "it is unnecessary to make a demand for payment on the principal debtor in a negotiable instrument in order to charge him"; and hence, in an action on negotiable bonds, demand need not be alleged in the complaint, the suit being all the demand required.

5. If, in an action on bonds, a demand for payment is alleged, a failure to state of whom made, or that it was made improperly or of the wrong person, is matter of defense.

6. A trust deed securing bonds may be foreclosed by a single holder of unpaid coupons on the refusal of the trustee to do so on request, regardless of whether or not the refusal was arbitrary or unlawful.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Foreclosure by the Citizens' Bank of Los Angeles against the Los Angeles Iron & Steel Company and others. From a judgment for plaintiff, defendant company appeals. Affirmed.

W. B. Mathews (Chas. H. McFarland, of counsel), for appellant. F. W. Burnett, for respondent.

CHIPMAN, C. Foreclosure of deed of trust. Plaintiff had judgment, from which the defendant the Los Angeles Iron & Steel Company appeals. The only question presented relates to the correctness of the order overruling the demurrer of defendant and appellant, the steel company. On May 1, 1894, the steel company executed a trust deed to the National Trust Company, as trustee, to secure the payment of the principal and interest of certain bonds, amounting to \$30,000, payable in 10 years, and interest coupons payable semiannually. On September 25, 1897, plaintiff brought this action, alleging that it was the owner of \$5,000 of these bonds, and of the attached coupons maturing May 1, 1895, and thereafter. Foreclosure was asked for the unpaid interest only, but the complaint was framed so as to authorize the sale of the entire mortgaged property under section 723, Code Civ. Proc. It was alleged that plaintiff was ignorant of the number of the bonds outstanding, and the owners thereof; that the trustee had been requested to bring the suit, but had refused to do so; and that payment of the coupons had been demanded more than six months prior to the commencement of the action. An accounting was asked as to the number and ownership of the outstanding bonds and coupons.

1. The only alleged ground of ambiguity or uncertainty is that the complaint fails to show what proportion of the bonds alleged therein to have been issued by the steel company is owned and held by plaintiff, or was so held at the time it demanded of the National Trust Company, trustee under the

deed of trust, to bring the suit to foreclose. This demand was made August 15, 1897, and the complaint was filed September 25, 1897, and the allegation is that plaintiff "is the owner," i. e. was the owner at the filing of the complaint. Whether plaintiff in fact owned any bonds at the time it made the demand of the trustee to bring the suit, and, if so, how many, might be important as matter of defense, should its ownership at that time be denied. But we do not think the failure to allege that plaintiff made known to the trustee the number of bonds held by plaintiff when the demand was made would be such uncertainty as would justify a reversal of the judgment. The complaint did allege the fact of ownership of certain described bonds. The trustee was made a party defendant and answered, and in its answer it stated that it refused to bring the suit for the sole reason that a majority of the bondholders had not, in writing, requested it to bring the suit. Defendant and appellant, the steel company, answered the complaint, denying plaintiff's ownership of any bonds; and this issue was determined at the trial, and the fact was found to be that plaintiff was the owner of certain bonds and coupons, as alleged in the complaint. A judgment on the merits will not be reversed on a demurrer for uncertainty and ambiguity, under the circumstances as disclosed here.

2. Objection is made, presumably in support of the general demurrer, that there is no allegation in the complaint that demand for interest was made before demand on the trustee to bring the suit; no allegation that the interest had been due six months prior to demand upon the trustee; no allegation that the trustee had been informed when he refused to bring the suit that interest had not been paid, or that plaintiff owned the bonds, or that a majority of the bondholders had requested the trustee to bring the suit, or that an indemnity bond had been offered the trustee. These objections relate to provisions found in the bond or in the deed of trust. There was no demurrer for uncertainty in respect to these matters. The point of the general demurrer seems to be that the showing is insufficient to justify the plaintiff in bringing the action, thus taking the control of the matter out of the hands of the trustee. It appears, however, that the trustee answered, alleging that the ownership of the bonds was unknown to it, and admitting that it had been called upon to bring the suit, and that it refused, as already stated, for the sole reason that a majority of the bondholders had not made a written request for it to bring the action. It appears from the decree that all outstanding bonds and coupons were brought forward by their respective owners at the trial, and all the bondholders concurred in the action and were provided for in the decree, and none of them appeals, nor does the trustee.

tee, and that default in the payment of interest had continued for over two years prior to request on the trustee to bring the suit. No demand was made by the trustee for indemnity, and an offer of indemnity to him was, therefore, not necessary. Plaintiff could not allege the several ownerships of the bonds; for, as shown by the complaint, plaintiff did not know who were the owners; but plaintiff, in effect, brought the action for the benefit of all bondholders, and, as we have seen, they were all ascertained at the trial, and they surrendered their bonds and coupons. As to alleging demand upon the steel company for payment, demand was alleged, and that such demand was made more than six months prior to commencing the action. But no demand on the steel company was necessary, so far as it was concerned (Civ. Code, § 3130), the suit being all the demand required. *Cousins v. Partidge*, 79 Cal. 224, 21 Pac. 745; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878. Furthermore, as demand was in fact alleged, a failure to state of whom made, or that the demand was made improperly or of the wrong person, would be matter of defense.

Appellant's principal contention is that a single bondholder cannot bring the suit without having shown that the trustee has arbitrarily and unlawfully refused to act; citing *General Electric Co. v. La Grande Edison Electric Co. (C. C.)* 79 Fed. 25; *Id.*, 31 C. O. A. 118, 87 Fed. 590; and other cases. It is well settled, I think, that any holder of unpaid coupons may sue upon refusal of the trustee to do so after request upon him. *Railroad Co. v. Foadick*, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. Ed. 47, and cases last above cited. The cases cited by appellant do not require that the refusal of the trustee must appear to have been arbitrary or unlawful. Where the deed authorizes the trustee to proceed upon the written request of a majority of the bondholders, it is held in those cases that he cannot act without such petition. But the bondholder has a right of action upon showing that the trustee has refused to bring the suit, even though the trustee may have been justified, under the provisions of the deed, in refusing. If this were not so, it would result in placing the same limitation on the right of the individual bondholder to bring the action as is placed on the trustee, namely, the written request of a majority of the bondholders; and this would practically make it possible for a majority to deprive the minority of the remedy of foreclosure altogether. There is no provision in the deed of trust authorizing any such limitation upon the bondholder's rights. Apart from the foregoing, as we have seen, it appeared that all the parties interested in the action, including the trustee, were before the court, and the bondholders not parties came in and surrendered to the court their bonds and coupons. Besides, it was made to appear by the answer of R. H. Her-

ron, who was permitted to answer as a defendant, that he became the owner of all of the steel company's property at a receiver's sale, and the decree refers to him as the successor in interest of appellant. This answer was treated as a cross complaint, and was served on defendant the steel company, and was not answered by it. The substantial rights of appellant have in no wise been injuriously affected, and no good purpose can be subserved by a retrial of the case. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(121 Cal. 311)

PEOPLE v. BROOKS. (Cr. 646.)¹

(Supreme Court of California. Jan. 3, 1901.)

CRIMINAL LAW—RECORD—APPEAL—EVIDENCE—SUFFICIENCY—HOMICIDE—MURDEROUS DESIGN—POLICE OFFICER—PRIVATE CITIZEN—LAW OF ARREST—INSTRUCTIONS—SUFFICIENCY.

1. Only such evidence which the record shows to have been introduced in a criminal case will be considered on appeal.

2. Deceased was shot at by a policeman, who testified that his revolver was of a 44-caliber, whereupon defendant pursued deceased, firing a number of shots at him with what his close friends testified was a 41-caliber pistol. The pursuit lasted four or five blocks, and it was shown that after defendant fired the last shot deceased threw up his hands, and exclaimed, "Oh, my God!" and that he was found lying a short distance from where he made the exclamation. On examination it was found that deceased was hit by only one bullet, which was of a 44-caliber. Held sufficient to show that deceased was killed by defendant, though there was no positive evidence that he had a 44-caliber pistol, since the jury were not obliged to believe everything to which defendant's close friends testified.

3. Defendant, who was a barkeeper, left his saloon in response to a telephone message, going to another saloon, and, after a whispered conversation there with a person, left, and in 10 or 15 minutes returned to his saloon, appearing to be in a state of great excitement. He hurriedly procured a revolver, and went to the back door, whereupon a police officer followed him, and, seeing deceased in the back yard with a revolver in his hand, went out, and ordered him to throw up his hands. The latter fired a shot, and the officer, after firing six times at deceased, dropped, and went towards the saloon, saying to defendant, "Help me, and shoot him." Defendant emptied his revolver at deceased, and then returned, procured another pistol, and pursued deceased, firing a number of times, deceased falling after the last shot, and dying as the result of a bullet hole in his body. Held that, though defendant may have pursued deceased, and shot at him, through a high sense of duty imposed on him by the police officer, the jury were warranted in finding that he was actuated by a murderous design to kill him.

4. In a trial for homicide the court charged that a citizen must assist in arresting a person when called on to do so by a peace officer, and that, if such arrest is resisted, such citizen may use sufficient force to effect his purpose, even though it go to the extent of taking life; and

¹ Rehearing denied February 2, 1901.

that fleeing from arrest constituted a resistance. Further, that if the jury believed from the evidence that defendant had a right to believe, as a reasonable man, and did believe, that deceased had unlawfully shot at or mortally wounded a peace officer in resisting arrest, it was his duty to pursue and arrest deceased, and use all necessary means of effecting his arrest. *Held* to correctly and sufficiently state the law as to a private citizen's right to assist a peace officer when called on to make an arrest.

5. Under Pen. Code, § 671, providing that, where the punishment is imprisonment for a term not less than any specified number of years, and no limit to the duration of the imprisonment is declared, the defendant may be sentenced to imprisonment during his natural life, the court may sentence one found guilty of murder in the second degree to imprisonment for life.

In bank. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Jack Brooks was convicted of murder in the second degree, and he appeals. Affirmed.

Lewis H. Smith, Frank H. Short, W. D. Tupper, W. P. Thompson, and W. D. Crichton, for appellant. Tiley L. Ford, Atty. Gen., for the People.

McFARLAND, J. By the information the appellant, Brooks, and one Tony Rice were jointly charged with the murder of Don Donnelly. Brooks was tried separately, and convicted of murder in the second degree. He appeals from the judgment and from an order denying a motion for a new trial.

The record is in a very loose and unsatisfactory condition. The bill of exceptions, after showing that certain witnesses were examined at the trial, and certain evidence taken, contains a statement of the contents of a certain alleged dying declaration of the deceased, which was used at the preliminary examination before the magistrate; but the record does not show that said declaration was introduced in evidence at the trial. There is also a statement of a recitation of certain evidence and facts made by the judge at the time he pronounced sentence, but the things which he recited do not appear among the evidence taken at the trial. Of course, this is a mere statement of what the judge said, but there is nothing to show that the evidence to which he alludes was introduced; and these things cannot be considered here. In determining this appeal we can consider only the evidence which the record shows to have been introduced. The record, as we must consider it, presents only two contentions of appellant which need be noticed: First, that the evidence is insufficient to sustain the verdict of guilty; and, second, that the court erred, to appellant's prejudice, in refusing to give certain instructions to the jury which appellant asked.

1. We cannot say that the evidence was insufficient to support the verdict. The main facts of the case are these: On the morning of June 27, 1899, shortly before daylight, appellant was in the Favorite saloon in the city

of Fresno, where he was employed as a bar-keeper, and, after some conversation through the telephone,—in the saloon,—he went out, and remained away about 10 or 15 minutes, when he returned. When he left the Favorite he went to another saloon across the street, and in the immediate neighborhood, called the "Golden West," to which place he had been summoned through the telephone. He had there a whispered conversation with a Mr. Ardell, and, after remaining in the Golden West a minute or two, he went out of the side door behind certain "cribs" or houses of prostitution. That part of the city is known generally as Chinatown, and is occupied to a great extent by prostitutes. It does not appear where he went immediately after leaving the Golden West, but, as before stated, in about 10 or 15 minutes he returned to the Favorite saloon, and appeared to be in a state of great excitement. He hurriedly went behind the bar, and got a pistol, and went to the rear door of the saloon. At that time Rice, who was a police officer, and was in or at the threshold of the saloon, followed the appellant to the back door, and said to him something like "This is my business," or, "If there is going to be any shooting, I will do it." Rice looked out of the glass door, and, seeing the deceased, Donnelly, with a pistol in his hand, went out and said to him, "Throw up your hands;" but Donnelly immediately fired one shot, either at Rice (as the latter testified) or up into the air (as another witness testified), and Rice then fired six shots at Donnelly. Rice testified that, his pistol being then empty, he dropped, and went into the saloon, and that as he dropped he called on appellant to "come and help him," and said, "My impression is that I said 'Help me' and 'Shoot him,' both." Appellant, who had gone out of the saloon with or closely behind Rice, immediately began to fire at Donnelly, who retreated; and appellant, following him, fired six shots at him, which emptied his pistol. He then returned a short distance, and, meeting Ardell, got another pistol from the latter, and then again pursued the deceased for about four blocks, and fired at him again at least twice. The last shot was near the residence of Mrs. Shober, who was awakened by the shots, and who testified that she got up, and saw Donnelly running; and that about half a second after the last shot he threw up his hands and exclaimed, "Oh, my God!" He was found lying about a block from Mrs. Shober's house, with the bullet hole in his body which caused his death a few days afterwards. He had been shot only once, and the wound was made by a 44-caliber Smith & Wesson pistol, and Rice testified that this was the kind of pistol with which he shot. It was in evidence that the pistol with which appellant fired the first six shots was a 41-caliber Colt, and it is claimed by appellant that there was proof that the pistol which he received from Ardell was a 41-caliber. The contentions of appel-

lant are: First, that the deceased must have been killed by a 44-caliber bullet from Rice's pistol, and could not have been shot by appellant, because the latter had no pistol of that kind; and, second, that, if appellant killed the deceased, he was justified in so doing by the command of the police officer, Rice. As to the first contention, it is sufficient to say that appellant had more than one pistol, and that there was sufficient evidence to warrant the jury in finding that the deceased was killed by one of the last shots fired by appellant, although there was no positive evidence to the point that he had a 44-caliber pistol. The jury were not compelled to believe everything testified to by witnesses who were apparently his close friends. As to the second contention, it is enough to say that, while it might be imagined, perhaps, that appellant pursued the fleeing Donnelly, and shot at him at every opportunity, solely through a high sense of duty imposed on him by Rice, still the facts amply warranted the jury in finding that he was actuated by a murderous design to kill him. Indeed, what Rice said can hardly be construed as a request to arrest Donnelly, or to pursue him for that purpose. Rice testified that while he himself was shooting at Donnelly he supposed that the latter was still shooting at him, which was a mistake, as Donnelly shot only once; and what he said to appellant when his own pistol had been emptied was apparently for the purpose of asking appellant to rescue him from his supposed present danger. At all events, it was for the jury to say why appellant alone pursued the deceased so far, and from all the evidence they were justified in finding that he did so for the purpose of committing murder.

2. We do not think that appellant was at all prejudiced by the refusal of the court to give certain instructions asked by his counsel. The court did, at the request of defendant, give to the jury some 14 instructions, and these instructions, together with others given by the court of its own motion, correctly and fully stated the law applicable to the case; and these instructions were certainly very favorable to the appellant. We think that all of the instructions refused which were correct were substantially included in the instructions given. The rejected instructions most insisted upon by appellant as correct refer to the right of a citizen to assist a police officer when called upon to make an arrest; but as to this matter the court instructed the jury at the request of the appellant as follows: "A citizen must assist in the arrest of a person when called upon by any peace officer so to do, and when so called upon the law clothes such person or citizen with the rights and duties and immunities of such officer. While an officer, or citizen requested by an officer to assist in making an arrest, must use as little violence as possible, if resisted he may use sufficient force to effect his purpose, even though it go to the extent of taking life.

Resisting arrest does not always constitute the use of physical force. A person may resist arrest by fleeing from an officer attempting to arrest him. If the jury believe from the evidence that the defendant had a right to believe, as a reasonable man, and did believe, that the deceased had unlawfully shot at or mortally wounded the officer, Tony Rice, in resisting arrest, before giving pursuit and the firing of the fatal shot, then the defendant not only had the right, but it was his duty, to so pursue and arrest the deceased, and use all necessary means of effecting his arrest." Under these instructions the jury were fully informed as to the law on this subject, and the appellant was not prejudiced by the refusal of the court to give the instructions refused.

There is nothing in the point that the court had no authority to sentence the appellant to imprisonment for life. Section 671 of the Penal Code expressly provides that, where the punishment is imprisonment for a term not less than any specified number of years, and no limit to the duration of the imprisonment is declared, the defendant may be sentenced to imprisonment during his natural life. There are no other points requiring notice. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; HENSHAW, J.; VAN DYKE, J.; GAROUTTE, J.; HARRISON, J.

(131 Cal. 183)

GEORGES v. KESSLER et al. (L. A. 778.)
(Supreme Court of California. Dec. 29, 1900.)

MECHANIC'S LIEN—FORECLOSURE—TRIAL—OBJECTION TO EVIDENCE—COMPLAINT—AMBIGUITY—SUFFICIENCY—DETERMINATION ON DEMURRER—EXHIBIT—REVIEW—EVIDENCE—FINDING OF COMPLETION OF WORK.

1. In determining on demurrer whether a complaint on foreclosure of a mechanic's lien sufficiently alleges the contents of the notice of lien, a copy of the notice attached, and expressly made a part of the complaint, must be regarded as a part of it as much as if it had been set forth in the body thereof.

2. An objection to a complaint to foreclose a mechanic's lien that it cannot be determined therefrom whether the contract was made by one or both of two defendants named, is without merit where it expressly alleges that the contract was made "with the said defendant," thereupon naming one of the defendants referred to.

3. Where a complaint on foreclosure of a mechanic's lien expressly alleges that a husband and wife, defendants thereto, are the owners of the land, and there is no intimation that she was a party to the contract otherwise than that she assented thereto, an objection that the complaint is ambiguous, in that it cannot be ascertained whether she is sought to be held under an alleged contract made with her, or on account of some interest she has in the land, cannot be sustained.

4. On foreclosure of a mechanic's lien, where the notice of lien was offered in evidence, defendant objected on the ground "that it was incompetent, irrelevant, and immaterial, and that it was a variance from the allegation of the complaint; no such lien having been pleaded,

and no contract set out in the complaint such as is described or attempted to be described in said lien." *Held*, that the objection did not point out to the court wherein a variance existed, or was supposed to exist; and was, therefore, properly overruled.

5. The finding of the court on foreclosure of a mechanic's lien that plaintiff fully completed the work according to the terms of the contract was objected to as not being justified by the evidence, because plaintiff did not put in an electric alarm bell; and on this point plaintiff testified that defendant directed him not to put it in, saying he would not pay for it, while defendant testified that its cost was included in the proposed sum for which the work was to be done. *Held* that, the evidence being conflicting, the finding could not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; D. K. Trask, Judge.

Action by Ellis P. Georges against W. J. Kessler and others. From a judgment for plaintiff, and from an order denying a new trial, defendant W. J. Kessler appeals. *Affirmed*.

Len Claiborne, Dunnigan & Dunnigan, for appellant. F. G. Hentig and John W. Kemp, for respondent.

HAYNES, C. Action to foreclose a mechanic's lien under a contract between the plaintiff and defendant W. J. Kessler for an improvement upon a building situate upon premises alleged to be the property of Mr. and Mrs. Kessler. Defendant Hanna was alleged to have or claim some interest therein, but she made default, and will not be further noticed. The plaintiff had findings and judgment, and defendant W. J. Kessler appeals from said judgment and from an order denying his motion for a new trial.

The demurrer to the complaint is general and special. Under the general demurrer it is said that the complaint does not allege that the notice of lien described the property sought to be affected by the lien, nor the terms, time given, and conditions of the contract. The complaint fully described the property as the westerly 82½ feet of lot 9 in block F of the Mott tract, and identified it as that upon which the building whereon the work was done was situated, and, after stating the work agreed to be done, stated the amount to be paid, and that it was agreed to be paid upon completion of the work; and, in addition to these allegations, which, we think, were sufficient, a copy of the notice of lien was attached to and expressly made part of the complaint, and became part of its allegations; "for there can be no difference between setting forth such instrument in the body of the pleading and in annexing it as an exhibit, and making it a part of the pleading by proper reference. In each case the copy is a part of the pleading. The only difference is in the arrangement or sequence of the parts, and this difference is entirely unimportant upon the question whether the pleading states a cause of action." Lambert

v. Haskell, 80 Cal. 612, 22 Pac. 328; Ward v. Clay, 82 Cal. 506, 23 Pac. 50, 227. See, also, the concurring opinion of Mr. Justice Temple in *Society v. Thornton*, 127 Cal. 577, 60 Pac. 37.

The first specification of ambiguity is to the effect that it cannot be determined whether the contract was made by Mr. Kessler, or Mrs. Kessler, or by both. It expressly alleged that the contract was made "with the said defendant W. J. Kessler," and the same statement is made in the notice of lien. It is also specified that the complaint is ambiguous in that it cannot be ascertained whether Mrs. Kessler is sought to be held under an alleged contract made with her, or on account of some interest she has in the land. It was expressly alleged that Mr. and Mrs. Kessler are the owners, and there is no intimation that the wife was a party to the contract otherwise than that she assented to it. The next specification is a repetition of the first above noticed. The next is that the complaint is ambiguous and uncertain in that the allegations in the complaint are inconsistent with the exhibit attached to it; but in what respect, or in what particular, is not specified. When the notice of lien was offered in evidence by the plaintiff, defendant objected on the ground "that it was incompetent, irrelevant, and immaterial, and that it was a variance from the allegation of the complaint,—no such lien having been pleaded, and no contract set out in the complaint such as is described or attempted to be described in said lien." This objection did not point out to the court wherein a variance existed, or was supposed to exist.

Nor do we think there is in fact any variance between the contract stated in the complaint and that stated in the notice of lien. The contract was oral, the proposition and specifications being memoranda. The proposition made by plaintiff was to do the work for \$138, "alarm bell and battery not included." This proposition was accepted by defendant. The reference to the alarm bell shows that there had been previous conversations, in which an alarm bell was spoken of, and the evidence confirms the inference. The lien filed was for \$138, the amount or value of the work stated in the proposition (the alarm bell and battery not included), less \$5 paid on account. At the conclusion of plaintiff's evidence in chief the defendants moved for a nonsuit on the ground that the evidence was not sufficient to show that the work was done according to the specification and contract set out, and on the further ground that there was no testimony tending to prove the contract set out in the complaint. This motion was properly denied. It was but a restatement of appellant's contention as to the supposed variance between the complaint and the notice of lien. In the transcript there are several specifications of alleged insufficiency of the evidence to support the findings, though but one of them is noticed in appel-

lant's brief. The court found, in substance, that plaintiff fully completed the work according to the terms of the contract; and it is contended that this finding is not justified, because the plaintiff did not put in said electric alarm bell. Upon this point the plaintiff testified that defendant directed him not to put in the alarm bell, saying he would not pay for it; while the defendant testified that the cost of the alarm bell was included in the proposed sum of \$138. Upon this state of the evidence the finding cannot be disturbed. I advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 316)

PEACHY v. WITTER et al. (L. A. 782.)

(Supreme Court of California. Jan. 4, 1901.)

MORTGAGES—AGREEMENT TO EXTEND TIME OF PAYMENT—WANT OF CONSIDERATION—ATTORNEY'S FEES—FORECLOSURE SUIT—BILL—EVIDENCE—ADMISSIBILITY—ADJOURNMENT—INTERVENTION.

1. A description of property in a bill to foreclose a mortgage as lot 18, block 16, in the city of E., county of S., state of C., as per map of said city in the office of the county recorder of said county, is not so uncertain as to render the complaint demurrable.

2. Where there is a conflict as to the making of an agreement extending a note, a finding will not be reversed on appeal.

3. A promise, made without consideration, to extend the time of payment of a note, does not prevent suit thereon within such time.

4. Where an attorney for defendant states that he is a witness, and requests an adjournment until afternoon, to secure the presence of his associate counsel, who was detained by sickness in his family, the cause will not be reversed for a refusal to grant such request, where it is not shown that all defenses were not fully presented.

5. Where a note containing an agreement for attorney's fees is secured by a mortgage, it is proper to grant attorney's fees on foreclosure.

6. Where a mortgagee offers to settle a cause on the payment of the principal, and afterwards brings foreclosure, a letter from the mortgagor accepting such offer after suit was commenced is not admissible.

7. Where there is no consideration for an agreement to settle a debt secured by a mortgage for less than the amount due, evidence of such agreement is not admissible in a foreclosure suit.

8. Where the intervener in a mortgage foreclosure suit contends that a decree in favor of the complainant would cloud his title, but his affidavit does not disclose the date of his title or the nature of his ownership, it is not error to deny the intervention.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; E. P. Unangst, Judge.

Bill by William T. Peachy against G. F. Witter, Jr., and others for the foreclosure of a mortgage. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

E. Graves and G. F. Witter, Jr., for appellants. W. H. Spencer, for respondent.

GRAY, C. The defendants appeal from a judgment against them and from an order denying their motion for a new trial in a suit brought by plaintiff on a promissory note for \$400, besides interest, and to foreclose a mortgage given to secure said note. There is also an appeal from an order denying one Charles Orendorff the right to intervene.

1. Appellants contend that the description of the premises alleged to be mortgaged, as it appears in the complaint, is uncertain, and for that reason the demurrer to the complaint for uncertainty should have been sustained. A part of the property included in the mortgage, as appears from the complaint, was described as lot 18 of block 16 of the city of El Paso de Robles, county of San Luis Obispo, state of California, as per map of said city on file in the office of the county recorder of said county. This description is undoubtedly plain and certain; and, as to the description of the rest of the property included in the mortgage, while it is not as certain, perhaps, as it should have been, yet it appears from the subsequent course of the case that the appellant understood just what land was meant by the description, and was not misled or even inconvenienced in any way in making his defense on account of any uncertainty in the description of the premises contained in the complaint. There was not any error, therefore, in overruling the said demurrer that should lead to a reversal of the judgment.

2. Appellants' next contention is that the action was prematurely brought, for the reason that the agent of plaintiff, acting within his authority and on behalf of his principal, by oral agreement extended the time for the payment of the note for a reasonable time, which reasonable time did not expire until after the date on which the action was begun. There is a conflict in the evidence as to whether the agent made such an agreement, and for that reason the finding of the court contrary to the contention of defendants should not be disturbed. Again, if there was any such an agreement for extension of time as claimed, it was made without any consideration therefor, and is a mere nudum pactum, and cannot be enforced. *Hughes v. Davis*, 40 Cal. 117.

3. On the calling of the case for trial one of the defendants, who had signed the answer as one of the attorneys, stated that he was a witness in the case, and desired the presence of his associate counsel, who was absent on account of sickness in his family, and asked that the case go over until afternoon, when his said associate could possibly be present. The court denied the request. We here repeat what was said by the court in *Bank v. Chester*, 55 Cal. 49: "Granting or refusing a continuance on account of the ab-

sence of counsel is a matter which rests largely, if not wholly, in the discretion of the court, and we cannot see that there was any abuse of discretion in this case." The case was tried before the court without a jury. The defendants were represented at the trial by one of their attorneys of record, and apparently their defenses were presented for all they were worth. We see no error in the refusal of the court to continue the case.

4. The complaint set out a copy of the note in suit, which contained, as a part thereof, a provision for a reasonable attorney's fee. It was also alleged in the complaint that the mortgage was given "to secure the payment of said note." These allegations of the complaint are found by the court to be true, and such finding is supported by the evidence. The agreement for an attorney's fee, therefore, appears to have been secured by the mortgage, and it was proper to so treat it in the decree of foreclosure. *Bank v. Goldtree* (Cal.) 61 Pac. 785.

5. A letter was offered in evidence, dated February, 1899, written by defendant Witter, Jr., some days after the action was begun, and purporting to accept a proposition of plaintiff, theretofore made, to the effect that he (plaintiff) would release the mortgage on payment of the principal of his note. This letter was properly excluded for two reasons: First, because it was written too late to constitute an acceptance of the alleged offer of plaintiff, as the said offer had been revoked by the commencement of the action; and, second, this letter, as well as the other evidence touching an agreement to take less than the whole amount due the plaintiff, was immaterial, because it appeared that there was no consideration for any such an agreement. An agreement to take less than the full amount of a claim, made after the same is due, must have a new consideration to support it, or such agreement cannot be enforced. There was no error in the exclusion by the court of evidence offered by appellants.

6. Orendorff seeks to intervene in the action for the reason, as stated on his behalf, "that a part of the premises described in said complaint is the property of said Chas. Orendorff," and "that if judgment were rendered in this action pursuant to said complaint, and the property sold as described in said complaint, it would cloud the title of the said Chas. Orendorff." Orendorff presented no complaint in intervention to the court, and he does not disclose the date of his title or the nature of his ownership in the affidavit filed on his behalf. From the meager showing made, it was impossible for the court to determine that his title was one that could be litigated in a suit for foreclosure. The burden was on him to show that his was a proper case for intervention. It appears to be the settled law that an adverse claim to the land in opposition to the mortgagor and mortgagee cannot be tried in the equitable action

of foreclosure. *Williams v. Cooper*, 124 Cal. 666, 57 Pac. 577; *Murray v. Etchepare* (Cal.) 61 Pac. 930. On the showing made, the court properly denied the intervention.

The other points urged by appellants are not of sufficient importance to require special notice. We advise that the judgment and orders appealed from be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(131 Cal. 291)

In re LUFKIN'S ESTATE. (Sac. 825.)¹

(Supreme Court of California. Jan. 8, 1901.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—TRIAL COURT—DISCRETION—WILL—CONSTRUCTION—LEGACY—ELECTION.

1. Where decedent's estate consisted of personal property worth \$6,500, and his widow had property of her own which produced an income of \$204 per annum, an allowance of \$40 per month to the widow, pending administration, will not be disturbed as unreasonable, or as constituting an abuse of discretion on the part of the trial court.

2. Where testator, whose estate consisted entirely of personal property, devised \$1,000 to his widow, on the payment of which she was to relinquish all further claim on his estate, the widow was entitled to an allowance pending administration of the estate, since her election between the legacy and an allowance was not to be exercised until payment of the legacy.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Application by the widow of D. T. Lufkin, deceased, for a monthly allowance out of the estate pending administration. From an order granting the allowance, certain heirs appeal. Affirmed.

Holl & Dunn and A. L. Shinn, for appellants. Albert M. Johnson, for respondent.

SMITH, C. Appeal from order making allowance to widow of deceased of \$40 per month for maintenance pending administration. The application was contested by the daughters and the children of a deceased son of a former marriage. The grounds of opposition were (1) that the widow had separate property sufficient for her maintenance; (2) that there was no property in the estate from which the allowance could be paid; and (3) that under the will of the deceased she was put to her election between her right to family allowance and the legacy bequeathed her.

The estate consists of a note and mortgage of the value of between \$7,000 and \$8,000, held by the California State Bank as security for an indebtedness of the deceased amounting, at the date of hearing, to \$2,500. The widow, it appears, has property of her own

¹ Rehearing denied February 4, 1901.

amounting to something over \$3,000, consisting of \$1,621 in bank, and the balance in solvent promissory notes, and she has also the interest for life on \$2,000, her income being \$204.73 per annum. With regard to the first point, this court cannot say that the separate property of the widow was sufficient for her maintenance. Nor can it entertain the question whether it was the duty of the court below to consider the separate property of the widow in fixing her allowance; for there is nothing in the record to show whether it did consider it or not. And, whether it did or did not consider it, this court cannot say that the allowance was not reasonable, or that it was more than was necessary for the maintenance of the widow. By the provisions of section 1466, Code Civ. Proc., the function of determining those questions is vested in the lower court, and, from the nature of the case, must rest largely in the discretion of the court. With that discretion, if not exercised on erroneous principles, we cannot, unless in extreme cases, interfere. The only point to be considered, therefore, is as to the construction of the will.

The provision of the will in question is: "I give, devise, and bequeath to my wife, Lucy, the sum of one thousand dollars (\$1,000), on the payment of which one thousand dollars she relinquish all further claim to my estate." By other bequests the whole of the testator's estate was disposed of. The term "claim," in its usual and proper sense, is broad enough to include the statutory claim or right of the widow to an allowance from the estate of the testator, and, where a different intention is not manifested by the context, must be so construed. Code Civ. Proc. § 16. It was doubtless so understood and intended by the testator here, and this intention is the more manifest from the fact that there was no community property or real estate from which a homestead could be allotted, and in fact nothing to which the term could apply, except the claim to family allowance. The bequest is, therefore, to be construed as conditional on the relinquishment of the claim of allowance for maintenance, and the widow is thus put to her election between the two. The case also comes within the reason of the rule "that he who accepts a benefit under a * * * will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it." 1 Jarm. Wills, 385; Story, Eq. Jur. §§ 1075, 1076; Morrison v. Bowman, 29 Cal. 346; In re Stewart's Estate, 74 Cal. 98, 15 Pac. 445; In re Smith's Estate, 108 Cal. 115, 40 Pac. 1037; Etcheborne v. Auzeais, 45 Cal. 121; Eproson v. Wheat, 53 Cal. 715.

As to the time the election is to be exercised, the will is equally clear. It is to be exercised only "on the payment" of the legacy. Until then the widow is entitled to the enjoyment of her statutory rights, and to the

allowance made to her thereunder. I advise that the order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(131 Cal. 291)

HIGGINS et al. v. CITY OF SAN DIEGO et al. (L. A. 724.)

(Supreme Court of California. Jan. 3, 1901.)

MUNICIPAL CORPORATION—LEASE OF WATER PLANT—PAYMENT FOR USE—PARTICULAR FUNDS—SURPLUS—FUNDS DEPOSITED IN BANK—FAILURE OF BANK—TREATMENT OF FUNDS—PRIORITY OF CLAIMS—OPERATING EXPENSES—PAYMENT—LEGALITY—WATER COMMISSIONERS—APPOINTMENT—SALARY—GENERAL FUND—STREET FUND—STREET-SPRINKLING FUND.

1. Const. art. 11, § 18, provides that no city shall incur any indebtedness in any manner or for any purpose exceeding in any year the revenue provided for it for such year, without the assent of two-thirds of the qualified electors. Act March 16, 1889 (Municipal Charters Act) §§ 11, 12 (St. 1889, p. 659), substantially reenacts the provision of the constitution. Section 9 (page 707) establishes a "fire department fund," on which all warrants must be drawn for fire department supplies and expenses whatsoever, and a number of other funds, with like directions as to warrants, concluding with a provision that the percentage of each annual tax levy shall be named for each fund, and the whole amount of taxes and revenue apportioned to the several funds accordingly, and that no transfer shall be made from one fund to another except as otherwise provided by the charter, unless by vote of the common council, and in no case shall any moneys be transferred from the school or library funds to any other fund. Section 10 (page 708) apportions fines to the police department and street funds. Section 11 (page 708) requires officers collecting city moneys to make monthly statements to the auditor, and pay such moneys to the treasurer; the auditor to apportion such moneys to the various funds to which they belong. Section 5 (page 705) directs the manner of apportionment of the moneys, and of drawing warrants for salaries and bills allowed by the auditing committee. Sections 1 and 2 (page 704) relate to the duties of the auditing committee, requiring that they designate the fund from which claims shall be paid. Sections 1 and 2 (page 696) declare that the auditor shall prepare an estimate of the probable necessities for the city for the current fiscal year, and show the revenue anticipated and the probable expenditures, when the council shall fix a tax rate sufficient to raise the necessary funds. Ord. San Diego, No. 128, established a water fund; section 9 of the ordinance providing that salaries and expenses of all kinds connected with the water department should be paid from such fund. Held, that a water company which leased its plant to the city of San Diego, could enforce payment for the use of such plant out of the surplus of any funds of such city left at the end of a fiscal year after payment of claims chargeable to the same, where the water and general funds, which were primarily liable, were exhausted.

2. A bank in which the city of San Diego deposited funds of the fiscal year of 1891 failed, but the city's books showed these funds as cash in the treasury for two years thereafter, when a fictitious account was entered on the books, wiping out the fund. Part of the fund

was recovered by suit, and there was no showing that more could not be realized. *Held*, that in an action against the city by a water company which had leased its plant to such city for the fiscal year of 1891 for the use of such plant, the funds primarily liable for such use being exhausted, the whole amount of the deposited fund must be treated as in the treasury for the fiscal year 1891, for the purpose of fixing the amount of plaintiff's judgment, and not merely the amount recovered from the bank, since it constituted a part of the funds raised to meet legitimate claims.

3. Act March 16, 1889 (Municipal Charter Act), gave no priority of right among claimants against the city, dependent on the order of time in which liabilities are incurred, so far as the city's different funds were concerned, except as to the water fund, in regard to which it was provided that the salaries of the water commissioners and expenses of operating the water plant should be paid before payment of the monthly rental. *Held*, that payments on claims accruing subsequent to those of a water company which leased a water plant to the city of San Diego, out of the water fund, were not illegal, and might properly be deducted from the amount the company should recover.

4. Though a lease of a water plant by a city is void, the city is liable for the use thereof; but payment of the operating expenses of such plant by the city is not illegal, and the water company cannot recover such moneys paid out of the water fund primarily applicable to its claims for the use of such plant.

5. Under St. 1889, p. 694 (Municipal Charter Act) c. 6, §§ 1, 2, authorizing the appointment of water commissioners when the city shall become the owner of any water supply or shall decide to construct a system of water supply, the city may appoint water commissioners, at a salary, where it leases a water plant, since the word "owner" is used in the sense that the city should have control of the water supply.

6. Where a city pays the salary of the city justice out of the general fund, instead of the salary fund, which was primarily liable therefor, before a demand on the city by a water company for payment for the use of a water plant leased to such city, out of such general fund, such payment is not an illegal diminution of such fund, since the company could look to such fund only at the end of the fiscal year.

7. The street fund established by St. 1889, p. 707 (Municipal Charter Act), from which must be paid all expenses for street repairs, sprinkling, cleaning, and improvements for which other provision is not made, and highway and bridge repairs, and the street-sprinkling fund established by ordinance, out of which water used in street sprinkling was paid for, as well as labor in doing so, are not primarily liable for the claim of a water company against the city for the use of a water plant.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by T. J. Higgins and others against the city of San Diego and others and the San Diego Water Company. From a judgment in favor of the city on the water company's cross complaint and the city's answer thereto, plaintiffs having withdrawn, defendant water company appeals. Reversed.

Works & Works and Works & Lee, for appellant. H. E. Doolittle, City Atty., for respondents.

CHIPMAN, C. Plaintiffs brought this action, as taxpayers of the city of San Diego, to set aside a contract of lease between the

said city and defendant water company. The case was tried on the cross complaint of the water company and the answer of the defendant city thereto, the plaintiffs having withdrawn from the action. The court found that the lease in question was void, and that the company was not entitled to recover the reasonable value of the use of its property by the city, nor was it entitled to damages for that breach of the contract. On appeal the decision of the lower court was affirmed as to the invalidity of the contract of lease, but the court held that the company was entitled to recover the reasonable value of the use of its plant and water. *Higgins v. Water Co.*, 118 Cal. 524, 45 Pac. 824. On rehearing, as to the form of judgment, the court held that the company was entitled to an "ordinary general judgment for whatever amount shall be found due it, without any direction as to the revenues out of which the judgment shall be satisfied." The directions given to guide the trial court will be better understood from the following excerpt from the court's opinion on the rehearing: "We cannot direct the superior court to enter a judgment upon the findings for the reasonable value to the city of the use of the water company's plant and of the water supplied, because it does not appear that the claims of the water company all accrued at a time when there were unappropriated revenues to meet them; and it will be necessary for the court to ascertain, as the basis of its judgment against the city, just when the claims of the water company for the reasonable value of use aforesaid, etc., equaled the amount of unappropriated revenues for respective fiscal years during which the city had the use of the water company's plant. Claims for the use of plant and the value of water supplied after such time are like other claims upon exhausted revenues. They are void, and will not warrant a judgment of any character." 118 Cal. 528, 50 Pac. 671. At the first trial the lower court found the reasonable value of the use of the plant and water per month; and at the second trial evidence was given of the payments made from time to time on account, and the money in the treasury to the credit of the various funds at the end of each month, and also showing the amounts accruing and unpaid each month during the time the plant was held by the city. The period of use was from June 1, 1891, to March 7, 1893. In ascertaining the unappropriated revenues to meet the water company's claims, the trial court found that there were but two funds provided by the city which were applicable to their payment, to wit, the water fund and the general fund; that there was no money in either of these funds, when the unpaid claims of the company accrued, available for their payment for the year 1891; that there was to the credit of these two funds for the year 1892, available for the payment of the company's claims for that

year, only the sum of \$5,421.29; that for the year 1893 there was available, in addition to payments made, the further sum of \$5,997.22 to the credit of said two funds. This sum was sufficient to pay in full the balance due for 1893. Upon these findings the court gave judgment against the city for the sum of \$11,418.51, leaving quite a large sum unprovided for. From this judgment the water company appeals.

The constitutional provision involved is section 18, art. 11: "No county, city, * * * shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year without the assent of two-thirds of the qualified electors," etc. Appellant's contention is that all contracts or liabilities incurred by the city during any fiscal year are valid and binding up to the amount of the revenues of the year, and that it is only contracts made or liabilities incurred after that time or beyond the revenue for the year that are void. Applied practically, the contention is that there were certain funds primarily applicable to the payment of the company's claims, to wit: (1) The general fund, the street fund, the street-sprinkling fund, and the water fund; and (2) that of all other funds, except possibly the school fund, all surplus remaining on hand at the end of the fiscal year in each fund, after paying the liabilities chargeable against that fund, must be applied to the payment of the general liabilities of the city for that fiscal year before being carried forward to the next year. This is the principal question presented by the appeal, and we give appellant's statement of its position still further, as follows: Conceding that moneys apportioned to any fund cannot be used for any other purpose until the object for which it has been apportioned has been accomplished, the learned counsel say: "But what we insist upon is that when the object for which it has been apportioned has been accomplished, by meeting all the claims specially chargeable to that fund, the surplus is applicable to the payment of other debts or liabilities of that year, and cannot be carried over into another year, leaving debts of the present year unpaid." If the municipal revenues were all thrown into a general fund, out of which all claims could be paid to the limit of such revenues, the solution would be much simplified. But this is not the case. Under the charter of the city there are certain designated funds, and the charter requires the revenues raised by taxation and from other sources, such as licenses, fines, etc., to be apportioned to these various funds. In a series of cases, commencing with *Gas Co. v. Brickwedel*, 62 Cal. 641, this court has decided that no indebtedness shall be incurred (except in the manner stated in the constitution) exceeding in any one year the revenue actually received by the municipality; i. e. that each year's income must pay each year's

liability, no part of which shall be paid out of the income of any future year. Other cases dealing with this provision of the constitution are *Shaw v. Stater*, 74 Cal. 258, 15 Pac. 833; *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. 449; *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033; *Weaver v. City and County of San Francisco*, 111 Cal. 319, 43 Pac. 972; *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794; *Bradford v. City and County of San Francisco*, 112 Cal. 537, 44 Pac. 912; and this present case (118 Cal. 524, 45 Pac. 824, 50 Pac. 670). The precise question now before us, as applicable to municipal expenditures, has not, we believe, been decided.

Looking to the language of the constitution, we find the only inhibition to be that "no * * * city * * * shall incur any indebtedness or liability * * * exceeding in any year the income and revenue provided for it for such year," etc. The natural and reasonable construction to be given this language is that all legitimate indebtedness of the municipality for any year must not exceed all the revenues and income provided for that year, and all indebtedness beyond such provision becomes void, and cannot be paid out of the funds of a succeeding year, or at all, except by the assent of two-thirds of the qualified voters. In the case before us there were moneys of considerable amount at the close of one or more years, when the company's claims accrued and were presented, against which there were no other claims made. These moneys had been distributed to various funds created by the charter, or by the council pursuant to the charter; but because the company's claims were not, on their face, payable out of any one of these funds, payment was refused, and these surplus moneys were carried over into the next year, and paid out as moneys belonging to the particular funds, on claims accruing against those funds during the succeeding year. In our opinion, there is nothing in the constitution forbidding the payment of the company's claims at the end of the year out of any revenue on hand in the various funds against which no claims existed which had accrued that year. If there is anywhere any inhibition against payment, it must be found in the municipal charter, or in some legislative provision elsewhere to be found. We know of no legislation applicable to the case, outside of the municipal charters act (Act March 16, 1889; St. 1889, p. 643). Sections 11, 12, p. 658, and section 12, p. 709, are substantially re-enactments of the constitutional provision, and there is nothing in these sections that goes further than to provide that no liability shall be incurred "during any fiscal year that cannot be paid out of the revenues provided for such fiscal year." This fiscal year begins January 1st, "for taxation, assessment and all other purposes." St. 1889, p. 698. If any provision is to be found in the act reaching the question now here, it is

found in the section establishing so-called "funds" (Id. p. 707), or other sections, a summary of which will next be given. Section 9 reads: "The following funds are hereby established: (1) 'Fire department fund,' upon which all warrants must be drawn for fire department supplies and expenses whatsoever." Then follow 13 other funds, with like directions that all claims pertaining to the particular fund must be paid by warrants drawn on that fund. The section contains a general provision as follows: "The common council may, from time to time, establish such other funds as they may deem necessary, and shall establish and continue in force all interest funds, bond funds, bond redemption funds, and other funds now or hereafter established for the payment of all interest upon and the payment of all bonded indebtedness of the city; and the percentage of each annual tax levy shall be named for each fund, and the whole amount of taxes and revenue of the city apportioned to said several funds accordingly; and no transfer shall be made from one fund to another except as otherwise provided in this charter, unless by a vote of the common council, by ayes and noes, recorded in the journal of proceedings; and in no case shall any moneys be transferred from the school fund or library fund to any other fund. The common council shall by ordinance determine and designate to what funds shall be apportioned all moneys arising from the levy of all license taxes in the city; provided, that none of such moneys shall be apportioned to either the school fund, library fund or to any of the bond funds, interest funds or bond redemption funds of the city." Section 10 (page 708) requires all fines to be apportioned to funds as follows: "One-half thereof to the police department fund and the other half into the street fund." Section 11 (page 708) requires all officers who collect moneys belonging to the city, except moneys collected by the treasurer on account of redemption of property sold for taxes, to make monthly statements to the auditor and pay such moneys to the treasurer. The auditor must, upon filing the treasurer's receipt, "forthwith apportion the money so paid in to the several funds to which it belongs, and file with the treasurer his statement of such apportionment." There is nowhere any provision that, when money is once apportioned to a given fund, it shall be thenceforth dedicated to the payment only of warrants authorized to be drawn upon that fund. The nearest approach to such provision is the following: "In no case shall any moneys be transferred from the school fund or library fund to any other fund." Section 5 (page 705), relating to the duties of the auditor, requires that he "shall apportion all moneys paid into the treasury of the city, in accordance with the annual tax levy and ordinances imposing and apportioning license taxes, fines," etc., "and draw all warrants upon the treasury for salaries as fixed by the

charter, and for all demands and bills allowed and ordered paid by the auditing committee." He must keep a cash book, which shall show at all times the amount of moneys received in the treasury, by whom paid in, and on what account, and show all moneys paid out, giving the number and date of warrant paid, and show the balance in the treasury. He shall keep in ledger form a just and correct account with the various funds of the city, and shall, monthly, make and report to the council an abstract of his accounts with said funds for the preceding month, showing receipts and disbursements, and from what received and for what paid out, and the balances in each fund, and the amount received in and paid out of the treasury during said month. Sections 1 and 2 (page 704) prescribe the duties of the auditing committee in the allowance of claims and the ordering of warrants in payment, and they must "designate the particular funds from which they are to be paid," etc. Bearing upon the question in some measure are the provisions found in sections 1 and 2 (page 696) as to levying the annual tax. The auditor, on or before the first Monday of April in each year, "shall prepare and transmit to the common council, accompanied with the estimates and reports of each department, * * * an estimate of the probable necessities for the city for the current fiscal year, giving the amount required to meet the * * * probable wants of all the departments * * * in detail, and showing the necessities of each of the several funds to be provided for in the treasury." The charter directs that this estimate shall, as near as may be, show the revenue anticipated and the probable expenditures, based on the expenditures and resources of the preceding year. With this estimate before them, the council are required to fix the tax rate and make the levy "necessary to raise sufficient revenues to carry on the different departments of the municipal government for the current fiscal year."

The "water fund" was established by ordinance No. 128, by which the lease of the water company's plant was accepted pursuant to the lease executed April 18, 1891, under the authority of joint resolution No. 56. The ordinance created a water department and a board of water commissioners, and prescribed their duties and fixed their compensation. Section 9 of the ordinance provides as follows: "That in conformity with the provisions of the city charter a water fund is hereby established into which all revenues derived from the department shall be paid, and upon which all warrants shall be drawn for salaries, material, supplies and expenses of every description connected with the water department, including the monthly payment of rent as stipulated by said lease, which warrants shall be drawn and paid in the order above mentioned." The ordinance authorized the board of water commissioners to "set all water rates for takers and con-

sumers in accordance with such ordinances as are now in force or which may hereafter be adopted," etc.; and it provided that "all money received by said board shall be paid to the city treasurer, who shall keep duplicate receipts therefor, one of which shall be filed with the city auditor, who shall keep accurate accounts of all receipts and disbursements." There was no source of revenue specially designated upon which warrants were authorized to be drawn for the support of this department or to pay the lease rentals, except this water fund. The general fund was available, if at all, by reason of its being created to pay "the appropriations and general expenses not payable from other funds." Apparently the strongest expression in the charter, as above synopsisized, tending to support the view taken by the trial court, is the following: "And the percentage of each annual tax levy shall be named for each fund, and the whole amount of taxes and revenue of the city apportioned to said several funds accordingly." But this is not equivalent to the declaration of a purpose to limit any particular class of expenditures to the apportionment made for that class; for, if that were so, there could be no transfer from one fund to another to re-enforce an exhausted fund. In *Potter v. Fowler*, 78 Cal. 493, 21 Pac. 118, it was held that, where the law established a fund and expressly limited the amount of its receipts, the board of supervisors could not transfer money from the general fund, and thus increase the expenditures under this limited fund. If we could find in the charter of defendant any express limitation upon the expenditures under a particular fund, we would still have to find some provision which in its effect prohibited the use of any surplus there might remain in that fund at the end of the year for any other purpose, before we could say that this surplus could not be used for some other object. It is not denied by either party that this surplus might be transferred to some other fund, even though that other fund had been exhausted of all the money apportioned to it. But this could not be done if the money apportioned to each fund must be regarded as dedicated to the use of that fund alone. The object of the law in providing for transfer from one fund to another is to meet a case where in the original apportionment the council had miscalculated as to the probable requirements of the various funds. The power to create other than the funds designated in the charter shows that it was in the mind of its framers that some portion of the revenue provided for the fiscal year might be required for purposes not embraced in funds existing when the apportionment for the year might be made. The form of demands, bills, and claims against the city prescribed by section 3 (page 705) requires no mention by the claimant of any fund to which he must look; and when he receives his warrant, drawn as it must be upon some designated fund, he

enters into no agreement to look alone to that fund. *Carter v. Tilghman*, 119 Cal. 104, 51 Pac. 34. If the fund is at the time of presentation exhausted, the claim cannot be paid; but the council may transfer money from some other fund and thus pay it, for it is not an illegal claim because when first presented there were not moneys to meet it. Where a legitimate indebtedness has been incurred for one of the various objects for which the municipality was created, and a claim therefor is duly presented, we do not think it is within the power of the municipality to defeat payment by drawing a warrant on some exhausted fund, or by refusing to draw a warrant because the particular fund applicable to its payment is exhausted. *Carter v. Tilghman*, supra. If at the close of the fiscal year there is a surplus in any fund, not expressly reserved by some law for the payment of claims upon that particular fund, and there are no claims existing against that fund created during the year, such surplus, and any other surplus remaining in any other such fund, should be and is available to discharge the unpaid legitimate indebtedness of that fiscal year; and we find nothing in the law to forbid this just and proper course to be taken. Let us not be misunderstood. There may be a surplus—for example, in the salary fund—at the end of the year, because some salaries have not yet been actually paid. There may be claims presented and allowed at the close of the year, for which warrants have not yet been drawn, upon other funds. In such case the surplus would be the moneys in the treasury against which there was no just claim presented or existing under the law, as in the case of salaries; and this surplus, in our judgment, should be treated as money applicable to the payment of any just debt then existing, created during that year. And a claimant cannot be deprived of his right to this surplus simply because the particular fund against which his warrant is drawn or should be drawn has become exhausted. See *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397. The city cannot defeat the payment of its honest debts by refusing to transfer funds to an exhausted fund, or by accumulating an undue proportion of the year's revenue in any one fund, or by transferring from one fund to another fund in order to defeat the claim against the fund from which the transfer was made. As was said in *Carter v. Tilghman*, supra, the council has "no power to indulge in a game of hide and seek with the funds" of the city. We do not wish to intimate that the council in the present case purposely arranged the funds at the close of the year so as to leave nothing in the water fund or general fund. But it must be obvious that by a simple bookkeeping process the council could so manipulate the funds of the city as to work great injustice, if they could carry over into another year the surplus of moneys in the various funds simply

because there were no claims against the city which were primarily payable from such funds. We think the creditors of the city have the right to contract with reference to its entire revenue, and, while it may be that payment cannot be enforced so long as the particular fund primarily available is without moneys to make payment, still if at the end of the year there is a surplus in any other fund not claimed, or not by the charter expressly reserved, it should be used to pay the debts of the city, so far as the surplus will go. This seems to be all that was designed to be accomplished by the constitution or by the charter, and if its framers desired to go further, as the legislature has in some cases in county legislation (*Potter v. Fowzer*, supra), they should have so provided in plain and unmistakable terms.

2. It appeared that about October, 1891, a deposit of the city's funds of \$45,500 (presumably the funds of the fiscal year 1891) was made by the treasurer in the California Savings Bank of San Diego. The bank failed in November, 1891, but the city auditor testified that this money "was carried in the bank, the same as if it was cash in the treasury"; that "the books showed just the same as if there was cash in the treasury." It so remained on the books until March 31, 1893, when a fictitious account, called "Dividend Fund," was entered on the books, by which the various funds which had been credited with their proportion of this \$45,500 were debited with like amounts, aggregating this total amount, and this so-called "Dividend Fund" was credited, and thus the credit to the various funds was wiped out. In effect, this dividend fund took the place of what in ordinary bookkeeping might be called "Profit and Loss Account." An effort was made, by suit commenced in 1892, to collect some of this lost money, and some was collected; and, so far as we know, still other payments may be realized. The auditor testified that the ledger showed a credit by collections of \$4,327.50 March 23, 1893, and \$910 August 21, 1893. The trial court dealt with this \$45,500 as unavailable, except as to the amount received, because apparently lost to the city through the failure of the bank. In this we think the court erred. The money was provided by the city, and became a part of its funds, against which liabilities might and did accrue, including the claims of the water company. It was said in *Montague v. English*, 119 Cal. 225, 51 Pac. 327: "The contract being valid in the first instance, we are unable to see how any event happening subsequent to that time can vitiate it. The mere fact that the fund upon which the party has relied for payment has become exhausted after he has furnished the material demanded by his contract, and before presentation of his claim, in no manner bears upon the validity of the contract or the legal liability of the city. Such unfortunate conditions facing the claimant only affect his remedy. The contract exists, and the lia-

bility of the city exists; but under the construction of this provision of the constitution, which declares that each year's revenue of the municipality must pay each year's indebtedness, the claimant is bound to look for satisfaction of his claim in the year's income, and only there." The contract here is implied, but it is none the less valid for that reason. *Buck v. City of Eureka*, 124 Cal. 61, 56 Pac. 612, was also an implied contract on which the plaintiff was allowed by the court a general judgment. In the former appeal of the present case (118 Cal. and 50 Pac., supra) it was held that plaintiff was entitled to an "ordinary general judgment * * * without any direction as to the revenues out of which the judgment should be satisfied." And the further direction was given to ascertain when the plaintiff's claim "equaled the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant," etc. It cannot be said that the funds deposited in the bank were appropriated. They were part of the funds of the city while so deposited,—as much so as while in the city treasury,—and it was not until 1893 that they were written off the books. It is true, the allowed claims of plaintiff could not be paid out of these funds, simply because the money for the time being was beyond reach of the city; but this money constituted a part of the funds of the fiscal year, raised to meet legitimate claims, and must be treated as in the treasury for the fiscal year 1891, for the purpose of fixing the amount of plaintiff's judgment.

3. It is contended, touching the right of the company to recover all moneys paid out of the fund primarily applicable to its claims, (1) that all payments upon claims accruing subsequent to those of the company were illegally paid, and cannot properly be deducted from the amount it shall recover; (2) that the payment of the expenses of operating the water plant under the lease was illegal, because the lease was held to be void, and that the charter authorizes the appointment of water commissioners only when the city "shall become the owner of any water supply or shall decide to construct a system of water supply,"—citing St. 1889, p. 694, § 1. It is hence claimed that the payment of the salaries of the water commissioners and the other expenses of their offices was wholly illegal and void. Furthermore, it is urged that the salaries of these officers were illegally paid out of the water fund, because, as that fund was illegally created, the money therein in fact became a part of the general fund, out of which officers' salaries could not be paid; and (3) that the city justice was wrongfully paid out of the general fund during the whole time.

We find nothing in the charter that makes the city liable in the order in which claims accrue against it. In the absence of some such provision, "there is no obligation upon the municipality, any more than upon any other

debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order and in such condition and with such formalities as entitle the claimant to immediate payment." *Weaver v. City and County of San Francisco*, 111 Cal. 319, 43 Pac. 972. There is no priority of right among claimants, dependent upon the order of time in which liabilities are incurred, given by the charter, so far as the different funds are concerned, except as to the water fund; and there the provision is that the salaries of the commissioners and the expenses of operating the plant shall be paid before payment is made of the monthly rental.

As to the point that the payment of the operating expenses of the water plant was illegal because the lease was void, it is a sufficient answer that these payments rest upon the same ground as payments for the reasonable use of the plant. If, as was held here, notwithstanding that the lease was void the city was liable for the use of the plant, the city would certainly be authorized to make provision for payment, which it did by the organization of the water department and the water fund, and by the appointment of commissioners and other employes to conduct the department and collect the revenues. This was done under the provisions of the charter found in sections 1, 2, chapter 6 (St. 1889, p. 694). But it is objected that this could only be done upon the city becoming the "owner of any water supply, or shall decide to construct a system of water supply," etc.; and it is contended that, inasmuch as the city never became the "owner" of any water supply, the water fund and the water department had no legal existence. "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. * * * " Civ. Code, § 654. "The ownership of property is either: (1) absolute; or (2) qualified." *Id.*, § 678. We do not think the word "owner," occurring in the charter, was used in the sense that the city must be the holder of the title, but rather in the sense that it should have the control of a water supply. The term "owner" includes any person having a claim or interest in real property, though less than an absolute fee. *Lozo v. Sutherland*, 38 Mich. 171. *Anderson's Dictionary* cites numerous cases in illustration of the principle that the term may designate the person in actual possession and occupancy of premises.

That the salary of the "city justice," so called, was paid out of the general fund for the whole period, is urged as an illegal diminution of that fund, and therefore the money so used was available to pay the water company. We do not find in the charter any such officer named. A police court is established, to be held by a "police judge," and the mayor is authorized to designate in writing any justice of the peace of the city, who "shall have power to preside in and hold the police judge's court," etc., in certain

cases. Assuming that the city justice referred to is the one or the other of these judicial officers, and assuming that he should have been and could have been paid from the salary fund, but was instead paid from the general fund, what then? The water company could look to the general fund only at the end of the year. A warrant drawn upon this fund after it had become exhausted could not be paid, and this would be true even though the fund had become exhausted by payments of claims primarily payable from some other fund. The fact would be the same,—that there was then no money available in that fund. If the right to the surplus in this general fund had attached, and the company had demanded payment before the alleged illegal payment to the city justice, the case might be different, for the reason that at the time of such demand there would have been money in the fund available for its payment. The record does not show the facts in this regard. But the liability for the salary of the city justice was legally incurred, and this is not questioned; and so the payment out of the general fund was not the payment of an illegal claim, but at the worst was the payment of a legal claim out of the wrong fund. If there was no authority for so paying it, the remedy was to transfer money from the proper fund to the general fund to reimburse the latter fund. This was not done, however, and we see no way by which the remedy can be applied in this action. What was said in *Weaver v. City and County of San Francisco*, *supra*, quoted approvingly in *McBean v. City of Fresno*, *supra*, seems appropriate here: "Whoever deals with a municipality does so with notice * * * that all other persons dealing with the municipality have the same rights to compensation and are subject to the same limitations as he is. Even though at the time of making his contract there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city; and, if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. * * * In dealing with the municipality he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain not only the amount of the income, but also the amount of the claims already existing, and of those that are likely to be incurred." In a concurring opinion in the former appeal of the case now before us, the chief justice expressed some dissent to this language, as too broad; but the court has not receded from the position taken in former cases, and we do not see how it can do so

without subjecting the municipality to a possible liability in excess of its revenues previously provided, in an amount which may prove to be very burdensome. Appellant complains of payments made out of the general fund other than the salary of the city justice, but they were legal claims, and the same thing is true of them as in the instance of the salary.

4. We are brought lastly to notice the contention that not only were the water fund and the general fund primarily applicable to the payment of the company's claims, but that the street fund and the street-sprinkling fund were also so applicable. The charter established a "street fund" from which must be paid all expenses for street repairs, street sprinkling and cleaning, highway and bridge repairs, and all other street improvements not otherwise provided for in this charter." The only reason stated for claiming this fund as primarily liable is that it was liable for street sprinkling. The street-sprinkling fund is claimed to be primarily liable because the water used for sprinkling streets was payable out of that fund. This latter fund was not established by the charter. The ordinance establishing it does not appear in the record, and we have no knowledge as to what expenditures were by the ordinance made payable out of this fund. The record contains the items of expenses paid out of it, and they include water used for sprinkling streets, labor sprinkling streets, repairs of hydrants and sprinklers, purchase of hose, etc. The answer to appellant's contention, as given by the learned trial judge, printed in respondent's brief, was as follows: "None of the company's claims, however, are founded on liabilities incurred for water furnished for street sprinkling. There is no evidence that any of the water furnished was used for that purpose. Aside from that, the company's claim is a general one, arising out of the liability of the city to pay for the use of the company's plant and the value of the water supplied during the time the city retained possession of it." This seems to us a satisfactory answer. There is nothing in the charter or in any ordinance shown to us from which it may be reasonably inferred that either of these funds was primarily liable for the rent of the company's plant. The judgment and order should be reversed, and the cause remanded; the cause to be retried on the evidence used at the last trial, with leave to either party to submit further evidence.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded; the cause to be retried on the evidence used at the last trial, with leave to either party to submit further evidence.

BEATTY, C. J. I concur in the judgment of reversal, but there are some points in the decision and some things said in the opinion from which I dissent. A passage is quoted from the opinion in *Weaver v. City and County of San Francisco* with commendation. My reasons for dissenting from that doctrine are fully stated in my concurring opinion upon the former appeal of this case. 118 Cal. 529, 45 Pac. 824, 50 Pac. 670. But even that doctrine does not sustain the conclusion reached in this case. In *Weaver v. City and County of San Francisco* it was held that a judgment against a city must be made payable out of the revenues of the year in which the claim accrued; but it was not held that the claimant could not have a judgment for the amount earned, because the money in the treasury at the time he made the contract, or coming in afterwards, had been misapplied in payment of claims subsequently accruing, and therefore void. Here, however, as I understand the opinion, it is held that the claimant upon a valid contract cannot have a judgment for more than is left in the treasury at the end of the fiscal year, although it be shown that large sums were paid out after its claim accrued upon claims that were invalid. This is a doctrine which finds no support in anything that has ever been decided in any previous case in this court. The right of the plaintiff to its judgment does not depend upon the ability of the defendant to pay it, or the means of enforcing it. How the judgment is to be collected is a question wholly foreign to this case. All that we have here to decide is the amount of the plaintiff's valid claim, and that is unaffected by any illegal expenditures made by the defendant after the respective monthly claims matured.

(131 Cal. 333)

McFADDEN v. GOETTERT et al. (S. F. 1,621.)

(Supreme Court of California. Jan. 9, 1901.)
LOST CERTIFICATES OF STOCK—OWNERSHIP—
WANT OF PROOF—EVIDENCE.

Plaintiff lost two certificates of mining stock. Defendant found two certificates of the same stock, and plaintiff sued him for conversion of the shares. Plaintiff did not know the numbers of his certificates. His broker testified that the certificates of the stock purchased for plaintiff by him bore the same numbers as those found by defendant, basing his recollection thereof on a memorandum which he made on plaintiff's bill at the time. Plaintiff had thrown back the bill on his desk, and he had kept it in a small account book until the day before the trial. The bill itself showed the writing on its face to be very faint, but the numbers of the certificates were written very heavily, which discrepancy the broker could not explain. The bill purported to be for 300 shares of stock, while the numbers on the reverse side represented only 250 shares. The broker's assertion that it was his custom to so write the numbers of certificates on his bills was contradicted. No other evidence tended to identify the certificates lost with those found. Held, that a verdict for defendant, because

plaintiff's ownership of the certificates was not sufficiently proven, was supported by the evidence.

Department 1. Appeal from superior court, city and county of San Francisco; Wm. R. Daingerfield, Judge.

Action by one McFadden against one Goettert and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Thomas E. Curran (Geo. H. Francoeur, of counsel), for appellant. Chas. G. Nagle, Wilbur G. Zeigler, and H. H. McPike, for respondents.

HARRISON, J. The plaintiff charges the defendants with the conversion of certain shares of stock belonging to him, and seeks by this action to recover damages therefor. His cause of action is based upon the following facts: At some time in the early part of 1896 he owned and had in his possession two certificates, representing, respectively, 50 and 100 shares of the capital stock of the Consolidated California & Virginia Mining Company. These certificates were in an envelope, which he carried in one of the pockets of his coat, and which was lost therefrom. At some time after he last saw the envelope he missed the stock, and upon making inquiries was informed that the defendant Goettert had found two certificates of the same stock, corresponding in the number of shares to those which he had lost. The certificates found by Goettert were numbered, respectively, 33,101 and 34,122, and were delivered by him to the defendant Heringhi, who claimed to be the owner thereof, and who afterwards sold them through his brokers, Stauf & Cooper, the other defendants. The plaintiff in his complaint alleged that he was the owner of the shares of stock evidenced by certificates which were thus numbered, and this allegation was denied by the defendants. The cause was tried before a jury, and a verdict rendered in favor of the defendants. From the judgment entered thereon, and also from an order denying a new trial, the plaintiff has appealed.

The issue presented for trial was the plaintiff's ownership of the shares of stock represented by the certificates which were found by Goettert, and the burden of proof was upon the plaintiff to show such ownership in himself; for, unless he was the owner of these shares, he had no right of action against the defendants, and could not question their title thereto. Upon this point the judge instructed the jury as follows: "The plaintiff is obliged to establish by a preponderance of the evidence that this stock found by defendant Goettert was his (plaintiff's) stock. It is not sufficient that he owned one hundred and fifty shares of Consolidated California & Virginia mining stock, but that he owned the identical shares found by Goettert. You are to infer the identity or nonidentity of the stock claimed to have been converted with

that claimed to have been lost from all the circumstances in the case on both sides." No exception was taken to this instruction; the error relied on by the appellant being that the verdict is not sustained by the evidence.

The plaintiff testified that when he purchased the stock he did not take the numbers of the certificates, and could not say what the numbers were. The broker through whom he purchased it testified that he had purchased for the plaintiff 150 shares of the capital stock of the above-named corporation, represented by certificates with the above-named numbers. He stated, however, that his recollection of the numbers was based entirely upon the bill therefor which he had made out to the plaintiff before he delivered the stock to him, and that his reason therefor was that he checked off the certificates by writing the numbers of the same upon the back of the bill. He also testified that when he handed the bill to the plaintiff the plaintiff threw it back upon the desk, and that he (the witness) placed it in a small account book kept by him, and that it had remained there until the day before the trial, when, upon a search among his papers, he found it. The bill was produced, and upon inspection the writing upon the face appeared quite faint, while the numbers upon the reverse were written very heavily. The witness stated that he was unable to account for this discrepancy. He also stated that it was his custom to indorse the numbers of certificates sold by him upon the back of the bill presented to his customers, but a bill was shown in which he had failed to observe this custom. Moreover, the bill presented to the plaintiff purported to be for 300 shares of the capital stock of this corporation, while the numbers of the certificates written upon the reverse thereof represented only 250 shares. There was no other evidence tending to identify the certificates found by Goettert with those lost by the plaintiff, and, in view of the above testimony of the broker, it may well be assumed that, under the above instruction of the court, the jury disregarded his statements regarding the numbers upon the certificates sold to the plaintiff, and, if so, the plaintiff failed to maintain his action.

When the jury brought in their verdict certain of the jurors stated, in answer to an inquiry from the court, that they doubted the identity of the stock. We cannot review the action of the jury in determining the weight to be given to the testimony in this particular, and as the court, upon the motion for a new trial upon the ground that the verdict was against the evidence, refused to set aside the verdict, it must be assumed that he also was satisfied that the plaintiff had failed to show his ownership of the stock found by Goettert. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 321)

McGORRAY v. STOCKTON SAVINGS & LOAN SOC. et al. (Sac. 718).¹

(Supreme Court of California. Jan. 8, 1901.)

BANKS—DEPOSITOR—INDORSEMENT OF CERTIFICATE—RIGHT TO RECALL DEPOSIT—LIABILITY OF BANK FOR PAYMENT—APPEAL—NOTICE.

1. Where a depositor delivered his certificate to the bank, indorsed to the sheriff, with directions to pay him the money whenever he should deliver to the bank for deposit a certificate of redemption of certain lands, and the sheriff never complied with the condition or made any claim to the money or certificate, the depositor may recall his deposit, and payment of the money to him by the bank discharges it from all liability.

2. Unless notice of appeal from the judgment was made within six months after its entry, as required by Code Civ. Proc. § 939, the appeal cannot be considered.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Action by B. McGorray against the Stockton Savings & Loan Society and another. From a judgment in favor of the defendant society, and from an order denying a new trial, plaintiff appeals. Order reversed.

Elliott & Elliott and A. H. Carpenter, for appellant. Nicol, Orr & Nutter, for respondents.

CHIPMAN, C. Plaintiff brings the action to recover from defendant bank \$12,778.05 alleged to have been deposited with the bank by plaintiff on September 19, 1894, with instructions "to pay the same to Thomas Cunningham, sheriff of San Joaquin county, provided the said sheriff called for the same and left with the bank for plaintiff a certificate of redemption of certain real property on or before the 15th day of November, 1894." The complaint further alleges that "the said sheriff having failed to call for said money and leave for plaintiff with said bank said certificate of redemption, and the time for so doing having elapsed, the plaintiff demanded of said defendant bank * * * the amount of money deposited with it as aforesaid," which was refused, etc. This demand is alleged to have been made about November 15, 1894. Upon this complaint judgment was demanded against the defendant bank. The bill of exceptions shows that on motion of defendant the court ordered plaintiff to bring in Cunningham as a party to the action, by proper amendment; that thereafter plaintiff filed an amended complaint, in the title of which he named Cunningham as defendant; that no allegation was made of or concerning Cunningham, or any interest asserted by him in the money in controversy; that Cunningham appeared by general demurrer, and it was sustained by plaintiff's consent, and plaintiff's counsel refusing to amend as to Cunningham, and plaintiff consenting, judgment on demurrer was given in favor of Cunningham, and he seems to have passed out of the case. The court found: That on

September 19, 1894, plaintiff deposited with the defendant bank \$12,778, and at his request the bank issued to plaintiff a certificate of deposit as follows: "No. 61,575. Stockton Savings & Loan Society. Stockton, Cal., September 19, 1894. Certificate of Deposit 15. B. McGorray has deposited in this bank (\$12,778) twelve thousand seven hundred and seventy-eight dollars, payable to himself or order on return of this certificate properly indorsed. S. S. Littlehale, Assistant Cashier. This certificate does not bear interest. Not subject to check." That subsequent to the issuance and delivery of the certificate McGorray indorsed it as follows: "Pay to Thomas Cunningham, sheriff of the county of San Joaquin. [Signed] B. McGorray." That thereafter, and with said indorsement thereon so made by him, McGorray delivered said certificate to the bank, with instructions to hold the same subject to the order of Cunningham, sheriff as aforesaid, and to deliver the same to him and pay him said money "at any time when he (said Cunningham) should deliver to the defendant for plaintiff a certificate of redemption of certain lands situate in the county of San Joaquin." That defendant has ever since held and now holds said certificate, and it has been during all said time, and is now, ready, able, and willing to deliver the same to Cunningham upon his delivering to it, for McGorray, a certificate of redemption of said land, and defendant has been able and willing at all said times to pay the money represented by said certificate to plaintiff upon the proper indorsement thereof. That plaintiff on several occasions inquired of defendant at its bank how he could obtain the money represented by said certificate, and on each occasion was informed by defendant's officers that such money would be paid on the indorsement of said certificate by said Cunningham. That in the month of May, 1898, plaintiff demanded of defendant payment to him of said sum, and at the same time defendant, on said demand, offered to pay plaintiff said money upon the written order of said Cunningham, or upon the indorsement of said certificate by Cunningham. That such order or indorsement of said Cunningham was at no time obtained or made, and no demands other than as above were ever at any time made, by plaintiff, and no certificate of redemption of said land has been delivered to defendant for plaintiff. As conclusion of law, the court found that, by the indorsement of said certificate of deposit and delivery thereof to defendant, plaintiff created and vested in Cunningham, sheriff of said county, an apparent interest in said certificate and the money represented thereby; that defendant cannot safely pay said money, or any part thereof, without the order or indorsement of the certificate by Cunningham, and plaintiff can take nothing by his action. Judgment went for defendant, from which, and from an order denying plaintiff's motion for a new trial, plaintiff appeals.

¹ Rehearing denied February 8, 1901.

There is no evidence whatever that Cunningham at any time had any interest or claimed any interest in the money or certificate of deposit. He was not in privity with either the plaintiff or the bank. He had nothing to do with making the deposit. The indorsement of the certificate to Cunningham did not in itself operate to transfer any title to or interest in it, or in the money it represented, in the absence of any act of Cunningham by way of acceptance or confirmation. He was a stranger to the transaction and in ignorance of it, and it was only in the event that he did a certain thing that the certificate was to be delivered to him and he was to be entitled to the money. He never did this thing, and it is not pretended that he was prevented from doing it by plaintiff, or that he ever offered or that he still desires to do it. When brought into court as defendant he made no claim to the property, and suffered the case to be tried without answer by him. Defendant asked that he be made a party to the action, and yet when brought in it took no steps to cause Cunningham to answer. The fact is that Cunningham made no claim to the property, so far as the evidence discloses, and it was a matter of indifference to plaintiff whether he became a defendant or not. Defendant asked in its answer that Cunningham be made a party, but it did not allege that he claimed any interest in the property, or that he "made demand * * * for such property" upon defendant, as required by section 386, Code Civ. Proc. Cunningham was not put to his answer by either party, and, so far as we can see, the case stands as though Cunningham at no time had anything whatever to do with the matter, and was wholly ignorant of what plaintiff had done. The question then is, could plaintiff recall his deposit, and would the payment of the money to him by defendant discharge the latter from all liability? We think the answer must be in the affirmative. The bank became the agent of plaintiff to do a particular act (Civ. Code, §§ 2295, 2297), and the principal (plaintiff) could terminate the agency at any time before the act was performed and before any rights of third persons had intervened. The agency was terminated by its revocation. *Id.* § 2356. The evidence was that the condition on which the particular act was to have been performed never happened, and that the only third person who by any possibility was concerned in the matter is not shown to have acquired any rights, or to have been in any way interested in the subject of the agency. Upon revocation of the agency by plaintiff the burden was on defendant to show that other claim was made upon the deposit, and in this defendant failed, and plaintiff was entitled to have the money paid to him.

Respondent's point that the notice of appeal from the judgment was not made within six months after entry of judgment, and such appeal cannot be considered, is well taken

(section 939, Code Civ. Proc.); and this court cannot, therefore, direct a judgment to be entered for plaintiff, if it were so disposed. Plaintiff gave notice of a motion to vacate the judgment, and enter another and different judgment, and correct the conclusions of law filed in the action, under sections 663, 663½, *Id.* This notice was separate from the notice of motion for a new trial. The motion for a new trial was heard and denied, but the motion to vacate the judgment and correct the conclusions of law seems not to have been made, nor was any order entered on such a motion. We assume that appellant does not rely on this motion. No question is raised, however, as to the consideration of the motion for a new trial, and we will raise none. It was specified in the notice that the evidence was insufficient to justify the decision, and that the decision is against law. Assuming that the evidence supports the findings, still it must follow, from what has been already said, that the order denying a new trial should be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed and the cause remanded for a new trial.

(131 Cal. 271)

NOLAN BROS. SHOE CO. v. NOLAN. (S. F. 1,455.)

(Supreme Court of California. Dec. 31, 1900.)
TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—
DECEPTION OF PUBLIC—FAMILY
NAME—INJUNCTION.

1. Plaintiff's acquiescence in defendant's use of a certain trade-name for a number of years in a wholesale shoe business does not preclude him from objecting to its use in a retail shoe business, since the mere use of a trade-name in one business does not give the right to use it in another business.

2. Where a retail dealer and his predecessors have conducted a business under a trade-name for 22 years in a city, another's use of the same name in the same business may be restrained as an infringement of the former's rights.

3. In an action to restrain the use of "Nolan Bros." as a trade-name, that the name "Nolan & Sons" was used by complainant's predecessor for a time does not show an abandonment of the term "Nolan Bros." where the latter name at no time for a period of 22 years prior to the suit was absent from complainant's place of business.

4. In a suit to restrain the use of "Nolan Bros." as a trade-name in a retail shoe business, the fact that defendant was successor to a wholesale firm doing a shoe business under the name of "Nolan Bros." will not entitle him to the use of such name in the retail shoe business as successor to such firm, as the latter is a distinct and different business.

5. In a suit to restrain the use of "Nolan Bros." as a trade-name, a contention that "Nolan," being a family name, could not be used as a trade-name, so as to exclude its use by another of the same name, cannot be sustained, where such trade-name was used by defendant as "W. H. Nolan & Co., Successor to Nolan Bros., 10-12 Sutter Street," and all the name except the "Nolan Bros." was in inconspicuous

characters, only visible for a short distance, so as to deceive the public into believing that it was complainant's place of business.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Bill by Nolan Bros. Shoe Company against W. H. Nolan to restrain the latter from using the name "Nolan Bros." in connection with his business as a retail shoe dealer. From a decree for complainant, defendant appeals. Affirmed.

W. S. Goodfellow (Jas. L. Robison, of counsel), for appellant. Smith & Murasky (C. W. Lynch and F. G. Drury, of counsel), for respondent.

GAROUTTE, J. Two brothers by the name of Nolan were engaged for 10 years in carrying on a wholesale shoe business in the city of San Francisco under the name of "Nolan Bros." One brother sold his interest in the business to the other, and that brother (W. H. Nolan) shortly thereafter closed out the wholesale business, and opened up a retail shoe business at another point in the city, under the name of "W. H. Nolan & Co., successor to Nolan Bros." A third brother, P. F. Nolan, had been engaged in the retail shoe business in the city of San Francisco for 22 years, some of this time in company with J. C. Nolan, a brother, and some of the time joined with one or more of his sons. In the year 1895, and shortly after the defendant W. H. Nolan had launched his retail shoe business upon the world, P. F. Nolan placed his business into a corporation under the name of "Nolan Bros. Shoe Company," and thereupon that company brought this action to restrain defendant in the conduct of his business from using the trade-name "Nolan Bros." The action is based upon the claim that such use is an infringement upon the rights of plaintiff to the use of the name of Nolan Bros.

It is asserted upon the part of defendant that plaintiff allowed him to use the name "Nolan Bros." in the conduct of his shoe business for a period of 10 years without objection, and that it is now too late to attack his right to its use. Whatever legal effect this long term of use might have as against plaintiff's claims, if defendant had been engaged in the retail shoe business, we will not decide; for during that period of time defendant was only engaged in the wholesale shoe business, and for that reason no occasion or necessity arose for plaintiff to make any objection. The use of the name by the defendant did not interfere with plaintiff's business, and hence it was an immaterial matter to him. Plaintiff was not injured by the use of the name and therefore was not concerned in the use. If defendant had been using the name "Nolan Bros." for these 10 years in the conduct of the plumbing business, plaintiff surely could not have objected. It does not appear from

the showing here made that defendant's wholesale shoe business interfered with plaintiff's retail shoe business to any degree; and without a showing of injury plaintiff had no right, under these circumstances, to object to defendant's use of the name, any more than if the defendant had been engaged in the plumbing business. The mere use of a trade-name in one business does not give a party a right to its use in any other business. We therefore attach no importance to the use of the name "Nolan Bros." by defendant for 10 years without objection upon the part of plaintiff, and we hold that the case stands exactly as if defendant engaged in the retail shoe business, never having been in the wholesale business.

Upon the foregoing assumption, has plaintiff such an interest in the name "Nolan Bros." as to be entitled to an order restraining defendant from making use of it? And this depends upon whether or not plaintiff's predecessor in interest had established a right to the use of the trade-name "Nolan Bros." in the retail shoe business when defendant started his retail shoe business. We will not give the evidence in great detail upon this question. While to some extent it may be said to be conflicting, yet we deem it ample to support the restraining order made by the trial court to the effect that the defendant's use of the name was an interference with plaintiff's rights. Plaintiff's predecessor in interest had been carrying on the retail shoe business in the city of San Francisco 22 years or more, and in a great many ways, and certainly for a great portion of that time, was doing business under the name of "Nolan Bros." The evidence before us of abandonment of the name by plaintiff's predecessor in interest does not establish the fact. The fact that the name "Nolan & Sons" was used as a trade-mark for a certain period of time by plaintiff's predecessor in interest is but a circumstance, and not at all sufficient of itself, to prove an abandonment. "A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of its use. Abandonment in the nature of a forfeiture must be strictly proven." *Browne, Trade-Marks*, § 681. In *Julian v. Drill Co.*, *Price & St. Am. Trade-Mark Cas.* 572, 573, it is said: "Abandonment means general abandonment to the public, and must be shown affirmatively and positively as affecting the interests of the public." At no time during the period of 22 years was the name "Nolan Bros." absent from the place of business. For 14 years continuously prior to the commencement of this action four metallic signs, in conspicuous places upon the front of the store, bore the trade-name "Nolan Bros."; for 13 years immediately prior to the commencement of the action within the doorway of the store a large glass sign carried over its front the words "Nolan Bros."; for the same length

of time a large sign bearing the words "Nolan Bros.," so that all could see it, was visible from the office door; and for the past 2 years prior to the commencement of this action it is conclusively established by the affidavits that the business was in all substantial respects carried on under the name of "Nolan Bros." The fact that other trade-names may have been used by the plaintiff for a short period of time in connection with the one here involved cannot neutralize the effect of the evidence quoted. Our conclusion is that this evidence greatly lacks in showing an abandonment of the right of plaintiff to use the name "Nolan Bros." *Coleman, Burden & Warthen Co. v. Dannenberg Co.* (Ga.) 30 S. E. 639, 41 L. R. A. 470, is cited to support the contention that P. F. Nolan could not, by using the name, "Nolan Bros. Shoe Co." two years before incorporation, acquire any right to the use of the name "Nolan Bros." It is claimed upon this point that the use of tags by P. F. Nolan, conspicuously indicating and representing that the business conducted by him was owned and conducted by a corporation, was a fraud on the public, by which he could not acquire any right. On examination, we find the case cited fails to support the contention, while *Block v. Distributing Co.* (O. C.) 95 Fed. 978, is the other way.

It is next claimed "that defendant had the absolute right to use a sign indicating that he was the successor to Nolan Bros., 10-12 Sutter street, that being the fact." What we have already said is opposed to this contention. The wholesale business carried on by defendant and his brother in another portion of the city is not the same business now carried on by defendant. The latter is a separate, distinct, and different business, and the statement upon the sign that he (defendant) is a successor of the business formerly conducted under the name of "Nolan Bros., 10-12 Sutter Street," is not correct. No one succeeded to that business, and it had no successor. The business became extinct, and the sign does not express the facts.

It is insisted that "the family name of a tradesman or manufacturer cannot be made a trade-mark so as to exclude the right to its use by another bearing the same family name." This contention is sound to a limited extent only. If the name is used in a manner clearly indicating an intent to mislead and deceive the public, then the use of the name will be restrained by a court of equity. The first answer to appellant's contention in this regard is found in the fact that it is not a use of the family name "Nolan," standing alone, to which objection is made, but it is a use of the name "Nolan Bros.," and in a case like that at bar the principle of law invoked seems to have no application. Furthermore, it is shown by the affidavits "that the said defendant established a retail boot and shoe business at No.

1022 and 1024 Market street. * * * and over such store placed a large sign containing the words and figures following, to wit, 'W. H. Nolan & Co., Successors to Nolan Bros., 10-12 Sutter Street.' That the words 'W. H. Nolan & Co., Successors to,' and the words and figures '10-12 Sutter Street,' are in such small and inconspicuous letters and figures that the same cannot be read at a distance of more than seventy-five feet or one hundred feet, while the words 'Nolan Bros.' are in such large and conspicuous letters, and so prominently displayed, that the same may be readily seen and read for a distance of nearly three hundred feet thereof." It is also stated in the affidavits of various parties that said sign is a deceptive sign, and is calculated to deceive the public, and lead the public, the dealers and buyers of boots and shoes and footwear, and the patrons and customers of plaintiff, to believe that the plaintiff is conducting a retail boot and shoe store, and a branch place of business, at Nos. 1022 and 1024 Market street. It is further shown that almost daily, ever since the establishment of said store by said defendant at Nos. 1022 and 1024 Market street, the salesmen of plaintiff have encountered many of the buyers of boots and shoes and the customers and patrons of plaintiff, who have purchased shoes at the store of defendant under the impression and belief that they were dealing with the plaintiff. Under the foregoing facts appellant's contention upon the proposition that he has here advanced is undermined. *England v. Publishing Co.*, 8 Daly, 375.

The remaining propositions advanced by appellant are not considered meritorious. For the foregoing reasons, the order is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(131 Cal. 326)

SECURITY LOAN & TRUST CO. v. MATERN et al. (L. A. 735).¹

(Supreme Court of California. Jan. 9, 1901.)

MORTGAGES—ADDITIONAL SECURITY—PLEADING—ONE CAUSE OF ACTION—RELEASE OF PART OF LAND—MORTGAGE OF THIRD PARTY—CONSIDERATION.

1. A mortgagee released part of mortgagor's land at his request, taking a mortgage on the property of B. as additional security. The agreed payments not being made, the mortgagee sought to foreclose the original and the subsequent mortgage. The complaint set out the making of the mortgages, in a first and second count, and averred that each mortgage was given as security for the same note. *Held*, that only one cause of action was stated against defendants, though different counts were used and different relief was sought from different defendants.

2. Where a mortgagee released his mortgage as to part of the land, taking a mortgage on another's lands as additional security for the payment of the mortgagor's note, the second mortgagor was a proper defendant in an action

¹ Rehearing denied February 8, 1901.

to foreclose the first mortgage, since he was responsible for any deficiency that might arise on foreclosure of the first mortgage.

3. Where a mortgage stated that it was given as security for a note dated March 1, 1895, "according to its terms," made by M. in favor of plaintiff, and secured by a mortgage of the same date, giving the date and place of record of the mortgage, there was a sufficiently definite description of the obligation for which it was given, and hence the mortgage was not invalid for want of definite description.

4. Where a mortgage was executed as security for the payment of an instrument "according to its terms," which were set forth in another recorded mortgage, the fact that the instrument was not a note, though referred to as such by the mortgage for security, does not invalidate the mortgage, since the mortgagor is presumed to have known its character, it having been set forth in the public records.

5. Where plaintiff released a part of mortgaged premises from the lien of its mortgage on condition that the mortgagor would obtain another mortgage for it as additional security, and a third party executed such mortgage at the request of the mortgagor, there was a sufficient consideration for the execution of the latter mortgage.

6. Where defendant testified that he had executed a mortgage without consideration, evidence that he had executed such mortgage at the request of another mortgagor in order to enable the latter to make an exchange of that portion of his mortgaged premises, which the mortgagee released in consideration of the new mortgage, and that such release and mortgage were deposited together in escrow, and then recorded at the same time, was admissible to rebut defendant's testimony.

7. Where a mortgage given in consideration of the release of a portion of other mortgaged premises was shown to be one transaction with the release, the release did not absolve defendant from liability on his mortgage.

8. Where a mortgage was given as additional security for the payment of a note secured by another mortgage, an agreement by a third party to guaranty the obligation of the latter mortgage was no defense to plaintiff's right to foreclose the mortgage given as security.

9. Where a mortgage was given as additional security for the payment of a note secured by a mortgage on other premises, the conveyance of the latter premises to defendant, who had made the mortgage for additional security, was no defense to an action to foreclose such mortgage together with the original, since such conveyance was not of record or delivered at the beginning of the action, though its date was anterior thereto.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Security Loan & Trust Company against Lena B. Mattern and another to foreclose certain mortgages. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Dunnigan & Dunnigan and Luke D. Bechtel, for appellants. Miller & Brown, for respondent.

HARRISON, J. The appellant Lena B. Mattern executed to the respondent a mortgage bearing date March 1, 1895, upon certain land in the county of Los Angeles, to secure payment of the sum of \$3,500, according to the terms of a promissory note there-

for executed by her to the plaintiff at the same time, with certain coupons for interest therein specified and described. The mortgage was recorded March 18, 1895. In August, 1897, the mortgagee executed at the request of Mrs. Mattern a release of a portion of the mortgaged land, and at the same time, in consideration thereof, the appellant Bechtel executed to the respondent a mortgage upon certain other property to secure the payment of the note executed by Mrs. Mattern. The release bears date June 24, 1897, and the mortgage of Bechtel bears date August 2, 1897, but each instrument was delivered and recorded August 9, 1897. Mrs. Mattern having failed to make the payments as agreed by her, the present action was brought for the foreclosure of her mortgage; the plaintiff also setting forth in its complaint the execution by Bechtel of his mortgage to secure the same obligation, and praying for a sale of the land described in each mortgage. Answers to the complaint were filed on behalf of each of the appellants, and the cause was tried by the court, and judgment rendered in favor of the plaintiff, directing a sale of the property described in the Mattern mortgage, and that, if the proceeds thereof should be insufficient to satisfy the amount of the plaintiff's claim, the property described in the Bechtel mortgage should then be sold, and, if then there should be a deficiency, judgment therefor should be docketed against Mrs. Mattern. From this judgment, and from an order denying them a new trial, Mrs. Mattern and Bechtel have appealed.

Each of the appellants demurred to the complaint upon the ground of misjoinder of causes of action, uncertainty, and want of facts to constitute a cause of action. The demurrers were chiefly based upon the theory that two distinct causes of action are set forth in the complaint,—one against Mrs. Mattern and one against Bechtel; and the demurrers specified several objections to portions of the complaint which are therein styled as counts, but which are treated by the demurrants as distinct causes of action. The court properly overruled these demurrers.

Although one portion of the complaint is entitled therein "First Count," and another portion "Second Count," the portions so entitled do not purport to set forth separate causes of action, but to state the facts by which the defendants, Mattern and Bechtel, are respectively related to the plaintiff's cause of action. A complaint, while setting forth a single cause of action, may at the same time ask for different relief from different defendants, according as they are connected with this cause of action; and its character is to be determined from its contents, rather than from a misnomer on the part of the pleader. The averment that the mortgages referred to in the different counts were given as security for the payment of the same promissory note, and that this note which is set forth in each of the counts is the same note, indicates with

sufficient clearness that only one cause of action is set forth in the complaint. Under the averment that the Bechtel mortgage was executed as additional security for the payment by Mrs. Mattern of the notes secured by her mortgage, Bechtel was properly made a defendant for the purpose of securing to the plaintiff, according to the terms of its mortgage, any deficiency that might arise upon the foreclosure of the Mattern mortgage. See *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200. The statement in Bechtel's mortgage that it was given as security for the payment of a promissory note dated March 1, 1895, "according to its terms," made by Mrs. Mattern in favor of the plaintiff, and secured by a mortgage of the same date, giving also the date and place of record of the mortgage, was a sufficiently definite description of the obligation for which it was given.

Neither is the mortgage invalidated because the instrument set forth in the Mattern mortgage, to which it refers, is not strictly a promissory note, within the definition of the Civil Code. Having executed his mortgage as security for the payment of an instrument "according to its terms," which is set forth in a public record, he is presumed to have known its character, and will not be relieved from his obligation because he has styled it a "promissory note." As the complaint sets forth at length the instrument for which the Mattern mortgage was given, its designation as a promissory note is immaterial. That instrument expressly provides for the payment of the interest coupons which are therein described, and no uncertainty is created by subsequently setting forth at length the form of these coupons.

The objection to the averment in the complaint in reference to the item of \$29.57 advanced for the preservation of the Mattern property needs no consideration, since no claim therefor was made by the plaintiff at the trial, and the item is not included in the judgment.

The defendant Bechtel alleged in his answer that the mortgage executed by him was without any consideration, and at the trial he gave testimony to the same effect. Aside from the consideration which is presumed from a written instrument, a sufficient consideration was shown for the execution of his mortgage. It was shown that he had executed it at the request of Mrs. Mattern, and that prior to its execution, Mrs. Mattern being desirous of effecting an exchange of a portion of the mortgaged premises for other property, a contract for that purpose was prepared by him; that the plaintiff agreed to release this portion of the premises from the lien of her mortgage upon the condition that Bechtel would make this mortgage; that he executed the mortgage at the request of Mrs. Mattern; that the mortgage thus made by him, together with the release by the plaintiff, were deposited in escrow until it was shown to the satisfaction of the plain-

tiff that Bechtel's property was unincumbered; and that the two instruments were placed of record at the same time. The contention that this evidence was outside of the pleadings was properly overruled. The evidence was admissible in rebuttal of Bechtel's testimony that he had executed his mortgage without any consideration. The further objection that, by introducing the release of a portion of the mortgaged premises, Bechtel was absolved from liability upon his mortgage, is without merit, since it appeared that the mortgage was given for the purpose of procuring the release, and was a part of the same transaction, and that this transaction was conducted in part by Bechtel himself, and was carried into effect with the knowledge and consent of all the parties interested. As the release was given at the request of Mrs. Mattern, her objection that the action is for a foreclosure of only a portion of the property originally mortgaged is entitled to no consideration.

The agreement by Trexler to guaranty the obligation of Mrs. Mattern was not available as a defense to the plaintiff's right to foreclose the mortgage given by Bechtel. Neither was the conveyance of the mortgaged premises to him from Mattern available as a defense in the action. This conveyance was not of record at the commencement of the action, and, although bearing date prior thereto, is averred by Bechtel in his answer to have been delivered to him and recorded June 9, 1898, subsequent to the commencement of the action.

Many other objections to rulings of the court in receiving or excluding evidence are presented by the appellants in their brief, as well as to the action of the court in the trial and determination of the cause, but they are not of such a nature as to demand extended consideration. The objection that the court erred in adjudging the attorney's fee allowed to the plaintiff to be a lien upon the land of Mrs. Mattern, thereby creating a greater deficiency to be enforced out of Bechtel's land, is not sustained by the record. The court finds the amount due upon the promissory note for principal and interest thereof, and declares that that amount is a lien upon the lands described in her mortgage, and in its decree directs a sale of sufficient of the land "to raise the amount due unto the plaintiff for the principal and interest and costs of this suit and the expenses of sale." The court does not find or decree that the attorney's fees allowed by it are a lien upon the land of Mrs. Mattern, or direct the sale of any property in satisfaction thereof. The court was authorized to fix the amount of the attorney's fees without receiving any evidence upon the subject. *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394. The judgment and order are affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

(33 Or. 246)

SHARP v. JOHNSON.

(Supreme Court of Oregon. Jan. 14, 1901.)

REPLEVIN — JOINT OWNER — UNDIVIDED INTEREST — ANIMALS — AGISTER'S LIEN.

1. Replevin will not lie for an undivided interest in personal property.

2. Independently of the statute or special agreement, one who cares for an animal of another has no lien thereon for his charges, since he does not impart any new or added value to it, and does not come within the policy of the law giving innkeepers a lien, not being bound to receive all animals that may be brought to him for keeping.

3. Under Hill's Ann. Laws, § 3684, giving one who feeds or bestows labor, care, or attention on the live stock of another a lien thereon for the charges for the care bestowed, feed furnished, etc., one is not entitled to such lien when the feed or labor was furnished by another, though he may have paid for the same.

4. The statute does not give a lien to one joint owner of a race horse against the other for freight, entrance, and jockey fees paid, etc., these arising in consequence of the joint ownership.

5. Mere possession by a joint owner of personalty does not entitle him to a return of the property taken in attachment against the interest of the other owner, such possession being that of the co-owner, and the officer having a right to levy on the entire property to enforce a claim against the co-owner.

Appeal from circuit court, Lane county; J. W. Hamilton, Judge.

Action by Ola Sharp against A. J. Johnson. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought to recover possession of a race horse called Black Alder. The plaintiff alleges that she is the owner of an undivided one-third interest in the horse, and that B. L. Bradley is the owner of the other two-thirds; that she had a lien on Bradley's interest therein, for the keep and board of the horse, under section 3684 of the statute (Hill's Ann. Laws), and was in possession of the animal on the 21st of April, 1898, when defendant wrongfully and unlawfully took him from her. The defendant in his answer denies all the material allegations of the complaint, except the taking; and for affirmative defenses alleges (1) that the horse belonged to T. C. Sharp and B. L. Bradley, who were indebted to R. R. Hays for the purchase price thereof in the sum of \$500; that on the 21st of April, 1898, Hays commenced an action against Sharp and Bradley, and caused a writ of attachment to be issued, under which the defendant, as sheriff of Lane county, attached the horse as their property by taking him into his custody; (2) that the plaintiff is the wife of T. C. Sharp, and, prior to the date referred to, she and her husband conspired and confederated together, with the purpose and intent to cheat Bradley out of his interest, and Hays out of his debt, by wrongfully and unlawfully pretending and claiming that Sharp had sold his interest in the horse to the plaintiff, and that she had an agister's lien on Bradley's interest, which she was attempting to enforce at the time the

horse was seized under the writ of attachment; that T. C. Sharp was and is insolvent; that there was no consideration for the alleged transfer from him to the plaintiff of his interest in the horse, or for her alleged lien on Bradley's interest; and that, at the time the horse was attached, he was in a barn on the premises occupied by the plaintiff and her husband as a residence. The allegations of the answer were put in issue by a reply, and, the trial resulting in a judgment for plaintiff, the defendant appeals, assigning as error the overruling of his motion for a nonsuit, and the refusal to give certain instructions requested by him.

W. C. Hale, for appellant. John M. Williams, for respondent.

BEAN, C. J. (after stating the facts). The motion for a nonsuit was based on the theory that the plaintiff failed to prove a cause sufficient to be submitted to the jury, and we think should have been sustained. The plaintiff claims title to an undivided third interest in the animal in controversy by purchase from her husband. She testified that such interest was transferred to her on the 25th of January, 1897, two days after the purchase from Hays, in consideration of money she had previously advanced to her husband for the payment of certain bills and expenses incurred by him. She gave evidence tending to support her claim, which, while far from clear or satisfactory, was perhaps sufficient to authorize a finding by the jury that she was the owner by purchase of her husband's undivided interest. But this alone would not entitle her to recover possession of the animal, because replevin will not lie for an undivided interest in personal property. Shinn, Repl. § 206; Cobbe, Repl. (2d Ed.) § 238; 20 Am. & Eng. Enc. Law, 1050; Phipps v. Taylor, 15 Or. 484, 16 Pac. 171; Huffman v. Knight, 36 Or. 581, 60 Pac. 207. Unless, therefore, she was entitled to possession as against the creditors of Bradley, the co-owner, she cannot prevail in this action, although she may be the owner of an undivided interest therein. The interest of one tenant in common in personal property may be attached for his individual debt, and the officer may take all the property into his custody without being guilty of a conversion as to the other tenant's share. "This," says Mr. Freeman, "is merely one of the disagreeable incidents of their joint ownership. In no other way could the interest of the defendant be subject to execution; for an execution sale of chattels not in the possession of the sheriff, nor present at the sale, would invite their sacrifice, and could not be tolerated. Taking possession is not optional with the officer. He must take possession, or in some way subject the property to his control, in order to make a valid levy and sale." 2 Freem. Ex'ns (3d Ed.) § 254a. See, also, 1 Freem. Ex'ns, § 125; Drake, Attachm.

(6th Ed.) § 248; *Waldman v. Broder*, 10 Cal. 378; *Bernal v. Hovious*, 17 Cal. 541; *Veach v. Adams*, 51 Cal. 609; *Remington v. Cady*, 10 Conn. 44; *Gaar v. Hurd*, 92 Ill. 315.

This brings us to the question of the validity of the plaintiff's alleged lien on Bradley's interest, for, unless she was entitled to hold possession as against him by reason of such lien, her action must fail. It seems from the testimony that the plaintiff's husband is a horse trainer, and that he and Bradley purchased Black Alder for the purpose of taking him around the country to the various race courses, and entering him for races; that Sharp, or the plaintiff, as she contends, was to have charge of him for both parties, and to be allowed \$20 a month for keeping and training him; that at the time of bringing the action she claimed a balance due for such services, and for freight, shoeing, entrance money, and jockey fees, of \$410.72, and a lien on the horse therefor. This amount is made up of a charge of \$20 a month for training and feed from January 23 to March 23, 1897, \$30 a month from March 23 to November 23, 1897, and \$20 a month from November 23, 1897, to March 23, 1898, besides other items mentioned. So it will be seen that the lien is claimed for feed from the time of the purchase by Sharp and Bradley, on the 23d of March, 1897, down to a few days before the attachment, without any statement as to whether such feed was furnished by the plaintiff or by other parties. It is well settled that, independently of the statute or special agreement, one who feeds or cares for an animal of another has no lien thereon for his charges, because he does not impart any new or added value to it, nor does he come within the policy of the law which gives innkeepers a lien on the baggage of their guests, because he is not bound to receive all animals that may be brought to him for keeping, but may refuse them if he sees fit, or impose such terms as he pleases. 1 Jones, *Liens* (2d Ed.) § 641; 2 Am. & Eng. Enc. Law (2d Ed.) 12. We must therefore look to the statute to determine the question. It provides that "any person who shall depasture or feed any horses, cattle, hogs, sheep, or other live stock, or bestow any labor, care, or attention upon the same at the request of the owner or lawful possessor thereof, shall have a lien upon such property for his just and reasonable charges for the labor, care, and attention he has bestowed, and the food he has furnished, and he may retain possession of such property until such charges be paid." Hill's Ann. Laws Or. § 3684. Now, the manifest design of this provision is to give to a bailee of live stock, who depastures, feeds, or cares for it, at the request of the owner or lawful possessor, a lien thereon for the food furnished or care bestowed by him, and the right to retain the possession until his charges are paid. To come within its purview, it would seem that the animal

must belong to another; for one who feeds and cares for an animal of which he is a part owner cannot be said to have rendered the care and furnished the feed at the request of the owner or lawful possessor, and this is an essential ingredient of such a lien.

But, however this may be, the statute is intended to give a lien to one who, at the request of the owner or lawful possessor, shall feed, depasture, or bestow labor and care upon an animal the property of another, for such feed or labor furnished by him, but not when furnished by another, although he may have paid for the same. The plaintiff has manifestly not brought herself within the law. She or her husband had possession of the horse, as a part owner, for the use and benefit of themselves and their co-owner, Bradley, and the feed and care for which the lien is claimed were, in part, at least, necessarily furnished by other people at places where the horse was entered for races, who, under the statute, might have had an agister's lien. The other items for which a lien is claimed, such as freight, entrance, and jockey fees paid, are clearly not lienable. The charges made by plaintiff or her husband against Bradley, and for which they claim a lien, arose in consequence of their joint ownership and joint adventure. For such expenses the statute gives no lien. Thus, in *Auld v. Travis*, 5 Colo. App. 535, 39 Pac. 357, it was held, under a statute substantially the same as ours, that one partner was not entitled to a lien upon the cattle of the partnership for food furnished by him, the court saying: "The lien is for the food and care expended upon the cattle of another, where the cattle are intrusted to his care. They must be delivered into his possession and subject to his control, and the bailment is such, and his possession so exclusive, that he may maintain trespass or trover against a wrongdoer for any injury to their possession." And, after reviewing the facts in the particular case, the court proceeds: "This brief statement shows the impossibilities of maintaining a lien where the requirements are—First, that the cattle should be the property of another, in which the agister had no rights of ownership; second, that the stock was delivered for the purposes of the agistment, under a contract of hire, with an agreement to pay for the food and care." So, also, in *Armitage v. Mace*, 96 N. Y. 538, where a mare was delivered to another, under an agreement by which he was to take her around the country to enter her for races, the owner to pay all expenses and the earnings to be divided, it was held that the expenses incurred for the board and shoeing of the animal while traveling with her did not give the possessor a lien under the statute.

The contention is made by the plaintiff that the property was in her possession at the time it was attached, that the defendant was guilty of trespass in taking it into his custody, and that she was therefore entitled to recover

on that ground alone. The horse was in a barn, in the possession of the plaintiff and her husband, and within the curtilage of their dwelling house, when taken by defendant, and hence the presumption is that he was in the possession of the husband and was his property. 9 Am. & Eng. Enc. Law, 801; Stew. Husb. & W. § 119. And this would probably be sufficient to support the attachment under the statute. But, whether it would or not, mere possession by the plaintiff would not be sufficient to entitle her to a return of the property, because her possession was that of her co-owner, Bradley, and, as we have seen, the sheriff, in attaching Bradley's interest, had a right to take the horse into his custody. It follows from these views that the judgment of the court below must be reversed, and the cause remanded, with directions to allow the motion for a non-suit.

(38 Or. 273)

KADDERLY v. FRAZIER et al.

(Supreme Court of Oregon. Jan. 14. 1901.)

QUIETING TITLE—SUFFICIENCY OF DESCRIPTION.

In a suit to prevent cloud on title, a complaint describing the property as "70 acres thereof," referring to a farm of 110 acres, is insufficient.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Suit by A. A. Kadderly against William Frazier and another. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit to prevent a cloud upon the title to real property. It is substantially alleged in the complaint that on March 14, 1892, one Alma Hall, being the owner in fee "of 110 acres of land situated in section 12, T. 1 S., R. 3 E. of the Willamette meridian, the same being a part of the L. B. Morgan D. L. C.," gave a mortgage thereon to H. W. Hogue to secure the sum of \$3,500, which the assessor of Multnomah county duly assessed the same year to the mortgagee, who neglected to pay the taxes levied thereon; that in 1894 Alma Hall sold and conveyed said real property to the plaintiff, who is now the owner thereof; that in March, 1899, the defendant William Frazier, as sheriff of Multnomah county, in pursuance of a warrant attached to the delinquent tax roll of said county for the year 1892, "levied upon the real property of this plaintiff first described herein, to wit, 70 acres thereof," and advertised it for sale to satisfy the taxes so levied upon the mortgage debt and security; and that, if he is permitted to do so, a cloud will be cast upon plaintiff's title to the land. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit having been sustained, and the plaintiff refusing to plead further, the court dismissed the suit, and plaintiff appeals.

John H. Hall, for appellant. M. L. Pipes and Alex Bernstein, for respondents.

MOORE, J. (after stating the facts). The question presented for consideration is whether the complaint describes plaintiff's land with sufficient certainty for identification so that a decree can be predicated thereon. It would be very difficult to say, from an inspection of the language of the complaint as quoted above, what part of the L. B. Morgan donation land claim had been levied upon by the sheriff. In *Ward v. Janney*, 104 Ala. 122, 16 South, 73,—a suit to quiet the title to real property,—the complaint, in respect to the description of the premises, contains this averment: "The following real estate, situated near the city of Montgomery, Alabama, namely, five acres of land, being a part of lot number five according to the survey made by A. J. Pickett of the land of Mrs. Westcott;" and it was held that the description was insufficient, and that the complaint was vulnerable to a demurrer interposed upon that ground. In the case at bar, the plaintiff not having described the real property with sufficient certainty for identification, no error was committed in sustaining a demurrer thereto, and hence the decree is affirmed.

(38 Or. 200)

GAINES v. CHILDERS et al.

(Supreme Court of Oregon. Jan. 7, 1901.)

MECHANICS' LIENS—MORTGAGES—PRIORITY—DECREE.

Hill's Ann. Laws, § 415, declares that any person having a lien subsequent to the plaintiff in proceedings for the foreclosure of a mechanic's lien shall be made a defendant in the suit. By mutual mistake on the part of the owner of property and his mortgagee, land intended to be mortgaged was not described in the instrument; and thereafter a material man foreclosed a mechanic's lien on a building erected on the land, omitted from the mortgage, and purchased the property, having no knowledge of the mistake in the mortgage at the time he furnished the material. The mortgagee was not a party to the proceedings. The mortgagee brought suit to have his mortgage reformed and foreclosed, and for a decree giving priority over the rights of the material man. *Held*, that a decree reforming the mortgage, but holding it subsequent to the rights of the material man, and that the mortgagee was entitled to redeem by paying the amount of the material man's bid, was proper, since the decree in the foreclosure of the mechanic's lien was not invalid on the ground that section 415 had not been complied with; the material man having obtained the legal title to the premises subject to the rights of the mortgagee to redeem.

Appeal from circuit court, Jackson county; H. K. Hanna, Judge.

Suit by James Gaines against Spencer Childers and others. From the decree rendered, the plaintiff appeals. Affirmed.

On November 20, 1895, the defendants Childers, intending to execute a mortgage to plaintiff upon certain land in Jackson county to secure the payment of a promissory note for \$550, by mutual mistake of the parties

thereto made it upon another and different tract. Thereafter, and between the 11th day of August and the 10th day of November, 1896, the defendant Woods sold and delivered lumber to Childers, to be, and which was, used in the construction of a building upon a portion of the premises intended to be so mortgaged. On December 9, 1896, he filed his claim of lien in the office of the county clerk, and on the 2d day of June, 1897, commenced a suit against Childers and wife and a subsequent judgment lien creditor to foreclose the lien. Such proceedings were thereafter had in the suit that a decree was entered in his favor, directing, among other things, the sale of the building, together with a certain described portion of the premises, under which decree and execution thereon the property was sold by the sheriff and purchased by Woods on the 28th day of August, 1897. The plaintiff, who was not a party to the suit to foreclose the mechanic's or lumber merchant's lien, commenced this suit on the 10th day of May, 1898, against Childers and Woods to reform and foreclose his mortgage, and for a decree giving it priority over the right acquired by Woods at such sale, alleging that Woods knew of plaintiff's rights at the time he sold the lumber to Childers. Upon the trial the court below, however, found as a fact—and we think its finding is supported by the testimony—that Woods had no notice or knowledge of the plaintiff's claim at the time he furnished the lumber and filed his lien, and that, although informed before the commencement of his suit that the plaintiff was supposed to have a mortgage on the premises, he did not make him a party, because he was advised by his attorney that it was not necessary, as the description in the mortgage did not cover the property to which the lien attached; and therefore the court entered a decree reforming plaintiff's mortgage, but holding that it was subsequent and subject to the mechanic's lien filed by Woods; that plaintiff was entitled to redeem from Woods by paying the amount bid by him for the premises purchased, together with interest and costs, and that, if he chose to exercise such right, the entire premises should be sold, and the proceeds applied: First, to reimburse him for the amount paid on such redemption; second, to the costs and disbursements of the suit; and, third, on the plaintiff's mortgage,—but that, if he did not choose to redeem, an execution should issue for the sale of the portion only of the premises intended to be mortgaged, not embraced in Woods' purchase. From this decree the plaintiff appeals.

Austin S. Hammond, for appellant. John A. Jeffrey, for respondents.

BEAN, C. J. (after stating the facts). The statute provides that no mechanic's lien shall bind any building for a longer period than six months after filing, unless suit be brought

in a proper court within that time to enforce the same (Hill's Ann. Laws Or. § 3675); that all persons personally liable and all mechanic's lien holders shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may, be made parties, but such as are not made parties shall not be bound by such proceedings (Id. § 3677). The position of the plaintiff is that under the statute a mechanic's lien lapses or becomes void, as against a junior mortgage or judgment lien, unless the lienholder is made a party to a suit to enforce such lien, brought within the time specified in the statute. But the statute provides that the pleadings, process, practice, and other proceedings shall be the same as in other cases, and shall, as nearly as possible, be made to conform to the proceedings of a foreclosure of a mortgage lien upon real property. Id. § 3677. The manifest purpose of these provisions is to assimilate the proceedings in a suit to foreclose a mechanic's lien, as nearly as possible, to those in a suit to foreclose a mortgage upon real estate; and it is well settled that a suit to foreclose a mortgage can proceed to final decree without the presence of other lien claimants, and that the absence of such parties from the record does not render the service a nullity. It is true, section 415 provides, "Any person having a lien subsequent to the plaintiff upon the same property or any part thereof * * * shall be made a defendant in the suit." But this is only in order that a decree may be rendered which will bind all parties interested in the land, and under which a sale may be effected which will transfer the title to the purchaser free from liens and incumbrances. The omission of such parties, however, will not invalidate the decree, nor will a bill be dismissed on account thereof for a defect of parties. 9 Enc. Pl. & Prac. 300. If incumbrancers are not made parties to a suit to foreclose a lien, they are, of course, in no respect bound by the decree or proceedings thereunder; but the decree itself is valid, and vests in the purchaser the legal title to the premises, and the right, in a proper proceeding, to compel such lien creditors to redeem. *Sellwood v. Gray*, 11 Or. 534, 5 Pac. 196; *Koerner v. Iron Works*, 36 Or. 90, 58 Pac. 863. The same is true in a suit to foreclose a mechanic's lien. Persons holding liens upon the premises by judgment or mortgage are not indispensable parties to such a suit. The only effect of not joining them with the owners of the premises is that the decree is not binding upon them, and does not cut off or deprive them of the right of redemption. *Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; *Whitney v. Higgins*, 10 Cal. 547; *Gamble v. Voll*, 15 Cal. 507. The failure, therefore, to make the plaintiff a party to the suit brought by Woods to foreclose his lien did not render the lien or the rights acquired thereunder invalid as to the plaintiff's mortgage,

but the purchaser at the sale under such decree obtained the legal title to the premises, subject to the right of the plaintiff to redeem; and therefore there was no error in the decree of the court below, which is affirmed.

(38 Or. 319)

WASHINGTON NAT. BUILDING, LOAN & INVESTMENT ASS'N v. STANLEY et al.

(Supreme Court of Oregon. Jan. 7, 1901.)

CORPORATIONS—FOREIGN BUILDING ASSOCIATIONS—DOMESTIC BUSINESS—CONTRACTS—USURY—CORPORATE EXISTENCE—DENIAL—ESTOPPEL—MORTGAGES—FORECLOSURE.

1. A complaint, in an action to foreclose a mortgage on realty, setting out the note, no part of which was paid, and averring that it was secured by a mortgage, duly recorded, on certain realty, which it described, states a cause of action, in the absence of specific objection, though it does not set up the mortgage by copy or exhibit, nor state the purport of its provisions.

2. Where a building association has attempted in good faith to comply with the laws governing its organization, persons who have borrowed from it, accepted its stock, and dealt with it in its corporate capacity, in an action by it to foreclose a mortgage, cannot question its corporate capacity to enforce the obligation because the law has not been fully complied with in its organization.

3. Under Sess. Laws 1895, p. 103, providing that, if the secretary of state is satisfied that a foreign building association has complied with the requirements of the laws entitling it to do business in the state, he shall issue his certificate stating such compliance, such certificate is sufficient to establish, prima facie, the authority of a building association holding it to do business in the state.

4. Sess. Laws 1895, p. 103, § 4, requires the by-laws of building associations to provide for the amount of premium to be paid for, and the rate of interest on loans; section 6 provides that its provisions relating to bidding on loans shall not apply to associations which fix the rate of interest and premium in their by-laws; and section 7 directs that any premium taken by an association shall not be treated as interest, or render the association amenable to usury laws. *Held*, that a contract with a building association stipulating for interest at 6 per cent. per annum, and a premium at the rate of 6 per cent. per annum, is usurious, since such laws do not permit the fixing of a premium by a rate per cent. on the amount of the loan, and dependent for the time of its payment on the time the loan may remain unpaid.

5. Where a contract with a foreign building association authorized to do business in Oregon is made in the latter state, and is secured by mortgage on realty situate therein, and a suit to enforce it is instituted in the county where the mortgaged premises are situated, such contract is to be construed by the laws of Oregon, though it stipulates that it is a contract of such foreign state.

6. Where a building association, in contracting with a member, has acted under an honest belief that a stipulated rate included as premium in addition to interest was recoverable by law, in which it was mistaken, and it appears that the law governing such associations is of doubtful import, the penalty for taking usury will not be enforced.

Appeal from circuit court, Polk county; H. H. Hewitt, Judge.

Action by Washington National Building, Loan & Investment Association against Hart-

well B. Stanley and others. From a decree dismissing its complaint, complainant appeals. Reversed.

This is a suit to foreclose a mortgage upon real estate. The complaint avers: That plaintiff is a corporation organized under the laws of the state of Washington, and that, by compliance with the requirements of the laws of this state, it is entitled to do business herein and to maintain this suit. That on September 2, 1895, Hartwell B. Stanley and wife, of Seattle, Wash., made their certain promissory note to plaintiff, of which the following is a copy: "On or before eighty-four (84) months after date, for value received, I promise to pay the Washington National Building, Loan and Investment Association, a corporation duly organized under the laws of Washington, the sum of five hundred (\$500.00) dollars, with six per cent. interest per annum, and six per cent. premium per annum, thereon from date until paid, principal, interest, and premium payable in United States gold coin of the present weight and fineness, payable monthly on or before the last Saturday of each month, principal, interest, and premium payable to the treasurer of the Washington National Building, Loan and Investment Association, at Seattle, Washington. Any failure to pay interest or premium when due shall, at the election of the payee, make the principal, interest, and premium at once due, and any waiver of such right shall not prevent the payee from enforcing the right, at its election. The shares of stock of the Washington National Building, Loan and Investment Association held by the undersigned, as shown by the certificate of stock No. 4,895, are hereby transferred and pledged to the payee as collateral security for the performance of the conditions of this obligation and of the mortgage securing the same. And it is hereby especially agreed that if this note is placed in the hands of an attorney for collection, or if collected by suit, I agree to pay such additional sum as attorney's fees as the court may adjudge reasonable." That at the same time the said Stanley and wife, for the purpose of securing the payment thereof, duly made, executed, and delivered to plaintiff their certain mortgage upon real property (describing it) in Polk county, Or., which was duly recorded in the office of the clerk of said county. That said note and mortgage were made with reference to, and in accordance with, the laws of the state of Washington, and that, under and by virtue of said laws, they are each valid and binding obligations. That no part of said note, either principal, interest, or premium, has been paid. That the shares of stock referred to in said mortgage are of no value whatever. That there is now due and owing from the defendants Stanley to plaintiff the sum of \$500, with interest thereon at the rate of 6 per cent. per annum, and premium

at the rate of 6 per cent. per annum, from September 2, 1895, and that \$75 is a reasonable sum to be allowed as attorney's fees for the foreclosure of said mortgage. The prayer is for such foreclosure, and a cancellation of the defendant's stock in the association. The defendants Stanley and wife join issue therewith, and, among other things, deny that the plaintiff had complied with the requirements of the act of February 25, 1895, entitling building and loan associations of other states to transact business within this state (Sess. Laws 1895, p. 103), or that said contract was made or executed in the state of Washington, or that they otherwise executed and delivered said mortgage, except as stated in their further and separate answer, or that there is anything due or owing from them to the plaintiff. As a separate defense, they allege that no rate of premium is fixed by plaintiff's by-laws, as provided by section 6 of said act, and that the agreement to pay a premium of 6 per cent. per annum, in the manner specified in said note, is illegal and void; that said note and mortgage were executed and delivered in Polk county, Or.; that the note was made and delivered upon a usurious agreement between the plaintiff and the defendants, and that said corporation has not complied with the provisions of said act, so as to entitle it to transact business in this state. The reply denies the material allegations of the answer, and further alleges, among other things, that plaintiff fully complied with the statute authorizing it to do business in this state, and received the certificate of the secretary of state to that effect. The trial resulted in a decree dismissing the suit, and the plaintiff appeals.

Guy G. Willis, for appellant. J. L. Collins and Raleigh Stott, for respondents.

WOLVERTON, J. (after stating the facts). One of the grounds upon which the dismissal was based is that the complaint does not state facts sufficient to constitute a cause of suit. Such insufficiency was not suggested by the defense, but was so found by the court upon its own motion, and is urged here as a correct holding in the premises. The specific objection to the complaint is that it has neither set up the mortgage by copy or exhibit, nor stated the substance or purport of its provisions, and that, therefore, the court cannot determine what are its conditions, or whether or not they, or any of them, have been broken so as to entitle the plaintiff to a foreclosure. The question not having been raised until after joining issue, all intendments must be taken in favor of the complaint. If it shows a good cause of suit, though defectively stated, it will support a decree, and ought to be allowed to stand, at this stage of the proceedings. But, if it has omitted an allegation material and necessary to a maintenance of the suit, then it must

be held insufficient. *Booth v. Moody*, 30 Or. 222, 46 Pac. 884. It must be admitted that the pleading contains but a meager statement of the plaintiff's cause, which, if tested by demurrer, could not be sustained; but, under the circumstances, we are inclined to think that it will support a decree. It was evidently patterned after one of the forms contained in 2 *Estee, Pl. & Prac.* (2d Ed.) 265, Form 450. This court has held a complaint in like form good against a collateral attack. *Berry v. King*, 15 Or. 165, 13 Pac. 772. It is there said, by Mr. Chief Justice Lord, that "it may be well doubted whether the allegation complained of is insufficient in the particular noted." While that case is perhaps not authority here, as the question has arisen in a direct proceeding, yet, giving the plaintiff advantage of all intendments, the complaint must be held to state a cause of suit.

The articles of incorporation appear to have been executed and acknowledged by only six persons, instead of ten, as required by the statute of Washington in the organization of such an association, and the defendants challenge the plaintiff's corporate capacity to enforce its obligations, because the law has not been complied with in the particular suggested. But the association having apparently and in good faith attempted to comply with the law governing the organization, and the defendants being borrowers of the concern, and having received and accepted its stock and dealt with it in its corporate capacity, they cannot now be heard to question its entity. The association is, at least, a *de facto* corporation, and may maintain suits and actions against those who have dealt with it to enforce their obligations, and the state only can complain of its defective organization. "When a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act, their legal authority to act as a corporation cannot be questioned collaterally." *Tayl. Priv. Corp.* (4th Ed.) § 145. So that, if there has been an apparent attempt to perfect an organization under the law, and there has been user in pursuance of such an attempt, the organization has acquired a *de facto* existence, which will enable it to maintain its individuality against all attacks that may arise collaterally. *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150. And this rule is applicable to building and loan associations, as well as private corporations generally. *Payette v. Association*, 27 Ill. App. 307; *Hagerman v. Association*, 25 Ohio St. 186.

It is further insisted that the plaintiff has not complied with the requirements of our statute so as to entitle it to do business within this state. The act (see Sess. Laws 1895, p. 103) provides that no building and loan association organized under the laws of any other state shall do business herein, unless such association shall have securities of the

value of \$100,000; and that, before commencing to do business here, such association shall file with the secretary of state an authenticated copy of its charter or articles of incorporation and by-laws, a duly-authenticated copy of a resolution adopted by the board of directors, appointing an attorney therefor, resident within this state, upon whom legal process may be served, and whose name and residence shall be stated therein, and an agreement that said association will pay any judgment that may be taken against it within 60 days after the final entry thereof, and a certificate of the authorized officer of such other state, showing that securities of the value of \$100,000 are on deposit with the proper officer or trust company, in trust for all the members and creditors of such association. It is further provided that every such association doing business in this state shall, on or before the 1st day of September of each year, deposit with the secretary of state a report of its affairs and operations for the year ending on the 30th day of June immediately preceding, which shall specify certain matters named in the act, and that thereupon, if the secretary of state is satisfied that it has complied with all the provisions of the act and is entitled to do business in this state, he shall issue his certificate, stating such compliance, and that it is entitled to do business accordingly, which certificate shall be in force for a period of one year, unless sooner rescinded. By stipulation of the parties, the certificate of the Honorable H. R. Kincaid, secretary of state, bearing date August 29, 1895, only a few days prior to the date of the execution of the note and mortgage, was offered and admitted in evidence, subject to any valid objections thereto, showing that all the provisions of said act authorizing such associations to do business in this state had been complied with. No objections having been urged to the competency or relevancy of the certificate, we are of the opinion that it is adequate to establish, *prima facie* at least, the authority of the plaintiff to do business here. We will not attempt, therefore, to make further inquiry as to what was in reality done by the association to the end that it might lawfully transact business in this state.

The mortgage recites that it is given to secure a loan upon five shares of stock, the monthly payments on which, amounting to \$3.25, the mortgagors covenant and agree to make until said stock becomes fully paid up; and the conditions thereof are that if the mortgagors shall well and truly pay, or cause to be paid, to the association, at its home office at Seattle, Wash., the sum of \$500, according to the conditions of the promissory note set out therein, with interest before and after maturity at the rate of 6 per cent. per annum until paid, payable monthly, and a premium at the rate of 6 per cent. per annum, payable at the same time and in the same manner as the interest, or shall pay, or

cause to be paid, at the home office, all installments of interest and premium which become due on such stock until it becomes fully paid, and before any of said installments shall have been paid due a period of six months, and shall surrender such stock in payment of the note, then said mortgage to become void, otherwise to be and remain in full force and effect. The stipulated facts show that the plaintiff, by resolution of its board of directors, appointed Guy G. Willis, of Portland, Or., its attorney for the state of Oregon, upon whom legal process might be served, to hold until another should be appointed to succeed him; that the defendants Stanley were not in the state of Washington on the 2d of September, 1895, when said note and mortgage were signed, acknowledged, and delivered; that on the 7th of August preceding the defendant H. B. Stanley made application to the plaintiff for a loan, and at the same time applied in writing for 10 shares of stock in the association; that plaintiff issued to Stanley its certificate for 10 shares of stock, and at the date of execution of the note and mortgage he redelivered the same to plaintiff as collateral security for the loan; that said application for a loan and stock was made at Dallas, Or., through one W. G. Wright, who represented that plaintiff had money for such investment, and the note and mortgage were there executed, acknowledged, and delivered to the plaintiff. The mortgage, however, contains a provision that it is understood to be made with reference to and under the laws of the state of Washington.

This brings us to the pivotal, and most difficult, question in the case, which is whether the note and mortgage, which must be construed together as one instrument, are tainted with usury. For a proper determination thereof, very much depends upon the precise nature and purpose of a building and loan or savings and loan association. The title of the act granting special and peculiar privileges to such organizations in this state is, "To regulate the incorporation and business of building and loan and savings and loan associations doing a general business." *Sess. Laws 1895, p. 103.* There is no distinction between a building and loan and savings and loan association, and the two appellations were used to designate but one class of societies, *viz.* those doing a savings and loan or investment business on the building society plan. Associations of this kind enable persons belonging to a deserving class, whose earnings are small, and with whom the slowness of accumulation discourages the effort, by the process of gradual and enforced savings to become, either at the end of a certain period, or by anticipation of it, the owners of homesteads. It is by reason of the peculiar character of this particular class of associations, and because of their capability, when conducted upon the plan which essentially distinguishes them from other organizations

and business enterprises, that they have acquired, under the law, distinct and peculiar rights and privileges. The act was designed, therefore, to encourage and extend the particular privileges therein designated to this peculiar class of organizations. None other can claim the benefits and immunities accorded them, and these only when they pursue the especial business, and observe the exceptional rules, which characterize them, and make them peculiar, as compared with other business enterprises.

A building association, as now existing, is defined by Thompson as "a private corporation designed for the accumulation, by the members, of their money, by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest, and a preference in securing loans over other members, and continuing their fixed periodical installments in addition; all of which payments, together with the nonborrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the installment, payments, and profits aggregate the face value of all the shares in the association, when the assets, after the payment of the expenses and losses, are prorated among all the members, which, in legal effect, cancels the borrower's debt, and gives the nonborrower the amount of his stock." *Thomp. Bldg. Ass'ns* (2d Ed.) § 3. Mr. Endlich defines such association as a "private corporation, erected for such a period of time as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders and the profits upon their investment, of a fund, to be applied, from time to time, in accommodating such shareholders with loans or advancements; for the purpose, primarily, of acquiring the free possession of real estate, and constructing dwellings, under terms and regulations sanctioned by experience, and prescribed by legislation, and the charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of gradually extinguishing the liability incurred from such loans and advancements simultaneously with the prescribed continuance of the shareholder's periodical contributions upon the stock held by him in the association; the said periodical contributions being so calculated as to amount, in the aggregate, at compound interest, to the par value of all the shares, as agreed upon at the formation of the society and fixed by its charter, within the period allowed for the anticipated duration of the society, or the continuance of the contributions, after deduction of all the necessary expenses of the business."

End. Bldg. Ass'ns, § 39. See, also, *State v. Association*, 45 Minn. 154, 47 N. W. 540. The societies in this country were first organized under the plan evolved in England. Lord Chancellor Cranworth, describing their operations in that country under the provisions of Act 6 & 7 Wm. IV. c. 32, §§ 1, 3-5, says: "Members subscribe monthly sums, which are accumulated till the fund is sufficient to give a stipulated sum to each member, and then the whole is divided among them. In the society now in question the sum to be raised for each member is £100. If this were all, it would be a very simple transaction,—mere accumulation,—and the only question would be how to invest the sums subscribed to the greatest advantage. But this is not all. One main object is to enable members to obtain their £100 by anticipation on their allowing a large discount. For this purpose, when a sufficient fund is in the hands of the treasurer, the members who desire to get their shares in advance bid, by a sort of auction, the sum which they are ready to allow as discount, and the highest bidder obtains the advance. Thus, if at the end of a year a sum of £500 is in the hands of the treasurer arising from the monthly subscriptions, and the holder of 10 shares is willing to allow a discount of 50 per cent. (no one offering more), the £500 is or may be advanced to him, being £50 in satisfaction of each of his 10 shares. For this accommodation he is bound to pay monthly, till a fund is raised sufficient to give £100 per share to all the other members, not only the original monthly subscription, but also a further monthly sum, called 'redemption money.'" *Fleming v. Self*, 3 De Gex, M. & G. 997, 1012. For a more extended and a very lucid explanation of the manner of carrying on the business of these societies, see *End. Bldg. Ass'ns*, § 8 et seq.

Societies of this description, working under the plan thus defined and outlined, are such as the legislature had in view when the act was passed authorizing their incorporation, and extending to them peculiar privileges withheld from other business enterprises. Among these privileges, is one by which a certain premium may be taken from the borrower for the right of securing a loan from the organization, without entailing the consequences of practicing usury.

Let us now inquire touching the nature of the premium peculiar to this class of associations. As understood by text writers, it is a "bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock by obtaining the immediate use of the money his stock will be worth at the winding up." Wrigley, "The Workingman's Way to Wealth," 67. After quoting Wrigley's definition, Mr. Endlich observes that, "In effect, it is the conventional difference between the par value of the share advanced and the amount actually received by the borrower." *End. Bldg. Ass'ns*, § 388. Messrs. Thornton and Blackledge define it as

"the amount which a stockholder, desiring to borrow, is willing to pay for the privilege of anticipating the ultimate value of his stock, by obtaining at once the use of the amount of money his stock will be worth when the association is wound up." *Thorn. & Blackl. Bldg. & Loan Ass'ns*, § 222. "It is the difference," says Wood, J., in *Sullivan v. Association*, 70 Miss. 91, 12 South. 590, "estimated by the association and its borrowing member, between the par value of the member's shares of stock and their present real value. It is the bonus which appellant might lawfully agree to pay for a present advancement in cash of a sum certain for the virtual transfer to the association of his shares of stock, which, in the final winding up of its affairs, may realize the sum actually received by the member, together with the premium bid, or which may not." Mr. Justice Cooper, in *Patterson v. Association*, 14 Lea, 677, 687, after giving briefly the history of those associations and the manner of their operation, says: "For the advance upon the dividends by way of anticipation, and the amount which the member was willing to give out of the final dividend for the preference of an advance, the words 'loan' and 'premium' or 'bonus' were used." Speaking interchangeably of the nature of the transaction and the consideration for the preference, Green, J., in *Pfeister v. Association*, 19 W. Va. 678, 686, says: "Having no English word to express accurately this abatement, they might have called it, as they did, 'the premium bid for the right of precedence in taking the loan.' And, there being no appropriate word to represent this transaction, it would naturally come to be called by various names, which, with more or less accuracy, would in a word or brief phrase give an idea of it. Some might call it a 'redemption of his interest in the association,' as the ultimate effect of it would be that he would, at the close of the association, get no money from it, because what would be otherwise coming to him would be absorbed by the payment of his note and this abatement he had agreed to, or his 'premium,' as it is generally called. Sometimes it would be called for the like reason, but with still more inaccuracy, 'a purchase of all his interest in the association, by the association.' And, as the loan is really to be ultimately paid by offsetting his interest in the association against this note to the association, it would sometimes, with much more accuracy, be called 'a loan on his interest in the association.'" And, again, in *Association v. Wilcox*, 24 Conn. 147, in speaking of the term "bonus," as used in the statute, the court say: "By that expression we think that they meant something definite; something distinct, and independent of the interest, in the ordinary acceptance of the term; * * * a definite sum for a loan for a specified time, and not anything which the parties in their contract might choose to denominate a bonus."

It is fairly deducible from these authorities that the significance of the term "premium," within the meaning of the law of building and loan associations, is a bonus in reality, or a definite fixed sum or amount agreed upon between the contracting parties,—the association and the borrower. Representing, as it does, the conventional difference between the par value of the share advanced and the amount actually received by the borrower, it is susceptible, in theory, at least, of definite and exact ascertainment, and it is a part and purpose of the scheme that it should be so determined and settled at the outset, and stand for the consideration upon which the loan or advancement is made. The usual method, and the most satisfactory and equitable way, of arriving at the premium to be paid for the privilege of obtaining the advancement, is by a bidding between the members wanting the accumulated funds; the highest bid, or the one offering the largest premium or bonus, taking the funds to the amount desired. By this method, the amount of the premium is ascertained, and becomes a lump sum, to be paid, or, rather, to be retained, by the association from the borrower for his privilege of being preferred over other members desiring the use of the funds of the association. It would seem that the practice of charging "fixed premiums"—that is, premiums prescribed by the by-laws of the association or the board of directors, and not determined by competitive bidding—has become prevalent to some extent among "national" associations. *Thomp. Bldg. Ass'ns* (2d Ed.) § 191. But the author of this work cites no case where the practice has been upheld, while many are referred to which condemn it as violative of one of the distinctive and most salutary principles characterizing these peculiar associations, which is that the money should be put up for sale, usually denominated "auction," and the highest bid fixes the amount of the premium, and determines, as between members, who shall obtain the loan. *Trust Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Butler v. Investment Co.*, 94 Ga. 562, 20 S. E. 101; *State v. Association*, 35 Ohio St. 258; *Bates v. Association*, 42 Ohio St. 655; *Brown v. Archer*, 62 Mo. App. 277; *Meroney v. Association*, 116 N. C. 882, 21 S. E. 924; *Boone v. Association* (Sup.) 23 N. Y. Supp. 203; *McCauley v. Association* (Tenn. Sup.) 35 L. R. A. 244 (s. c., 37 S. W. 212). In a footnote to the last case cited, Mr. Burdett A. Rich, one of the annotators of that valuable series of reports, makes this observation: "In America the reported cases which have discussed the matter all seem to condemn fixed premiums or any rule to limit the usual scheme of free bidding."

These loans, where upheld as not usurious, when the premium, added to the redemption money or interest, exceeds the lawful rate of interest, are supported upon the ground that the transaction is not, in all of its es-

sentials, a loan, but an anticipatory advancement, by way of discount, of the share the member would otherwise be entitled to claim payment of on the termination of the society, coupled with the idea that it is a dealing with what is virtually a co-partnership fund, or one in which all the members, including the borrower, are mutually interested. *Seagrave v. Pope*, 1 De Gex, M. & G. 783; *Silver v. Barnes*, 8 Scott, 300. This is, in brief, the rationale of the English doctrine, which has been adopted by many of the states of the Union. *Association v. Martin*, 13 N. J. Eq. 427; *Association v. Stephens*, 26 N. J. Eq. 351; *McLaughlin v. Association*, 62 Ind. 264; *Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 South. 369; *Robertson v. Association*, 10 Md. 397; *Massey v. Association*, 22 Kan. 624; *Sullivan v. Association*, 70 Miss. 94, 12 South. 590; *Merrill v. McIntire*, 13 Gray, 157; *Tilley v. Association (C. C.)* 52 Fed. 618; *Holmes v. Smythe*, 100 Ill. 413; *Association v. Lampson*, 60 Minn. 422, 62 N. W. 544; *Association v. Gilbert*, 23 Grati. 787.

Our statute prescribes (section 4 of said act) that the association shall adopt by-laws, which, among other things, shall "especially provide for the character and methods of conducting the business of the association, with rules governing the admission of members, the sale of its shares, the amount of admission fee, the amount of and the periods when dues shall be paid by the members to the association, the disposition and investment of the funds of the association, including loans, the amount of premiums to be paid for and the rate of interest on loans," etc. Section 6, that the by-laws shall provide for the mode in which the application or bids for loans shall be made and received, and who shall be entitled to preference in allotting the same, but it contains a proviso as follows: "That the provisions of this section, relating to bidding for loans, shall not apply to associations which fix the rate of interest and premium in its by-laws or annually, by resolution of the board of directors, at a rate which will keep the money of such association at all times safely invested and in which the system of bidding is not allowed. The minimum amount and nature of premiums to be bid or asked for loans shall be fixed and described in the by-laws, but the same may from time to time be changed by a two-thirds vote of all the members of the board of directors." Section 7 provides that "any premium which has heretofore or which shall hereafter be taken for loans * * * made by any association governed by this act, shall not be considered or treated as interest, nor render such association amenable to the laws relating to usury." Does this statute permit the taking of a rate of premium such as is stated in the obligation set out in the complaint which the plaintiff seeks to foreclose? Section 4 requires the by-laws to provide for the amount of the premium to be paid for, and the rate of interest on, loans. This obvi-

ously treats the premium as something different in character from interest, and is in perfect accord with another provision to be contained in the by-laws, prescribing the mode by which bids for loans shall be made, obtained, and received; for, when the two are observed, the amount of the premium becomes definitely fixed and determined, and in that respect is well distinguished from the interest.

But when we come to the proviso of section 6, above noted, the intendment of the legislature is not so clear. It may be conceded, for the purposes of this case,—but we must by no means be understood as deciding it,—that it would be legitimate for the association, through its by-laws or by resolution of its board of directors, to prescribe a minimum lump premium, or name a certain or definite amount per share to be paid as a premium, upon a loan or advancement to be made; but even this could not be held to authorize the fixing of a premium by a rate per cent. or by a percentage upon the amount of the loan, and dependent for the time of its continued payment upon the length of time the loan may remain unpaid, or the stock of the borrower be not fully paid in. There is nothing in such a condition to distinguish it from interest, and the legislature surely did not intend to say that interest shall not be treated as interest, or that interest, to be collected by the designation of premium, shall not be treated as interest. So that, when the statute speaks of the rate of premium, it does not mean the same thing as the rate of interest. The more natural and consistent interpretation would be that, when the legislature speaks of a rate of premium, it means a proportional or pro rata distribution of the payment of a premium, fixed by the by-laws or by resolution of the board of directors of the association. If it does not have this meaning, it has no other that will distinguish it from interest, and the act cannot be held to sanction the taking of any premium at all under the appellation of "rate of premium." The idea of a rate of premium corresponding to rate of interest is not within the spirit and intendment of the law of building associations, and, if that is what was attempted to be sanctioned by legislative edict, so as to relieve it from amenability to the laws relating to usury, it would be very questionable whether it could secure the warrant of the constitution, which inhibits the adoption of any special or local law relating to interest on money. Under this interpretation of the act, it is plain that the plaintiff was not warranted in exacting from the borrower the 6 per cent. premium upon the amount of the loan, as, when added to the 6 per cent. interest, it exceeds the lawful rate which is permitted to be charged in this state as interest on money. The device has the characteristic of a shift to circumvent and avoid the law relating to usury, and cannot receive our sanction. *Meroney v. Association*, supra,

was a case where \$3.25 per month, as interest and premium, was contracted to be paid upon a loan of \$300, and it was held that the whole transaction could not be characterized otherwise than as "a lending of \$300 to the plaintiff at 12 per cent. per annum." So it was said, in *Butler v. Investment Co.*, supra: "It [the association] claims to loan money at 6 per cent. per annum, payable and collectible monthly; but under the name of premium, which is but another name for usury, collects another 6 per cent. monthly, by such device collecting really 12 per cent. interest per annum, payable monthly, on loans; thus, under fancy names, carefully eschewing the name of interest, which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than that allowed by law." These cases illustrate the principle adopted, and it would seem that plaintiff's contract is usurious upon its face.

The plaintiff contends, however, that the agreement must be treated as a Washington contract, and therefore should be construed with reference to the usury laws of that state, and, incidentally, that the transaction of making the loan, and taking a note payable at Seattle, Wash., and a mortgage upon lands in Oregon, to secure its payment, was not doing business within this state. It is strange reasoning to insist, on the one hand, that, in order to enable the plaintiff to sue in our courts, it has complied with the law with that particularity which will enable it to do business in the state, and yet, when it is suggested that it has violated the laws of usury here by a transaction consummated under the same authority that authorizes the suit, to insist that it has not done business within the state. The very purpose of the act is to enable those associations having their domiciles in other states to do and transact business and sue and be sued here, and it ought to be alike effective under all conditions. When they come here under the statute, and have the license of the secretary of state to do business here, they become pro hac vice domestic corporations, and must operate as if actually domiciled in the state. They submit and render themselves amenable to the laws of the state, which must be taken to govern all their transactions entered into and consummated therein. Our own citizens would not be permitted to make contracts here payable in another state, and then insist upon having them construed here according to the laws of such state; and it does not seem consistent with principle and reason that a foreign corporation, securing citizenship in this state for the purpose of promoting its business, can insist upon making its contracts payable elsewhere, and then invoke the authority and process of our courts to enforce them according to laws other than our own. If such were to be recognized as good law, it would in many instances give foreign

corporations, although domiciled in this state, advantages over those organized under its laws and having their principal place of business here. But the transaction, under the conditions attending it, must be regarded as doing business within this state. *Bank v.* Page, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137. The contract was made in Oregon, and must be construed and enforced according to our laws. The application for stock and the loan was made in Oregon, to and by an association domiciled and doing business therein, through a resident solicitor. The mortgage was given upon an Oregon farm, and was executed and acknowledged here. The money was used here, and this suit was instituted in the county in which the mortgaged premises are situated, as contemplated by the association when it acquired the license to do business in the state. All this, notwithstanding the mortgage stipulation to the effect that it is a Washington contract, clearly shows its Oregon nativity, and it is therefore solvable by the laws thereof. *Meroney v. Association*, supra; *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092, 8 L. R. A. 170; *Dickinson v. Edwards*, 77 N. Y. 573; *Jackson v. Mortgage Co.* (Ga.) 15 S. E. 812.

But, notwithstanding the contract appears to be usurious on its face, and the natural inference to be drawn therefrom is that the parties intended the result of their own acts, yet there is another element which must attend the practice of usury. It must be with a corrupt intent, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law. 27 Am. & Eng. Enc. Law, 925; *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89; *Burwell v. Burgwyn*, 100 N. C. 389, 6 S. E. 409. But, where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken, it has been held that the penalties of usury would not be enforced. *Thompson v. Jones*, 1 Stew. (Ala.) 556. There is no evidence in this case, aside from that which appears upon the face of the contract, by which we are or can be advised as to the true intent of these parties. Hence we may fairly suppose that they in good faith designed to act within the legislative intentment of the act governing the management and conduct of building and loan associations, and as the provisions governing in the premises are, as we have seen, of doubtful import, in view of the rule that forfeitures are never enforced except when the case is reasonably free from doubt, we have concluded to decree a foreclosure in favor of the plaintiff for the principal sum, with interest at the rate of 6 per cent. per annum, against which defendants will be allowed credit for the \$39 paid upon the stock. Plaintiff should also have \$60 as an attorney's fee, being the

amount found to be reasonable by the court below, and its costs and disbursements in both courts.

(38 Or. 253)

DEKUM et al. v. MULTNOMAH COUNTY.

(Supreme Court of Oregon. Jan. 14, 1901.)

TAXATION OF MORTGAGES—INTEREST IN THE LAND—LIEN FOR TAXES—EFFECT OF RELEASE.

1. Under Mortgage Tax Law (Laws 1882, p. 64, and Laws 1891, p. 136), providing that mortgages on land or real property shall be assessed and taxed to the owners of such mortgages, a mortgage of real property, given to secure a debt, conveys, for the purposes of assessment and taxation, an interest in such property, which is subject to the lien of a tax levied on such debt and security, which may be sold for the payment of any taxes due thereon in the same manner, and with like effect, that real property is sold for payment of taxes.

2. Under Mortgage Tax Law (Laws 1882, p. 64, and Laws 1891, p. 136), the lien of the tax on a mortgagee's interest in mortgaged premises was not discharged by satisfaction of the mortgage, since such release was an equitable assignment of the mortgagee's interest in the land, carrying with it the incumbrance of the lien for taxes.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Action by Adolph A. Dekum and others against Multnomah county. From a judgment dismissing the suit, plaintiffs appeal. Affirmed.

This is a suit to determine an adverse claim to real property. The transcript shows that on December 8, 1890, one Frank Dekum, being the owner in fee of lots 1 and 2, in block 48, in the city of Portland, Or., gave a mortgage thereon to the German Savings & Loan Society to secure the sum of \$150,000, and covenanted therein to pay all taxes that might be levied on the mortgage, which instrument was duly recorded in Multnomah county. The assessor of said county, in 1892, assessed said lots to Dekum, after exempting therefrom a sum equal to the mortgage debt, and the taxes thereon were duly collected, but the taxes levied on the mortgage, amounting to \$3,000.12, have not been paid. Dekum having died testate, the title and possession of said lots inured to plaintiffs, who on August 20, 1898, having paid said debt, secured a release of the mortgage, which was thereafter duly recorded. It is alleged in the complaint that the tax levied on the mortgage is claimed by the defendant to be a lien upon the land, and that such claim, though without foundation, is a menace to plaintiffs' title, which they pray may be quieted. The answer avers that plaintiffs are not entitled to the relief demanded, for that neither they nor their ancestor complied with the covenant to pay the taxes levied on the mortgage. The cause, being at issue, was duly tried, resulting in a decree dismissing the suit, and plaintiffs appeal.

E. B. Seabrook, Wm. A. Munly, and John K. Kollock, for appellants. M. L. Pipes and Alex. Bernstein, for respondent.

MOORE, J. (after stating the facts). The question presented for consideration is whether a mortgage of real property given to secure the payment of a debt conveys, for the purposes of assessment and taxation, any interest in the premises affected thereby that may become subject to the lien of a tax levied on a debt and security, and, if so, does a satisfaction of the mortgage discharge an existing lien for such taxes? A mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover the possession of the land without a foreclosure and sale according to law. Hill's Ann. Laws Or. § 326. The rule is well settled in this state that a mortgage of real property does not convey, as at common law, an estate therein upon condition, but creates only a mere lien or incumbrance thereon. *Anderson v. Baxter*, 4 Or. 105; *Renshaw v. Taylor*, 7 Or. 315; *Sellwood v. Gray*, 11 Or. 534, 5 Pac. 196; *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *Adair v. Adair*, 22 Or. 115, 29 Pac. 193; *Marx v. La Rocque*, 27 Or. 45, 39 Pac. 401. It has also been held that a promissory note was the substance, and a mortgage of land given as security therefor the shadow, so that an assignment of the evidence of the debt necessarily carried the mortgage with it, without any formal transfer. *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609. In the light of the decisions to which attention has been called, we will examine the provisions of the statute known as the "Mortgage Tax Law" (Laws 1882, p. 64; Laws 1891, p. 136), which were in force in 1892, when the tax on the mortgage in question was levied, but have since been repealed. Laws 1893, p. 6. The statute, so far as deemed applicable herein, is as follows: "And a mortgage * * * whereby land or real property * * * is made security for the payment of a debt, together with such debt, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property." Hill's Ann. Laws Or. § 2730. "And * * * shall be assessed and taxed to the owner of such security and debt in the county * * * in which the land or real property affected by such security is situated. The taxes so assessed and levied on such security and debt shall be a lien thereon, and the debt, together with the security, may be sold for the payment of any taxes due thereon, in the same manner and with like effect that real property or land is sold for the payment of taxes." Id. § 2735. "And in all cases the assessor shall assess such debt and security for the full amount of such debt that appears from the record of such security to be owing, unless in the judgment of the assessor the land or real property by which such debt is secured is not worth as many dollars as still ap-

pear unpaid of such debt, and then in that case he shall assess such debt and security at whatever sum he thinks to be their real cash value." Id. § 2737. "It shall be the duty of the assessor to deduct the amount of indebtedness within the state, of any person assessed, from the amount of his or her taxable property," Id. § 2752. "A debt secured by land or real property * * * shall, for the purpose of taxation, be deemed and considered an indebtedness within this state, and the person or persons owing such debt shall be entitled to deduct the same from his or their assessments in the same manner that other indebtedness within the state is deducted." Id. § 2753. "No promissory note or other instrument of writing which is the evidence of a debt that is wholly or partially secured by land or real property * * * shall be taxed for any purpose in this state." Id. § 2754.

The ease with which promissory notes secured by mortgages could be removed from the state, prior to the enactment of the mortgage tax law, and the evident desire of foreign owners of such property to escape taxation thereon, to the detriment of resident money lenders, rebuts any inference that the taxes imposed upon the debt and security could ever have been intended as a lien upon the mortgage and notes secured thereby, as mere evidences of indebtedness, in the nature of a common-law lien, to secure a general balance due an attorney upon a bond and mortgage left with him by his client for foreclosure, because such lien was predicated upon, and existed only while the attorney retained, possession of the choses in action. 1 Jones, Liens (2d Ed.) § 113; Bank v. Todd, 52 N. Y. 489. The exemption from taxation of a promissory note secured by a mortgage of land tends to show that it was the intention of the legislative assembly not to treat the evidence of the debt, and the mortgage, which is an incident thereof, as a chose in action, but to regard the mortgage as transferring an interest in the land itself, commensurate with the debt due from the mortgagor, as shown by the mortgage record. And the exemption allowed the mortgagor from his assessment of real property of a sum equal to the debt secured thereon, and providing for the assessment of such debt and mortgage as land, furnished a method of avoiding a double taxation of real property, and evinced a legislative intention to segregate the mortgagor's estate in the premises into a fee, represented by the equity of redemption, and the mortgagee's interest in, or incumbrance upon, the land, in the nature of an artificial estate, and, as the fee estate and mortgagee's interest are assessed to the owners thereof, respectively, such fee or interest upon which the tax is levied may be sold for the nonpayment thereof. The legislative assembly, by treating the debt and security as land, to be taxed in the county in which the real property affected by the mort-

gage is situated, gave to the debt and security a situs; thereby changing, for the purposes of assessment and taxation, the theory adopted by this court that a mortgage on real property was a mere incident, which necessarily followed a promissory note secured thereby, when the holder of the note placed it beyond the taxing power of the state by removing therefrom. The mortgage tax law, when considered in its entirety, induces the belief that the legislative assembly intended that though the evidence of the debt, and the mortgage which is its incident, may pass beyond the boundaries of the state, the debt and the lien created by the execution of the mortgage still remain (Mumford v. Sewall, 11 Or. 67, 4 Pac. 585) and are taxable as land in the county in which the real property affected by the mortgage is situated, and the tax levied thereon is, by the express provisions of the statute, impressed as a lien on the mortgagee's interest in or incumbrance upon the premises which may be sold for the payment of any taxes due thereon, in the same manner and with like effect that real property or land is sold for the payment of taxes. Nor do we think the description of the debt and mortgage contained in the abstract of unsatisfied instruments, furnished by the recorder of conveyances or county clerk to the assessor, and which forms the basis of the assessment, and is presumably copied into the assessment roll, insufficient to create a lien on the mortgagee's interest in the real property affected by the mortgage, because only "a brief description of the property contained therein, to wit, the range, township, and section in which it is situated," is required (Hill's Ann. Laws Or. § 2755, subd. 4); for an observance of the other subdivisions of that section would enable a competent person, by inspecting the book and page where the mortgage is recorded and to which reference is made, to identify and locate the real property subject to the lien of the mortgage, upon which incumbrance the tax lien is impressed, and, in the absence of a statute requiring a more specific description of the property assessed, the means indicated is sufficient for identification if the record to which attention is called affords adequate information upon the subject (1 Blackw. Tax Titles [5th Ed.] § 241; Law v. People, 80 Ill. 268; Fowler v. Same, 93 Ill. 116; Sloan v. Sewell, 81 Ind. 180; Adams v. Larrabee, 46 Me. 516; Inhabitants of Orono v. Veazle, 61 Me. 431). In Savings & Loan Soc. v. Multnomah Co., 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803, in construing the mortgage tax law of this state, it was held that a mortgage of land given to secure the payment of a debt conveyed an interest in the premises thereby incumbered. Mr. Justice Gray, speaking for the court upon this subject, says: "Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the

mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. * * * The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor."

The tax impressed upon the debt and security being a lien upon the mortgagee's interest in the real property subjected thereto, a release of the mortgage would necessarily reinvest the original estate in the mortgagor, unless the tax levied on the debt and security had not been paid; and it remains to be seen whether the lien thereof is discharged by cancelling the incumbrance or foundation upon which it rests. When the release of a mortgage is made to a party whose duty it was to pay the debt, and there are no supervening equities by which a merger of the estate and interest would defeat the rights of either party to the contract, such release will generally operate as a discharge, and not as an assignment of the mortgage. 1 Jones, Mortg. (4th Ed.) § 858. A nonmerger of such estate and interest will be decreed in equity, however, when a union thereof would be contrary to the intention of the parties, subversive of their interests, or would defeat the demands of justice. *Watson v. Investment Co.*, 12 Or. 474, 8 Pac. 548; *Trust Co. v. Wrenn*, 35 Or. 62, 56 Pac. 271; *James v. Morey*, 2 Cow. 240; *Franklin v. Hayward*, 61 How. Prac. 43; *Gardner v. Astor*, 3 Johns. Ch. 53; *Sheldon v. Edwards*, 35 N. Y. 279; *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544; *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Roberts v. Jackson*, 1 Wend. 478.

A court of equity will not permit the conveyance to a reverser of a life estate burdened with a lien to merge such estate into the fee, when by doing so it would defeat the charge impressed thereon. 15 Am. & Eng. Enc. Law, 315; *Hasbrouck v. Angevine* (Sup.) 1 N. Y. Supp. 789; *Browne v. Bockover*, 84 Va. 424, 4 S. E. 745. Upon the principle thus announced, the lien of the tax levied on the debt and security having attached to the mortgagee's interest in the premises prior to the release of the mortgage, the demands of justice ought not to be frustrated by permitting the cancellation of the incumbrance to merge such interest in the fee so as to defeat such lien; for to do so would frustrate the object of the mortgage tax law, by compelling the county to pay the state taxes levied on the debt and security without receiving any portion thereof from the person whose duty it was to pay the same, thus imposing upon other taxpayers an additional burden not intended by the act. If a release of the mortgage discharged the lien of the taxes impressed upon the debt and security, the collection of the tax could be defeated by cancelling the mortgage for the sole purpose of renewing the debt and security. The plain-

tiffs having secured no greater interest than the German Savings & Loan Society had in the premises, the release of the mortgage was an equitable assignment thereof, which leaves the mortgagee's interest still subject to the lien of the taxes, and hence it follows that the decree is affirmed.

(38 Or. 433)

ALLIANCE TRUST CO., Limited, v. MULTNOMAH COUNTY et al.

(Supreme Court of Oregon. Jan. 14, 1901.)

TAXATION—MORTGAGES—SALE—PROPERTY MORTGAGED—VALIDITY—SATISFACTION OF MORTGAGES—REPEAL OF TAX LAW—INJUNCTION—TENDER OF TAXES.

1. Where mortgages held by plaintiff were taxed, and afterwards some of them were foreclosed, and the property became the property of plaintiff, the satisfaction of such mortgages by merger did not invalidate a subsequent sale of the premises to the county to satisfy the taxes, since the levy of the tax on the debt and security created a lien on the mortgagee's interest in the premises, which the release of the mortgage could not discharge.

2. Where taxes had been assessed on mortgages before the repeal of the mortgage tax law, such repeal does not invalidate a subsequent levy and sale of the mortgagee's interest in the mortgaged property to satisfy the tax lien, since the repealing act (Laws 1893, p. 6, and Laws 1893, p. 85), providing that the taxes of 1892 should be collected as taxes prior to the repealing act had been, does not affect prior valid assessments.

3. Where taxes had been lawfully assessed on mortgages held by plaintiff, and by foreclosure and voluntary conveyances plaintiff had acquired title to the land, which had been levied on to satisfy the tax lien, plaintiff cannot maintain an injunction to restrain the sale under the levy without tendering the taxes levied.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Suit by the Alliance Trust Company, Limited, against Multnomah county and William Frazier, as sheriff of Multnomah county. From an order sustaining a demurrer to the complaint and dismissing the suit, plaintiff appeals. Affirmed.

This suit was originally instituted to enjoin the sale of real property, and thereafter the complaint was amended so as to remove a cloud from the title thereto. It appears that the plaintiff, a private foreign corporation, loaned \$45,200 in various sums to sundry persons, taking as security therefor mortgages on real property in Multnomah county, Or., which having been duly recorded therein, the assessor thereof, in 1890, 1891, and 1892, assessed said debts and mortgages as land to the plaintiff, but the taxes levied thereon for state, county, and school purposes, to wit, the sum of \$937.84, including costs, have never been paid. Defaults having also been made in the payment of the sums so loaned, plaintiff, by foreclosures, sales, confirmations, and sheriff's deeds, and by voluntary conveyances, has secured the legal title to the premises so mortgaged to it. In 1899 the defendant William Frazier, as sheriff of said county, levied on the plaintiff's interest in said lands as

such mortgagee, and advertised the same for sale, to satisfy the taxes so levied thereon; whereupon this suit was instituted to enjoin said sale, the plaintiff alleging, in substance, that, prior to and at all times since the levy of said taxes, it had personal property in said county upon which Frazier's predecessors in office could have levied and collected said taxes under the original warrants attached to the tax rolls of the respective years, but that no levy was made thereon, and that the sheriff's returns indorsed upon the delinquent rolls of said county for the years 1890 and 1891 were false; that in 1892 no return whatever was made under the original warrant attached to the tax roll of that year, nor had any levy in pursuance thereof ever been made upon plaintiff's goods and chattels. The plaintiff, by leave of court, filed an amended complaint, alleging that, after this suit was begun, Frazier, in pursuance of said levy and notice, sold said interest in the real property to said county for the amount of the taxes and costs, and issued to it a certificate of sale, whereby it claims to own said mortgage interest in the land to the extent thereof; but that by reason of the satisfaction of said mortgages, and the repeal of the mortgage tax law, said premises could not be legally sold under the warrant, and the pretended sales thereof conveyed no interest in said land, but cast a cloud on the title thereto, which it prays may be removed. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit having been sustained, the suit was dismissed, and the plaintiff appeals.

Wm. D. Fenton, for appellant. M. L. Pipes and Alex. Bernstein, for respondents.

MOORE, J. (after stating the facts). The contention of plaintiff's counsel that the release of the mortgages in question and the repeal of the mortgage tax law rendered the tax sales void is without merit; for in *Dekum v. Multnomah Co.* (just decided) 63 Pac. 496, it was held that a mortgage of real property given to secure the payment of a debt conveyed, for the purpose of assessment and taxation, an interest in the premises, and that a tax levied upon the debt and security created a lien upon such interest, which could not be discharged by releasing the mortgage. In *Smith v. Kelly*, 24 Or. 464, 33 Pac. 642, it was held that the repeal of the mortgage tax law did not destroy the remedy with respect to the existing mortgage taxes, because, by the tax system considered as an entity, these taxes were collectible under other provisions of the statute; that when a tax system is revised, and a former law repealed, the legislative intent is assumed, in the absence of any provision to the contrary, to be of prospective force only, and prior valid assessments were not affected thereby; and that Act Feb. 21, 1893 (Laws 1893, p. 85),

read in connection with the repealing act of February 10th of that year (Laws 1893, p. 6), left no room for doubt as to the legislative intent in reference to the collection of the mortgage taxes levied prior thereto. Plaintiff's counsel assign many other reasons tending to show that the tax levied upon the respective debts and securities is invalid, but, inasmuch as it has not tendered the sum so levied, it is not entitled to equitable interposition. In *Welch v. Clatsop Co.*, 24 Or. 452, 33 Pac. 934, Mr. Chief Justice Lord, in commenting upon this principle, says: "In view of the authorities, the considerations which influenced a court of equity to restrain the collection of a tax are confined to cases where the tax itself is not authorized, or, if it is, that such tax is assessed upon property not subject to taxation, or that the persons imposing it were without authority in the premises, or that they had proceeded fraudulently." It will be remembered that this is a suit by a taxpayer to escape the burden which the law imposed upon it, and in such case the rule is well settled that a court of equity will not interfere by injunction to restrain the collection of the tax until the plaintiff has tendered the amount that can be shown to be due. *Goodnough v. Powell*, 23 Or. 525, 32 Pac. 396; *Society v. Kelly*, 28 Or. 173, 42 Pac. 3; *Dayton v. Multnomah Co.*, 34 Or. 239, 55 Pac. 23. Plaintiff's debts and mortgages were proper subjects of assessment, and the tax levied thereon was authorized by law and imposed by officers upon whom the duty devolved, who did not proceed fraudulently in the premises. If any irregularity occurred or fraud was practiced in the attempt to collect the tax, whereby expenses were improperly or unlawfully incurred, it was nevertheless incumbent upon plaintiff, as a condition precedent to equitable relief from such expenses, to tender, at least, its ratable share of the public revenue, based upon the value of its property which had been protected under the law. Much stress is laid by counsel for the appellant upon the case of *Hughes v. Linn Co.* (Or.) 60 Pac. 843, in which it was held, in a suit to prevent a cloud upon the title to real property, instituted by a party who succeeded to the owner's estate therein by a conveyance thereof in satisfaction of a mortgage, that it was not necessary to tender the taxes levied upon an assessment of said property, and charged against the former owner, as a condition precedent to equitable interference, Mr. Justice Dean saying: "It is well to observe at the outset that this is not a suit to enjoin the collection of taxes, nor is it a controversy between the taxpayer and the county authorities." In the case at bar the primary object of the suit, when instituted, was to enjoin the collection of the taxes; but after the sale of the plaintiff's interest in the premises it became, by amendment, a suit to remove a cloud from its title, but at all times it was a controversy between the taxpayer

and the county authorities, and hence it should have tendered the taxes levied upon its property. Not having done so, the decree is affirmed

(23 Wash. 501)

RUSH v. SPOKANE FALLS & N. RY. CO.

(Supreme Court of Washington. Dec. 13, 1900.)

MASTER AND SERVANT—EXPLOSIVES—NEGLIGENCE—DEFECTIVE APPLIANCES—FELLOW SERVANTS—INSTRUCTIONS—SAFE PLACE—HIGHEST DEGREE OF CARE—EXCESSIVE VERDICT.

1. Where a complaint alleged that an engine was defective, and that through the negligence of the defendant it emitted large quantities of sparks from its smokestack in close proximity to an explosive substance in the caboose, and that the use of the engine in such condition was gross carelessness, causing an explosion, by which plaintiff was injured, such averments of negligence, being conclusions from the facts stated, did not preclude proof of other negligence alleged in the complaint that defendant was careless in placing the explosive in the caboose, and in not warning plaintiff of its presence.

2. In an action by an employé of a railroad for injuries caused by an explosion of dynamite carried in the caboose, whether evidence that "sparks were flying all the time" tended to show that the engine was in a defective condition was a question for the jury.

3. An employé who is given charge of dangerous instruments, such as dynamite, represents his master in the care and custody thereof, and is not a fellow servant, and hence the master is liable for injuries to employés through negligence in the care of such articles.

4. In an action for injuries to a railroad employé the alleged negligence consisted in placing a box of dynamite in an open caboose, which carried its employes. An instruction that it was the duty of the master to ascertain and make known to his servants the danger of this explosive, and the proper method of handling it with safety, and that the ignorance of the master thereon would furnish no excuse if he could, by reasonable diligence and ordinary care, have obtained such knowledge, was not objectionable as irrelevant to the issues.

5. An instruction, in an action for injuries, that, if the jury believed it was dangerous to ship and handle dynamite in the caboose car of a train with the doors open, and that such danger could have been avoided if a safer way, known or easily capable of being learned by the master, had been adopted, then it was the duty of the master to his servants to adopt such safer way, was not erroneous on the ground that no allegation or proof of a safer method was shown, since there was a patent danger in so shipping such an explosive.

6. Where an instruction, otherwise proper, does not fully cover a point in issue, the remedy is to ask for further instructions thereon.

7. Where an objection to a part of an instruction on the ground that it was outside the case was valid, but the objection went to the whole instruction, which was not subject to such objection, it was not error to overrule the same.

8. Where an employé of a railroad company was injured by an explosion of dynamite in a caboose furnished to employes to convey them to work, an instruction that the master, in employing a servant, impliedly engages with him that the place in which he is to work or in which he is to be placed shall be reasonably safe, was not erroneous as not bearing on the issue, since the company impliedly engaged with the employé that such caboose was rea-

sonably safe for the purpose for which it was used.

9. Where there was some evidence that employes were smoking cigarettes and scuffling in a caboose in which an explosion of dynamite occurred, by which plaintiff, an employé, was injured, refusal to give an instruction that if the jury found the explosion might have been caused thereby, and that there was just as much probability that it happened in that way as by sparks from the engine coming through the open door of the caboose, then they should find for the defendant, was not error, since the railway company had not exercised the highest degree of care imposed on it by reason of its custody of such dangerous explosive.

10. A verdict for \$1,200 for injuries sustained by plaintiff in an explosion, whereby he was stunned, bruised, and otherwise injured, was not so large as to indicate passion and prejudice on the part of the jury, and hence not reversible error.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by James Rush against the Spokane Falls & Northern Railway Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Albert Allen and Jay H. Adams, for appellant. William H. Ludden and James Z. Moore, for respondent.

ANDERS, J. In April, 1897, the respondent, James Rush, was in the employ of the Spokane Falls & Northern Railway Company, appellant, in the capacity of a common laborer, and was engaged with others in rippapping and repairing its roadbed in the vicinity of Marcus and Bossburg, in this state. It was the duty of the respondent, in the course of his employment, to load and unload rock, which was transported on appellant's cars from a quarry near the railroad track to places where it was needed. Dynamite or giant powder was used in blasting rock at the quarry, but the respondent had nothing to do with blasting, or with handling or using explosives. It was the custom of the railway company to convey its employes from their boarding camp to their work on its cars, and, accordingly, on April 28, 1897, a caboose attached to an engine was taken to the camp where the respondent and from 10 to 14 other laborers were boarding and lodging for the purpose of transporting them to the place where they were required to work on that day. Before the train reached the place where these workmen were, a box containing dynamite and fuse had been placed in the caboose near one of its two side doors (both of which were left open) by one Harklerode, who was at the time the foreman of this gang of laborers. The fuse was wrapped in paper, and laid on top of the giant powder, and the box containing both of these substances was left uncovered. After the respondent and the other men of his gang, their foreman, and Rogers, the superintendent of the work, had boarded the caboose, and proceeded several miles towards their destination, it was discovered by some one in the

car that the paper covering the fuse was on fire. When the men became aware of the danger to which they were thus exposed, they were greatly alarmed and confused, and instantly undertook to get off the caboose. Some of them, it appears, jumped off at once, regardless of consequences. At the time the fire was discovered, the train was running at its usual rate of speed, but it was "slowed up" almost immediately thereafter. On discovering his perilous situation, the respondent passed out of the car by way of the rear door, and sat down on the step or platform, intending to jump off as soon as the speed of the car would permit him to do so with safety. While the respondent was in that position, and the train still in motion, the powder exploded with such violence that the top and sides of the car were entirely destroyed, and the respondent was thrown upon the ground, and thereby stunned and bruised, and, as he claims, otherwise injured. This action was instituted to recover damages for the injuries thus sustained by the respondent, on the theory that the explosion was caused by the negligence of the appellant. The particular acts of negligence or breaches of duty charged against the appellant are set forth in the complaint as follows: "(6) That the engine to which said caboose was attached was in a defective and wornout condition, and was so negligently and carelessly managed by defendant that it emitted large volumes of smoke and sparks from the smokestack and furnace thereof; that the use of said engine in such condition and in the proximity to said explosive substance was gross carelessness on the part of said defendant; that, if defendant had exercised ordinary care in and about the construction and care of said engine, said sparks would not have been emitted, and the explosion hereinafter mentioned would not have occurred. (7) That on the said 28th day of April, 1897, while the plaintiff was on board of said caboose, and riding thereon to his place of labor, as directed by said defendant, said explosive substance was ignited by the sparks and fire emitted by said engine, and without warning, and without plaintiff having an opportunity of saving himself from injury, the said explosive substance exploded with terrific force and violence, and caused the injury to plaintiff herein mentioned; and that said explosion and the injury received by plaintiff hereinafter mentioned were caused by gross carelessness and negligence of the defendant, and without negligence or fault on the part of this plaintiff. (8) That said explosive substance—giant powder or dynamite—was concealed in said caboose, and covered up in such a way by defendant that plaintiff was unable to learn or discover that the same was an explosive substance; and the said explosive substances and the manner in which they were covered up and concealed from this plaintiff constituted a latent danger then well known to the defendant, but unknown to the plaintiff; and

while said latent danger existed on said caboose as aforesaid the said defendant ordered plaintiff on board of said caboose, and placed him in close proximity to said explosive substance, and put him in imminent danger of his life. That the defendant was grossly careless and negligent in storing and carrying said explosive substance in said caboose, and in ordering plaintiff near it without plaintiff's knowledge, and in using a defective engine, and in the negligent and careless management of said engine; and that defendant was grossly careless and negligent in not warning plaintiff of the danger to which he was exposed; and defendant was negligent and careless in allowing said explosive substance to remain in a place where it was probable and likely that it would be exploded by sparks coming from said engine, which would be likely to fall therein and thereon." The appellant, in its answer, admitted that it was a corporation operating a railway as a common carrier, as alleged by respondent, but denied all the remaining averments of the complaint. And by way of defense the appellant alleged that, if the respondent was injured in any manner while in the employ of the appellant, such injury was occasioned by his own want of care and contributory fault, and that any such injury so received was the result of the ordinary risk which the respondent assumed by reason of his employment. The new matter set up in the answer was controverted by the reply. A trial of the issues involved was had to a jury, resulting in a verdict and judgment for the plaintiff (respondent here) for \$1,200.

At the close of respondent's testimony the appellant challenged the legal sufficiency of the evidence, and moved the court to take the case from the jury, in accordance with section 4994, Ballinger's Ann. Codes & St. This motion was denied, and the appellant excepted. The motion was renewed at the close of the evidence, and again denied by the court, and the appellant now contends that the trial court erred in refusing to discharge the jury, and direct the entry of judgment in favor of appellant, as requested. In support of this contention it is urged that there was absolutely no proof at the trial of the particular negligence with which appellant was charged in the complaint, and that there was, therefore, as a matter of fact, nothing for the jury to determine. In proof of appellant's position it is asserted that paragraph 6 of the complaint not only designates the specific negligence on the part of the appellant which is relied on for a recovery, but avers that such negligence was the proximate and only cause of the explosion which resulted in the injury to the respondent; and that, in view of these particular allegations of negligence, all the other averments of the complaint respecting the placing of the giant powder in the caboose, and the want of knowledge on the part of the respondent of its presence there, are mere matters of inducement, and are

made to show that the respondent did not assume the risk of an explosion by riding in the caboose. This objection was made and decided adversely to the contention of the appellant in *Allend v. Railway Co.*, 21 Wash. 324, 58 Pac. 244, in which case the plaintiff sued the appellant here to recover damages occasioned by the same explosion, and in which the complaint contained substantially the same allegations of negligence as are set forth in the complaint herein, and now under consideration. In that case it was held that the plaintiff was not precluded by such allegations as those set out in paragraph 6 of the complaint from proving any other negligence alleged in the complaint. That case is decisive of the point here in question, and no further argument of the proposition is necessary.

It is true, as claimed by appellant, that there was no proof whatever at the trial that the engine in question was negligently managed, but there was certainly some proof, which, unexplained as it was, tended to show that it was in a defective condition; the undisputed testimony being that "there were a lot of sparks flying all the time" from the engine. It is claimed, however, that, inasmuch as there was no evidence that any one saw a single spark from the engine come into the caboose or fall upon the paper which was ignited in the box of dynamite, no inference that the locomotive engine was defective could be drawn from the mere fact that it emitted sparks. It is, we think, a sufficient answer to this proposition to simply observe that that was a question for the jury to determine, in view of all the circumstances, under proper instructions by the court. But it is further insisted that, even if it be true that the emission of sparks raised a presumption that the locomotive was defective, still no actionable negligence is made to appear in this case, for the reason that the acts of Harklerode and other employes of the appellant were those of a fellow servant, for which the railway company is not responsible. For the reasons given in the opinion in the *Allend Case*, this position is entirely untenable. Even if it were conceded that Harklerode was a fellow servant with the respondent when engaged in loading and unloading cars in the ordinary course of his employment, yet it would by no means necessarily follow that he was such fellow servant while acting as custodian of dangerous instruments, such as dynamite. In that capacity he undoubtedly represented the appellant, and his negligence was legally imputable to the appellant.

The court instructed the jury to the effect that before using or handling a dangerous explosive it is the duty of the master to ascertain and make known to his servants the dangers to be reasonably apprehended from its use, and the proper method of handling it with reasonable safety; and the ignorance of the master as to the danger to be appre-

hended from its use or the proper method of handling it will furnish no excuse if the master, by the exercise of such reasonable diligence and ordinary care as a reasonable and prudent man under like circumstances would use, could have obtained such knowledge. That this instruction announced the law correctly, as a general proposition, is not disputed; but appellant insists that it was misleading, and, therefore, erroneous, because it was neither applicable to the pleadings nor to the testimony adduced at the trial. It is no doubt true, as appellant contends, that the instructions of the court to the jury should be relevant to the issues and pertinent to the evidence in the case; and the question to be determined is whether the instruction in question is so clearly violative of this settled rule as to warrant the reversal of the judgment. We are not satisfied that it is. One of the principal questions for determination at the trial in the court below was whether the appellant was guilty of negligence in placing the box of dynamite in the car in the place and in the condition above mentioned, and, in order to enable the jury to determine that question properly, it was necessary for the court to instruct them as to the duty of the appellant to its servants before using or handling dangerous explosives. It is admitted that the respondent and the other men who were with him in the caboose were appellant's servants, and the testimony shows that the respondent was not informed as to the presence of the dynamite in the car, and had no knowledge of it until the fire was discovered. Upon this state of facts it can hardly be said that this instruction was inapplicable to the pleadings or to the evidence.

Instruction numbered 2 given by the court to the jury is to the effect that, if the jury believe from the evidence that it was dangerous to ship and handle dynamite in the caboose car with the doors open, and that such danger could be avoided and greatly reduced by shipping it in some safer way which was in easy reach of the master, and that the existence of such danger and the means of avoiding or reducing it were known to, or could have been known by, the master by the exercise of reasonable care and diligence, it was the duty the master owed his servants to adopt such method of shipping such dynamite as was reasonably safe; and any other method which was not reasonably safe will not excuse the master for injuries to the servant resulting therefrom. It is urged that this instruction is erroneous for the reason that it does not appear from the allegations or proof that any safer method existed for handling or shipping dynamite or giant powder than that made use of in the case at bar, or that, if any safer way existed, it was within the reach of the railway company. We are unable to discover any merit in appellant's criticism of this instruction. It would be difficult

to imagine a more unsafe method of shipping dynamite than that adopted in this instance by the appellant. It is perfectly apparent that the danger of an explosion would have been greatly reduced, if not absolutely avoided, by putting an ordinary wooden cover on the box, and which was presumably within reach of the appellant.

Error is also predicated upon the third instruction given to the jury. In that instruction the jury were charged that the servant assumes the ordinary risk incident to the service after the master has used such care as a reasonable and prudent man would exercise under like circumstances, when using dynamite or giant powder, for the safety and protection of the servant, commensurate with the danger to be reasonably apprehended from the service; and if the master fails to use such care and caution, and an injury results therefrom, it is not a risk incident to the employment, and the master is liable therefor, unless the danger was open and apparent, or the servant had actual knowledge thereof. It is not contended that the court did not state the law correctly in this instruction, but it is claimed that it should have gone further, and explained to the jury the application of the law to the case on trial in view of the pleadings and evidence. All that need be said in answer to this objection is that, if appellant desired further instructions upon this point, it should have requested the court to give them at the proper time.

It is also claimed that the court erred in charging the jury that in using high, dangerous explosives the master owed a duty to the servant to employ experienced agents who knew the danger ordinarily incident to its use, and the proper method of manipulating it with reasonable safety, and have the servant whose duty it is to come in contact therewith properly instructed and informed as to such danger. It is urged by the appellant that this instruction is objectionable for the reason that there is no allegation or proof respecting the particular matters therein mentioned. Had the appellant limited his exception at the trial to that part of instruction numbered 4 here complained of, there would be more force in its contention. But its exception went to the entire instruction, which, as a whole, is not subject to the only objection urged against it, namely, that it is outside of the case as made before the jury.

Nor do we see any substantial merit in appellant's objection to that part of the seventh instruction wherein the jury were told that, if they believed from the evidence that said dynamite, by the negligence of the defendant railway company, was exploded without any fault of this plaintiff, and that the plaintiff sustained injuries by reason of such explosion, then they should find a verdict for the plaintiff. The contention that the court erred in giving this instruction is based solely on the proposition that it failed there-

in or elsewhere to define the negligence for which the appellant would be liable in the case at bar. This is but another instance of an objection, not to what the court did say to the jury, but to what it did not; and we have already pointed out the remedy which ought to be pursued in such cases. See, also, *Allend v. Railway Co.*, supra.

It is further contended that the court erred in charging the jury that the master, in employing a servant, impliedly engages with him that the place in which he is to work, and the tools, machinery, and surroundings of his work, or in which he is to be placed, shall be reasonably safe. In support of this contention it is urged that the question whether the respondent had been furnished with a safe place in which to do his work was in no wise involved in the case. It must be conceded, as claimed by appellant's counsel, that the respondent, when he was riding in the caboose, was not in a place provided him wherein to work; but it was, nevertheless, a place where he had a right to be at the time, and we think it is quite clear that when the appellant furnished him a caboose in which to ride it impliedly engaged with him, as the learned trial court observed, that it was "reasonably safe" for that purpose.

The instruction given to the jury upon the question of fellow servants is also complained of, but, as what we have already said upon that subject disposes of the objection, no further comment is necessary.

There was some testimony upon the trial to the effect that before the explosion in question occurred some of the men who were in the caboose were smoking cigarettes and scuffling, but whether these men were near the box of dynamite or in some other part of the caboose at the time is not disclosed by the evidence. In view of this testimony the appellant requested the court to charge the jury that: "If you find from the evidence that the co-employees of the plaintiff, while riding in the caboose where the giant powder or other explosive was being carried, and that some of the co-employees or fellow servants of plaintiff were smoking cigarettes in such caboose, and scuffling therein, and that the said explosive might have become ignited from the fire in smoking cigarettes, and that there is as much probability that the explosion happened in that way as from sparks from the engine, then you should find for the defendant." The court refused to instruct the jury as thus requested, and this ruling of the court is assigned as error. At first blush we were inclined to the opinion that this instruction should have been given as requested, and that the refusing to give it was prejudicial error; but upon further reflection, and in view of the duty imposed by law upon those who use or have the custody of dangerous instruments or agencies to exercise the greatest care to prevent others from being injured thereby, we have concluded that the request was properly refused. According to the better authorities,

It was the duty of the railway company to exercise the highest degree of care and diligence in the custody of the dynamite, in order to protect those who were in the caboose from injuries which would probably and naturally result from an explosion of it, and, not having done so, it must be held liable for the consequences of its want of care. It is said by Shearman & Redfield, in section 154 (5th Ed.) of their work on Negligence, that "a master who intrusts a servant with the charge of some inherently dangerous thing (e. g. an explosive) is responsible for the omission of the servant to keep it safely, and, therefore, for his malicious use of it for mischievous purposes." And in *Railway Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, it was held (quoting from the syllabus, which correctly states the conclusions of the court) that: "The law requires of those who use dangerous agencies in the prosecution of their business to observe the greatest care in the custody and use of them. This duty cannot be shifted by the master from himself to his servants, so as to exonerate him from the negligence of the servant in the use and custody of them. Where they are so intrusted, the proper custody, as well as the use of them, becomes a part of the servant's employment by the master; and his negligence in either regard is imputable to the master in an action by one injured thereby." In that case the railway company was held liable for injury to a small boy, caused by the explosion of a torpedo negligently and wantonly left on its track by one of its servants at a place where children and others living along the line of the track were in the habit of passing with the knowledge and acquiescence of the company. The torpedo was picked up by one of the companions of the plaintiff, and caused to be exploded by hitting it. In the well-considered case of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, in which the opinion of the court was delivered by Judge Cooley, an owner of land was held liable for injuries occasioned to a child by the explosion of a dynamite cartridge which he had left in an open shed on his premises in a box of sawdust, and which the child discovered and exploded by striking it with a rock. And in *Tissue v. Railroad Co.*, 112 Pa. St. 91, 3 Atl. 667, it was ruled that it is the duty of the master to know, as far as it is possible to know, the character of such material as dynamite which he places in the hands of his agents; and, if he negligently places it in such a position as to expose his servants to a danger to which they might not be exposed, he is liable for any damages resulting from such negligence. And it was there held that it was a question for the jury to determine whether it was negligence on the part of the railroad company to permit a large quantity of dynamite to be stored in such a position that an accidental explosion of it might result in death or injury to its servants. In that case a servant of the defendant company was killed

by the explosion of dynamite which was used in the business of the defendant, and stored near the railroad track where the servant was required to work. What caused the explosion was not disclosed by the evidence, and the trial court directed a verdict for the defendant, but on appeal to the supreme court the judgment was reversed. See, also, *Allison v. Railroad Co.*, 64 N. C. 382.

Although it appears to us from the evidence that the jury was somewhat liberal in awarding damages to the respondent, the amount is not so large as to indicate passion or prejudice on their part, and we therefore do not feel at liberty to disturb the verdict on the ground of excessive damages.

It is claimed by appellant that the court erred in the reception and rejection of testimony during the trial, but we are of the opinion that the objection to the ruling of the court in that regard is not well taken. The judgment is affirmed.

REAVIS and FULLERTON, JJ., concur.

DUNBAR, O. J. I am unable to understand the application of the authorities cited in the opinion to the instruction last commented upon. It seems to me that the quotations from *Shearman & Redfield* and from the case of *Railway Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, amount to nothing more than an announcement of the general rule that the master is liable for the negligence of the servant, just as he would be if a conductor negligently operated a train. In such a case the custody and use of the train become a part of the servant's employment by the master, and the master cannot escape responsibility to one who is injured. The same may be said of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257. In none of these cases is the question of fellow servant involved. The plaintiffs who were injured were all strangers, and the rule is laid down with reference to the responsibilities of the masters to strangers. *Tissue v. Railroad Co.*, 112 Pa. St. 91, 3 Atl. 667, bears more nearly on the question involved, but it does not seem to me that it is exactly in point, for it does not appear there that the explosion was caused by the action of a fellow servant. But the rule is announced that the company is responsible to its servants when it permits a dangerous explosive to be placed in such quantity and position that an accidental explosion may result, and that the master will be responsible to his servant for damages arising from such negligent placing. I think, however, that any one who handles dangerous explosives should be held to the highest degree of care; that he should be as careful of the safety of his servants as of the safety of strangers; and that when the defendant shipped the powerful explosive which it did in this case in the manner which the testimony indicates, without sufficient covering, it was guilty of willful negligence,

and ought to be held responsible for the injuries inflicted upon the plaintiff in this case, even if it be conceded that it was the negligent act of a fellow servant which caused the explosion, when it is shown, as it is in this case, that the plaintiff was not aware of the exposed condition of the dynamite. The duty should not be imposed upon him to contemplate the existence of such a hidden danger, or to guard against it. For this reason I concur in the judgment announced.

(23 Wash. 610)

HALL v. UNION CENT. LIFE INS. CO.

(Supreme Court of Washington. Dec. 27, 1900.)

INSURANCE—PRINCIPAL AND AGENT—ADMISSIBILITY AGAINST PRINCIPAL—LIMITATIONS ON AGENT'S AUTHORITY—SECRET AGREEMENT—VALIDITY—TIME TO SUE—WRONGFUL DELAY.

1. Where D. was appointed agent of defendant, and was held out by defendant as such agent, and no revocation of his agency was shown, D.'s testimony was not objectionable on the ground that a principal cannot be bound by the admissions of a discharged agent.

2. Where it was an agent's duty, under his contract with defendant, to collect premiums, the introduction in an action on a policy of such agent's admissions in reference to the collection of premiums was not objectionable as hearsay, and as not within the scope of the agent's authority.

3. Where an agent's contract clothed him with authority to solicit insurance and collect premiums for defendant, the fact that his contract of employment provided that he should be agent of defendant's general agent, and that no liability was created by such contract against the defendant corporation, did not relieve defendant from liability for the agent's acts, since a principal cannot escape liability by secret arrangements with its agents of which the public can have no knowledge.

4. A policy of insurance provided that no action should be maintained on it after one year from the death of the insured. Defendant's general agent represented to the beneficiary that, if she would wait until the agent to whom the insured paid his premiums had returned from Klondike, the policy would be paid if such payments were made; and the agent did not return until after the expiration of the year. *Held*, that the representation of the general agent excused plaintiff's delay in bringing suit.

5. A finding of the jury, under such evidence, that a suit brought within one year and nine months after the death of the insured was not an unreasonable delay, cannot be set aside on the ground that such a delay was unreasonable as a matter of law.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by Wisa H. Hall against the Union Central Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John E. Humphries and Harrison Bostwick, for appellant. Martin, Joslin & Griffin, for respondent.

DUNBAR, C. J. This is an action by the respondent against the appellant on a policy of insurance issued upon the life of her husband, George E. Hall, deceased. On a trial by jury, verdict was rendered in favor of

the plaintiff for the amount sued for, and judgment was entered in accordance with the verdict, from which this appeal is taken.

There are some 21 assignments of error set forth in appellant's brief, the most of which are discussable under the second and third assignments, viz. that the court erred in denying the motion of appellant for nonsuit, and that the court erred in denying the motion of appellant in the challenge to the whole evidence, and in not taking the case from the jury. The substance of these objections might have been raised on error alleged in allowing incompetent testimony. It is contended by the appellant that defendant's challenge to the sufficiency of the testimony ought to have been sustained, for the reason that there was no testimony that the deceased had complied with the provisions and conditions of the policy; the only testimony introduced being declarations and admissions of one John Doser, who, it is admitted by the appellant, had formerly been a district agent for the appellant, and who, it is maintained by the respondent, was the agent at the time the declarations were made. Many authorities are cited by the appellant to sustain the proposition that the admissions of a discharged agent are not competent evidence to bind such agent's former principal. Conceding, for the purpose of this investigation, the correctness of the rule contended for, the cases are not applicable to the facts proven in this case, as determined by the jury. As to the existence of Doser's agency, the plaintiff showed his appointment by the company, and there was no proof that such agency had been revoked. Under the rule that, where an agency is shown to exist, it will be presumed to continue until the contrary is proved, it must be concluded that Doser was the agent of the company at the time these alleged admissions were made. His first appointment was made in December, 1896, and was to continue for 10 years, unless terminated by service of notice upon him by the company. If there is anything in the proof that would indicate that he had been removed, it would be his second appointment in December, 1898, where he is appointed by P. F. Leavy, general agent of the Union Central Life Insurance Company; and it is not shown that this appointment was revoked prior to the time the alleged declarations were made. We think sufficient evidence went to the jury to sustain the verdict on that ground. In any event, the testimony shows that the company held him out as an agent, and it is bound by his acts. But it is contended by the appellant that these admissions, if made, were not of the *res gestæ*, were not within the scope of the agent's authority, and were mere hearsay; and many cases are cited in support of the contention that the admission of an agent must be made at the time of the contract. We do not think these cases are applicable to the case at bar. Doser's admis-

sions were not with reference to the making or effect of any contract, but with relation to the payment of the premiums during the decedent's lifetime. Under the contract it was his duty to collect and pay to the company these identical premiums. Under such circumstances an admission in relation to such collections would be within the scope of his duties as agent, and the evidence was competent to bind the principal. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020. It is true that under the conditions of the contract between P. F. Leavy, who was the general agent of the company, and Doser, it is provided that, "although the said John Doser shall be styled and addressed as agent for said company, it is yet distinctly understood to be the purport and intent of this agreement that he shall be the agent o.' said P. F. Leavy alone, and that no liability is hereby created against said company; nor shall said John Doser, party of the second part, create any such liability." It would seem that comment upon such a stipulation in an agreement was unnecessary. It is too late in the history of jurisprudence, if such time ever existed, to allow corporations or individuals to escape their honest liabilities by secret understandings between principals and agents of which the public has, and can have, no knowledge. Under this contract, which provides that Doser shall work for the company, although he was to be the agent of Leavy only, he is clothed with authority, not only to solicit and procure persons to insure with said company, but to collect and pay over the premiums to the agent of the company; and the company cannot escape its responsibilities when he does collect them from his patrons, and fails to turn them over to the company. *Hart v. Insurance Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

Another question involved raises the question of limitation of the commencement of the action. The policy provides that the action shall be commenced within a year from the death of the insured. The death of the insured occurred on October 27, 1897, and the action was not commenced until June 13, 1899, and it is contended by the respondent that the action is barred. But the testimony shows that the respondent was attempting to get her policy paid without the expense of a lawsuit; that she was told by Mr. Newbegin, who was then the general agent of the company, that the money would be paid if it was found that the payments had been made, and that it was best to wait until Mr. Doser, whom it was claimed the payments had been made to, and to whom the testimony shows the payments were actually made, returned from the Klondike country. On this proposition the evidence is conclusive and undisputed that the respondent was led by these representations on the part of the agent of the company to wait until after the year had expired. It

is insisted, however, by the appellant, that, even if that be true, the length of time was unreasonable. But that matter was submitted by the court to the jury. By their verdict they have found that it was not unreasonable, and the court cannot, as a matter of law, under all the circumstances of the case, say that it was.

Many objections to the instructions of the court are made, and error is based upon the refusal of the court to grant the instructions asked for; but we think the court gave instructions that were applicable to the pleadings and circumstances proven upon the trial, that the law was properly given to the jury, and that, without particularly traversing them, the instructions asked by the appellant, and which were mostly based upon the theory of the case which we have been discussing, were properly refused.

It is insisted that the court erred in giving certain oral instructions after the request to have the jury charged by written instructions. In answer to this assignment it is sufficient to say that it does not appear from the record that any oral instructions were given by the court.

There is also an assignment to the effect that the court erred in overruling a demurrer to the respondent's complaint, but from the record we are unable to discover that any demurrer to the complaint was interposed.

There seems to be no meritorious defense to this action, and, no prejudicial error of law having occurred, the judgment will be affirmed.

ANDERS, REAVIS, FULLERTON, and WHITE, JJ., concur.

(23 Wash. 325)

ROBERTS v. SPOKANE ST. RY. CO.

(Supreme Court of Washington. Nov. 28, 1900.)
STREET RAILWAYS—COLLISION—NEGLIGENCE
—CONTRIBUTORY NEGLIGENCE—
INSTRUCTIONS.

1. The court cannot determine, as matter of law, that a speed of 2½ miles an hour is not excessive for a street car with defective appliances for control, where passing at a street crossing another car going in the opposite direction.

2. Where a street car is equipped with defective appliances for control, to the knowledge of the company, it is not freed from responsibility for collision with a person coming suddenly in front of it, by the motorman, on discovering such person, doing all that he could with the equipments.

3. Failure to look and listen before crossing tracks of an electric railway in a public street is not negligence, as matter of law.

4. A requested instruction, in case of collision of a street car with plaintiff at a street crossing, that if he was guilty of an act of negligence directly contributing to the injury, or of any lack of ordinary care, or an omission to do what he ought to have done under the circumstances, which act or omission directly contributed to the accident, it would defeat a recovery, is properly refused, as requiring more than ordinary care.

5. The question of negligence in one street car passing another at a street crossing is one

of fact, in the light of all the evidence in the case.

6. On the questions of contributory negligence of one who, riding on a bicycle close behind a west-bound street car, turns suddenly at a street crossing in front of an east-bound car, which he could not see till he was on the track, the fact that he was less than 11 years old is to be considered.

7. Though there was want of ordinary care in getting in front of a street car, if this does not contribute to the injury, but is a mere condition before the accident, the proximate cause of which is the negligence of the street railway, there may be a recovery.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by Edward Roberts, an infant, by Edward J. Roberts, his guardian ad litem, against the Spokane Street-Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Stephens & Bunn, for appellant. C. S. Voorhees, Reese H. Voorhees, and Albert Allen, for respondent.

REAVIS, J. Plaintiff, by his guardian ad litem, commenced an action against defendant, a street-railway company of Spokane, for personal injuries sustained through negligence of the company, and alleged that Spokane was a city with a population of over 30,000; that Riverside avenue, where the injury occurred, was one of the principal thoroughfares and public streets of the city, on which a large amount of business was transacted, and across which all the people of the city were accustomed and had a right to travel; that, by reason of the public use of the street, it was the duty of the defendant to use great care and caution in keeping its cars and machinery in proper condition and repair, as well as great caution in the operation and running of the cars over its tracks on Riverside avenue; that for a long time prior to the injury of plaintiff the defendant carelessly and negligently used and operated a car upon Riverside avenue which was broken, defective, and out of repair, in that the controller handle thereon (being the handle used for the purpose of turning the current of electricity off and on and controlling the car) was broken, and on account of such defect the power of the motorman operating the car, to control and regulate the current of electricity and to control the car in case of an emergency, was rendered uncertain; that by reason thereof it was dangerous to operate such defective car upon the street; that defendant was careless and negligent in operating such car in such dangerous and defective condition; that defendant at the time of the injury was running such car at a high and dangerous rate of speed along one of its tracks on Riverside avenue, meeting another car coming in the opposite direction on a parallel track, causing the two cars to meet and pass each other at a point where Riverside avenue is crossed by another public street, and which point of crossing was much frequented by public travel with

teams, bicycles, and on foot; and that on the 8th of May, 1896, while plaintiff was lawfully traveling with a bicycle along, upon, and across Riverside avenue, at the crossing of the streets at the time of the meeting of the cars, he was caught, knocked down, and run over by the defective car and severely injured. Defendant answered the complaint, denying its negligence, and setting up that the injury, if any, received by plaintiff was caused directly, proximately, and solely by his fault and negligence, and without any fault or negligence of defendant, and that the father and guardian ad litem and the mother of plaintiff were guilty of contributory negligence, causing the injury, in allowing the minor plaintiff to escape beyond their custody and control.

In mentioning the facts established at the trial, where the evidence is conflicting only those facts will be considered which are substantially shown from the evidence adduced by plaintiff. At the time the injury occurred the plaintiff was between 10 years and 10 years and 9 months old. He was a boy of average capacity of that age, was accustomed to ride a bicycle in the streets of Spokane, and knew it was dangerous to collide with a street car in motion in the streets while riding his bicycle. Prior to the accident he was holding to the west-bound car, in riding his bicycle, until within about a block and a half of the place where the accident occurred. The east-bound car, which collided with plaintiff, was running at a speed of about $2\frac{1}{2}$ miles per hour. If the plaintiff had looked before going on the track of the defendant in front of the east-bound car, he could not have seen the car in time to avoid the collision. The motorman on the east-bound car rang his bell to salute the passing west-bound car prior to the accident, but just how far distant does not appear. The motorman did not see the plaintiff on the bicycle in time to avoid the collision. The motorman had been in the employ of the defendant company for about two years, and was shown to have experience and capacity. He testified, in substance, that the car had eight wheels, was about 32 feet long, with motors of the Thomson-Houston system, and that it was controlled by an upright controller in front, the reverse and controller lever resting on the same stand, but not on the same staff (that is, on the outside pipe); that there was one pipe for the controller part; that the center staff was the controlling staff, known as the "rheostat," which ran down to the bottom of the car on the front end to a sprocket, and down to the sprocket wheel, so as to control the connections underneath, known as the "rear connection," by a sliding contact; that on the same stand was the controller lever; that the controller lever had an upright handle; that there was a steel or wire spindle that went down from the lever that came out on the steel spindle; that each was worked by a loose handle, and, the handle being held tightly, it would turn on the

spindle, and connect the sliding contact that was on the rheostat, which was about a half circle, and connected with a cable and sprocket; that the purpose of the controller handle was to start and stop the car by the connection underneath; that the reverse lever was one that came out on the same plan as the controller lever, only that it had no upright handle to it; that there was an overhead switch above the motorman's head, known as a "cut-off," to either connect the electricity with the motors or disconnect it; that there were brakes on the car; that the controller or controller handle was the appliance ordinarily used for starting and stopping the car; that it had an upright handle of brass, and a steel or iron rod that went through and riveted underneath; that at the time the controller handle or upright grip that was used to turn on and off the electricity for the motors was wired on with a piece of baling wire, and that the rod of wire or steel that went down through the handle slipped from the staff; that the staff was brass, and there was a hole through the end of it, and the rod went through that hole and was ordinarily riveted underneath, but in this car the constant working of the hard metal on the brass had worn the hole so that it allowed the rod to pull through, and it had thus been wired in order to hold it on (that is, to hold the rod in the proper place). The motorman saw the plaintiff about halfway between the two tracks, a foot or two in advance of the front end of the car. He put his hand on the controller handle, released about a half turn of the controller staff to throw off the current, and at the same time put on the brake, but, in making the motion to throw off the current with the controller handle, the handle fell over and prevented him using the reverse lever. The reverse lever was nearly under the disabled controller handle. His next effort to throw off the electricity was by the overhead switch. The northeast corner of the car struck the boy's bicycle and knocked him forward three or four feet. He saw the boy fall, but could not specify at what distance he was from the car when he struck the ground. When the car was stopped, plaintiff was lying across the north rail, and his left leg under the drive wheel of the car. The track at the time was dry, and slightly inclined to be up-grade. The motorman stated that he made an immediate effort to stop the car when he saw the plaintiff. He says that as soon as he saw the plaintiff he made an effort to throw the current out of the car with the controller, and the handle broke,—pulled out of the socket,—because wired down. Then he made an effort for the reverse lever, and it came in contact with the disabled controller handle. He then threw the overhead switch, and disconnected the current from the trolley wire to the motors. At the time the plaintiff was struck, the front wheel of the car was on or near the west crosswalk or a

little west of him. With the controller in good condition, the motorman stated, "the car could have been stopped under the circumstances, considering the place and rate of speed, very nearly instantly." He also said the disabled controller prevented his operating it, and prevented him from operating the reverse lever successfully. He also said that the plaintiff would not have gone under the front end of the car had the controller been in sound condition. The motorman was corroborated by other railway employees of experience in his statement that if the controller had been in sound condition the car, under the circumstances, could have been stopped almost immediately; some of them stating two or three feet as the limit. It was also shown that the defect in the controller had existed for some time, and was known to the officers of the company. The plaintiff, in company with another boy, had been following the west-bound car, which was a box car, for some distance. He and his companion had been riding behind the box car on their bicycles, each having hold of the end of the car, until within about a block and a half of the crossing where the accident occurred. They had then ridden along the street some six feet north of the track, still following within a short distance of the west-bound car, until near the place of the accident, when the companion of plaintiff turned south and crossed the two parallel tracks, inviting plaintiff, by gesture or voice, to follow him. The plaintiff, a few feet behind the west-bound car, turned, going south, diagonally. Plaintiff testified he was about six feet back of the west-bound car and six feet towards the north, when his companion left him, and he was about three feet behind the west-bound car when he crossed the track southward. When he got between the two parallel tracks he saw the east-bound car. He says he was then going diagonally southwest, and he immediately turned to the southeast to avoid the collision, when he was struck by the east-bound car, and knocked to the front of the car some little distance; that he was riding at an ordinary rate of speed upon his bicycle, and had slackened a little when he crossed the railway track, but attempted to ride more quickly, to cross ahead of the car. The jury found that the car, after the collision, stopped within 14 feet.

1. Counsel for defendant requested that the jury be instructed to find for the defendant. Of the several instructions requested by counsel for defendant, which were refused by the court, mention will be made here of such as are deemed material. The court was requested to instruct that the allegations of the complaint confined the alleged negligent acts of the defendant to defective controller handle, excessive, dangerous, and high rate of speed, and cars passing at and on the intersection of the two streets, and that the evidence disclosed that

the car was not running at a high, dangerous, or excessive rate of speed. The court, of its own motion, instructed as follows: "There are but three acts of negligence alleged which you are allowed to consider: First, the use and operation on Riverside avenue of a car with a defective controller handle; second, running said car with such controller handle at a high and dangerous rate of speed while meeting another car going in an opposite direction on a parallel track; * * * third, permitting the cars to pass at a street crossing." The refusal of defendant's instruction as tendered is not erroneous. The court could not, under all the circumstances surrounding the accident, determine, as a matter of law, that the rate of speed was not excessive. "It is well settled that at crossings street cars and pedestrians have equal rights to the use of the street, and it has been held in that connection that what is proper care and caution on the part of those in charge of cars to prevent accidents is a question of fact in each case. *Schulman v. Railroad Co.* (Super. N. Y.) 36 N. Y. Supp. 439. * * * The facts in the present case, to say the least, fairly raise a question for the jury, whether the defendant was in the exercise of due and reasonable caution when it permitted its south-bound car to pass the standing car at that public crossing, and at such a rate of speed, under the circumstances. In forming a judgment upon that question, there were subsidiary questions equally calling for consideration and judgment, such as, was it the duty of the motorman, in the exercise of due and proper care, as he approached the standing car, which would obstruct his view of passengers or pedestrians who might be waiting to pass, to sound his bell or gong as a warning? And did he so sound his bell or gong? And should he have had his car under control at this crossing? And did he have it under such control when approaching the standing car? These facts, and the inferences to be fairly drawn from them, under the principle before alluded to, it seems to me, clearly were matters for the jury, exclusively." *Traction Co. v. Scott* (N. J. Err. & App.) 34 Atl. 1094. The evidence had disclosed defective appliances in the control of the car, so that it could not be so speedily stopped as where the machinery for operation was in sound condition. Safety in the rate of speed is nearly always relative. In *Penny v. Railway Co.*, 7 App. Div. 595, 40 N. Y. Supp. 172, it was held: "As it was the defendant's duty to have its cars under control at street crossings, the jury had a right to consider the question whether the car could have been stopped more easily if the sand box, approved for use under such circumstances, had been filled with sand." Whether the collision between the infant plaintiff and the car was unavoidable or inevitable was properly submitted to the jury. Counsel also requested an instruction that if the evidence showed

that the bells and gongs had been sounded, and the car was running at slow and moderate speed, and plaintiff, without warning, under circumstances which were not reasonably to be expected, darted suddenly in front of or against or in close proximity to the car, then the defendant would be liable only for the use of ordinary care after discovering the infant plaintiff, with such car, equipment, and apparatus as the defendant and its motorman then had for stopping the car, if the motorman did all he could with the car and equipment at that time, after discovering the position or danger of the infant plaintiff, then the verdict should be for defendant. The element of error in this proposed instruction is that the duty of the defendant in the exercise of ordinary care was measured by the condition of the equipment and apparatus of the car at the time of the accident. It omits defective appliances for stopping the car. Counsel requested the charge that, if the plaintiff failed to stop, look, and listen, or take any reasonable precaution to ascertain whether a car was coming east, it was contributory negligence. The court gave the following instruction: "You are instructed that the plaintiff is required to use ordinary care,—that is, such care as an ordinarily prudent person would use under the facts and circumstances detailed in this case, taking into consideration the age, capacity, knowledge, and experience of the infant plaintiff; and he is required to use the same care as the average careful and prudent boy of his age, capacity, prudence, and knowledge. If you find that he possessed such knowledge, capacity, and experience, and knew it was dangerous to pass immediately in front of a moving street car, and that he attempted to do so without looking and listening, when, if he had done so, he would have discovered the car in time to have avoided the accident complained of, the presumption is that he was guilty of contributory negligence." It is not negligence per se if it is not shown that one looked and listened in crossing a street railway. The degree of care required in crossing a highway and steam railway, in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway on a public street. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not exclusive right of way, is not negligence, as a matter of law. *Robbins v. Railway Co.*, 165 Mass. 30, 42 N. E. 334; *Traction Co. v. Scott*, supra; *Shea v. Railway Co.*, 50 Minn. 395, 52 N. W. 902. Counsel for defendant also requested the instruction that if the plaintiff was guilty of an act of negligence which directly contributed to the injury, or of any lack of ordinary care on his part, or an omission to do what he ought to have done under the circumstances, which act or omission directly contributed to the accident, it would defeat a recovery. We

think the instruction attempts to refine the rule of ordinary care which was imposed on the plaintiff. Defendant objects to the following instruction given: "That if you find from the evidence that the plaintiff was injured by one or more of defendant's cars, at or near a street crossing, at the time of the passing of another car, it is for the jury to determine from all the evidence, taking into consideration all of the circumstances of the case, whether it was negligence for the defendant motorman operating the car which did the injury to pass such other car at that place and at the time at which you find from the evidence he did that." As we have seen, the question of negligence in one car passing another at a street crossing is one of fact, in the light of all the evidence in the case.

2. The railway company was negligent in the operation of the car. The controller handle was defective, and the car could not be stopped with the same facility as if the appliance had been sound. But the defendant alleges contributory negligence upon the part of the infant plaintiff,—that plaintiff placed himself in a dangerous position contributing to his injury. The question of the contributory negligence of plaintiff is one of fact, and for the jury, unless the undisputed facts are so clear that all reasonable inferences point to one conclusion. It was observed in *Traction Co. v. Scott*, supra, which case, in its facts, is somewhat similar to the one at bar: "There is another element to be considered as affecting juridical action upon the question of contributory negligence in this case, and one that I think clearly makes it a question for the jury alone, and that is the fact that the plaintiff's intestate was a boy of tender years. He was described as a bright boy, but he was so young that naturally his powers of reason and judgment could be but partly developed. He had not passed far beyond the age of seven years. * * * Where there is a question whether the child is of sufficient age and discretion to be capable of some care for his own safety, the question of his capacity and its degree is for the jury. * * * And when a child has reached the age of discretion, and is considered *sui juris*, as a matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment, and experience; and whether that degree of care and caution has been exercised by the child in a given case is usually, if not always, a question of fact for the jury. 4 Am. & Eng. Enc. Law, 46, and cases cited." It was said in *Redford v. Railway Co.*, 15 Wash. 419, 46 Pac. 650, that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the defendant is still liable. In *Mitchell v. Motor Co.*, 9 Wash. 120, 37 Pac. 341, the following instruction of the superior court was approved:

"In determining whether the plaintiff or defendant was guilty of negligence, if either of them was, you should take into consideration the age and intelligence of the plaintiff. The law does not require the same degree of caution from a child of tender years as would under like circumstances be required of an adult, but the degree of caution required is to be determined by the maturity and capacity of the child. So that what you might consider under the same or similar circumstances would be negligence on the part of a grown person would not necessarily be so considered by you in case of a child of tender years." It was also ruled in that case that there was sufficient evidence to refuse a nonsuit when the facts shown were that the gripman did not keep such a lookout as the circumstances demanded, nor give any warning of approach, and that after discovering the child on the track the car might have been stopped sooner if the brakes had been in proper condition; and it was observed: "The mere circumstance that the car ran an unusual distance before it was stopped was some evidence either of improper management, or that it was out of repair, or that the brakes were defective." No negligence on the part of the parents was shown. The real question here arises upon the motion to instruct for the defendant upon the ground of contributory negligence by the infant plaintiff; and, conceding there was want of ordinary care in the plaintiff preceding the collision, did it contribute to the injury, or was it a mere condition before the accident? We conclude that the important inquiry determinative of this controversy is, was the negligence of the defendant the proximate cause of the injury? The facts shown by the plaintiff have been given, and do all the inferences arising from them show to all reasonable minds that want of ordinary care on the part of the plaintiff contributed to his injury? We have seen that it was not negligence per se for plaintiff to pass from behind the west-bound car for the purpose of crossing the south track. In the case of *Thompson v. Rapid-Transit Co.* (Utah) 52 Pac. 92, 40 L. R. A. 172, the facts are very similar to those in the case under consideration. There the defendant sent out a defective street car, and maintained that the plaintiff was negligent in crossing the track in front of the car, and that in such case it was the duty of the defendant, after discovering the dangerous situation of the plaintiff, caused by his own negligence, only to exercise all reasonable care and diligence at his command at the time of the injury, and that when the motorman did all he could to stop the car, although its brakes were defective, the defendant could not be held liable. Of this the court observed: "The result of such a doctrine would be that under such circumstances, when the defendant discovered negligence in a plaintiff, it could legally excuse the exercise of its own want of reasonable care

by showing that its appliances and brakes were in such a wretched condition at the time, on account of its previous and continued negligence, that it was incapacitated from preventing the injury complained of at the time by the use of reasonable care. * * * If such rules were applicable to contributory negligence, his [plaintiff's] safety in crossing a street where street cars were operated, with his right to recover damages in case of negligence, would largely depend upon the option of the company to keep its appliances in good repair." The question of contributory negligence, under all the circumstances in the case, was, we think, properly submitted to the jury, and its verdict must be conclusive. Affirmed.

FULLERTON, J., concurs.

DUNBAR, C. J. I concur in the result. I think the action of the respondent constituted contributory negligence as a matter of law, and that, if there had been no fault on the part of the appellant which was the proximate cause of the injury, the respondent could not recover. But whatever the fault of the appellant may be termed,—whether "comparative negligence" or "willful negligence,"—companies employing dangerous agencies like electricity must be held to the highest degree of care, not only in operating their cars, but in what is of even more importance, viz. in furnishing their servants with suitable equipment for properly operating the cars; for, without a compliance with this first and most important requisite, the skill and care of the operators would be of little avail. In this case, if the controller handle had been in perfect order, and the motorman had not been driven to the necessity of finally resorting to the over switch to throw off the electricity, thereby losing precious time, the injury would probably have been averted. The imperfect condition of the controller handle was known to the company, and the operation of the car with this glaring defect in an appliance so important, and upon which the safety of the traveling public so largely depends, placed the company in the attitude of operating its car in willful disregard of the rights of the traveling public; and such acts should be held to be willful negligence, in their application to the party injured.

(23 Wash. 766)

MARBLE SAV. BANK v. WILLIAMS et al.
(Supreme Court of Washington. Jan. 11, 1901.)
**EVIDENCE — EXPLAINING JUDICIAL RECORDS
BY PAROL—CONCLUSIVENESS
OF JUDGMENT.**

In mandamus to compel a school district to levy a tax to pay interest on its bonds, the district filed three separate defenses: (1) That the district was in debt above the constitutional limit; (2) fraud in the issuance of the bonds; and (3) that since issuance portions of the territory of the district had been cut off from it,

and added to other districts. Demurrer there-to being overruled, judgment was rendered for defendant. *Held*, in a subsequent action for the interest, defense of res judicata being interposed, that plaintiff could show by parol that the court based its decision in the former action on the sole ground that the money then in the treasury was not applicable to the interest, and hence that the judgment was not conclusive as to the other defenses interposed.

Appeal from superior court, Pacific county; H. S. Elliott, Judge.

Action by the Marble Savings Bank against W. R. Williams and others as the board of county commissioners of Pacific county, and school district No. 4 of Pacific county. From a judgment for plaintiff, defendants appeal. Affirmed.

Welsh & Thorp, for appellants. Hewen & Stratton and Cotton, Teal & Minor, for respondent.

DUNBAR, C. J. In August, 1892, school district No. 4 of Pacific county, in consideration of the sum of \$5,137.50, paid to it by Farson, Leach & Co., issued to said company its negotiable bonds in the sum of \$5,000, payable 20 years after August 1, 1892, bearing interest at the rate of 7 per cent. per annum, payable semiannually. Interest installments were evidenced by interest coupons attached to each bond. Said bonds were issued for the purpose of purchasing a school-house site and erecting and furnishing a school house for said district. The respondent herein, on or about December 8, 1892, purchased the bonds so issued of C. H. White & Co., who had become the owners of the same. It is conceded that none of the interest sued for in this action has been paid. In October, 1898, C. H. White & Co., on behalf of respondent, filed a petition praying for a writ of mandate to require the defendants (appellants) to levy a bond interest tax on the property situated in school district No. 4 sufficient to pay the interest then accrued on said bonds, amounting to \$1,050. To this petition the school district filed an answer containing three separate affirmative defenses,—one alleging that the school district was in debt over and above the constitutional limitation at the time the bonds were issued; one alleging that the bonds were sold at private sale, without notice, and also fraud and conspiracy in the bidding and issuance of the bonds, and that the plaintiff was a party to the fraud; and the third that at the time the bonds and coupons were issued the school district comprised a large portion of land which had since been cut off therefrom, and comprised and was a part of other school districts. To these defenses the plaintiff interposed a demurrer, which was overruled, and the plaintiff electing not to plead further, judgment of dismissal was taken, in favor of the defendants. Subsequently this action was brought by the respondent against the same defendants for the recovery of the interest

due upon the coupons of the aforesaid bonds, and the judgment in the former action was pleaded as an estoppel to the action now pending. Upon the trial of the cause, over the appellants' objection, testimony was introduced tending to show that the court, in dismissing the action of C. H. White & Co., did not rule, adjudge, or decide any question involving the validity of the bonds or interest coupons, and did not adjudicate any of the issues joined in the present action, but dismissed said suit of C. H. White & Co., and rendered judgment therein on the sole ground that the moneys then in the hands of the county treasurer were not applicable to the payment of the interest coupons; and the finding of the court in the present case is to that effect. The reply of the respondent alleged that the district appeared and answered the complaint in the first action to the effect that none of the moneys then in the possession of the county treasurer were applicable to the payment of the coupons sued on, and that the court sustained this plea of the defendants in that suit, and rendered the judgment pleaded on that defense alone; but did not rule, adjudge, or decide any of the other defenses pleaded by the defendants, did not rule, adjudge, or decide on the validity of said bonds or interest coupons, and did not adjudicate any of the issues joined in the present action. Upon the trial of the cause judgment was rendered in favor of the respondent for the amount demanded.

There are but two questions presented by the record in this case: (1) Has the respondent, a foreign corporation, a right to sue in the courts of Washington without appointing any agent in the state or filing the appointment of such agent in the office of the secretary of state? (2) Is respondent estopped by the judgment rendered in the case of C. H. White & Co.? We will not take time to discuss the first proposition, for it has been twice decided by this court against respondent's contention; first in *Foundry Co. v. Augustive*, 5 Wash. 67, 31 Pac. 327, and then in *La France Fire-Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, which approved the former case.

The second proposition is of broader import, as the decisions upon the question of res adjudicata are numerous, and somewhat bewildering. Certain propositions are advanced by the appellants which it is claimed the authorities sustain, viz.: "While parol evidence may be received to show what was litigated upon the trial, it must be consistent with the record, and cannot be admitted to explain or contradict it." "Where the defendant pleads res adjudicata, parol evidence is not admissible to contradict the record, and substitute the opinion of witnesses as to the meaning and effect of the pleadings and judgment in the former case." "It cannot be shown by parol evidence in opposition to the record that a question which appears by

it to have been settled was not in fact litigated." "Where it appears by the record that a particular issue was determined, all questions of fact are excluded, and the court must, as a matter of law, declare such determination to exist, and to be conclusive." "A judgment bars not only every defense raised, but every defense that might have been raised." We are not certain but that the soundness of all these propositions, with the exception of the last, might be conceded without, as a consequence, working a reversal of this case. As to the last proposition, it is rather a loose expression of the law, which has frequently been used and has been stated as a general proposition by this court in the cases cited by appellants. The essential thing to determine is whether or not the question involved in the second suit was actually litigated in the first. The doctrine of res adjudicata is based upon this proposition. It is true that, for the purpose of preserving the verity of judgments, and making stable and enduring the judgments of courts, the law employs certain presumptions in favor of the judgment; but these presumptions must not interfere with investigations which elicit the truth. Consequently, if it does not conclusively appear from the record that the matter in dispute was adjudicated, evidence will be admitted to ascertain that fact. All the authorities hold that an estoppel will not be pronounced when it affirmatively appears from the whole record that the point in controversy was not actually adjudicated, even where it might have been adjudicated under the pleadings; that is to say, that presumptions will not balance or outweigh the affirmative showing of the record,—as when, for instance, an opinion has been filed which indicates upon what particular point the judgment was granted, where, under the pleadings, it might have been granted on one or more points raised by the pleadings. If, in this case, the judge had rendered an opinion stating that the demurrer was overruled because it appeared that the funds sought could not be made responsive to the judgment asked, and that it was, therefore, not necessary to enter into an investigation of the other defenses, it would be plain, under all authority, that estoppel could not be successfully invoked. Not having done that, the judge in this case, who was the same judge who tried the former case, heard testimony to the effect that the judgment which he announced in the former trial comprehended only the question of the applicability of the funds. It would seem that there could be no great difference in principle. It is true, the lapse of time and the interest of witnesses might establish the fact with a little less certainty. Still we think less harm will be done by adopting such rule than by adopting the harsh rule that all questions which could have been litigated under the pleadings must be conclusively presumed to have been litigated. It is not the policy of the law to take

snap judgment on litigants, and it seems to us that great injustice might be done by precluding an investigation of the point actually adjudicated when the judgment is consistent with an adjudication of one or all of the matters in issue.

In *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626, in an opinion rendered by Justice Brewer of the supreme court of the United States, who was then a member of the supreme court of Kansas, it is said: "The whole philosophy of the doctrine of *res adjudicata* is summed up in the simple statement that a matter once decided is finally decided, and all the learning that has been bestowed, and all the rules that have been laid down, have been for the purpose of enforcing that one proposition. One rule fully established is, that you may examine the entire record of the prior action in order to determine what was in fact adjudicated. The inquiry is not limited to the mere formal judgment. It extends to the pleadings, the verdict, or the findings; and the scope and meaning of the judgment is often interpreted by pleadings, verdict, or findings. Indeed, to determine the matters which were adjudicated, not only may you look to the entire record, but also, in many instances, you may resort to parol testimony." In *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195,—a case which has been frequently cited on both sides of this controversy,—an extract from the opinion in the case of *Packet Co. v. Sickles*, reported in 24 How. 333, 16 L. Ed. 650, is approvingly quoted, and is as follows: "The record produced by the plaintiffs showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial with a view to ascertain what was the matter decided upon by the verdict of the jury." So, in this case, the judgment of dismissal might have been rendered upon the question of the inapplicability of the funds; for, if it was found that the funds were inapplicable, *mandamus* would necessarily fail, and it would not have been necessary for the court to have gone into an investigation of the other questions raised in the pleadings. It seems, then, not to be inconsistent with any equitable rule to allow the court to determine by investigation the particular matter litigated, to the end that matters which had been litigated could not be again adjudicated, but that those questions which had not been adjudicated might be adjudicated for the first time. There is also approvingly quoted therein the case of *Howlett v. Tarte*, 10 C. B. (N. S.) 813, which was an action for rent under a building agreement. The defendant pleaded a subsequent agreement changing the tenancy into one from year to year,

and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defense pleaded in the second action. On demurrer the replication, after full argument, was held bad. In deciding the case Mr. Justice Willes said: "It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action. I think we should do wrong to favor the introduction of this new device into the law." Mr. Justice Byles said: "It is plain that there is no authority for saying the defendant is precluded from setting up this defense." Mr. Justice Keating said: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant." In *Cromwell v. County of Sac*, supra, a distinction is made between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action; and it is stated that in the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. But this is no more than an announcement of the rule that in such case that which was adjudicated upon the merits of the action could not be again adjudicated; and while it is true that, in accordance with cases cited by appellants and many others, a judgment upon the pleadings is said by the courts to be a judgment upon the merits, it is not true with reference to the announcement made in *Cromwell v. County of Sac*, supra. In *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214, in an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims,—one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheep skin by means of a compound, and applied in a particular manner,—the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. Held, that the judgment rendered in the action did not estop the defendant in a suit in equity by the

same plaintiff for an injunction and an accounting for gains and profits from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. It was said that the validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery; that the patent might be valid as to a single claim, and invalid as to the others; and that if, upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there was no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. Said the court in that case: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." The doctrine of this case, if followed, must be conclusive of the case at bar. The very example given there is furnished by the case at bar, viz. that several distinct matters may have been litigated upon one or more of which the judgment may have passed, without indicating which one of them was litigated, and upon which the judgment was rendered. It will also be observed that the court there places the burden of proof upon the party invoking the estoppel to show that in such case, where there are several defenses, upon either of which the judgment might properly have been based, the judgment was actually based upon the proposition which is pleaded in bar. The court there cited an expression of Coke to the effect that an estoppel must be certain to every intent, and added: "And if, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence;" citing *Alken v. Peck*, 22 Vt. 260, and *Hooker v. Hubbard*, 102 Mass. 245. A very instructive case is that of *Fahey v. Machine Co.* (N. D.) 44 Am. St. Rep. 554 (s. c. 53 N. W. 580), where it was held

that, when the record does not settle the question, oral evidence is admissible to show what was in fact decided; and that, if a judgment may have been based upon either of two or more issues presented in the pleadings, it is not conclusive upon either unless evidence is received to show which issue was in fact determined as the ground of the former adjudication; that uncertainty as to what was in fact decided is fatal to the use of a judgment as an estoppel. It would be useless to make excerpts from the opinion in this case, but it is decisive of the question at issue, and Mr. Freeman, in his note to the case, has collected the authorities, and discussed them with his usual force and clearness, showing that the great weight of authority is to the effect that evidence may be introduced to make certain that which is uncertain as bearing upon the question of what was adjudicated in the former action. It is true that there are cases holding to the stricter rule announced in the expression that the general doctrine is that the plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time; but neither in those cases nor in the case cited from this court, where that doctrine seemed to have been approvingly quoted, was there an attempt, as in this case, on the part of the party resisting the plea, to show by extraneous testimony that the matter pleaded in estoppel had not actually been adjudicated in the former trial; and in our investigation of this case—and it has embraced an examination of all the cases that were available to us, those cited by the appellants and respondent as well as many others—we have been unable to find a case which holds that, where the judgment which is pleaded as a bar could have been rendered upon one of many defenses or affirmative allegations, the party would not be allowed to introduce testimony showing the truth and establishing the fact as to what had actually been litigated in the former proceeding. The judgment will be affirmed.

ANDERS, FULLERTON, and REAVIS,
JJ., concur.

(23 Wash. 742)

PRICE v. MITCHELL et al.

(Supreme Court of Washington. Jan. 10, 1901.)
BILLS AND NOTES—EXTENSION OF TIME—CON-
SIDERATION—NUDUM PACTUM.

The agreement of the payee of a note, which specified interest at 12 per cent., and which fell due September 4, 1891, to take a lower rate of interest, and to extend the time of payment, providing the makers would pay both principal and interest by September 16, 1900, was a nudum pactum, and constituted no defense to an action on the note.

Appeal from superior court, Pierce county; J. A. Williamson, Judge.

Action by James H. Price against Joseph T. Mitchell and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Fogg & Fogg, for appellants. Albert E. Joab, for respondent.

WHITE, J. The question for the consideration of the court on this appeal is presented by plaintiff's demurrer to defendants' amended answer and affirmative defense to plaintiff's complaint. The complaint states as plaintiff's cause of action: That the defendants, for value received, made, executed, and delivered to plaintiff herein their certain promissory note in the words following: "\$800. Tacoma, Wash., May 6th, 1891. Sixty days after date, without grace, we jointly and severally promise to pay to the order of James H. Price, at the Bank of British Columbia, in this city eight hundred dollars, for value received, with interest after maturity at the rate of twelve per cent. per annum until paid; principal and interest payable in U. S. gold coin; and, in case suit is instituted to collect this note, or any portion thereof, we promise such additional sums as the court may adjudge reasonable as attorney's fees in said suit. Joseph T. Mitchell. Susan Elizabeth Mitchell. Wilson F. Smith. Bank of British Columbia, Tacoma, Washington." That that note is now due, and that it has not been paid; and plaintiff demands judgment for the amount claimed to be due on it. The answer of the defendants to this complaint admits the making of the note, but denies that any sum is now due thereon. As an affirmative defense to the action, and as a reason why nothing is now due on said note, defendants allege that on or about the 16th day of September, 1898, these answering defendants, being then unable to pay the note herein sued on, and being desirous of obtaining an extension of the time of payment of the same, entered into an agreement with plaintiff, said agreement being partly oral and partly in writing, and made and entered into in consideration of their mutual promises and agreements, whereby these answering defendants on their part promised and agreed to pay to said plaintiff interest on the principal sum set forth in said note at the rate of 10 per cent. per annum from the date of said note, to wit, from May 6, 1891, till the 16th day of September, 1898, and at the rate of 8 per cent. per annum thereafter a part of said time, to wit, from May 6, 1891, to July 5, 1891; the time from the date till the maturity of the note being a period during which defendants had never before promised or agreed to pay any interest, and now for the first time did promise and agree to pay interest; and, further, to pay to plaintiff on or before the 16th day of September, 1900, the whole amount of the principal of

said note and the interest so agreed to be paid; it being agreed that, in case of their failure so to do, the interest was to stand as stated in said note,—i. e. at the rate of 12 per cent. per annum from the maturity of said note, to wit, from July 5, 1891; and whereby the said plaintiff on his part, and in consideration of the said premises of said defendants, promised and agreed to extend the time of payment of said note to the 16th day of September, 1900, and to accept interest at the rates in said oral and written agreement by said defendants promised to be paid. As a part of said extension agreement the said James H. Price then and there made, executed, and delivered to these defendants the following writing, to wit: "Albert E. Joab, Attorney and Counselor at Law. Merchants' National Bank Building, Rooms 508, 509, and 510, Cor. Eleventh and Pacific Avenue. Tacoma, Wash., Sept. 16, 1898. I hereby agree to accept ten per cent. interest on one certain promissory note due me from Joseph T. Mitchell, Susan Elizabeth Mitchell, and Wilson F. Smith from the date thereof until the 16th day of September, 1898, and eight per cent. interest from said 16th day of September, 1898: provided, the principal and interest shall all be paid on or before the 16th day of September, 1900; otherwise, the interest is to stand as in the note stated,—twelve per cent. [Signed] Jas. H. Price." In the making of said agreement the said defendant Joseph T. Mitchell in that behalf acted for himself and as agent for his co-defendant Susan Elizabeth Mitchell. The court sustained the demurrer, and gave judgment for the plaintiff. The error assigned is that the court erred in sustaining plaintiff's demurrer to defendants' amended answer and affirmative defense, and in giving judgment for plaintiff.

When there is a sufficient consideration to support an agreement to extend the time for the payment of a note, such agreement may be pleaded in bar to an action on the note. Was there anything in the agreement set out in the answer on the part of the defendants Mitchell and wife from which the plaintiff would derive a benefit or advantage? If so, there is a consideration to support the agreement; otherwise, there is not. *Staver v. Missimer*, 6 Wash. 173, 32 Pac. 995. When this agreement was made there was a definite and ascertainable sum due upon the note, and under the terms of the note there would be due a definite and ascertainable sum on September 16, 1898. The sum the defendants agreed to pay amounted to much less than was due or would become due under the terms of the note, notwithstanding interest was to be computed for two months longer time than provided for in the note. In short, the defendants promised to pay a less sum than they were obligated to pay; and, for the reason that the computation was to be on a different basis from that provided for in the note, they claim a

sufficient consideration arises to support the agreement to extend the time of payment. What benefit or advantage was it to the plaintiff to make a reduction of the debt due him of \$102.04 up to the 16th day of September, 1898, and a reduction on the interest of \$32 per annum after that date? What did he receive for this but the mere naked promise of the defendants to pay such less sum, when they were obligated by their contract to pay, not only the smaller sum, but the additional sum we have indicated? As was said by the supreme court of Indiana in the case of *Wolford v. Powers*, 85 Ind. 294: "A money consideration is capable of exact and definite admeasurement. Its value is fixed and unalterable, and there cannot be any uncertainty as to its adequacy or inadequacy. The parties really exercise no judgment in passing upon its value, for that never is in doubt. Courts can, therefore, pass upon its sufficiency without infringing the rule that, where the parties have for themselves determined the sufficiency of the consideration, courts will not review their decision. *Schnell v. Nell*, 17 Ind. 29; *Shepard v. Rhodes*, 7 R. I. 470. But, where the consideration is something else than money, there must be some exercise of judgment in ascertaining and settling its value." It is a well-settled principle of law that an agreement to accept a smaller sum in payment of a larger one is not binding, because there is no sufficient consideration to support the agreement. "The only question here is whether this promise by the plaintiff to take a less sum than the whole demand was obligatory on the party ab origine, or whether it was a nudum pactum for want of a consideration. I am clearly of opinion that it was a nudum pactum in its creation. Here there is a debt of 20 pounds due from the defendant, and a promise by the plaintiff to take 5 pounds only, which is, in effect, a promise to give the defendant 15 pounds; for a promise to forgive the defendant 15 pounds is like a promise to give that sum. But such a promise is a nudum pactum for want of a consideration, and therefore is not binding unless it be executed. It is true, indeed, that if A. promise to give B. 15 pounds, and he actually pays it, he cannot recover it back again; but here the question is whether an agreement by the plaintiff to take a less sum is obligatory without acceptance. It has been said that a tender is in all cases equivalent to payment; but that is not so, for, if a tender be pleaded in bar of a promise, it is not taken as a payment, but as a bar to the action. This agreement is not binding in law. The plaintiff is always entitled to the whole demand. And therefore, as this agreement has not been followed up by an actual acceptance, which is negated by the record, it was not obligatory; and the plaintiff, whether from caprice or any other motive, was at liberty to refuse taking less than his whole de-

mand." *Heathcote v. Crookshanks*, 2 Term R. 24. See *Smith v. Bartholomew*, 1 Metc. (Mass.) 276; *Harriman v. Harriman*, 12 Gray, 341; *Shepard v. Rhodes*, 7 R. I. 470; *Foakes v. Beer*, 9 App. Cas. 605. In *Smith v. Bartholomew*, supra, two were jointly liable. One made part payment. The creditor agreed to look to the other for the payment of the balance. It was held that there was not a sufficient consideration to discharge the one paying, because it was a payment of his own debt; that this was not a meritorious consideration requiring a recompense. The court says: "The payment of a debt by a debtor, the same being due and payable, is not a sufficient consideration to support a promise. It is not considered as any detriment to the debtor or benefit to the creditor. The one pays only what he was bound to pay, and the other receives no more than his just debt. Such a consideration is merely nominal and insignificant, and is deemed in law no consideration at all." For the same reason an agreement to pay a less sum in money than was due is no consideration, for the defendants were under obligation to pay the same, and it is no detriment to the debtor or benefit to the creditor. So viewing the agreement pleaded in the answer of the defendants *Mitchell* and wife, it is unnecessary to pass upon the other questions discussed in the briefs. The judgment of the court below is affirmed.

DUNBAR, C. J., and REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 689)

REINER v. CRAWFORD.

(Supreme Court of Washington. Jan. 3, 1901.)
ORAL EVIDENCE AS TO WRITTEN CONTRACT—
APPEAL—REQUESTED INSTRUCTION—WAIVER OF ERROR—EXCEPTION.

1. Oral evidence to show that a contract for the sale of stock was delivered to take effect only on condition that the stock had not been sold by a certain agent was properly admitted, as it did not contradict or vary the terms of the writing, but merely showed that it had not become operative.

2. Where plaintiff failed to take exception to an instruction to the jury, his objection thereto could not be reviewed on appeal.

3. Where plaintiff requested the judge to charge the jury to determine the issue on a preponderance of the evidence, he cannot object to such instruction on appeal.

4. Where there was some substantial evidence in support of the verdict, the appellate court will not weigh the evidence to determine on which side it preponderated, as that was a question for the jury.

Appeal from superior court, Lincoln county; C. H. Neal, Judge.

Action by George J. Reiner against William A. Crawford. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Winston & Winston and Myers & Warren, for appellant. H. N. Martin, for respondent.

FULLERTON, J. This is an action brought by the appellant against the respondent.

ent to recover damages alleged to have accrued by reason of the failure of the respondent to comply with the terms of a written contract, by the terms of which the respondent agreed to sell and deliver to appellant certain shares of stock in the Deer Trail No. 2 Mining Company. The instrument sued on was executed at Davenport, Wash., and the shares of stock at that time were in the hands of the respondent's agent at Spokane, Wash., who had authority to sell and contract for the sale of the same. The respondent in his answer to the complaint admitted the execution of the instrument, but denied that it ever became operative, averring that it was delivered to appellant upon the express understanding and condition that it was not to take effect if the respondent's agent at Spokane had sold the stock, or entered into a contract for the sale of the same, prior to the time the appellant reached Spokane and notified the agent of the contract of purchase; further averring that in fact the agent had contracted to sell the stock on the day preceding the execution of the writing sued on, and that the shares of stock were delivered to the purchaser prior to the time appellant reached Spokane. Issue was taken on the answer, and a trial was had before the court and a jury, resulting in a verdict and judgment for the respondent.

On the trial the court permitted the respondent, over the objection of the appellant, to prove by oral evidence the conditional delivery of the writing. This is assigned as error, being, it is contended, in violation of the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument. But we think the rule invoked is not applicable to the question here suggested. To show that a writing in the form of a contract was delivered to take effect on the happening or the not happening of a condition, and that the condition on which it was made to depend has happened or has not happened, as the case may be, does not in any true sense contradict the terms of the writing or vary their legal import, but is, rather, the showing of a separate agreement, constituting a condition precedent to the attaching of any obligation under the writing. In other words, while parol evidence is inadmissible to vary or contradict the terms of a written instrument, such evidence is admissible to show that a writing in the form of a contract never became operative as a contract. This principle is generally approved by the authorities. *Whart. Ev.* § 927; *Wilson v. Powers*, 131 Mass. 539; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Benton v. Martin*, 52 N. Y. 570; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 406; *Refining Co. v. Dunning (Mich.)* 73 N. W. 239; *Bank v. McNulty (Tex. Civ. App.)* 31 S. W. 1091; *Bourke v. Van Keuren*, 20

Colo. 95, 36 Pac. 882; *Hurlburt v. Dusenbery (Colo. Sup.)* 57 Pac. 860.

The second contention is that the trial court erred in instructing the jury that they would be warranted in finding for the defendant if they found by a preponderance of the evidence that the contract was delivered on the condition set out in the answer, whereas it is said the court should have instructed the jury that they could not find for the respondent unless they found by clear and convincing proof that the contract was so conditionally delivered. Conceding the law to be as the appellant here contends, there are two reasons why the objection cannot avail him: No exception was taken by him to this part of the charge of the court, and an inspection of the record shows that the charge was given in this form at his request.

Lastly it is insisted that the verdict of the jury is contrary to the evidence. On this branch of the case the appellant argues that a conditional delivery of the contract is not shown by even a preponderance of the evidence, when nothing less than clear and convincing proof is sufficient. On which side the evidence preponderated was a question for the jury, and this court, as we have repeatedly held, will not weigh the evidence for the purpose of determining whether or not the jury arrived at a correct conclusion. We will do no more than examine the record, and, if we find some substantial evidence supporting the verdict, will not disturb the jury's finding. Whether the jury should have been instructed to find for the respondent on a preponderance of the evidence, or on clear and convincing proof, was a question of law, which the appellant should have raised at the trial in the court below before the cause was submitted to the consideration of the jury. By requesting, as he did, that the jury be instructed that they might find on this issue on a preponderance of the evidence, the appellant waived his right to predicate error thereon, either on a motion for a new trial, or on appeal to this court. The judgment is affirmed.

DUNBAR, C. J., and REAVIS, J., concur.

(23 Wash. 758.)

McCLAIN v. FAIRCHILD.

(Supreme Court of Washington. Jan. 11, 1901.)

LIMITATION OF ACTIONS—AMENDING DEMURRER TO PLEAD STATUTE—ACCRUAL OF RIGHT OF ACTION.

1. An order permitting the filing of an amendatory demurrer, setting up the bar of the statute of limitations, is within the discretion of the court.

2. A subscriber of a subsidy proposal to aid in the construction of a railway reserved to himself the right to pay his subscription in money or real estate. The subscription was to be delivered to trustees on the acceptance of the proposal by the railway company, and was to

be delivered to the company when the road was completed. *Held*, in an action to recover the subscription, that the cause of action accrued as soon as the subscriber had notice of the completion of the railway.

Appeal from superior court, Pierce county
J. A. Williamson, Judge.

Action by A. F. McClaine against Solomon Fairchild, administrator of the estate of John Saltar, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

T. O. Abbott, for appellant. Frederick H. Murray, for respondent.

REAVIS, J. The complaint, for cause of action against defendant (respondent), alleges, substantially, that in 1889 certain residents of Pierce county, at Stellacoom, made a proposal in writing to aid in the construction of a motor railway between Tacoma and Stellacoom. These persons were designated as the parties of the first part, and through certain trustees named as parties of the second part proposed, to any company, person, or persons who might accept the proposal, and who were designated as parties of the third part, that in consideration of the construction and operation by the parties of the third part of a motor line of railway, the power of which might be steam or electricity, at the option of the third parties, from the city of Tacoma to Stellacoom, the parties of the first part agreed to pay the amounts set opposite their names, either in money, labor, materials, or real estate, as should be specified with each signature contributing towards the building of such railway. The conditions upon which payments were to be made were that the third parties should agree to the acceptance of the subsidy proposal, and, upon compliance with the conditions by the first parties, the third parties were to construct and operate the motor line of railway from Tacoma to Stellacoom, and to commence work of grading on the line of railway within 30 days after the necessary right of way should have been secured, and such line of railway should be completed and in operation within six months from the time it was commenced. The trustees, the parties of the second part, were authorized and empowered to present the proposal for acceptance to any responsible company or person that the trustees should deem responsible for the faithful performance of the contract, and, upon the acceptance of the contract by the third parties, each of the first parties agreed to execute and deliver to the trustees their several promissory notes, payable one day after date, payable to the third parties for the several sums of money subscribed, and duebills for materials subscribed, specifying the material and labor, and deeds for the real estate subscribed, and the trustees were instructed to deliver to the third parties such notes, duebills, or deeds to real estate to the amount of one full half of the total thereof when the railway was graded and the ties and iron laid,

the balance to be delivered when the first train was run over the entire line. The trustees were authorized and empowered to grant to the parties of the third part the time necessary to secure the right of way, and such time might be extended by the trustees in their discretion, but the acceptance of the proposal by the third parties should not bind the first parties any longer or greater length of time than the time limited by the trustees, and should not preclude the trustees from contracting with other parties for the construction of the railway after the time limited by the trustees for securing the right of way should expire, and the parties of the third part waived all claims and demands after the expiration of such time fixed by the trustees. In July, 1890, the trustees having been designated, a written acceptance was filed with them by the assignor of plaintiff in the following form: "I hereby accept the foregoing proposition and bonuses, and agree to construct, equip, and operate a line of electric railway, as therein required, on or before February 23, 1891. On behalf of Tacoma and Stellacoom Railway Company. T. O. Abbott, President." The defendant's intestate, Saltar, was one of the persons who signed the proposal, and in the following form: "John Saltar, one thousand (\$1,000) dollars, or five lots in Stellacoom, at my option." About the 9th of February, 1891, the railway company, plaintiff's assignor, performed the conditions on its part to be performed of the terms of the proposal and acceptance, and at the same time duly notified said Saltar in writing of its performance in all the matters and things by it to be performed, and demanded of Saltar that he make the election in the agreement specified, and perform the condition required to be performed on his part. Saltar neglected to perform such condition and to make his election as to the payment of his subscription, and again about the 6th of October, 1891, a similar further demand in writing was made upon said Saltar, but Saltar neglected to comply with the demand, and wholly failed to perform the condition of the the agreement on his part to be performed, and failed to make any election as to the manner of payment of his subscription or to make payment thereof. On the 20th of February, 1899, Saltar died, and the respondent herein was appointed administrator of his estate. On the 8th of August, 1899, the claim for \$1,000 against the estate of deceased was duly presented to the respondent as administrator thereof, with a claim of legal interest thereon from the 9th day of February, 1891. The claim against the estate was rejected by respondent. Judgment is demanded here for \$1,000, together with legal interest from the 9th day of February, 1891. It is also alleged in the complaint that the presentation of the claim on the 8th day of August, 1899, was a reasonable time for presentation of the same, on the performance of the condition on the part of the railway company. A general de-

murrer was interposed to the complaint by the defendant, and was afterwards, by the permission of the court, withdrawn, and another demurrer filed, setting up the additional ground that the action was barred by the statute of limitations. The demurrer setting up the bar of the statute of limitations against the cause of action was sustained, and judgment of dismissal of the action entered thereon.

1. Appellant maintains there was error in the order permitting the filing of the second demurrer setting up the bar of the statute of limitations. It is urged that the statute authorizing amendments to pleading in furtherance of justice does not vest the court with indiscriminate discretion; that it must always be with a view of the promotion of the equitable considerations which exist between the parties; and it is particularly insisted that the plea of the statute of limitations is not viewed favorably, and several authorities are cited which give color to the contention. But such view of the statute of limitations is not now, we think, usual or supported by the weight of authority. In *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1064, this court said: "Under the weight of the authorities, the statute of limitations is not now, at least, generally regarded as an unconscionable defense. We regard this so well settled that we deem a citation of many authorities unnecessary, but refer to *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807." It is observed in 13 Enc. Pl. & Prac. p. 209: "Although according to some authorities the plea of limitation is classed among those not deemed meritorious, yet the statute of limitations is not now generally regarded as an unconscionable defense." The filing of the amendatory demurrer was within the discretion of the superior court. See *Roche v. Spokane Co.* (Wash.) 60 Pac. 59.

2. It is further maintained that the bar of the statute cannot prevail against the claim, because no date certain is fixed in the contract when the promise of Saltar became enforceable, and therefore Saltar was entitled to a reasonable time after the performance of the consideration by the railway company within which to make the election of the form of his payment of the subscription which he had reserved to himself; and that even if there was no election reserved to Saltar, and his promise had been simply to pay \$1,000, as there is no definite date fixed the right of action could not accrue to plaintiff until after a reasonable time had elapsed from the time when the railway was actually completed according to the agreement, and that as long as appellant is content to permit the right of election to remain with Saltar he could not complain. But more than a reasonable time had elapsed after it became his duty to make the election. It is also urged that in optional contracts, where the election must be made before a day certain, if the election is not made in

the time specified then the right of election passes at once to the other party. And in optional contracts, where the time of election is uncertain and indefinite, then the party reserving the option must exercise his right within a reasonable time; otherwise, the right passes to the other party. But it will be observed the contract specifically provided that the notes and deeds to the real estate and other things mentioned in the subscriptions were to be delivered to the trustees, the parties of the second part, upon the acceptance of the proposal by the railway company, and were to be delivered to the railway company completely when the first train was run over the entire line. The complaint states definitely that the railway company completed its entire line, and run its trains over the same, on the 9th day of February, 1891. Certainly, under the terms of the contract, the \$1,000 subscription by Saltar was due and payable at that date, in default of the delivery of the deed to the real estate; that is, Saltar must make his election to pay by deed to the real estate or in money when the terms and conditions of the contract were completely performed by the railway company, on the 9th day of February, 1891, or as soon thereafter as he had notice or demand, and such notice and demand was duly given to him. *Russell v. McCormick*, 45 Ala. 587, 6 Am. Rep. 707; *Roberts v. Beatty*, 2 Pen. & W. 63, 21 Am. Dec. 410. It would seem that the obligation of the subscriber as set forth in the contract was to make payment of his subscription upon the completion of the railway. It does not seem that he had the election of the time when he would pay. He must, however, elect at the time what he would pay, and about nine years had elapsed since the accrual of the cause of action. Upon the facts stated in the complaint, the superior court's ruling upon the demurrer is approved, and the judgment affirmed.

DUNBAR, C. J., and FULLERTON and ANDERS, JJ., concur.

(23 Wash. 777)

PEOPLE v. BRUCE.

SAME v. CHAMBERS.

(Supreme Court of Washington. Jan. 12, 1901.)
MUNICIPAL CORPORATIONS—RIDING OF BICYCLES ON TOWN STREETS—LICENSE ORDINANCE—CONSTITUTIONALITY.

Ballinger's Ann. Codes & St. § 1011, subd. 4, gave the town councils of towns of the fourth class general power to control and manage their streets, and subdivision 17 authorized such councils to make all such ordinances and regulations as might seem to further the peace, good government, and welfare of the towns. *Held*, that the councils had no power, under such provisions, to exact a license fee as a prerequisite to the right to ride a bicycle on the town streets; the streets being public highways, and the bicycle a vehicle reasonably adapted to travel thereon.

Appeal from supreme court, Chehalis county; Charles W. Hodgdon, Judge.

Andrew Bruce and L. H. Chambers were convicted of violating a town ordinance by riding bicycles on the town streets without having paid a license fee. From a judgment of the superior court reversing the convictions by a justice of the peace, the town appeals. Affirmed.

James H. Parker, for appellant. Irwin & Bridges, for respondents.

FULLERTON, J. The town of Hoquiam, a municipal corporation of the fourth class, passed in due form an ordinance making it unlawful for any person to ride any bicycle, tricycle, velocipede, tandem, companion, or vehicle of like character within the corporate limits of the town of Hoquiam, "until the owner thereof shall have paid unto the city of Hoquiam annually the sum of one dollar, and obtained a license therefor"; further making a violation of the ordinance a misdemeanor punishable by fine. The respondents were charged in separate complaints, made before a justice of the peace, with having violated the ordinance, and upon a trial were convicted and fined. From the judgments of conviction they appealed to the superior court, where the judgments were set aside on the ground that the ordinance was invalid. The town brings the cases here.

By subdivision 4, § 1011, Ballinger's Ann. Codes & St., the town councils of towns of the fourth class are given power "to establish, lay out, alter, widen, extend, keep open, open, improve, and repair streets, * * * and generally to manage and control all such highways and places"; and by subdivision 17 of the same section power is given to the town council "to make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the town." Undoubtedly, under these general provisions, municipalities of the fourth class have power to pass all reasonable ordinances necessary to a proper regulation of the use of the streets. They can prohibit, as this ordinance does, the riding of bicycles on the streets in the manner known as "coasting," or "hands off," or in excess of a reasonable rate of speed, or on certain of the sidewalks of the town, and may prescribe and enforce penalties for the violation of such regulations. But the streets of the town are, nevertheless, public highways, common to all the citizens of the state, and may be used by them for the purposes of travel in any of the recognized methods in which the highways of the state are used. A bicycle is a vehicle, within the meaning of the law, and the rider thereof on the public highways is entitled to the same rights and privileges, and is governed by the same rules, that govern persons riding or driving any other vehicle thereon. To ride a bicycle on the public highways is not of it-

self unlawful, nor is it so much in the nature of a nuisance as to require special police surveillance. A municipality, under its general powers to manage and control its streets and to pass ordinances for the good government and welfare of the town, is without power to exact a license fee as a prerequisite to the right to travel on its streets, if the method adopted be usual and reasonable, and not calculated to prevent a reasonable use thereof by others, and is without power, therefore, to require a license fee as prerequisite to the right to ride a bicycle thereon. Whether it may do so under an express statutory grant of power we do not now determine. The judgments are affirmed.

DUNBAR, C. J., and REAVIS, J., concur.

(23 Wash. 476)

GAFFNEY v. MEGRATH (STANDARD FURNITURE CO., Garnishee).

(Supreme Court of Washington. Dec. 12, 1900.)

GARNISHMENT — PETITION TO QUASH — RIGHT TO JURY TRIAL — INCONSISTENT REMEDIES — ELECTION — ESTOPPEL — SATISFACTION OF JUDGMENT.

1. On an issue as to whether a writ of garnishment should be quashed on the ground that plaintiff's judgment had been satisfied, it was not error to refuse the judgment debtor and garnishee a jury trial, since the sufficiency of the ground to quash the writ was a question for the court.

2. After the issuance of an execution on plaintiff's judgment, defendant executed to plaintiff's attorney a bill of sale for a certain quantity of brick, under an agreement that, in case plaintiff's judgment was affirmed on appeal, the brick should be held by the attorney in trust to pay a mortgage on them, and in satisfaction of plaintiff's judgment, and in consideration of the agreement the attorney recalled the execution. After affirmation of the judgment and refusal of the attorney to pay over the proceeds of the brick to plaintiff, she sued him, and obtained judgment for the value of the brick in excess of the mortgage. Held, that plaintiff's suit against the attorney estopped her from maintaining garnishment proceedings against a debtor of defendant to collect her judgment against him, since, by electing to sue the attorney, she ratified his acts, and could not thereafter pursue a remedy inconsistent therewith against defendant.

3. Plaintiff having obtained judgment against the attorney, it was error to refuse to quash the writ of garnishment, since the judgment against the attorney operated as a satisfaction of the judgment against defendant.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by Mary A. Gaffney against John Megrath and another, as principal defendants, and the Standard Furniture Company, garnishee. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant Megrath and the Standard Furniture Company appeal. Reversed.

Preston, Carr & Gilman, for appellants. Brady & Gay, for respondent.

WHITE, J. On August 19, 1899, the plaintiff, Mary A. Gaffney, filed in the su-

perior court of the state of Washington for King county her garnishment affidavit, in which she alleged, in substance, that the defendants, John Megrath and John McGough, and each of them, were indebted to her upon a judgment rendered against them, and each of them, in said court, for \$861.29, with interest at 8 per cent. from April 1, 1894, and costs amounting to \$35, and supreme court costs amounting to \$41.50, which judgment was wholly unsatisfied; and that the Standard Furniture Company, a corporation, was indebted to the defendant John Megrath in a sum exceeding the amount of said judgment. Upon the filing of a proper bond a writ of garnishment was issued, directed to the Standard Furniture Company. This writ was properly served upon the garnishee. The answer of the garnishee raised no issues which need to be considered upon this appeal. The defendant John McGough made no appearance whatever in the garnishment proceedings. The defendant John Megrath appeared in the garnishment proceedings, and filed therein a pleading denominated a "complaint in intervention," in which, for the purpose of resisting the plaintiff's claim in the garnishment proceedings, and of demanding relief adverse to the plaintiff, he set up, in substance, that after the rendition and entry of the judgment referred to in the plaintiff's affidavit for garnishment, and before the issuing of the writ of garnishment, the said judgment was fully paid and satisfied, including all costs and interest, according to the terms of the judgment; and that, although the said judgment was fully paid and satisfied, the same was never at any time satisfied upon the records of the court, and that the records of the court did not show the payments made thereon. The said pleading further charged that, after the said judgment had been fully paid, the said plaintiff wrongfully sued out the garnishment, and caused the same to be served upon the garnishee, and that there was no sum or sums whatever then due from the said defendant to the plaintiff on account of or by reason of the rendition and entry of the said judgment. In said pleading the defendant prayed that the writ of garnishment be dismissed, and that the garnishee be released from all liability by reason of the issuance and service thereof. To this pleading the plaintiff interposed a motion, by which she asked the court to require the defendant John Megrath to make the second paragraph of said pleading more definite and certain in this: "that he be required to state the time, place, and manner of the alleged payment of the said judgment." Upon the hearing of this motion the court ordered the defendant Megrath to make his pleading more definite and certain in the particular demanded by the plaintiff; and thereafter, in compliance with the order of the court, said defendant filed an amended pleading, designated as his "amended complaint in intervention." In

this amended pleading the defendant Megrath alleged that after the entry of the original judgment in the superior court of King county, Wash., in the action in which Mary A. Gaffney was plaintiff and John Megrath and John McGough were defendants, and before the determination of the appeal taken by the defendants from said judgment to the supreme court of the state, the plaintiff caused a writ of execution to issue on said judgment against the property of the defendants, and caused the same to be duly levied by the sheriff of King county on the 29th day of May, 1894, upon 460,000 bricks, the property of the defendant John Megrath, and the said bricks were of the value of \$2,000, upon which bricks there was a valid mortgage of \$436.32; that said bricks were, by the sheriff, advertised for sale, and the date of said sale fixed for the 30th day of June, 1894; that on the 30th day of June, 1894, the date fixed for said sale, said John Megrath was prosecuting an appeal to the supreme court of the state from said judgment, and that on said day, for the purpose of avoiding the necessity of the making and filing of a stay bond or supersedeas bond pending the determination of said appeal, and at the same time giving the plaintiff security for the payment of her judgment equally as good as a stay bond or supersedeas bond, and for the purpose of enabling sales to be made of the said bricks without loss to the said Megrath in respect to the value thereof, and without endangering the security which the plaintiff had by virtue of the levy of the said execution upon said bricks, the said Megrath entered into an agreement with Richard Saxe Jones, who was then the attorney of record of the plaintiff in the said action of Mary A. Gaffney against John Megrath and John McGough, as follows: It was agreed that said Megrath should make, execute, and deliver to the said Jones, as the attorney of the said plaintiff, and in trust for the benefit of the said plaintiff and the said Megrath, a bill of sale of said bricks; and that the title to the said bricks, until the same were sold, should remain in the said Jones as trustee; and that the said bricks should remain where they then were, on the land of said Megrath; and that sales of the said bricks should be made by the said R. S. Jones and said Megrath, and that all proceeds of the sales of said bricks should be paid to the said Jones and by him received in trust; and that the proceeds of such sales should be by the said Jones applied, first, towards the payment and satisfaction of the said mortgage on said bricks, which mortgage the said Jones claimed to have purchased on the said day; and that the balance of the proceeds of the sales of said bricks should be deposited by the said Jones in a depository to be agreed upon between himself and the said Megrath, and there held until the final determination of the appeal of said action; and that, in case the said judgment should

be affirmed by the supreme court, or the said plaintiff should obtain any final judgment in said action against the said John Megrath, then the proceeds of the sale of said brick, over and above the amount required to discharge said mortgage, should be applied to the satisfaction of such judgment; and that any balance of said proceeds after the payment of said mortgage and said judgment should be paid to the said Megrath; and that upon the execution of the said bill of sale and of a written agreement of the tenor above stated the execution issued upon said judgment should be recalled, and the levy made thereon released; and that pending the final determination of said action no execution should be issued on said judgment, but that the said bill of sale, under the said agreement, should have all the force and effect of a stay or supersedeas bond. It was further alleged by the said Megrath that at the time of making this agreement he had implicit confidence in the honesty and integrity of the said Richard Saxe Jones, and by reason of his said confidence intrusted the preparation of all of the writings necessary to carry said agreement into effect to the said Jones; that in pursuance to said agreement the said Jones prepared a bill of sale from said Megrath to himself of the said bricks, which said Megrath duly executed and acknowledged, and thereupon the said Jones, as the attorney for the plaintiff, recalled the said execution, and procured the release of the said levy; that at the same time the said Jones prepared a written instrument, which he informed Megrath truly recited the terms of the said agreement regarding the selling of said bricks, and the disposition of the proceeds arising from sales thereof, and that Megrath, relying implicitly upon the honor, honesty, and integrity of the said Jones, and believing his representations as to the contents of said written agreement, signed the same without making or causing to be made an examination as to its contents; that the said Jones fraudulently, and for the purpose of cheating and defrauding Megrath, prepared the instrument in the manner shown by the full copy of said agreement set out in the said pleading. The particular in which it is charged in the amended pleading that the written instrument, after reciting the execution of the bill of sale from Megrath to Jones of the bricks, and the conditions under which the bricks should remain, and under which sales could be made by Jones and Megrath, and after providing for the payment of the mortgage from the proceeds of sales, provides as follows: "And, second, that the said brick, and the balance of the said sum so derived from the said brick, shall be subject to the payment of the judgment in favor of the said Mary A. Gaffney, so far as the same may apply, and that the said last-mentioned sum (if any such there shall be) shall be held in such depository until the time for the appeal from such

judgment shall have expired, in case no appeal is taken, or until the final decision of such appeal, should one be taken, in the supreme court of the state of Washington; and if, on such appeal, the said judgment shall be reversed, the said money so on deposit shall be the property of the said John Megrath, but, if said appeal shall not be taken, or shall in any way be dismissed, or if, on such appeal, the said supreme court shall find that the said Mary A. Gaffney is entitled to judgment against the said John Megrath for as much or more than the said sum so on deposit, then the said sum shall be the property of the said Jones." It is further alleged in said amended pleading that Megrath did not discover the fraud and deceit which had been practiced upon him by said Jones until after all of the bricks had been sold, and that after the making of the agreement, and before Megrath discovered the fraud and deceit which had been practiced upon him, the said Jones sold a portion of said bricks, for which he received the sum of \$1,030, and that Megrath sold a portion of said bricks for the sum of \$275, which was paid to said Jones, and that Jones, without the knowledge or consent of Megrath, converted to his own use the remainder of said bricks, which remainder were of the value of \$700; that after the sale and conversion by Jones of all the bricks Megrath demanded an accounting of him in regard to the bricks and the proceeds thereof, and demanded that Jones apply a sufficient amount of the proceeds of the sales of said bricks to the payment and satisfaction of the Gaffney judgment, and that he pay to him the balance of the proceeds and value of said brick remaining after the payment and discharge of said mortgage and said judgment, which demands Jones refused, claiming that the agreement between him and Megrath was as stated in the last clause of the written instrument, and that all of the proceeds of the sales of said bricks, including the value of the bricks converted by Jones to his own use, were the sole property of him, the said Jones, individually, and not in trust for the purposes contemplated by the agreement between him and Megrath. It is further charged that thereafter the dispute between Megrath and Jones regarding the said brick and the proceeds thereof was submitted to arbitration, and the arbitration between them, as Knights Templar belonging to Seattle Commandery, No. 2, was upon the following questions: "Who owns the said brick, John Megrath or R. S. Jones? And, if the said arbitrators shall decide that the said R. S. Jones is the owner of said brick, what is he to do with the money arising from said brick under the contract?" And further showing an award upon said agreement as follows: "First. That the brick in controversy, or the proceeds thereof, are the property of R. S. Jones. Second. That the value of said brick was \$1,526.25; the amount of money advanced by

R. S. Jones, with interest one year, was \$540.64; amount of money or value of brick Jones had use of about one year, \$985.61, with interest, \$1,085.61. Third. Whereas, both the parties are Knights Templar and Masons in good standing, and considering that Masonic charity should ever be exercised and maintained between members of the order, that it is better to make a sacrifice than to stand for the strict letter; and whereas, strong differences have arisen between these two men as to the meaning and effect of certain instruments in writing which they signed affecting the brick in controversy, that the value of the brick or the proceeds thereof should be disposed of as follows: (a) R. S. Jones to reimburse himself for money advanced to the amount of \$540.64, and satisfy the chattel mortgage which he purchased; (b) also satisfy Mrs. Gaffney's judgment against John Megrath." It is then further alleged in the said amended pleading that the plaintiff, Mary A. Gaffney, had full knowledge and notice of the agreement between Megrath and Jones regarding said bricks, and the application of the proceeds of the sales thereof, and had full knowledge of the dispute which arose between Megrath and Jones regarding the true meaning of said agreement, and had full knowledge and notice of said arbitration and the said award, and that the said plaintiff, having such full knowledge and notice regarding all of said matters, adopted, ratified, and confirmed the acts of the said Jones, and ratified and confirmed the making of the said agreement regarding the holding and sale of the said bricks and the application of the proceeds and value thereof, as the truth of the said agreement was established by the award of said arbitrators; that the said Jones failed and refused to comply with the terms of said agreement, and failed and refused to perform the award made by said arbitrators; that, after the making of the said agreement, and after the award made by the said arbitrators, the said plaintiff, Mary A. Gaffney, brought an action in the superior court of King county against the said Jones for the purpose of recovering the amount which was then claimed to be due and unpaid upon her said judgment against Megrath, to wit, \$896.29, with interest thereon at the rate of 8 per cent. per annum from the 26th day of May, 1894, which amount the said plaintiff claimed and alleged in her said complaint against the said Jones that the said Jones had obtained and received from Megrath in payment of said judgment under and by virtue of the agreement between Jones and Megrath (which has been above referred to), which agreement the said plaintiff, in her complaint in said action, claimed and alleged had been made by the said Jones as her attorney and for her benefit; that the said Jones answered the said complaint, denying liability to the said plaintiff, and that upon a trial of the said action of Mary A. Gaffney against Richard Saxe

Jones judgment was rendered in the said superior court in favor of Mrs. Gaffney and against Jones for the amount then found by the jury to be due and unpaid on said judgment, to wit, the sum of \$829.28; that the said Jones prosecuted an appeal from judgment, to wit, the sum of \$829.28; that the that upon a hearing of the said appeal the judgment was in all respects affirmed.

Upon the facts above recited it was alleged by the said Megrath in his amended pleading that the judgment in favor of the plaintiff and against him and his co-defendant, John McGough, was fully paid and satisfied, including all costs and interest, according to the terms of said judgment, but that the same had not been satisfied upon the records of the court, and that the said records did not show the payments made thereon; and the said Megrath prayed that the writ of garnishment be dismissed, and that the garnishee be released from all liability thereon. To this amended pleading the plaintiff filed a motion asking the court to strike certain portions thereof, which motion was denied, and thereupon the plaintiff filed a general demurrer to the said amended pleading, which demurrer was by the court overruled. Thereafter the plaintiff answered this amended pleading, denying that the plaintiff's judgment against Megrath and McGough was wholly unpaid. Megrath filed a reply to this answer, denying the affirmative allegations regarding the judgment. Upon the trial the defendant Megrath and the garnishee demanded that a jury trial be had of the issues between the defendant Megrath and the plaintiff, which demand was opposed by the plaintiff. The demand for a jury trial was refused by the court, and thereupon the court, over the exception and against the protest of Megrath and the garnishee, proceeded to hear and determine said issues without a jury. After the trial of the action, and before any findings of fact and conclusions of law had been made or signed, the defendant Megrath and the garnishee presented to the court certain proposed findings of fact following the allegations of the defendant Megrath's amended pleading above referred to, and conclusions of law resulting from said facts, and requested the court to make and sign the same, which request was refused as to each and every of the said findings of fact and conclusions of law. Thereupon the court made and entered written findings of fact and conclusions of law to the effect that on the 10th day of May, 1895, the plaintiff obtained judgment in said court against the defendants, John Megrath and John McGough, and each of them, for the sum of \$861.29, with interest and costs, and that no part of said judgment had been paid except the sum of \$492, which was obtained by the plaintiff's attorney, Richard Saxe Jones, as the net proceeds of certain brick turned over by the said Megrath to the said Jones, and that there was then due and unpaid on the

said judgment the sum of \$568.83, and that the garnishee was indebted to Megrath in a sum in excess of that amount; and as a conclusion of law that the plaintiff was entitled to judgment against the garnishee for the sum of \$568.83. Thereafter, within the time limited by law, the defendant Megrath and the garnishee filed their written exceptions, whereby they duly excepted to the making of each of the findings of fact made by the court, and to the making of the conclusion of law made by the court, and wherein they duly excepted to the refusal of the court to make each of the findings of fact and conclusions of law requested by them. Thereafter, within the time limited by law, the garnishee and the defendant Megrath duly moved for a new trial, which motion was by the court denied, to which denial due exception was taken and allowed. Thereafter the court signed a judgment entry containing findings to the effect that there was due and unpaid on the plaintiff's judgment the sum of \$568.83, and that the garnishee was indebted to Megrath at the time of serving and filing its answer to the writ of garnishment in a sum in excess of this amount, and adjudging that the plaintiff, Mary A. Gaffney, have and recover from the garnishee the sum of \$568.83, with interest and costs. From this judgment the defendant Megrath and the garnishee, the Standard Furniture Company, a corporation, have appealed.

The first error assigned is that the court erred in denying the demand of the defendant Megrath and the garnishee for trial by jury of the issues of fact made between the defendant Megrath and the plaintiff. The pleading called "amended complaint in intervention" is, in effect, a petition to the court setting forth facts which, if true, would not only authorize, but require, the court to recall and quash the writ of garnishment. The writ of garnishment is in aid of the writ of execution. It is well settled that it is a ground for quashing an execution that, before it was issued, the judgment which is relied upon as authority for its issuance had been paid. The supreme court of Illinois, in *Sandburg v. Papineau*, 81 Ill. 446, says: "There is no principle of law better recognized than that which gives to courts of record power over the process of their courts. It is essential to the administration of justice, and it by no means depends upon statutory enactment; but the power is coeval with the common-law courts, and such courts will recall their process, and quash the same, when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced. If a judgment were satisfied, and, through mistake or by design, an execution were to issue upon it, does any one suppose the court from which it issued is powerless to recall and quash it?" The judgment debtor, upon the issuance of either a writ of execution or a writ of garnishment upon a judgment that

has been satisfied, has the right to petition the court to recall the writ, and it is the duty of the court on such petition to inquire into the facts set forth, and to render judgment thereon as the rights of the case demand. *Harkins v. Clemens*, 1 Port. 30; *Anthony v. Shannon*, 8 Ark. 52; *Harper v. Graham*, 20 Ohio, 106; *Walrath v. Walrath*, 27 Kan. 395; *Sandburg v. Papineau*, supra. Regarding the so-called amended complaint in intervention as a petition to the court to recall and quash the writ of garnishment, we think it was for the court, and not for a jury, to determine whether there existed sufficient grounds, legal or equitable, for the exercise of this power; and hence no error was committed by the court in refusing a jury trial.

The second assignment of error is that the court erred in finding that there was due upon the judgment rendered in favor of Mary A. Gaffney against John Megrath and John McGough the sum of \$568.83, and erred in finding that there was any sum whatever due on said judgment. The evidence in this case shows that as early as February, 1896, Mrs. Gaffney knew of the contract between Jones and Megrath and the decision of the arbitrators set out in the petition. After trying to get Jones to pay to her the amount of her judgment against Megrath and McGough, and failing therein, on or about the 30th of June, 1896, she commenced an action in the superior court of King county, by Allen & Powell, as her attorneys, alleging, in substance, her employment of Mr. Jones as her attorney in her suit against Megrath and McGough, the recovery of a judgment for \$1,161.29 and costs on the 26th of May, 1894, in that suit, the issuing of a writ of execution on that judgment at the instance of Jones, and the levy of the same on May 29, 1894, upon 460,000 brick, the property of Megrath, which she alleges were of the value of \$2,000; that said brick were advertised by the sheriff for sale on her execution; that, prior to the time of sale, Jones, as her attorney, but without her knowledge or consent, directed the sheriff to release the brick from the levy of the writ, and that the sheriff did so, and returned said writ unsatisfied; that Jones, without her knowledge or consent, entered into an agreement with Megrath whereby Megrath, under a bill of sale, delivered the brick to Jones, and as a part of the same transaction made the agreement which is set out in the petition herein. She further alleges that Jones took possession of the brick without her knowledge or consent; that said brick were of the reasonable value of \$2,000; that he sold a part for \$1,030; that a part were sold by Megrath for \$275, and the money turned over to Jones, and that the remainder of the brick, of the value of \$700, were used by Jones in improving his own property. She further alleged that Megrath and McGough prosecuted an appeal on the original judgment, and that it was modified by the

supreme court so that the final judgment was for \$861.29 and costs. She further alleged that she had demanded of Jones that he pay her the value of the brick, that he apply the proceeds derived from the sale of brick upon her judgment, and that he pay to her the amount of the judgment and costs, with interest at 8 per cent. per annum from the date of the judgment; and she prayed judgment against Jones for the amount of the Megrath-McGough judgment, with interest at 8 per cent. per annum from date thereof. Jones denied that he had entered into the agreement with Megrath as attorney for Mrs. Gaffney, but alleged it was solely for himself; and he further alleged that the agreement did not properly and truly express the agreement made between McGrath and Jones. He further alleged that Mrs. Gaffney had no interest in the agreement. He admitted that there were 407,000 brick, but no more, and he denied that they were worth any more than \$1,000. He denied the sale of the brick for the sums alleged by the plaintiff, and he denied any improvement to his own property by the use of the brick. He claimed that the writ of execution was released at Mrs. Gaffney's request. It is not necessary to set out any more of the answer. A trial was had in the superior court in the case, which resulted in a verdict and judgment in favor of Mrs. Gaffney against Jones for \$820.28. An appeal was taken to this court (Gaffney v. Jones, 18 Wash. 311, 51 Pac. 461), and the judgment was affirmed. Megrath at all times claimed that the transfer of the brick to Jones was to secure the payment of the Gaffney judgment against him and McGough in case the supreme court affirmed the same. When Mrs. Gaffney was fully informed of the entire transaction, she assumed the same position taken by Megrath, and brought the suit referred to against Jones to recover not only the money realized by Jones in the sale of a part of the brick, but the value of the remainder of the brick, which she alleged went to improve the property of Mr. Jones. The mortgage on the brick, which was prior to the lien of the execution of Mrs. Gaffney, was for \$437.32, and Jones had paid sheriff's costs and other costs on the execution, amounting to something like \$60; making in all about \$500. In the case of Gaffney v. Jones, supra, the court charged the jury as follows: "If you believe, from a preponderance of the evidence in this case, that the defendant, Jones, has taken, sold, or otherwise disposed of any or all of the brick described in the pleadings, and that the value of such brick, if any, at the time they were acquired by the defendant, exceeds the sum of \$500.20, then you will find a verdict for the plaintiff against the defendant for the amount of such excess; provided, however, that you will not find for the plaintiff in a sum greater than \$861.29, with interest thereon at eight per cent. per annum from May 26, 1894, to this time. Should you find, from a preponderance

of the evidence in this cause, that there was no such excess, you will find a verdict for the defendant." The court, in delivering its opinion, speaking of the bill of sale and agreement set out in the petition, says: "It is true that in this bill of sale, or agreement, or whatever it may be called, between the appellant and Megrath, it is stated that under certain conditions the proceeds of the brick are to be applied upon the judgment of Mrs. Gaffney; and, if this plan had been carried out, and the appellant had received the brick for the respondent's use and benefit, and sold them as her agent or trustee, then an accounting would be required, and he would be responsible only for what he received for the brick. But the whole record shows that the appellant treated these brick, after he bought them of Megrath, as his own, and that he eliminated the respondent's interest from them entirely. In fact, he frankly testifies that he did not consider that Mrs. Gaffney had any interest in the deal, and that the purchase of the brick was his deal. This being admitted, and it being true, as we think, that the respondent was deprived of the right she had in the brick by the action of the appellant, there was nothing left for the jury to determine but the amount of damages under the instruction of the court." After Jones came into possession of the brick, he disavowed his agency. The disavowal made him none the less an agent under the agreement. His principal treated this disavowal and the subsequent sale of the brick on his own behalf as a wrongful conversion of the brick by Jones, and she then sued him for their value to the extent of her demand against Megrath, and thereby made the agent's acts in entering into the agreement her own acts. Mrs. Gaffney is certainly estopped by her suit against Jones from denying that Jones received the brick in her interest, for her benefit, and as her agent. She claimed in that suit that whatever Jones did about the brick he did as her attorney, but without her knowledge or consent. Section 4766, 2 Ballinger's Ann. Codes & St., reads as follows: "An attorney and counsellor has authority,—1. To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of or any of the proceedings in an action or special proceeding, unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney. 2. To receive money claimed by his client in an action or special proceeding during the pendency thereof, or after judgment upon the payment thereof and not otherwise, to discharge the same or acknowledge satisfaction of the judgment. 3. This section shall not prevent a party employing a new

attorney, or from issuing an execution upon a judgment, or from taking other proceedings prescribed by statute for its enforcement." Counsel for respondent claims that under this section Jones had no authority to receive the brick in payment of the judgment of Mrs. Gaffney against Megrath and McGough. There is no doubt that Mrs. Gaffney herself could have entered into the arrangement that Jones entered into with Megrath. And while it may be conceded that under the limited power given to an attorney by the statute he could not make such an agreement so as to bind his client, yet, if he did make such an agreement, and it was afterwards ratified by his client, it would be as binding on the client as if made by the client in the first instance. By ratifying the unauthorized act, the principal assumes and adopts it as his own. This adoption extends to the whole of the act. It goes back to its inception, and continues to its legitimate end. The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given. The principal cannot avail himself of the benefit of the act, and repudiate its obligations. Having, with full knowledge of all the material facts, ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort, and whether it results to his advantage or detriment. *Mechem, Ag. § 167.* The methods by which a ratification may be effected are as numerous and as various as the complex dealings of human life. *Id. § 149.* When the principal knowingly accepts of security taken by an agent in pursuance of an arrangement made with the debtor, the arrangement so made will be deemed to be ratified. *Keeler v. Salisbury, 33 N. Y. 648.*

In the case at bar the principal treated the bill of sale and agreement between Megrath and Jones as transferring the brick to her agent for her benefit, and, the agent having failed to account to her for them, she sued him for their value to the extent of her interest in them, and this was a prima facie ratification of the acts of the agent in receiving them from Megrath under the agreement heretofore referred to. Where an agent without authority had consigned his principal's goods for sale, and the principal brought an action against the agent for the price and value of the goods so consigned, it was held to be a prima facie ratification of the consignment. *Frank v. Jenkins, 22 Ohio St. 597.* Megrath at all times claimed that the delivery of the brick to Jones was for Mrs. Gaffney's benefit in case her judgment against him and McGough was affirmed. Mrs. Gaffney knew this before she brought suit against Jones. Had she declined to ratify the agreement, Megrath would have been at once in a position to have brought suit

against Jones for the value of the brick. By her suit against Jones she made her election, and justice requires that she should adhere to it. It is a well-settled rule of law that, where there exists an election between inconsistent remedies, a party is confined to the remedy which he first adopts. *Rodermund v. Clark, 46 N. Y. 354; Morris v. Rexford, 18 N. Y. 552; Brown v. Littlefield, 11 Wend. 467; Moller v. Tuska, 87 N. Y. 166; Hanly v. Kelly, 62 Cal. 155; Hanchett v. Distillery Co., 15 Ill. App. 57.* In *Rodermund v. Clark*, supra, the defendant, Clark, who was the sole owner of a sloop, sold an undivided one-half of her to Ward, and agreed to put him in possession of the vessel in the spring of 1863, and afterwards delivered possession of the sloop to Ward as part owner and as captain, and Ward had possession of her from that time until the winter of 1865-66, and navigated her for the joint benefit of himself and Clark. During the winter of 1865-66 the vessel was laid up. On the 10th of February, Clark, having previously advertised her for sale, sold the entire vessel at public auction. Ward forbade the sale of his half. At the time of the sale the sloop could not be removed, being inclosed in the ice. She remained there until the opening of navigation, when Ward commenced to run her again. After making two trips with her, the purchaser at the sale commenced an action against him to recover possession of the sloop, and she was seized by the sheriff. Ward gave a counter bond, and she was redelivered to him. So far as the records of the custom house showed, the title to the entire vessel was in Clark. Afterwards the purchaser libeled the sloop as owner in the United States district court, claiming her under his purchase from Clark, and she was seized by the marshal, and taken from Ward. The purchaser obtained a judgment in that proceeding by default, and the marshal delivered the sloop to him. The default was afterwards opened, but the purchaser retained the sloop, and she never came back to the possession of either Ward or the plaintiff. Ward gave the plaintiff an assignment of all his interest in the vessel, and of all causes of action against Clark for selling the sloop, and the plaintiff sued Clark to recover damages for the conversion of Ward's half interest in the sloop. The court says: "When, then, the defendant afterwards sold the whole of the sloop to Malcolm, ignoring the rights in her of Ward, his act authorized Ward to sue for a conversion of the property, * * * and this although the sloop was not put beyond the reach of Ward. * * * Ward then had two courses, either of which he might pursue: He could sue the defendant for the conversion, or he could assert his right of possession by keeping a permanent possession, or regaining possession if it was interrupted. The effectually taking of either of these two courses precluded him from taking the other. * * *

Ward had taken his position. He had chosen to assert, and to act upon the assertion, that the defendant had no right to sell the whole of the sloop, and that his attempt to do so had not divested, and should not divest, the interest of Ward in her. In our judgment, he had then gone so far as that he could not afterwards entirely change his position, and that neither he nor the plaintiff, his assignee, recognizing the act of the defendant as having worked the destruction of his half of the sloop, could yield to the claim of Malcolm, asserted in the action in the United States court, submit to the seizure in the behalf of Malcolm of the vessel in that action, and then have a right of action against the defendant for the conversion. The mode Ward had first chosen had, until then, been effectual to preserve to him his property and the possession of it; and when that was interfered with by Malcolm in his suit in the United States court it was the duty of Ward and the plaintiff not to abandon the property, but to persist in a defense of his right. Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. * * * Any decisive act of the party with knowledge of his rights and of the fact determines his election in the case of conflicting and inconsistent remedies." *Morris v. Rexford*, supra, was an action of assumpsit for goods sold and delivered. It was shown that after the sale and delivery of the goods the plaintiff had brought two actions of replevin for the recovery of their possession for failure to pay the purchase price. Held a disaffirmance of the sale, and evidence in bar of a subsequent action for the purchase money. The court says: "The law tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price. In peculiar circumstances a party may take either one of these courses, but, having rightfully made his choice, the right to follow the other is extinct and gone." It might well be said in the case at bar that the law would tolerate no such absurdity as the recovery of a judgment by Mrs. Gaffney against her attorney, Jones, upon a claim that Jones, as her attorney, had received from Megrath, her judgment debtor, payment of her judgment, and the subsequent enforcement by her of her judgment against Megrath upon the claim that the transactions between Megrath and Jones were unauthorized in law or in fact. In *Hanly v. Kelly*, supra, it appeared that in a former action between the plaintiff and the defendant, James Kelly, the plaintiff had alleged the deposit with Kelly, in trust, of the sum of \$600, to be returned upon demand,

and that demand had been made and refused. In that action he recovered judgment against Kelly for the sum of \$600, with interest and costs. In this action he pleaded this judgment, and its nonpayment, and averred that the said sum of \$600 of trust money had been invested by Kelly in part payment of a lot of land on which he had afterwards filed a declaration of homestead. He asked that a trust be established in his favor for an interest in the land equal to the proportion which the \$600 bore to the whole purchase price. The trial court sustained demurrers to the complaint, and the appellate court said: "The demurrer to the third amended complaint was properly sustained. * * * For aught that appears, the investment was made with full knowledge on the part of plaintiff before the action was brought to recover the amount deposited, with interest, which resulted in the judgment at law; and facts are alleged showing that plaintiff had complete information with respect to the amount and condition of the trust fund. Under such circumstances plaintiff must be held to have elected his remedy at law, and to be estopped from pursuing in equity the fund into the homestead." In *Hanchett v. Distillery Co.*, supra, it is said: "Where one purchases goods upon false representations as to his financial ability, and the vendor, in reliance upon such representations, makes a sale, such a sale is voidable at the option of the vendor, and he may either rescind the contract and sue to recover back the goods, or he may sue for the purchase money according to the contract of purchase. But a suit brought by the vendor against the vendee for the price of the goods with knowledge of the fraud by which the sale was effected affirms the sale, and he cannot thereafter rescind the same. The election to rescind or not rescind, being once made, is final and conclusive." Where two inconsistent remedies are open, an election to pursue one estops a party from thereafter pursuing the other. *Button v. Trader* (Mich.) 42 N. W. 834; *Connihan v. Thompson*, 111 Mass. 270; *Washburn v. Insurance Co.*, 114 Mass. 175; *Black v. Miller* (Mich.) 42 N. W. 837; *Thomas v. Joslyn* (Minn.) 29 N. W. 344; *Steinbach v. Insurance Co.*, 77 N. Y. 498; *Seanor v. McLaughlin* (Pa. Sup.) 30 Atl. 717; *Rogers v. Green*, 35 Tex. 730; *Arbuckle v. Hawks*, 20 Vt. 538. In *Steinbach v. Insurance Co.*, supra, the plaintiff had brought an action in the state of Maryland upon a policy of fire insurance, which action had been removed to the United States circuit court, in which court he was defeated upon the ground that there had been a breach of a condition of the policy prohibiting the keeping of fireworks. Afterwards he brought this action in the New York court, asking a reformation of the policy by inserting therein a permission to keep fireworks, on the ground that said permission was omitted from the policy by mistake, and to recover

upon the policy as thus reformed. The court said: " * * * The plaintiff, having elected to sue upon the contract as it was, and been defeated, is bound by that election, and cannot now maintain this action to reform the contract." The institution of a suit is such a decisive act as to determine an election. *Connihan v. Thompson*, 111 Mass. 270; *Butler v. Hildreth*, 5 Metc. (Mass.) 49; *Kimball v. Cunningham*, 4 Mass. 502; *Washburn v. Insurance Co.*, 114 Mass. 175; *Thompson v. Howard*, 31 Mich. 308; *Kenyon v. Woodruff*, 33 Mich. 310. Conceding that the acts of Jones were wholly unauthorized, the plaintiff ratified them by bringing her action against him. *Knowlton v. School City of Logansport*, 75 Ind. 103; *Kyser v. Wells*, 60 Ind. 261; *Eadie v. Ashbaugh*, 44 Iowa, 519; *First Parish in Sutton v. Cole*, 3 Pick. 232; *Meyer v. Morgan*, 24 Am. Rep. 617; *Walker v. Railroad Co.*, 34 Miss. 245; *Bank v. Conrey*, 28 Miss. 667; *Corser v. Paul*, 77 Am. Dec. 753; *Benson v. Liggett*, 78 Ind. 452. In *Knowlton v. School City of Logansport*, supra, it was decided in the action for conversion that plaintiff, by suing, ratified the defendant's act in making collection of money for plaintiff. Why is it not equally clear that in suing Jones for the value of the brick Mrs. Gaffney ratified his action in receiving them from Megrath to the extent of making his act in taking them and agreeing to account for the proceeds of their sales her act, thus making her answerable to Megrath for the value of the brick by reason of Jones' breach of trust, which trust she had elected to declare was assumed by him for her benefit?

As to the value of the brick received by Jones under the agreement: The quantity was about 407,000. In the suit of Gaffney v. Jones, supra, the jury found, in effect, that the value of the brick was \$829.29 in excess of \$500.20. That would make the value, according to the verdict of the jury under the instructions of the court, \$1,329.48. But it must be remembered that Megrath was not a party to that action, and it is open for him in this proceeding to prove the value of the brick. His evidence is all there is in the case as to value, unless the testimony of Mr. Jones as to what he sold the brick for may be considered in that connection. Mr. Megrath puts the value of the brick at \$1,723.50. Mr. Jones says he sold the brick for \$1,000 to Mrs. Judd, a client of his, because he was in need of money; but he shows that he received in cash for Mrs. Judd from others to whom he sold for her about \$1,132.50, and, in addition to that, 124,700 of the brick went into Mrs. Judd's house at Ballard. The evidence shows that these brick were worth from \$4 to \$4.50 per 1,000 at the least. Taking the testimony all together, it is clear to us that the brick, when delivered to Jones, were worth more than enough to pay the mortgage on them, the costs assumed by Mr. Jones, and the judgment of Gaffney against Megrath and McGough, as finally de-

termined by this court. That being the case, from our view of the law as herein expressed the respondent's judgment against Megrath and McGough has been fully satisfied. The writ of garnishment against the Standard Furniture Company on that judgment was improvidently issued. The judgment of the court below against the Standard Furniture Company and in favor of the respondent is therefore reversed. It is further ordered that said writ of garnishment be quashed and set aside, and that the appellants recover their costs herein.

DUNBAR, C. J., and FULLERTON, REAVIS, and ANDERS, JJ., concur.

(23 Wash. 673)

CROSS et al. v. CROSS et al.

(Supreme Court of Washington. Jan. 3, 1901.)

WILLS—CONSTRUCTION—UNCERTAINTY OF INTENT.

An illiterate testator, drawing his own will, first distinctly devised \$1,000 to his wife, if living, and \$300 each to granddaughters named, if living, "and, if not living, to their heirs, if any, living, and, if none living, it shall fall to the following named heirs," naming them, but not including the wife or grandchildren before mentioned. He then concluded, "I also appoint the above-named heirs to choose their own executor." Held, that his intent beyond the bequests was not ascertainable, and that as to the residue of his property he died intestate.

Appeal from superior court, Columbia county; Thomas H. Brents, Judge.

Petition by Lemira Cross and others against Solomon Cross and others for the construction of a will. Petitioners appeal from the decree. Reversed, with directions.

Will H. Fouts, for appellant Mohmdro. Edmiston & Miller, for appellant Lemira Cross. Sturdevant & Brown, for respondents.

REAVIS, J. This suit involves the construction of the following will:

"I M. Cross, sr. of Dayton Co of Columbia Washington Territory
piling up a farmers' Earnings.
Make this my last will.

I give devise bequeath my estate and property Real and Personal as follows

that is to say after my debts and Funeral expenses is all paid
I bequeath to my wife if living
first one thousand, 1000, Dollars.
and to Malvina Miller Louisa Donaldson
and Lively Fuller all the Daughters of Zepaniah Deceased three 300 hundred Dollars each if living and if not living
to their heirs if any living

and if none living
it shall fall to the following named
heirs of the said M. Cross, sr. if living
and if not living their propotionable part

to be divided equally among their Lawful heirs. to witt.

W. N. Cross, Lucinda Crall.

Solomon Cross, James H. Cross.

Mary E. Vallen, and M. Cross, Jr.

I also appoint the above named heirs to choose their own Executor in witness whereof I have signed and sealed and Published and declared this

Last will

instrument as my ^A at Dayton Columbia County Washington Territory.

Signed and Sealed. M. Cross sr. (eal)

this the 27th day of Dec. 1887

this said will dated at Dayton

Columbia Co Washington, Territory

on this the 27 day of December 1887 signed and sealed this instrument and published and declared the same as and for his last will and we at his request and in his presence and in the presence of each other hereunto written our names as subscribing witnesses.

"D. C. Guernsey.

"F. W. Guernsey."

The superior court construed the testator's intention to devise to the wife, Lemira Cross, \$1,000, and to Lively Fuller, Melvina Miller, and Louisa Donolson the sum of \$300 each, and all the rest, residue, and remainder of the estate to Solomon Cross, W. N. Cross, James H. Cross, M. Cross, Jr., Lucinda Crall, and Mary E. Vallen, share and share alike, and made the order of distribution in accordance with such construction. The persons mentioned in the will were all living at the death of the deceased. The deceased and Lemira Cross were married in 1884. The will was executed in 1887. There was no issue of the marriage, but each had children by former marriages, all of whom were of age, and living separate and apart from their parents. The testator died in September, 1896. The will is entirely in his handwriting, and the estate left is of the value of \$40,000. The "Zepaniah deceased" mentioned in the will was the son of the testator, and the three daughters of "Zepaniah" are the granddaughters of the testator. Some testimony was heard by the court, which tended to show that deceased was careful and prudent in his business transactions, and that the relations existing between deceased and his family and that of his wife were friendly. The opinion of the learned judge of the superior court is included in the record, and it may be conceded that some of the authorities mentioned go to the extent of supporting the conclusion of the court, or rather supporting the proposition that the court must find the testator's intent to devise his estate differently from the distribution made by the statute of descents; and counsel for respondents have cited many cases illustrating the application of the accepted canons for the interpretation of wills. There is no substantial controversy in the authorized rules for the interpretation of wills.

63 P.—34

Our statute (section 4614, Ballinger's Codes & St.) declares: "All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." It is true that, in the interpretation of the will, words, phrases, or sentences may be transposed, and may be added to or taken from the will, when it becomes necessary in order to find the true intent and meaning of the testator, and to carry that intent and meaning into effect. It is also true that the presumption exists that the testator devises his whole estate when he makes his will; and we think the language of the will under consideration indicates that the testator had in mind the disposition of his entire estate. The case of *Murphy v. Carlin*, 113 Mo. 112, 20 S. W. 786, cited by respondents, states the principle very well: "The true intent and meaning of the testator can be best ascertained by the courts and those concerned in the execution of wills by putting themselves, so far as may be, in the place of the testator, and reading all his directions therein contained in the light of his environment at the time it was made." There are also other principles which are present at the construction of a will. As said in *Wilkins v. Allen*, 18 How. 385, 15 L. Ed. 396: "The rule of law gives the estate to the heir unless the will takes it from him, and in order to take it from him it must give it to some other person." It is urged by counsel for the respondents that the pronoun "it" in the seventeenth line of the will should have for its antecedent "estate"; that the disposition of \$1,000 to the wife and \$300 each to the granddaughters, being specific bequests to the heirs mentioned, allows the inference that the other six children of the deceased mentioned should take the residue of the estate; that the pronoun should be taken apart from its grammatical significance, because the testator's language indicates that he was illiterate, and had not an accurate knowledge of the use of words and the construction of sentences. It is conceded that the antecedent of the pronoun "it" in its logical connection would be the \$900 devised to the three granddaughters, but, if the antecedent of the pronoun, according to the conjecture of counsel, is the estate, then a fair conjecture might be that a contingency was in the contemplation of the testator; that is, if the wife and granddaughters nor their heirs were living at the death of the testator, the whole estate would go to the six children mentioned in the last clause. But such provision would take care of only the \$1,000 devised to the wife and the \$900 to the three grandchildren; for the residue of the estate on the demise of the persons mentioned would, under the law, pass to the six children. But, in the contingency that some of them were living at the time of his death, there is nothing said of any portion of the

estate other than the \$1,900 which was carved out. It was said in *Wright v. Hicks*, 12 Ga. 155: "In the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent or direct it in a different course should require plain words to that effect." Mr. Jarman, in his work on Wills (page 465), says: "The heir is not to be disinherited unless by express words or by necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." The testator seems to have followed one thought in his devise. That was to bequeath to his wife and the three grandchildren. The \$1,900 is carved out, and specifically disposed of, even to the contemplation of the residuary legatees. No mention or intimation of any other portion of the estate is specified. We fully realize the duty of the court to diligently inquire into the words of the will, and the environment of the testator, if those words are not clear, to determine his intention; and that such intention, when ascertained, must be given effect. But the court ought not to make a will; and while the inference, as stated, is that the testator intended to devise his whole estate, it is equally necessary that the persons to whom it is devised should be indicated. We cannot, from this will, gather such intention. It would be mere conjecture. It would be the direction of the court, rather than that of the testator. It may be well to consider that in this state nonintervention wills are not infrequently executed, and powers given to executors, so that the administration may not be within the probate court. The natural and ordinary distribution of the estate is according to the statute of descents, and the presumption that the execution of a will meant that the testator intended to devise his estate to other than the heir probably had greater force in ancient times, when the inequality of the larger inheritance of the heir was recognized. Here the testator seems to have distinctly devised \$1,000 to his wife and \$300 each to his granddaughters, and either to have been satisfied with the lawful distribution of the residue, or to have omitted any further reference to it. At any rate, there is no intelligible designation of the objects of further bounty, and, as has been observed, the court cannot enter into the field of conjecture, and itself determine who should take the estate. The cause is reversed, with direction to the superior court to distribute the estate as follows: \$1,000 to the wife, \$300 each to the granddaughters, and the residue of the estate to the heirs according to the law of descents.

DUNBAR, C. J., and ANDERS and FULLERTON, JJ., concur.

(23 Wash. 706)

GRAY'S HARBOR CO. v. DRUMM et al.

(Supreme Court of Washington. Jan. 4, 1901.)

PUBLIC LANDS—ADVERSE CLAIM—FINDING BY LAND OFFICE—CONCLUSIVENESS.

Plaintiff's grantor, the Northern Pacific Railway Company, claimed indemnity lands in 1885, under 16 Stat. 379, providing that such company might have such indemnity lands in the event of there not being at the final location of the road the amount of lands granted by congress to the company; and a patent issued therefor in 1895, a part of which were sold to plaintiff. Defendants, in 1890, settled on the lands afterwards sold to plaintiff, applying to enter them as a homestead, which application was held for the consideration of the claim of the railroad to such premises as indemnity lands. In 1896, after defendants were fully heard, the commissioner of the general land office determined the controversy, finding that the premises were within the indemnity limits of the grant to the company; that they were selected in 1885, which selection was never abandoned; that the company's right attached and was valid from the date of selection, the filing of record of which prevented the attachment of any adverse rights thereafter. Held, in an action by plaintiff to recover possession of such lands, that a judgment that defendants were the equitable owners of such lands was erroneous, since, they not having shown an affirmative finding in the land department of such fact of the invalidity of the indemnity selection as would enable the court to declare as matter of law that such selection was void, the findings of the land department were conclusive on the question of ownership.

Appeal from superior court, Chehalis county; Charles W. Hodgdon, Judge.

Action by the Gray's Harbor Company against Ed. Drumm and Hannah E. Drumm. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Sidney Moor Heath and Stephens & Bunn, for appellant. W. H. Abel, for respondents.

REAVIS, J. Appellant commenced an action to recover the possession of certain real estate in Chehalis county, deraigning title by patent from the United States to the Northern Pacific Railroad Company. The usual allegations of the wrongful possession of the defendants and the rights of the plaintiff were stated. Defendants answered, and set up an affirmative equitable defense, and claimed equitable ownership of the premises in controversy. The answer averred that defendants, about the year 1890, settled upon the premises as a homestead; that application to enter the same as a homestead was thereafter made by defendant Ed. Drumm, and proper averments are made of the competency of the claimant to make a homestead entry, and that the requisite acts of settlement and residence were duly performed; that such application was held for the consideration of the claim of the Northern Pacific Railroad to the premises as indemnity in lieu of lands lost in the original grant; that, pending such consideration, the patent to the railroad company was inadvertently and by

mistake issued from the general land office; that the indemnity claim of the company was first made in 1885, and that the claim was filed without specification of the lands lost, and not in accordance with the requirements and regulations of the interior department; that the premises in controversy are not within the indemnity limits granted to the railroad company; and that no hearing was afforded defendants in the land department. Evidence was heard, and the court found the facts upon such evidence adduced at the trial, and judgment was entered declaring defendants the equitable owners, and that plaintiff held the patent in trust for defendants. The claim for indemnity lands was made under the joint resolution of congress of May 31, 1870 (16 Stat. 379), which provides as follows: " * * * And in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four." Counsel for appellant maintain that the answer does not show what the actual findings of the land department were; that, in the absence of such showing, the presumption is in favor of the patent. This contention may be conceded, if the allegation in the answer that a sufficient opportunity for hearing in the land department was not afforded defendants does not take it out of the rule stated in *Moore v. Cormode*, 20 Wash. 305, 55 Pac. 217. But it does not seem that the objection to the insufficiency of the answer was sufficiently pressed before the court. Reply was made by appellant, and evidence adduced, including the record of the proceedings in the contest before the land department. It appears, however, from the transcript of the proceedings in the land department, that the controversy between the railroad company and defendants was heard and determined by the secretary of the interior. Defendants, together with a number of other claimants similarly situated, offered to file upon lands within the indemnity claim of the railroad company. Several of these

cases were heard and determined together, and, while it is true the patent issued in 1895, before the formal entry of a determination in the controversy between defendants and the railroad company, yet defendants were afterwards heard fully, and all the facts were found. It is apparent, upon well-recognized authority, that the facts thus found in the land department are conclusive. *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398. The honorable commissioner of the general land office in March, 1896, determined the controversy between defendants and the railroad company, and found that the premises in controversy were within the indemnity limits of the grant to the railroad company, and were selected by the company in May, 1885, according to a list rearranged on amendatory lists filed in September, 1887, and June, 1893; that the filing of the rearranged list was not an abandonment of the original selection; that the railroad company's right attached and was valid from the date of the original selection in 1885; that the filing of the indemnity selection of record prevented the attachment of any adverse rights thereafter; and that such original filing was several years before any rights of defendants attached to the premises in controversy. It will thus be seen that the averment in the answer of defendants that the indemnity selection was not made under the requirements of the land department is not sustained. The question of abandonment of the selection is one of fact, and within the jurisdiction of the land department. The situation of the premises in controversy within the indemnity limits is also a question of fact, determined in the land department against the averment of the answer. *Scott v. Railway Co.*, 5 Land Dec. Dep. Int. 468; *O'Brien v. Railroad Co.*, 22 Land Dec. Dep. Int. 135; *Sage v. Swenson* (Minn.) 67 N. W. 544. It would seem that under the rule stated in *Moore v. Cormode*, supra, the defendants must show the affirmative finding in the land department of such fact of the invalidity of the indemnity selection of 1885 as would enable the court as a matter of law to declare, contrary to the conclusion of the secretary of the interior, that such selection was void. Such facts have not been shown by defendants. It seems, under the indemnity grant, that the essential fact upon which the right to select lieu land is based is actual loss at the time of the selection. The method of selection is under the direction of the secretary of the interior. The presumptions, therefore, are all in favor of the decision of the interior department and of the correctness of the patent issued. The cause must be reversed, with direction to enter judgment for the appellant (plaintiff).

DUNBAR, C. J., and ANDERS and FULLERTON, JJ., concur.

(23 Wash. 700)

**STATE ex rel. WHITE v. BOARD OF
STATE LAND COM'RS et al.**(Supreme Court of Washington. Jan. 4,
1901.)**PROHIBITION—STATE LAND COMMISSION—
HARBOR AREAS—LEASE.**

Laws 1897, p. 255, § 53, provides that the harbor-line commission shall have power to lease the right to build wharves on or within the harbor-line area, abutting on tide or shore lands, directs the reservation of certain rights in such leases, and gives authority to cancel any lease for breach of condition, and for the leasing of harbor-line areas to the highest bidder if any person having a preference right to such lease fails to exercise such right within a time to be prescribed. *Held*, that prohibition would not lie to prevent the board of state land commissioners, acting as the harbor-line commission, from leasing certain harbor areas, since the duties of the board in leasing such lands are purely administrative or executive.

Original application in the supreme court for a writ of prohibition by the state of Washington, on the relation of C. F. White, against the board of state land commissioners. Writ dismissed.

Greene & Griffiths, for relator. Thomas M. Vance and Winstock & Israel, for respondents.

WHITE, J. This matter comes on for final determination upon the application of the relator for a writ of prohibition against the board of state land commissioners, which writ has heretofore issued, and is now returnable. The relator briefly claims that heretofore, and while he was a taxpayer in the town of Cosmopolis, Chehalis county, and engaged in the lumbering and shipping business along the water front of the harbor area of said town, Eugene Bell and W. H. Abel made a written request of the respondent board for permission to lease from the state certain harbor areas; that the board made an order that such areas should be let to the highest and best bidder, and directed the county auditor of Chehalis county to offer such privilege of leasing at public auction to the highest bidder on the 25th of June, 1898; that said auditor some time between the 24th and 25th days of June, 1898, posted on the wall inside his office three paper writings, containing, respectively, the descriptions of the tracts of harbor areas so to be offered, and wherein it was stated that the same would be offered at public auction on said 25th of June to the highest bidder; that on said date, in the afternoon, said auditor offered said privileges at public auction, and there was but one bidder, and one bid, at \$10, offered for each of the tracts, averaging \$30, the same being made by and on behalf of one Eugene Bell for one of said tracts, and one Henry Rosmond for the others; that after said bids had been accepted by said county auditor, and said privileges sold to said parties, this relator filed with the said auditor a written bid of \$20 for each of said tracts; that his bid was forwarded to the board of

state land commissioners, with the returns of said sale, and that he filed with the said board a protest against the acceptance of the bids made, and claimed the right to purchase the privilege; that his protest was objected to by said Bell and Rosmond, and upon hearing before the board of land commissioners the objection was sustained, and the right to lease awarded to Bell and Rosmond. Of this action of the board he complained in his petition, and asked the writ prohibiting the board from further acting in the matter, alleging that the notice of the intention to so sell such privilege was illegal and insufficient. Upon the respondent's answer, this board referred the questions of fact raised thereby to Hon. O. V. Linn, superior judge of Thurston county, for the purpose of having the evidence taken and the facts determined. That judge heard the testimony, and filed his findings in this cause.

This court directed a reargument of the case on the demurrer to the application and writ, as well as on the findings of Judge Linn. The application for the writ was originally made in this court. By section 1, art. 4, of the state constitution, this court has power to issue writs of prohibition. When our constitution was adopted, the courts and text writers of this country generally held that the writ was to restrain the exercise of unauthorized judicial or quasi judicial power, and that the remedy might be invoked against any court, or body of persons, board, or officers assuming to exercise judicial or quasi judicial powers, although not strictly or technically a court. High, Extr. Rem. § 764a. Undoubtedly this is the function the writ is to perform under our constitution. The writ, as so understood, was to prohibit proceedings of a judicial nature, but not to prohibit merely administrative, executive, or ministerial acts. High, Extr. Rem. §§ 769, 782; Spell. Extr. Rel. §§ 1722-1744. "And, to warrant granting the writ to any organized body other than a court, it is necessary that the acts sought to be prohibited are purely judicial, and not executive, administrative, or legislative." Spell. Extr. Rel. § 1744. If the court or organized body in the particular is acting only in an administrative or executive capacity, although in other matters it may exercise judicial powers, a writ of prohibition is not the proper remedy, however illegal such administrative or executive acts may be. Spell. Extr. Rel. § 1722; State v. Justices of Clark Co. Ct., 41 Mo. 44. In some particulars the act of 1897 confers upon the board judicial powers. In the matter complained of by the respondent, the powers are purely administrative or executive. Section 53 of the act provides that: "The harbor line commission shall have the power to lease the right to build and maintain wharves, docks and other structures upon or within any harbor line area abutting upon tide or shore lands which have been sold, or which may hereafter be

sold or leased as provided in this act, for a term not exceeding thirty years, upon such covenants and conditions as the commission shall prescribe. The said commission in any and all such leases, shall reserve to the state of Washington the right to regulate, either under rules of the commission or legislative enactment, or by both methods, the rates of wharfage, dockage and other tolls to be imposed by the lessee upon commerce for any of the purposes for which said leased area may be used, and the right, as above mentioned, to prevent extortion, discrimination and exclusive privileges. Said commission shall require a bond with sufficient surety, to be approved by the commission, in such sum as may be prescribed by the commission, conditioned for the faithful performance by the lessee of all the terms and conditions of the lease under such rules and regulations as the commission may prescribe. The said commission shall have power at any time to summon sureties upon any bond and to examine into the sufficiency of the bond, and if found by the commission to be insufficient, the commission shall require the lessee to file a new and sufficient bond within thirty days after receiving notice from the commission, under penalty of immediate forfeiture of the lease. The commission shall have power to annul or cancel any lease upon a breach of its conditions by the lessee. The state hereby reserves the right to cancel any and all leases upon payment to the lessee of the value of his improvements made on any leased area: provided, that this section shall not be held to apply to the cancellation of leases by the commission for fraud or breach of any covenants of the lease or failure to file and keep a good and sufficient bond with said commission; but in all such cases the improvements, if any, shall become the property of the state. Any lessee desiring to erect any wharf, dock or other structure upon any such leased area shall prepare and file with the said commission plans and specifications of such proposed improvement and showing its proposed location on the leased area, and no such wharf, dock or structure shall be constructed until such plans, specifications and location shall be approved by said commission. There shall not be any artificial filling in of such area or any deposit of rock, earth, ballast, refuse, garbage or other matter within such area, except as may be provided by law, or upon approval in writing by said commission. If the person, association or corporation having the preference right to lease any of the harbor line areas does not exercise such right within such time as may be prescribed by the commission and under its rules and regulations, then the said commission may, in its discretion, provide for the leasing of such harbor area to the highest and best bidder: provided, that the commission may reject any and all bids when in its judgment the sum bid is too low. The rent derived from such leases shall be paid

into the state treasury under such regulations as the state commission may prescribe, and shall constitute a fund to be used as the legislature may direct: provided, that after the expiration of one year, if the parties who have leased any of said areas do not commence to build wharves, docks or make such other improvements as provided in this act, the commission may cancel the lease and release the same under the provisions of this act." It will be observed that the commissioners, in their discretion, may reject any and all bids, if too low; that full control relative to leasing is given to the board. In leasing they are not acting without or in excess of their powers, and if, as a matter of fact, the board should accept the bid of the relator because it is a better bid, or should refuse it, in so doing they would be exercising executive or administrative functions only; and, no matter how illegal such action might be, the writ of prohibition would not restrain it. "The writ of prohibition will not be issued as of course, nor because it may be the most convenient remedy. Nor will it be allowed to take the place of an appeal, or perform the offices of a writ of review. It is a preventive remedy, and as such is bounded by rigid rules, and is only issued in cases of extreme necessity. The remedy is employed only to restrain courts and inferior tribunals exercising judicial functions from acting without or in excess of their jurisdiction, and, if the court or tribunal sought to be restrained has jurisdiction of the subject-matter in controversy, a mistaken exercise of its acknowledged powers will not justify the issuance of the writ." *State v. Hogg* (Wash.) 62 Pac. 143; *State v. Moore* (Wash.) 62 Pac. 441. Of course, in doing these acts the board must exercise judgment, but this does not necessarily make the act judicial. As was said by the supreme court of Indiana in the case of *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192, quoted at length by this court in *Bellingham Bay Imp. Co. v. City of New Whatcom*, 20 Wash. 59, 54 Pac. 774: "If the appellant were correct in his assumption, then every school examiner who examines an applicant for license, every clerk who accepts and acts upon an affidavit, every auditor who accepts an abstract of title when he loans school funds, and every officer who approves a report, would exercise judicial functions. That they do, in some degree, act judicially, is true, and so does every officer, from the governor to constable, who is invested with discretionary powers; for the governor, when he issues a requisition for a fugitive from justice, decides many things, and the constable, when he executes a writ or a warrant, exercises a discretion, but no one of these officers exercises judicial judgment, in the sense that a court or judge does." For the reason that in leasing the land in question the board acts only in an administrative or executive capacity, we think the writ in this case was improperly issued, and must

be set aside. For that reason, we will not now pass upon the legal capacity of the relator to bring this action, or the power of the board to lease the tract in question, or the sufficiency of the notice given. Let the order be that the writ be set aside and this action be dismissed, and the defendants recover their costs.

DUNBAR, C. J., and REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 393)

WILLIAMS v. NINEMIRE et al.

(Supreme Court of Washington. Dec. 6, 1900.)

APPEAL AND ERROR—REVIEW—STRIKING OUT—IMPERTINENT PLEADINGS—CUSTOMS AND USAGES—EXCLUSION BY CONTRACT—EVIDENCE OF SALES—PLACE OF DELIVERY—INSTRUCTIONS—PLEADING.

1. Where, in an action to recover for cattle sold defendants, a part of their answer raised improper and immaterial issues, a reply thereto was unnecessary, and was properly stricken out.

2. Where, in an action to recover for cattle sold defendants, a part of their answer raised improper and immaterial issues, the action of the trial court in striking out the reply to such issues will not be reviewed on appeal.

3. Where, in an action to recover for cattle sold, which were lost while in transportation on board a scow, plaintiff alleged that the cattle were to be delivered to defendants at the place of shipment, which defendants denied, claiming that they were to be delivered at the place of destination, where they were to be weighed, it was error to admit evidence of a custom that the place where cattle were weighed was the place of delivery, since the parties had expressly agreed on a place of delivery, though differing as to where it was, thereby excluding usage.

4. On an issue whether title to cattle passed at the point of embarkation or the point of destination of the scow in which they were shipped, where they were to be weighed, evidence that "weighed at M." in the contract, meant that title did not pass until the cattle were weighed, that title to cattle does not change until they are weighed, that cattle are in possession of seller until weighed, and that they are not delivered until weighed, was improperly admitted to show a custom that the place of weighing cattle is the place of delivery, since they did not testify to the fact of a custom but merely their opinion as to the effect of an agreement to weigh at a certain place.

5. It was error to instruct that plaintiff could not recover unless he proved that the cattle were not only delivered to defendant at the point of embarkation, but that at the time of delivery title vested in defendants, and that they became absolute owners of the cattle at that point, since, if plaintiff proved an absolute delivery, he proved a transfer of title, and could not be required to do more; whether or not title vested being a legal conclusion to be drawn from the facts proved.

Appeal from superior court, Chehalis county; Charles W. Hodgdon, Judge.

Action by Fred F. Williams against George W. Ninemire and Thomas Morgan. From a judgment in favor of plaintiff for the amount tendered by defendants, he appeals. Reversed.

Hogan & Abel, for appellant. Irwin & Bridges, for respondents.

WHITE, J. The facts in this case sufficiently appear from the pleadings. The second paragraph of the complaint, containing the contract sued upon in this action, is as follows: "That during the month of June, 1899, said plaintiff, at the special instance and request of the said defendants, sold and delivered unto said defendants, at London, in said county and state, the following live stock, to wit:

6 fat cows, wt. 7,500 lbs., at 3½ c.	
per lb., value.....	\$262 50
2 fat stags, wt. 2,900 lbs., at 3½ c.	
per lb., value.....	101 50
5 fat steers, wt. 6,750 lbs., at 4 c.	
per lb., value.....	260 00
6 fat calves, wt. 1,200 lbs., at 5 c. per lb., value	60 00

Total value of fat cattle..... \$684 00

8 stock cows, at \$25 each.....	\$200 00
4 two year old stock steers, at \$20 each	80 00
2 stock yearlings, at \$15 each.....	30 00

Total value of stock cattle..... \$310 00

Total value of stock cattle..... \$310 00

Total value of fat cattle..... 684 00

Total value of fat cattle and stock cattle \$994 00

—That the said defendants agreed to pay said plaintiff for said fat cattle and stock cattle the prices set opposite the above respective descriptions, but have failed to make payment of the same or any part thereof, and that said defendants are now indebted unto this plaintiff in the sum of \$994 for said cattle, no part of which said sum has been paid, and demand therefor has been duly made, and payment refused."

The defendants answered as follows: "(2) They admit each and every allegation contained in paragraph 2 of the said complaint, in so far as the same has reference to what is therein designated 'stock cattle,' except as hereinafter particularly denied; that is to say, they admit that on or about the — day of June, 1899, the defendants purchased of the plaintiff, to be delivered at London, Chehalis county, Washington, eight stock cows, at twenty-five dollars each, four two year old steers, at twenty dollars each, and two yearlings, at twenty-seven and fifty one-hundredths dollars for the two; and they deny each and every other allegation contained in said paragraph 2 of complaint, and they deny each and every allegation in said paragraph 2 wherein the same has reference to fat cattle, and deny that plaintiff sold to defendants, at their request or otherwise, any of the fat cattle mentioned in said paragraph 2, the same to be delivered at the London therein mentioned; and they deny that the fat cows therein mentioned weighed 7,500 pounds, and allege that they did not weigh to exceed 1,050 pounds, on the average, for each cow, and deny that the fat steers therein mentioned weighed 6,750 pounds, and allege that their weight was not to exceed 1,150 pounds, on the average, each;

and they deny that the fat stags therein mentioned weighed 2,900 pounds, and allege that they did not weigh to exceed 2,500 pounds for the two. And, further answering unto the allegations contained in said paragraph 2, the defendants allege that some time prior to June, 1899, there was an agreement between the plaintiff and defendants whereby the defendants agreed to and did buy of plaintiff, and plaintiff agreed to and did sell to defendants, the certain stock cattle mentioned in the said paragraph, such stock cattle to be delivered at London, Chehalis county, Washington, on the scow, defendants to pay therefor the price set out in the complaint herein, except, however, by such agreement and sale defendants were to pay \$15 for one of the two stock yearlings mentioned in said paragraph, and \$12.50 for the other of said yearlings, being the sum of \$307.50, for all of said stock cattle; that, about the time and place with the purchase of said stock cattle, these defendants agreed to purchase from plaintiff, and plaintiff agreed to sell to defendants, various fat cattle, some or all of which are described in said complaint as fat cattle, and such fat cattle, by the terms of such agreement, were to be delivered to the defendants by plaintiff at Montesano, Washington, there to be received by defendants, weighed, and paid for per pound according to such weight, at the various figures as set out in the said paragraph 2 of complaint, except, however, the calves therein mentioned were to be paid for at four and one-half cts. per pound, and the defendants allege that the plaintiff has never fulfilled his agreement as aforesaid with relation to said fat cattle, and has never delivered the same to the defendants, nor has he ever delivered any thereof to defendants, at said Montesano or elsewhere, except, however, one fat cow, the weight of which was one thousand and five pounds, and for which said fat cow the defendants are indebted to the plaintiff in the sum of \$35.17; that the defendants have at all times been willing and able to receive the said fat cattle at said Montesano, and to pay therefor, and the defendants allege that they have received from plaintiff none of the said fat cattle, other than the aforesaid cow. (3) And, further answering unto the allegations of said paragraph 2, the defendants admit and allege that they are indebted to the plaintiff for and on account of the aforesaid stock cattle in the sum of \$307.50, and no more; that they are indebted to the plaintiff for and on account of the aforesaid fat cow in the sum of \$35.17, and no other or greater sum, and the total indebtedness of the defendants to the plaintiff for and on account of the matters and things set out in said complaint is the sum of \$342.67, and no more; that heretofore the defendants have tendered to the plaintiff, in gold coin of the United States of America, in full payment of all sums due and owing to him from de-

fendants, the sum of \$345.17, and the plaintiff refused and still refuses to receive the same or any part thereof. And the defendants now bring into court, for the purpose of keeping the said tender good, the last aforesaid sum, and tender the same to the plaintiff, and, in addition to the said sum, they likewise herewith bring into court and tender to the plaintiff the sum of \$6, in payment of his costs to this date incurred in this action; and defendants hereby offer to pay to plaintiff the aforesaid sums in full payment of all sums due and owing to the plaintiff for and on account of the matters and things herein set forth. (4) Further answering unto the allegations contained in said paragraph 2, these defendants allege that they are informed and believe, and therefore allege the facts to be, that during the June mentioned in the complaint herein the plaintiff started to bring and deliver to defendants, in accordance with the agreement hereinbefore set out, certain fat cattle, being all or a part of the fat cattle mentioned in the complaint; that such fat cattle, together with said stock cattle, were placed on board a scow at said London, with the intention of bringing them to said Montesano; that on the voyage to said Montesano the said scow capsized, and all of said cattle except the one fat cow hereinbefore mentioned were drowned; that the defendants were present at such drowning; that the day after such accident these defendants removed the hides from said stock cattle; that in the absence of the plaintiff, and for the sole purpose of saving to the plaintiff the hides of said fat cattle, and as an accommodation to plaintiff, and not otherwise, defendants removed the hides from said fat cattle so drowned; that long before the commencement of this suit, and since the commencement of this suit, defendants have tendered to plaintiff all of the hides so by them removed from said fat cattle, but plaintiff has at all times refused, and still does refuse, to receive such hides; and defendants still have such hides, and they are prepared, ready, willing, and anxious to deliver to plaintiff the said hides, at any time he will receive the same, and because of the bulk of said hides, and their nature, defendants are unable to bring the same into court and make the usual tender, but tender them as aforesaid, and hereby bring them into court as aforesaid and tender them, and their tender is made because of inability to tender into court, otherwise than as hereinabove tendered, the said hides."

To the answer plaintiff replied as follows: "(1) Plaintiff denies that part of paragraph 2 alleging an agreement to deliver any of said fat cattle at Montesano, but reaffirms the allegations of his complaint alleging that a delivery was to be made at London, in Chehalis county, Washington, and that said delivery was so made, and plaintiff alleges that he has complied in all respects with his part of said agreement, and did deliver the

said fat cattle and said stock cattle to the defendants at London, and as agreed upon; and plaintiff denies that he delivered any fat cow unto defendants at Montesano, and denies that said defendants have been willing and ready to pay for said fat cattle at Montesano, and further denies each and every allegation of said paragraph 2 controverting the allegations of plaintiff's complaint. (2) Replying to paragraph 4 of defendants' answer, plaintiff alleges: That the agreement was that said stock cattle and said fat cattle were to be delivered at London, in said county, and were there delivered by this plaintiff unto the said defendants, and that the said defendants then and there accepted said stock cattle and said fat cattle, and proceeded to and did load all of said cattle upon a scow, which said scow was under the hire of said defendants, and was being towed by a tugboat also employed and hired by these defendants, and said fat cattle were loaded by defendants with the intention of bringing the same to Montesano, and the said defendant Thomas Morgan had charge of said scow, *and that said defendants carelessly and in a negligent manner overloaded said scow, for the purpose of saving freight on said cattle, which freight was to be borne and paid by said defendants. That by the careless and negligent overloading of said scow, and while said scow loaded with the cattle was en route to Montesano, the same then and there being at a point in the Chehalis river near the poor farm in said county, by virtue of the negligence and careless handling by defendants then and there capsized, and the greater portion of said cattle were then and there drowned; but that at all times from the time of delivery of said cattle by this plaintiff unto said defendants as aforesaid said defendants had full and complete charge of all arrangements of transporting said cattle from London to Montesano, and that the loss of said cattle was due to the negligence and carelessness of the said defendants, and not unto this plaintiff. The plaintiff called the attention of the defendant Morgan, at London, to the fact that said scow was overloaded and was in a leaking and unsafe condition, but that the said defendant Morgan, for the purpose aforesaid, and being then and there in charge of said scow loaded with cattle, and for said defendants, assumed all risk of transporting said cattle to the Montesano market. That when said sale and purchase were made, as alleged in the complaint herein, plaintiff and defendants were unable to agree as to the weights of said fat cattle, and that at the place of delivery, to wit, at London, there were no scales by which said fat cattle could be weighed, and that plaintiff and defendants then agreed that said cattle should be weighed at Montesano, after said defendants had transport-*

ed them to that place, but that said cattle were lost through *the gross negligence and carelessness of said defendants*, who at that time had said cattle in charge, and who accepted all of said fat cattle and said stock cattle at London as aforesaid, there took charge of the same, and, at their own risk and expense, undertook to transport the same to Montesano. That plaintiff was present at the time said scow was capsized, but that defendant Morgan, for said defendants, had full charge thereof. Further replying to said paragraph 4, plaintiff denies that defendants, as an accommodation to plaintiff, removed the hides of said cattle, but plaintiff avers that, if said hides were removed by said defendants, it was for their own benefit, and was done without the knowledge of plaintiff, and that said hides at said time were owned by said defendants. (3) Plaintiff further denies each and every allegation in said answer contained, controverting the allegations of his complaint herein."

On defendants' motion the court struck from the reply all of the italicized part, to which the plaintiff excepted. The case was tried before a jury, and the following verdict was returned: "We, the jury duly impaneled and sworn to try this cause, do find for the plaintiff in the sum of \$345.17, being the amount tendered herein; and we do further find for the plaintiff that he is entitled to recover from the defendants the hides of the fat cattle, as tendered." The plaintiff moved for a new trial, which was overruled, and a judgment was entered in accordance with the findings of the jury. From this judgment this appeal is taken.

The second point raised by the appellant is that it was error for the court to strike from the reply the italicized part above set out. The answer in this case, after denying the contract alleged by the plaintiff as to the fat cattle, weight, and value, and after pleading tender of payment as to the stock cattle, raised all the issues proper to be raised under these pleadings. All that part of the answer which attempts to set up the defendants' version of the contract, and that part of the answer that sets forth that plaintiff started to bring the fat cattle to Montesano, and placed them on a scow, and they were lost, etc., were improper and raised immaterial issues. The reply thereto was likewise improper. All this should have been stricken from the pleadings. The territorial supreme court, in the case of *Iron Co. v. Worthington*, 2 Wash. T. 472, 7 Pac. 882, 886, states the rule governing the pleadings in this kind of a case as follows: "But the reply was, for the purposes of the action, wholly impertinent. It should have been stricken from the cause. It was no more impertinent, however, than the affirmative defense which it professed to reply to. Under our system of pleading, the technical learning of the common-law pleader is of but

little account. The plaintiff is required to state his cause of action with sufficient particularity to apprise the defendant of its true character. The defendant, in his answer, must deny the facts alleged in the complaint, or he must state new matter in avoidance or by way of counterclaim. If these several pleadings are not accurate and full, the party required to take the next step may have them made more definite and certain before he proceeds. With these fundamental principles kept in view, there ought to be little difficulty in framing correct pleadings. In this case the defendant denied all the matters averred in the complaint. His affirmative defense cannot be construed as doing more. Neither the supposed affirmative defense, nor the reply to it, added anything to the issue, which was fully and completely made up when the defendant denied that it made the contract described in the complaint. It added nothing to that denial to set out affirmatively the version of the contract which defendant insisted was the true one. Seeking no affirmative relief, it made no difference what other contract it had made with plaintiff, if it had not made the one sued on." For these reasons, we will not consider any alleged error founded upon a motion to strike portions of impertinent pleadings.

It is claimed by appellant that the court erred in admitting the testimony of witnesses Morgan, Woods, J. E. Medcalf, Keller, Sol. Medcalf, and Ninemire, as tending to show a custom existing among cattle dealers that, where cattle were sold to be weighed at Montesano, the title to the property was considered as not passing to the buyer until weighed. Morgan testified for defendants: "Q. Tom, when there is an arrangement between the buyer and the seller as to stock (cattle, for example), in this county, and there is an understanding that the cattle are to be weighed at a certain place (say, Montesano), what is understood by cattle buyers and sellers as being meant by that expression, with relation to transfer of title? Mr. Schofield: We object to the question, as it is a question of law. Mr. Bridges: The intention is to elicit from this witness what the expression means, 'of weighing.' Q. What is understood by the expression 'of weighing at Montesano,' or any other particular place? Judge: Proceed. Mr. Schofield: We object to the question in that form, for the reason that general customs cannot be proven in as small a community as Montesano, and can then only be resorted to when within the knowledge of both parties. The evidence sought to be adduced is clearly incompetent, irrelevant, and immaterial, and, under the pleadings, defendants should not be permitted to attempt proof of a place of delivery by resorting to custom as to weight. Judge: Proceed. A. The expression 'weighed at Montesano,' or weighed at any place, means that the title to this stock— Mr. Schofield:

We object to the meaning as to the phrase forming itself into an absolute conclusion of law. It is incompetent, irrelevant, and immaterial. Judge: Proceed. (Exception.) A. (continued). That expression means, in this locality, or any other locality I have ever done business, that the title to anything does not pass until they are weighed. I can give instances. Mr. Schofield: We object to this answer and to special instances. Judge: We think particular instances are not material." Woods testified for defendants: "Q. I'll ask you, Mr. Woods, what, among the cattle men (stock men) of this community, when stock is being bought and sold,—what is the meaning of the expression of 'weighing the stock' at a certain place? Mr. Schofield: We object to the question, as a question of law. Irrelevant and immaterial. (Overruled. Exception.) A. Custom where I've been, persons buying cattle or persons selling cattle do not own cattle until weighed." J. E. Medcalf, witness on behalf of defendants: "Q. I'll ask you, Mr. Medcalf, as between buyer and seller of cattle in this community, what is meant by the expression 'cattle are to be weighed at Montesano.' Mr. Schofield: We object to the question. Irrelevant, immaterial. (Overruled. Exception.) A. General condition to be delivered here; they are in my possession until weighed. That's always been the custom." Mr. Keller, witness on behalf of defendants: "Q. I ask you whether, as between buyer and seller in this community, what is meant by the expression that the cattle are to be weighed at a certain place. Mr. Schofield: We object. (Overruled. Exception.) A. What cattle I bought, I expected them to be delivered here, where they were to be weighed." Sol. Medcalf, witness on behalf of defendants: "Q. Mr. Medcalf, I ask you what is meant in this community, as between buyer and seller of stock, by the expression or understanding that the cattle are to be weighed at a particular place,—say, Montesano? (Question objected to by Mr. Schofield. Overruled. Exception.) A. I'd expect them to be delivered, before they'd be mine. And they'd be mine until delivered to somebody else." George Ninemire, one of the defendants, a witness in behalf of defendants: "Q. I ask you, Mr. Ninemire, what, in this community, as between buyer and seller of stock (say, cattle), is the meaning of the expression or understanding between them that cattle are to be weighed at a place designated? (Objected to by Mr. Schofield. Overruled. Exception.) A. It is understood by cattle men that the cattle are to be delivered and received at a particular place before title passes. This is the custom all over the state of Washington and Oregon." In this case an issue was raised between plaintiff and defendants by the allegation of the pleadings as to where the cattle were delivered under the contract of the parties. The plaintiff alleged that the cattle were sold and delivered to the defend-

ants at London. The defendants denied this. The plaintiff testified that the agreement between himself and defendants was that all the cattle were to be delivered to the defendants at London, and that he did deliver them there, and he testified to circumstances tending to show an acceptance there by the defendants. The defendant Morgan, who made the contract with plaintiff on behalf of defendants, testified that the agreement was that the fat cattle were to be delivered by the plaintiff to defendants at Montesano. The fat cattle were to be weighed at Montesano. As to this there is no dispute. Here is an express agreement, according to the claims of both sides, as to the place where the fat cattle were to be delivered. While one of them claimed the delivery was to be at London, and the other at Montesano, yet both alike admitted that the place of delivery was a subject of express agreement between them. "If parties make a special contract in relation to a matter which would otherwise be determined by usage, it follows that they intended to exclude the operation of usage, since otherwise they would not make the special contract. Therefore, whenever it appears that an agreement has been made upon a particular point, and the controversy is as to the terms of that agreement, such terms cannot be shown by proof of the usage, respecting them. In other words, the special agreement excludes the usage." 27 Am. & Eng. Enc. Law, 716. *Simmons v. Law*, *42 N. Y. 217, was an action to recover the value of a quantity of gold dust shipped by Simmons from San Francisco to New York, on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, says: "A clear, certain, and distinct contract is not subject to modification by proof of custom. Such a contract disposes of all customs and practices by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined." *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Boon v. The Belfast*, 40 Ala. 184. It is only where a contract is silent in some particular or is ambiguous that proof of custom is admissible, and such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it. Proof of custom is received in such cases upon the assumption that, as to those matters not covered by express stipulations in the agreement, the parties are presumed to have made their contract with reference to the established custom and usage of that place; and these the law will incorporate into the contract, in order to explain or complete it. But it is always within the power of the parties to exclude custom from their dealings

by their express agreement, as was done in this case. This precise point was decided by this court in the case of *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474, which was a case analogous in all respects to the present one. That case involved the purchase price of saw logs lost during shipment. In its opinion the court said: "The controversy was as to whether the title had passed. The plaintiff testified that the logs were to be scaled and delivered at his mill according to the terms of the contract. The defendants contended that the logs were to be accepted according to a scale made at Priest's Point. The logs were taken from this place and were lost before reaching the mill. The plaintiff was allowed to introduce proof to show a general custom, in case of a sale of logs, to scale and deliver them at the mill. This testimony was objected to by the defendants, and its admission is alleged as error. We think the point is well taken. The contract was not indefinite. There was simply a controversy as to what the contract was. Both parties admitted that there was an express agreement as to where the logs were to be scaled and delivered. In such a case proof of a custom to scale at the one place or the other was inadmissible." *Swadling v. Barneson*, 21 Wash. 699, 59 Pac. 506. An examination of the testimony admitted to establish an alleged custom to weigh cattle at Montesano shows that it amounts only to the opinion of the witnesses, and is not proof of any such custom. For instance, the witness Morgan says, in substance, "'Weighed at Montesano' means that title does not pass until the cattle are weighed." Woods' testimony, in substance, is that persons selling cattle have not parted with title until they are weighed. J. E. Medcalf's testimony, in substance, is that the cattle were in possession of seller until weighed. Keller's testimony is substantially that they were not delivered until weighed. Ninemire's testimony, in substance, is that cattle were to be weighed before delivery was completed. "Usages being a fact, and to be proved as a fact, it follows that the existence of a usage cannot be established by the mere opinions of witnesses as to what the law is, as applied to the case in hand. It often happens that what is supposed to be a usage of trade is merely the general opinion of persons as to their rights and liabilities under certain facts. Such opinion cannot constitute a usage. * * * It must be a method of dealing with certain facts, and not a conclusion as to the rules of law pertaining to those facts." 27 Am. & Eng. Enc. Law, 736. See, also, *Cox v. O'Riley*, 58 Am. Dec. 633; *Press Co. v. Stanard*, 100 Am. Dec. 255. The testimony of these witnesses was all illegal, and, no doubt, going as it did to the very question of delivery, prejudiced the case against the appellant.

One of the instructions given by the court to the jury was as follows: "The plaintiff

cannot recover unless he prove that the cattle were not only delivered to the defendants at London, but that at the time of such delivery the title thereto vested in the defendants. In other words, the plaintiff cannot recover in this action unless and until he proves to the satisfaction of the jury that the defendants had become the absolute owners of the said cattle at London." The foregoing was an unfair statement of the law as applicable to the case. If the plaintiff proved an absolute delivery, he proved a transfer of title; but here the court led the jury to believe that something more was required,—that the plaintiff must prove that the title vested. Whether or not the title vested was a legal conclusion to be drawn from the facts proved. If there had been a complete delivery, there was a vesting of title, and plaintiff could prove no more; yet the court told the jury, in effect, that no delivery would suffice, but more must be proved. The jury, in considering the illegal evidence to which we have referred, in connection with this instruction, could not well have rendered any other verdict than the one it did render. According to the contention of the appellant, the fat cattle were sold and delivered at London, and were then placed under the control of respondents. If that was a fact, the sale was complete, and weighing was not necessary to pass title. The jury might well infer from this instruction, in view of the illegal testimony of Morgan, Medcalf, and others as to the custom of weighing at Montesano, that the title did not pass when the cattle were delivered to respondents at London. It is manifest that in giving this instruction the trial court acted upon the assumption that, since the cattle were to be weighed at Montesano, the title had not passed at the time of the loss. The court applied the rule that the title to property does not pass by sale "if some act remains to be done in relation to it." But that rule applies only to cases of constructive delivery, and does not apply to a case where the property has been actually delivered to the purchaser, and nothing remains to be done by the seller. *Bogy v. Rhodes*, 4 G. Greene, 133. "Where the goods are delivered with the intention of passing title, and the sale is absolute and complete, the title passes to the vendee, although the weight or measure of the article sold remains yet to be ascertained." 21 Am. & Eng. Enc. Law, 635. See, also, *Riddle v. Varnum*, 20 Pick. 280; *Leonard v. Davis*, 1 Black, 476, 17 L. Ed. 222; *Mining Co. v. Senter*, 28 Mich. 73; *Osborn v. Lumber Co. (Wis.)* 65 N. W. 184; *Burke v. Shannon (Ky.)* 43 S. W. 223.

There is conflict in the legitimate testimony as to where the fat cattle should have been delivered. If this had been the only error complained of, the court's ruling would not be disturbed, but manifest error was committed in admitting the testimony of Morgan, Woods, J. E. Medcalf, Keller, Sol. Medcalf, and Ninemire, in the particulars heretofore

pointed out, and in giving the instructions heretofore mentioned; and for these reasons the judgment of the court below should be, and the same is, reversed, and this cause is remanded to the court below for a new trial; the appellant to recover his costs on this appeal.

DUNBAR, C. J., and FULLERTON and REAVIS, JJ., concur.

(23 Wash. 615)

PETERSON v. SEATTLE TRACTION CO.

(Supreme Court of Washington. Dec. 27, 1900.)

MASTER AND SERVANT—FELLOW SERVANTS—STREET RAILROADS—COLLISIONS—NEGLIGENCE—PLEADING—CONTRACTS—LIMITATION OF CARRIER'S LIABILITY—PUBLIC POLICY—EVIDENCE—EXPERTS—DAMAGES.

1. One employed to lay track for a street-car company, with transportation to and from work as part consideration, and who has no duties to perform in connection with the operation of the car on which he rides, and whose contract does not require him to ride on any particular car or on any car, is not a fellow servant of the employees operating the car at the time of an injury received by him while so riding, exonerating the company from liability therefor.

2. Where two street cars meet in a head-end collision on a single track, in the absence of other showing negligence must be assumed in the employees operating the cars, and hence in their employer.

3. Plaintiff, suing for injuries sustained in a street-car accident, alleged his employment by the company, by which it was to pay him certain wages, and transport him to and from his work. Defendant denied that it agreed to furnish him transportation. *Held* that, under the denial, defendant could offer any evidence to defeat the alleged contract or to show a different one, and hence a demurrer to a separate answer pleading defendant's version of the alleged contract was properly sustained.

4. A contract between a street-car company and its employees limiting its liability for injuries received by them while riding to and from work on its cars is not against public policy; the employees not being bound to enter or remain in the employ of the company.

5. Where an employee of a street-car company, injured in a collision, claimed that he was employed at certain wages, with transportation to and from his work, unconditionally, and the company claimed the contract of transportation was limited by a provision against liability for injury, though ticket books, with the limitations thereon, were strong proof to substantiate defendant's contention, they were not conclusive.

6. Testimony of lay witnesses, the wife and acquaintances of one injured in a collision, that before the accident he was a healthy-looking man, a strong laborer, and since then he looked thin and pale, was more quiet in manner, and did not hear so well; that he came home after the accident in an excited condition, and complained of pain in his head and back,—was not objectionable as being expert opinion evidence.

7. To prove impairment of plaintiff's earning capacity caused by an injury, testimony as to what occupation plaintiff had been in was competent, as showing what wages would be open to him in a business he understood, and which he could resume but for his injuries, though he had not been engaged in it for several years, and did not claim to intend to return to it.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by Paul Peterson against the Seattle Traction Company. From a judgment for plaintiff, defendant appeals. Reversed.

Burke, Shepard & McGilvra, for appellant. Milo A. Root and Brady & Gay, for respondent.

WHITE, J. Appellant was operating a street railway in Seattle, and respondent was working for appellant as a day laborer along its track. The contract of employment, as claimed by respondent, gave respondent, per day, \$1.50, and transportation to and from his work. His daily work closed at 6 o'clock p. m. As evidence of respondent's right to transportation, appellant furnished him a book of tickets, which tickets he used when traveling to and from his work. This book had a stipulation printed thereon exempting appellant from any liability for injury to respondent. The first book of tickets was furnished respondent a few days after his employment. At the time of his employment nothing was said to him about his transportation having any conditions upon it exempting the company from liability, and the contract of employment, it was claimed by respondent, did not provide for transportation so conditioned. Respondent was injured by negligence of the company while riding on its car on his way home after his day's work was completed. The evidence does not show what particular officer or employé was guilty of the negligence which caused the injury. The car was inward bound to Seattle on the appellant's single-track Green Lake suburban line, leaving the lake end of the line just after 6 o'clock p. m., and the accident occurred within a few minutes after the car started, being caused by a head-end collision with an outward-bound car on the same line while the cars were on a curve rounding a projecting bluff on the side of the lake, which prevented the motorman of either car from seeing the other until within a short distance from it. The respondent was riding on the rear platform of the inward-bound car, and received his injuries from the shock of the collision, being thrown against the rear wall of the inclosed part of the car, thus receiving a violent blow on the head, and then falling or being thrown to the ground. The respondent recovered judgment for \$3,000. The plaintiff (respondent) only testified as to the contract of employment, as follows: "On the 25th of January, 1899, I met Linder, the foreman of the defendant, on Fifth avenue, close to Pike, and asked him for work; and he says, 'All right. Come in the morning.' I says, 'What do you pay?' And he says, 'A dollar and a half a day.' And I says, 'That is very small, aint it?' And he says, 'We pay a dollar and a half a day, and transportation to and from your work.' I says, 'All right. I will come in the morning.' And he says, 'The tool box

is between Western avenue and Harrison street. Come down there in the morning.' And I walked from my home in the morning, and walked home in the evening, and walked out again the next morning, down to the tool box; and one day he gave me a book with tickets in it. The foreman of the company gave it to me. I never had any different agreement or contract than that one made at that time." On cross-examination he testified: "I went to work for the traction company about the 26th of January, last year. The foreman of the track gang hired me on Fifth avenue, close to Pike. I did not see him at the company's office. I had not worked for this same foreman before, but had seen him. He was working for the traction company, and told me that the company would pay a dollar and a half a day, and transportation to and from my work. They gave me a book of tickets. * * * I don't know what the printing was. I received that book from the foreman * * * a day or two after I went to work. I cannot say the date when I received my last book from the company while I was at work. It was further back than just a day or two before this accident. * * * The last book that I had—the one that I got a little before the accident—was given to me by Linder, the foreman, * * * out at Green Lake. I know Mr. Kempster, the secretary of the company. He did not give me this book in the company's office. * * * I did not sign that condition on the back. If I went to the office and got a book, and he came with the book and pen and ink and said, 'Put your name on the back,' I put my name on it and put it in my pocket and went out. I don't know the name of the man who would give a book to me at the office. * * * Before this last book was issued to me, I had received some books like this at the office, and signed my name on the back when the clerk told me to. I suppose that this book that was given to me last was the same sort and had the same cover as those others, but I did not pay much attention to it. I never looked. * * * I got on the car coming into town that night before the accident because I was going home from my work. My day's work was done. When I got on the car again in Fremont (this was the returning car after the accident) the conductor came and wanted the ticket, and I had one in my pocket, and I gave him one. * * * He did not collect the fares before the cars came together, he had not got to me to collect the ticket then, and had not taken up the tickets before I was hurt, but he did afterwards, in Fremont. When I went out to Green Lake on the morning of the day I was hurt, I rode out there to my work, and when the conductor called for my fare I gave him a ticket. I went out to Green Lake that morning to go to work, and did not have any other errand out at Green Lake that day. I went just to go to my work, and when I came in

it was to go home from my work." E. Linder, the foreman of the track gang, who employed the plaintiff, testified for the appellant. He was not asked any question relative to the employment of the plaintiff, but his testimony was to the effect that about the middle of June, 1899, he took up from the plaintiff an employé's ticket book which the plaintiff had for use on the line, and that he returned to Mr. Kempster, the secretary of the company, the unused part of the book taken up from Mr. Peterson. He further testified as to the accident, and that he and the members of the track gang, including Peterson, were in the car, going home, at the end of the day's work. A. L. Kempster, the secretary of the appellant, testified that he issued to the plaintiff on May 29, 1899, a book of coupon tickets, and he identified the book taken up from Peterson as the book; that when it was issued it had on it a cover with certain printed matter, and when it was returned the cover was off. No question was asked this witness as to his authority to make contracts for the company, or as to his authority to employ workmen for the company. Except as hereinafter stated, the foregoing is all the testimony in the case, or offered, touching the employment of the plaintiff, or relative to his transportation. There was testimony tending to show that the plaintiff was injured by the accident, and the nature and extent thereof.

Was the plaintiff a fellow servant of the operators of the cars at the time of the accident? The case of *Lundquist v. Railway Co.* (Minn.) 67 N. W. 1006, cited by appellant, was as follows: The defendant was a street-railway corporation operating a street railway in Duluth. The plaintiff was one of a crew of men employed by the defendant, who were engaged in repairing tracks by taking up and relaying the pavement between the rails over which the defendant's street cars, operated by electric power, passed frequently at irregular intervals. Operators of the cars were required by rule to give warning of their approach to the crew of track repairers. Plaintiff was pursuing his work in reliance on the rule. While so engaged, and without notice, he was struck by the car. He was held to be a fellow servant with the motorman. This case is in point only so far as it holds that the motorman and laborer were fellow servants at the time the accident occurred. In the case at bar the plaintiff was not injured when actually performing labor as a track layer. The case of *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, cited by appellant, holds that a laborer while working on a culvert under a foreman, and who received an injury, while at work, through the negligence of a conductor and engineer in moving and operating a passenger train, was a fellow servant of the engineer and conductor. The case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, cited by appellant, holds

that a brakeman who was killed by the negligence of the conductor while the train was being operated, and the brakeman was discharging his duties as such on the train, was a fellow servant with the conductor. These cases hold that a common employment existed at the time the accident occurred, and then apply the doctrine of fellow servants. In the case at bar it is claimed by respondent that the relation of master and servant did not exist between the parties when the plaintiff received the injury. If this was the case, it is useless to discuss whether or not a track layer and operators of street cars are fellow servants during the time they are actually engaged in their common employment. The real question to be determined is, was the plaintiff in the service of the defendant when on the street car at the time the accident occurred? We will first examine the cases cited by the appellant on this proposition.

The case of *Russell v. Railroad Co.*, 17 N. Y. 134, was as follows: A laborer was employed by a railroad company to work in connection with a train of cars. The laborer lived in New York City. He was employed in loading gravel and sand, at the pits where they were dug, upon cars, for transportation to places upon the railroad where filling was required. He and others employed in this kind of work were paid monthly at a certain per diem. It was the practice of the workmen who lived in New York to come from home in the morning upon the cars of the company, and it was understood that they were to be brought back at night, paying no fare either way. On the day the accident occurred, the plaintiff went upon the cars with every load of gravel for the purpose of assisting to unload it. After the last load of gravel had been discharged, some paving stones were taken upon the cars, which proceeded towards New York. The stones were thrown off a short distance above Spuyten Duyvel creek, and the plaintiff had then, as was testified, no further duty to perform. It appeared, however, that some of the workmen acted as brakemen for the gravel train upon which they rode home. The accident occurred while the cars, after discharging the gravel and stone, were on their way to New York with the workmen residing there. The court decided that the laborer and the engineer of the train through whose negligence the accident occurred were fellow servants, and in so holding said: "But the main ground relied upon to distinguish this case from those previously decided is that at the time when the accident occurred the plaintiff was not an employé of the company, but a passenger merely, and entitled to protection as such. By the arrangement between him and the defendants he was to be taken home to the city upon the gravel train at night; and he insists that his day's work was completed when the last load of gravel was deposited, and that he was under no further obligation to do anything for the company;

that carrying him home was a service to be performed by the company in consideration of the labor previously done, and constituted a part of his wages; and that it was entirely optional with him to avail himself of this service or not. It is not, I think, entirely clear that the defendants would not have had a right, under their agreement with the plaintiff, to insist upon his returning to the city at night. The gravel train could not be properly managed by the engineer alone. Men were required to act as brakemen in case of accident. It appears that some of the same men who worked in the gravel pit also manned the brakes. A portion of the hands employed lived in the city, and the defendants may have relied upon them to work the brakes, in case of necessity, upon the return of the train, and may have taken this into consideration in agreeing to bring them home at night. But, conceding that the plaintiff was not bound to return, even if the defendants insisted upon it, it does not follow that while actually returning to the city with the train he was not the servant of the company. If he was a mere passenger, he was not bound to do anything to facilitate the return of the train. If an emergency arose, requiring the use of the brakes, he might refuse to raise his hand. If an obstruction was met with upon the track, he might fold his arms until the company removed it; and what he might do in this respect, every other hand returning to the city under similar circumstances might also do. Such could not, I think, have been the true relation between the parties. The plaintiff was employed by the defendants as a day laborer. He was to be taken up at the city where he lived in the morning, and set down there at night; and he should, I think, be regarded as having been, during the entire interval, the servant of the company, and bound as such to render aid if necessary in promoting the passage of the train both to and from the city. This is decisive of the case." It will be seen that this decision rests upon the theory that until the train returned to New York the relation of master and servant continued, and, if necessary, the servant was bound to render aid in promoting the passage of the train both to and from the city. It is clear in the case at bar that the plaintiff had nothing whatever to do with operating the cars or with dispatching them on their time schedule. For that reason the case cannot be held to be in point. The case of *Gillshannon v. Railroad Corp.*, 10 Cush. 228, was as follows: The plaintiff was a common laborer employed in repairing the defendants' roadbed at a place several miles from his residence. Each morning and evening he rode with other laborers to and from the place of labor on the gravel train of the defendants. This was done with the consent of the company, and for mutual convenience; no compensation being paid, directly or indirectly by the laborers, for the passage, and the company being

under no contract to convey the laborers to and from their work. The plaintiff was injured by reason of a collision between the train and a hand car through the negligence of those having charge of the train. It was held that plaintiff could not recover. It will be observed in this case the company was under no contract to convey the laborer to and from his work, and no compensation was paid directly or indirectly by the laborer for his passage. In *Seaver v. Railroad Co.*, 14 Gray, 467, the court below said: "It appeared that the plaintiff was employed by the defendants to work as a carpenter in repairing fences along the line of the road, in repairing bridges, making switch frames, and other similar work; that he commenced to work on May 23, 1856, at the rate of one dollar and fifty cents per day; that he lived in Lawrence, and that at the time he agreed to work for the defendants at the above rate he asked the agent who employed him if he could be permitted to ride to his place of work without paying fare, and was told that he could, and that none of the workmen employed by the defendants paid fare; that he worked for the defendants from May 23 till September 11, 1856, when the accident happened by which he was injured, during which time he was paid his wages monthly at the rate aforesaid, and rode daily to and from his place of work without paying fare; and that he was so riding at the time he sustained the injury for which he sought compensation in this action. Upon these facts, I was of opinion and ruled that the plaintiff could not recover for injuries sustained by him, occasioned by the negligence or carelessness solely of another servant of the defendants, employed as engineer to manage and run their locomotives." The supreme court affirmed this ruling. In this case the company was under no contract to convey its employé to the place where he worked, and it received no compensation, directly or indirectly, for so doing. In the case of *Wright v. Railroad Co.* (N. C.) 29 S. E. 100, the facts were that the plaintiff was a section master in the employment of the defendant, and slept sometimes at Gumberry, the northern terminus of the road, sometimes at Jackson, the southern terminus, and sometimes at Mowfield, an intermediate station. After his day's work was over he went to his sleeping place on a hand car or on the defendant's train, as suited his convenience. On the night when the plaintiff was injured, he and the laborers working under him, having left off work for the day, with a light for a signal on the side of the railroad, were waiting for the train on its way to Gumberry. All were taken on; the plaintiff getting on the engine, and the hands on the flat cars loaded with logs. No fares at any time were received or expected from the plaintiff. The court held that the plaintiff was not a passenger, and that he was a fellow servant with the engineer, citing in support thereof *Gillshannon v. Railroad Corp.*

supra, and Seaver v. Railroad Co., supra; also, State v. Western Maryland R. Co., 63 Md. 433, and Tunney v. Railway Co., L. R. 1 C. P. 291. In the last-mentioned case plaintiff was employed as a laborer to assist in loading what is called a "pick-up train" with materials left by plate layers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham, where he resided, and whence the train started, to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured. It was held that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow servant when both are acting in pursuance of a common employment. In this case plaintiff was employed in connection with a particular train, and was to travel upon it in performance of his contract.

The case of State v. Railroad Co., supra, supports the contention of the respondent in this case. In that case the court says: "Abell [plaintiff] was employed as a regular brakeman on a passenger train that left Union Bridge every morning, except Sundays, for Baltimore city, and returned to Union Bridge every afternoon, Sundays excepted. Abell was employed and paid by the day, and was liable to be discharged at any time. Union Bridge was at one end of his route, and Baltimore city at the other. When the train reached Union Bridge on Saturday evening, it remained there until Monday morning, and Abell was expected to be at Union Bridge from Saturday evening until Monday morning, unless he had permission to leave. Abell's family lived in Baltimore, and he had permission from the conductor to go to Baltimore on Sunday, 2d of September, 1883, and, while traveling to Baltimore from Union Bridge on a train of the appellee, was killed by a collision. The conductor of the train upon which Abell acted as brakeman had a regular pass for himself and all his crew to go to Baltimore on the train upon which Abell was killed. Abell, as one of the crew, was traveling on this pass, and paying no fare, at the time he was killed. The deceased was not paid for the Sundays, unless he was required for duty. He was not required for duty on Sunday, September 2, 1883, the day he was killed. The first question with which we have to deal is the inquiry whether on Sunday, September 2, 1883, Abell was in the employment of the railroad company, in such a manner that the company is entitled to claim

the benefit of the rule that would exempt it from liability for the negligence of its other employes. A case very similar to the one before us has already been decided by this court. In the case of Baltimore & Ohio R. Co. v. State, to Use of Trainor, 33 Md. 542, Trainor was employed and paid by the day. At six o'clock p. m. his day's work ended; and on a day that he had been at work, but had finished his day and laid aside his tools, and was on his way home, and not on that portion of the track upon which he worked, the injury occurred. He had expected to resume his work the next morning. With these facts before it, this court decided that at the time of the injury he would not be considered in the employment of the company. The decision in Trainor's Case proceeds upon the assumption that he was not at the time of the injury acting in the service of the company; that his day's labor was over for the day; and, although he expected to resume work again on the next day, that when his day's work was over he occupied towards the company the position of a stranger, and was entitled to all the privileges he would have had if he had not been an employe. The facts in this case are stronger than those in Trainor's Case. The deceased had finished his week's work on Saturday evening, expecting to resume it on Monday. He had been expressly relieved from all service to the company until Monday, and was given permission to go to Baltimore. He could call the Sunday on which he was killed entirely his own day, and employ himself in it as he pleased, and he therefore could not be considered on that day as acting in the service of the company."

The case of Vick v. Railroad Co., 95 N. Y. 267, was as follows: "The evidence shows that he [plaintiff] had been in the employment of the defendant, as a foreman in its tin shops at Rochester, prior to December, 1876. The defendant at that time removed its shops from Rochester to Buffalo, but before their removal the deceased had left defendant's employment. Many of the employes in the tin shop at Rochester continued in the employ of the defendant after it had removed its shops to Buffalo, but still resided at Rochester. By an arrangement made between them and the defendant, they were to be taken to Buffalo on Monday morning, and brought back Saturday evening, of every week, in the defendant's car. Sometimes they were carried in a baggage car, sometimes in a passenger car, and afterwards in a passenger car called a 'shop,' in which other persons, who paid fares, were permitted to ride. No fare was required of the men thus employed and transported, but by agreement a deduction was made from their wages, at an amount fixed per hour, being the same as when at work, for the time they were upon the train; their wages beginning when they reached the shops at

Buffalo, and ending when they left them. In the month of January, 1877, the deceased applied for his former position as foreman, and was employed accordingly by the defendant. He asked if he could go with the rest of the men, and he was told he would be passed with the rest of the men in the defendant's shop car. Upon these terms he again commenced working for the defendant as foreman in the tin shop at Buffalo. The only pass given was one to the master mechanic, Mr. Gould, under which all the men who lived at Rochester and worked in the shops at Buffalo traveled. There was no evidence upon the trial showing that the deceased ever saw the pass, or that he was acquainted with it contents. He was paid for his work in accordance with the arrangement already stated. It appears that the contract for his employment in the tin shops, and for traveling between Rochester and Buffalo while engaged in his work, was one and the same contract, made at the same time, and the whole must be taken together as an entire agreement. The essence of the contract was that the deceased should work for the defendant as foreman of the tin shop, and in consideration thereof it should pay him a price fixed per hour, and should transport him from his residence to the place where the work was to be done, and back again, upon its railroad, without charge. At the time of the accident the deceased was in the shop car of the defendant, on his way to the place where he was to perform services. As his transportation was a part of the contract, he was there by virtue thereof as an employé. His services had then commenced under the contract. He paid no fare, as an ordinary passenger would have done, but was being transported under the pass referred to. Under these circumstances, the deceased was at the time of the accident in the car under the terms of the contract made for the rendition of his services, and not as a passenger. It was essential that he should be in the car at the time and place of the accident, to enable him to perform the contract of service into which he had entered. But for this he would not have been there at the time, and his traveling on this occasion was in the capacity of an employé, and not as a passenger. If two separate contracts had been intended to have been made,—one for the services of the deceased, and the other for his transportation,—it is fair to assume that the amount allowed for his wages would have been increased sufficiently to pay his fare as a passenger. Clearly such could not have been the intention, as the contract made was a single one, which related only to the services of the deceased, and the compensation he was to receive for the same. It was part of this contract of service that he was to be carried to and from the place of his work every week on the defendant's railroad, and on a train which was usually pro-

vided for that purpose. The right to go and return being inseparable from the contract to do the work, it is not obvious that any valid ground exists for claiming that the deceased was a passenger and paid his own fare. As to the position that, because his hours of labor had not commenced at the time of the accident, the deceased was to be regarded as a passenger, it is a complete answer to say that his conveyance to and from his work was incident to his employment, and was part of the contract of service under which he was engaged. This remark will also apply to the position of the respondent's counsel that traveling to the shop where work was to be done was not the beginning of service, but an act done to obtain the service. If it was a part of the contract, then obviously it cannot be said that the deceased gave a portion of his wages as the price of transportation, independent of his contract. He was as much under the control of the defendant when traveling as any other employé who was transported by virtue of a contract with the company for his services, which contract provided for the right to go and come upon the defendant's cars to and from the place where he was required to work. Although he had no particular duty to discharge while traveling, yet the traveling of the deceased was not as a passenger, but as an employé under the contract of service between him and the defendant." In this case the court expressly held that the principle announced in *O'Donnell v. Railroad Co.*, 59 Pa. St. 239, hereafter cited, was not sound law. In the *Vick Case* the court held that the plaintiff, when traveling under his contract, was as much under the control of the defendant as any other employé. It will be observed, also, that the plaintiff was to travel usually on a train provided for that purpose; that it was essential that the plaintiff should be in the car at the time and place of the accident, to enable him to perform the contract of service into which he had entered. It was not essential in the case at bar that the plaintiff should be in the particular car he was in when the accident occurred. He was not under the necessity of riding in any car in order to perform his contract of track-laying. He might have walked to his place of labor and home, had he seen fit, without violating any of the terms of his contract.

The respondent cites several cases in support of his contention that when the injury occurred he was not acting in the service of the appellant. We will now consider them. The case of *Baird v. Pettit*, 70 Pa. St. 477, was as follows: The plaintiff was employed as draftsman in the defendant's locomotive works. A carpenter employed in "jobbing" for defendant in any part of the works was, by the direction of the defendant, superintending the excavation of a cellar under the building, employing and paying hands, etc. He had a large pile of dirt thrown on the

public foot walk. The plaintiff, in leaving the house in the dark, after ceasing his day's work, fell over the dirt and was injured. Held, that the plaintiff and carpenters were not fellow servants in the same common employment, so as to relieve the defendants from liability from the carpenter's negligence. In this case the court said: "The relation of master and servant did not exist between the parties when the plaintiff received the injury. He was not then in the service of the defendant. He had quit work and was on his way home. He was no longer subject to the defendant's control, or bound to obey his orders. As soon as he left the building he was his own master. He was then no more in the defendant's service than any other citizen passing along the street, and he was entitled to the same rights and immunities." In the case of *Gillenwater v. Railroad Co.*, 5 Ind. 339, the plaintiff was employed to frame and build a bridge. He was directed by defendant to go to a certain station to help load some timbers. He was traveling free of fare when injured by negligence of the employes who were running the train. Held, that he could recover. In the case of *Fitzpatrick v. Railroad Co.*, 7 Ind. 436, plaintiff was employed by defendant as laborer to ballast road. Defendant agreed to transport him to and from his home to where he should be working. While being so carried he was injured by negligence of the engineer operating the train. Held, that the defendant was liable. Among other things, the court said: "He was not, it is true, a mere passenger; * * * but, under an agreement with the defendants, he was to be regularly conveyed to and from his work. This, it seems to us, involves an implied engagement that they would convey him as safely and securely as if he had been a passenger in the ordinary sense of the term." Upon the question of liability of a street-car company to an employé, working as track repairer, while riding upon its car, the supreme court of Colorado, in the case of *Rapid-Transit Co. v. Dwyer*, 36 Pac. 1106, says: "He was in the defendant's employ at the time, and it is undisputed that it was the defendant's custom to furnish transportation to such employes to and from their work, and that upon this occasion, the hand car being out of order, the foreman substituted transportation by the train. Although no fare was collected or expected from the plaintiff, the evidence shows that he was lawfully upon the train." And the court held that he was entitled to recover against the company for injuries occasioned by the negligence of the engineer in managing the train. In the case of *Rosenbaum v. Railway Co.*, 36 N. W. 447, the supreme court of Minnesota held that a man working as a grader in ballasting the track could recover for injury sustained when riding on the train of defendant without having paid any fare, and at a time when he

might be considered an employé, although not actually working at that time; it appearing that the company was in the habit of carrying these workmen to and from their work. In *Stubber v. Railroad Co.* (C. C.) 102 Fed. 421, plaintiff, who was a skilled machinist, and employed by defendant to keep its pumps, tanks, wells, etc., in good working order, while riding on one of defendant's engines to reach a point where his duties called him was injured by the engineer's negligently running the engine into a freight train. Held, that plaintiff and the engineer were not fellow servants in such sense as to prevent recovery by plaintiff for the damages sustained. The case of *O'Donnell v. Railroad Co.*, 59 Pa. St. 239, is in point, if the contract was as claimed by respondent. In that case the railroad company hired O'Donnell to do carpenter work upon a bridge 15 miles from where he lived. The company agreed to pay him a certain price per day, and transport him on its trains to and from his place of work free of charge. One day, after O'Donnell had finished his day's work and was riding home on the train, a wreck occurred, and he was badly injured. The supreme court of Pennsylvania held that he was not a servant of the railroad company when hurt, but was a passenger for hire. Among other things, the court said: "O'Donnell traveled not as a part of his employment as a carpenter at the bridge, but as a passenger from and to his home. He was not hired to pursue his business on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was performed he was no longer in the service of the company, but was free to go or to stay, and when he traveled, in effect, paid his fare out of his wages."

We think that when the respondent had ceased his day's work at track-laying he was not in the employ or under the control of the appellant until he again resumed track-laying under the superintendency of Linder, the foreman of the track gang. Linder certainly had no control over the respondent while going to and from his work, and the respondent was not under any obligation to go to and from his work of track-laying on the cars of the appellant. At 6 o'clock his day's work ended. He had no rights and no privileges on that car, other than or different from those of any other passenger. He was not required to perform services on the car. He was under the control of the conductor of the car, and not of his own foreman, just as any other passenger on the car. As was said by the court in *Hutchinson v. Railway Co.*, 6 Eng. Ry. Cas. 580, cited in *State v. Railroad Co.*, supra: "* * * We do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury acting in the service of his master. In such a case the servant

is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant." Holding as we do that at the time of the accident the respondent was not a servant of the appellant, it is unnecessary for us to consider further the doctrine of fellow servants. And this disposes of the first, fourth, and sixth assignments of error, because, where two cars meet in a head-end collision on a single-track railway, there must be negligence somewhere, by somebody or other. That negligence, in the absence of other showing, must be assumed to have been primarily the negligence of the defendant's employes in charge of the cars, who caused or allowed them to come into collision. It being primarily the negligence of those employes, it is imputable to their employer, and that employer is in law responsible for its consequences.

The plaintiff, in his complaint, alleged that the defendant hired the plaintiff to work as a laborer on its roads, agreeing to pay him therefor the sum of \$1.50 per day, and transportation to and from his work on the cars of the defendant. The defendant denied that it agreed to pay the plaintiff therefor the sum of \$1.50 per day, and transportation to and from his work on the cars of the defendant; and the defendant denied that it then or at any other time agreed to pay or furnish to the plaintiff transportation to and from his work on the cars of the defendant, or transportation at all on its cars, or on its road or roads. When the plaintiff offered his evidence as to his transportation, and the tickets in connection therewith, under the denial of the defendant, it was competent for it to offer in evidence any material matter to defeat the alleged contract or to show a different contract. The fourth separate answer to the complaint, and as new matter constituting third affirmative defense, to which a demurrer by the plaintiff was sustained, and the same plea as finally amended, and to which a reply was filed, was an attempt on the part of the defendant to plead its version of the alleged contract. It added nothing to the denial already made. This defense cannot be construed as doing more than the denial. *Iron Co. v. Worthington*, 2 Wash. T. 483, 7 Pac. 882, 886, and *Williams v. Ninemire* (filed in this court Dec. 6, 1900) 63 Pac. 534. The defendant, on the cross-examination of the plaintiff and in its testimony in chief, sought to show that the ticket book given to the plaintiff for his transportation to and from his work, and on which he was being carried at the time of the accident, contained the following condition: "In consideration of this pass, I hereby agree to assume, and do assume, all risks of accidents, damages, and loss sustained by me while using it, and expressly agree with the Seattle Traction Company that it shall not be liable, under any circumstances, whether by reason of negligence of its agents or otherwise, for any injury or loss to me as afore-

said." And it offered further to show that the plaintiff, when the book was delivered to him, was told by the secretary of the company to sign it on a line at the foot of the condition intended for his signature, and that the plaintiff did sign his name as directed, and that the book of tickets was, after it was signed by the plaintiff, signed by the secretary, and that the ticket book so signed was the one plaintiff was using at the time of the accident, and that this book contained 100 single-fare tickets. All this testimony was excluded on the ground that it was immaterial, and in various ways the defendant has saved exceptions to the rulings of the court as they were made during the progress of the trial, excluding this evidence. Was this evidence material, under either the denials or the affirmative answer of the defendant? The defendant sought by this evidence to show that the plaintiff, under his contract with the defendant, and in consideration that the defendant would employ and pay the plaintiff \$1.50 a day for track-laying, agreed to accept from the defendant transportation on the cars of the defendant to and from his work, on employes' tickets limiting the liability of the defendant. Was this contract against public policy? In the case at bar the plaintiff was traveling on the carrier's line not as an ordinary passenger, but incidentally to his service as an employe. The carrier was not required by law or duty to give the plaintiff work as a track layer, and, when he sought to obtain such work, it seems to us that he had a perfect right to contract, as an incident to the principal contract, that he should be carried by the defendant over its lines to and from his work, subject to the condition that the plaintiff would assume, while being so transported, all risk of accidents, etc., contained in the conditions which the defendant sought to prove. The plaintiff was not bound to enter or remain in the defendant's employ. Both parties were free, the one owing no duty, the other being under no obligation to travel on the defendant's line otherwise than as an ordinary passenger, paying fare, and entitled to full redress for injury through negligence.

The cases of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535, have been reviewed by the supreme court of the United States in the case of *Railway Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 500. In that case the railway company, being engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do, and actually doing, the business known as "express business," by which contract the railroad company agreed, solely upon the consideration and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines,

certain privileges, facilities, and express cars, to be used and employed exclusively by said express company in the conduct of such express business, and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as "express messengers," for that purpose to be allowed to ride in said express cars; to transport such express messengers, for the purposes and under the circumstances aforesaid, free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities, and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employes of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employes, or otherwise. Voigt made application to said express company, in writing, to be employed by it as express messenger on the railroad company, between which and such express company a contract as aforesaid existed; and such applicant, pursuant to his application, was employed by the express company under a contract in writing, signed by him and it, whereby it was agreed between him and the express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it, arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company, on demand, any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release, under his hand and seal, of all claims and demands and causes of action arising out of, or in any manner connected with, said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company. Held, that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger, within the meaning of the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger;

and that such a contract did not contravene public policy. In the Voigt Case the supreme court, in speaking of the decision of the court in *Railroad Co. v. Lockwood and Railway Co. v. Stevens*, says: "The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Registering Co. v. Sampson*, Law R., 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.' " In the Voigt Case it was held that the messenger was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it, by securing his appointment as such messenger. So in the case at bar the plaintiff was not constrained to enter into the contract whereby the street-car company was exonerated, but by entering into it he obtained employment as a track layer. There is no difference in principle between the two cases. This court, in the case of *Muldoon v. Railway Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, says: "The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely and without any limiting conditions; and therefore such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz. to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in and deny the right of the carrier to limit its chances of

loss in the operation, even though a careless servant cause unintentional injury to the passenger." In the case just cited the same principle is laid down as in the case of *Railway Co. v. Voigt*, supra. We think the evidence offered was admissible, as tending to show a contract for transportation different from that alleged in the complaint, and that the court erred in refusing to admit the same. We do not mean, however, to hold that the mere signing of the condition, under the circumstances under which it was signed, is conclusive on the plaintiff, as showing that the contract of transportation was as claimed by the defendant. The allegations of the complaint and the evidence of the plaintiff are to the effect that the transportation was to be unconditional. If such was the case, then the plaintiff would be a passenger for hire, and entitled to all his rights as such. The fact that the plaintiff was employed by the day, and could quit at any time, and that he received from time to time ticket books with conditions thereon like that offered to be proven, would be strong circumstances to show that the contract for transportation was as the defendant contends, but it is not conclusive. It must be remembered that there was no showing or offer to show that the secretary was authorized to enter into contracts for the employment of track layers, or that he was authorized to bring about a modification of the contract originally made by Linder with the plaintiff, and that at the time Linder employed the plaintiff nothing was said to the latter about his transportation having a stipulation attached which should exempt the company from liability. All these facts and the circumstances under which the plaintiff signed the condition were for the consideration of the jury, under proper instructions, from which they might determine whether the contract of transportation was unconditional, as claimed by the plaintiff, or was conditional, as claimed by the defendant.

Dahl, an acquaintance of the plaintiff, testified as to his appearance prior to the accident as having been that of "a healthy-looking man,—a strong laborer,"—and as to his appearance since, as looking more thin and pale, and not seeming to hear as well as before, and being more quiet in manner. The plaintiff's wife testified as to his excited condition when he came home on the evening after the accident, and his complaining that night of pain in his head and back, and as to his impaired condition in various respects from that time onward. This testimony was admitted over the defendant's objection and exception. It is claimed by defendant that this testimony falls under the head of expert and opinion evidence, and as the witnesses were people of ordinary observation, and not qualified as experts, they should not have been allowed to testify to the facts recited. One was the wife and the other an acquaintance of the plaintiff. They had observed his appearance and conduct before and after the

accident. We think this evidence was admissible. In *Hardy v. Merrill*, 22 Am. Rep. 441, the court says: "Opinions concerning matters of daily occurrence and open to common observation are received, from necessity. *Com. v. Sturtivant*, 117 Mass. 122. And any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eyewitnesses to form an accurate judgment in regard to it. *De Witt v. Barly*, 17 N. Y. 340; *Bellows, J.*, in *Taylor v. Railway Co.*, 48 N. H. 304, 2 Am. Rep. 229. How can a witness describe the weight of a horse, or his strength, or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of the step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances, because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but at the same time incapable of description, the opinion of the observer is admissible, from the necessity of the case, and witnesses are permitted to say of a person, 'He seemed to be frightened,' 'He was greatly excited,' 'He was much confused,' 'He was agitated,' 'He was pleased,' 'He was angry.' All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual,—appearances which are plainly recognized by a person of good judgment, but which he can no otherwise communicate than by an expression of results in the shape of an opinion." See, also, *Railway Co. v. Gilland* (Wyo.) 34 Pac. 953.

The plaintiff testified that he had worked as a deckhand on a steamboat for about six years, on and off, ending three years before the day of the accident. Since then his activities had been confined to fishing in the summer season and working as a track hand on street railways during the winters. The defendant claims that as the plaintiff had not been working on a steamboat for three years, and did not claim to intend returning to that calling, it could not fairly be regarded as his occupation, or as one of his occupations, either present or prospective, when he received his injuries; that therefore the earnings of a steamboat hand at that time testified to by the plaintiff had nothing to do with the question of how much his physical impairment due to his injuries might deprive him of earning. It was proper to show what wages

would be open to the plaintiff in a business he understood, and which he would have the right to resume were it not for the injuries which prevented him from again entering that business. This disposes of the third assigned error. For error of the court in rejecting the testimony hereinbefore indicated, the judgment of the court below must be, and the same is, reversed, and this cause is remanded for a new trial in accordance with the views herein expressed.

ANDERS and FULLERTON, JJ., concur.

(23 Wash. 779)

HARRIS v. HALVERSON.

(Supreme Court of Washington. Jan. 12, 1901.)

PLEADING—CONCLUSIONS—LANDLORD AND TENANT—NOTICE TO QUIT—EVIDENCE—HEARSAY—WITNESSES—LEADING QUESTIONS—INSTRUCTIONS—NOMINAL DAMAGES—HARMLESS ERROR.

1. The objection that a complaint fails to state a cause of action, in that it states conclusions instead of facts, should be raised by motion to make the averments more definite, and not by demurrer.

2. An allegation in a complaint that plaintiff is a "lessee" of certain premises is a sufficient averment of the tenancy, without stating the facts constituting it.

3. An allegation that a party occupied premises under a verbal lease from month to month, which began and ended on the 1st day of each month, is not objectionable because such a tenancy cannot begin and end on the 1st of each month, but amounts to an averment of a month to month tenancy, beginning on the 1st of each month, the allegation as to the ending being treated as surplusage.

4. A notice to terminate a tenancy ending on the last day of April, being served more than 20 days before the expiration of the tenancy, as required by statute, is sufficient, though it notifies the tenant to quit at the expiration of said month "ending May 1st," the words quoted not being misleading.

5. Allowing or refusing leading questions is not generally a ground for reversal, unless there appears to be a clear abuse of discretion.

6. Refusal to charge on nominal damages is not prejudicial error, where plaintiff recovered only nominal damages.

7. Where a tenant refuses to yield possession at end of his term, action therefor may be maintained by a lessee whose term immediately follows.

8. Testimony of a witness as to advice given him by an attorney regarding the method of serving a notice to terminate a tenancy, and what witness understood from the conversation with the attorney, is inadmissible as hearsay.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by S. E. Harris against N. P. Halverson. From a judgment for plaintiff, defendant appeals. Reversed.

Fred H. Peterson, for appellant. Fred Rice Rowell, for respondent.

WHITE, J. The complaint in this action, omitting formal parts, is as follows: "(1) That the plaintiff is the lessee and entitled to the possession of that second and upper story of that certain brick building located

on the southwest corner of 2d avenue and Union street, in the city of Seattle and state of Washington, county of King, known as 'Bigelow Block,' and is entitled to collect all rents due and owing and payable from the tenants of said upper story of said building after May 1st, A. D. 1900. (2) That the defendant, N. P. Halverson, has occupied room numbered 7 in said second and upper story of said block under a verbal lease from month to month, made by I. N. Bigelow, the owner of said building, and that said lease began and ended on the 1st day of each and every calendar month. (3) That on the 9th day of April, A. D. 1900, and more than 20 days prior to the expiration of the monthly term of said lease for the month ending May 1, A. D. 1900, said I. N. Bigelow, desiring to terminate said monthly lease of this defendant, served notice, by delivering a copy thereof personally to this defendant, requiring him, this defendant, to quit the said premises at the expiration of said month, ending May 1, 1900. (4) That said defendant continues in possession of said room No. 7 in person continually, since May 1, A. D. 1900, without the permission of this plaintiff, and by reason whereof this plaintiff has sustained damages in the sum of \$50.00," etc. To this complaint a demurrer was interposed, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and this is assigned as error. No motion to make the complaint more definite or certain was made. The appellant contends that the allegation that plaintiff "is the lessee and entitled to the possession of that second and upper story, * * * and is entitled to collect all rents due and owing and payable from tenants of said upper story, after May 1, A. D. 1900," is a conclusion of law that would result from certain facts, such that on a certain date the plaintiff, by virtue of an agreement, had become the tenant of said Bigelow, and whatever her rights may have been, and also that by virtue thereof she was entitled to all the rents, and that there was an attornment by the tenant; but to allege merely that she was the lessee, not stating when or how it happened, or what was done, is not complying with the statute, which requires, "the complaint must set forth the facts on which he seeks to recover." Even if we conceded, for the purpose of this decision, that the allegation is a conclusion of law, yet it is not such an objection as can be urged upon demurrer. "Thus if, instead of alleging the issuable facts, the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law in place of fact, the resulting insufficiency and imperfection would pertain to the form, rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer." Pom.

Code Rem. § 549. This rule was adopted by the supreme court of the territory of Washington in the case of *Chambers v. Hoover*, 3 Wash. T. 107, 13 Pac. 466, and reaffirmed by this court in *Isaacs v. Holland*, 4 Wash. St. 54, 29 Pac. 976. The true doctrine is that every reasonable intendment and presumption is to be made in favor of the pleading, and if substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are conclusions of law, or otherwise imperfect, incomplete, and defective, such insufficiency pertaining to the form rather than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment. Pom. Code Rem. §§ 547, 549. This court has held that an allegation that the plaintiffs are "owners" of the premises is sufficient, without derailing their title. *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123. We think the allegation that the plaintiff is "lessee" falls within the same rule. From the context in paragraph 2 of the complaint, it is manifest that the allegation "that said lease began and ended on the 1st day of each and every calendar month" is equivalent to alleging that said tenancy began, etc. This paragraph alleges that defendant occupied room No. 7 under a verbal lease from month to month. This is an allegation of a monthly tenancy. It is claimed, however, that no such tenancy could begin and end on the 1st day of every calendar month. The allegation of this paragraph, construed under the rule hereinbefore stated, amounts to this: That appellant was a tenant from month to month; that his tenancy began on the 1st of each calendar month. The allegation as to when it ended is therefore mere surplusage; for under the authorities cited by the appellant, and under the law as we understand it to be, if the monthly term began on the first day of the month it would end on the last. The allegation of the third paragraph of the complaint is to the effect that on the 9th of April, 1900, prior to the expiration of the monthly term, respondent served on the appellant notice to quit said premises at the expiration of said month ending May 1, 1900. There was no tenancy ending on May 1, 1900. The monthly tenancy ended on April 30th. The notice was served on April 9, 1900. As we have said, the proper construction of the second paragraph of the complaint is that the tenancy began on the 1st of each calendar month. The said month referred to in paragraph 3 means the calendar month of April, and under it the notice served was admissible in evidence, and the words "ending May 1, 1900," could not have misled the appellant as to the meaning of the notice.

The notice actually served was as fol-

lows: "Notice is hereby given and extended that you are hereby required to quit, surrender up, and deliver to the undersigned the possession and occupancy of those certain premises described as follows, to wit: Photographic room No. seven (7) on second floor of Bigelow Block, corner of 2d avenue and Union street, in the city of Seattle, state of Washington, which you now hold of me; and to remove therefrom and vacate said premises on or before the first day of May, A. D. 1900, pursuant to the statute in such case made and provided; and you are further notified that on said first day of May, A. D. 1900, that the relation of landlord and tenant heretofore existing between the undersigned and yourself will thereupon cease and terminate. You are further notified hereby that in case of your failure so to do you will be guilty of unlawful detainer, and liable to an action for such unlawful detainer." The tenant, under his contract of lease, had the right to occupy the premises until 12 o'clock midnight of April 30th. The mere fact that he was given by the notice all of the 1st day of May to remove we do not think vitiated the notice, or amounted to a new contract of letting for another month or for any period of time. He was entitled, under the law, to more than 20 days' notice to quit before the expiration of his monthly tenancy. This he received, and, in addition, his landlord gave him all of the 1st day of the ensuing month to remove. This day, as the evidence shows, corresponded to the day upon which the rent was payable; the receipts showing that the rent was paid on the 1st day of the month in advance. The statute does not require the notice to specify the time at which the tenant must remove. It simply requires it to be served more than 20 days before the expiration of the tenancy. The notice in this case required the tenant to vacate on or before the 1st day of May, and was a sufficient notice to vacate on April 30th, the day his tenancy expired. We are aware that it has been held: "If a particular day is named in the notice, it must be the day of, or corresponding to, the conclusion of the tenancy, and not to its commencement." *Tayl. Landl. & Ten.* (8th Ed.) § 477. But it has also been held that where there was a letting from month to month, and the tenancy began on the 18th of December, a notice to quit on the 17th of January was not sufficient; that the notice should have been to quit on the 18th of January. *Waters v. Young*, 11 R. I. 1; *Steffens v. Earl*, 40 N. J. Law, 128. We think that all the tenant was entitled to was more than 20 days' notice before the 30th day of April that his tenancy would end, and that giving an additional day, at the tenant's option, as was the effect of this notice, does not render it invalid.

The appellant calls attention to two leading questions, one of which was answered over his objection. Allowing or refusing

leading questions is not generally a ground for reversal, unless there appears to be a clear abuse of discretion. We are not prepared to say there was such an abuse as to prejudice the appellant in this instance.

The appellant requested instructions as to nominal damages, and error is assigned for refusal to instruct on this point. The jury found nominal damages, and therefore the appellant was not prejudiced by the refusal of the court to instruct on that subject. The court instructed the jury, in substance, that, if they found the appellant was not entitled to the possession of the premises, they should find for the plaintiff "such sum, not exceeding fifty dollars, as you shall find from the evidence constitutes the damages, if any, sustained by the plaintiff by reason of the defendant's failure to surrender the premises at the time indicated in the notice." The court did not tell the jury, as assigned as error, that "they could find such damages as they might see fit." The record does not show this assigned error, and we will not further consider it.

There was evidence tending to show that from the 1st day of May, 1900, the plaintiff was the lessee of the owner of the premises in question, and in *Brewing Co. v. Crosbie* (Wash.) 60 Pac. 652, we held that, where a tenant refuses to give up possession at the expiration of his term, an action may be maintained against him by a lessee whose term immediately follows. The seventh assigned error is therefore not well founded.

We will consider together the fourth and fifth errors assigned, which are as follows: Permitting hearsay evidence to be introduced upon the trial, and refusing to strike out part of Bigelow's testimony. The appellant in his answer denied that notice to quit was served upon him. Bigelow, the owner of the property, in his testimony in chief, testified positively on behalf of respondent that he delivered a copy of the notice to quit personally to appellant. This was all of the testimony in chief on that point offered by respondent. The appellant flatly contradicted Bigelow, and testified that no notice was served upon him by Bigelow, but that his (appellant's) wife gave him the notice on the 9th of April. The wife testified that, on the 9th day of April, Bigelow came into their reception room, and handed the notice to her, and she afterwards gave it to her husband. Under the undisputed facts in this case, the service, under the statute, could be made only by delivering a copy personally to the appellant. 2 Ballinger's Ann. Codes & St. § 5529. On rebuttal, Bigelow, over the objection of appellant, to which proper exceptions were saved, was allowed to testify that he consulted his attorney, Mr. Rowell, and ascertained the attorney's opinion as to the proper method of serving the notice. The following question was then asked, and answered by the witness: "Q. From my (Rowell's) advice, what did

you do when you went to serve this notice,—what did you understand that you must do? I will put that a little different: What did you understand that the statute of the state of Washington required you to do in order to make a service? A. I understood, according to your instruction, and I supposed you knew, that I was to serve personally any notice of the kind. I had others to serve, and I was to serve personally on the parties themselves. You also instructed me that if they did not take it from my hand, and I would place it on their desk, I would serve it as effectively, and consequently, when I went in, I gave Mr. Halverson that notice. I was passing through there, and if he had not been in the room I could have seen him in the other room. There was a large door opening in there. There was no reason why I should not give it to him."

The fifth assigned error is because the court did not strike out all of this answer after the word "consequently." The jury were entitled to know all of the circumstances attending the service of the notice, but conversations with, and advice of, attorneys prior to such service is not an attending circumstance. Most of this testimony was hearsay evidence, and its tendency was to bolster up Bigelow's evidence. "One of the most important of the rules excluding certain classes of testimony is that which rejects hearsay evidence. By this is meant that kind of evidence which does not deprive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information. * * * The dangers of admitting hearsay evidence are especially obvious when issues of fact are to be determined by jurors who are not trained to discriminate between different grades of testimony,—between those statements which, in a legal sense, are only gossip, and others which are tested by cross-examination, and sanctioned by the solemnity of an oath." 2 Jones, Ev. § 299.

Part of the testimony which the appellant moved to strike was the conclusion of the witness, and as to that the motion should have been granted. But, if this were the only error, we would not consider it of sufficient importance to reverse the judgment. The other testimony of Bigelow, as to the advice of his attorney, and what he understood from his conversation with him, was clearly inadmissible, and from its nature must have been prejudicial, and it should not have been admitted over appellant's objection. For that reason, the judgment of the court below is reversed, and the cause is remanded for a new trial, appellant to recover his costs of this appeal.

DUNBAR, C. J., and REAVIS, ANDERS, and FULLERTON, JJ., concur.

(23 Wash. 666)

**STATE ex rel. TANNER, County Treasurer,
v. CHEETHAM, State Auditor.**

(Supreme Court of Washington. Dec. 29,
1900.)

**SCHOOLS AND SCHOOL DISTRICTS — SCHOOL
FUND—DEBT DUE TO STATE—STATE'S
RIGHT TO RETAIN.**

Where the superintendent of public instruction properly apportioned to a county its share of the public school funds, the state auditor could not retain from such amount a sum claimed to be due from the county school fund to the state on account of moneys levied and collected for school purposes by such county.

Mandamus by the state, at the relation of T. J. Tanner, against Neal Cheetham, state auditor. Writ granted.

W. W. Felger, for relator. Thomas M. Vance, for respondent.

REAVIS, J. Original application for mandamus. Relator shows that he is the treasurer of Jefferson county; that the respondent is the state auditor; that, during the times mentioned in the application, Hon. Frank J. Browne was superintendent of public instruction of the state, and U. G. Edwards was the county school superintendent of Jefferson county; that in May, 1900, the state auditor certified to the superintendent of public instruction the amount of the state school fund subject to apportionment for the quarter ending May, 1900, and thereupon the superintendent duly apportioned the same to the various counties of the state, and apportioned to the county of Jefferson the sum of \$5,098.19; that the apportionment as aforesaid was duly reported by the superintendent of public instruction to the auditor, with direction to issue warrants to the treasurers of the various counties for the respective amounts of the apportionment; that the superintendent of public instruction also reported to the various county school superintendents the sum apportioned to each county, and that such report was made to said U. G. Edwards as superintendent of Jefferson county; that after such apportionment and report, and direction of the superintendent of public instruction, the state auditor refused to issue the warrant for the said sum apportioned to Jefferson county, or any portion thereof, except the sum of \$4,297.61, for which a warrant was issued; that the state auditor retains the sum of \$800.61; and that relator has duly demanded the warrant for such sum. The respondent (the auditor) admits substantially all the allegations of the relator, but for affirmative defense sets up that the school fund of the county of Jefferson is indebted to the state of Washington in the sum of \$2,401.74 on account of moneys levied and collected for school purposes by the county of Jefferson, which moneys were retained by said county, and that the county alleged as its

reason for retaining the same that such money was security for certain warrants issued in anticipation of the revenue of the county from said source; that the attention of the county officers had been called to the fact that such county was indebted to the state on account of such moneys improperly retained; and that the auditor suggested to the county officers that the amount so improperly retained by them be taken out of the subsequent apportionments to be made to the county by the proper state officers, and the auditor maintains that it is his duty to adjust the differences between the county and the state. It is apparent that a legal controversy is suggested between the county of Jefferson and the state. The superintendent of public instruction is charged with the duty of making a general apportionment of the state school fund when such fund is collected and placed in the state treasury. Such apportionment when made places in the state treasury a sum of money to which the school fund of each county is entitled, and the law requires the auditor to issue warrants to the respective county treasurers for the amount due each county. But the auditor assumes that Jefferson county has retained school moneys collected by the county which should have been paid into the state treasury, and that it is the duty of the auditor to determine what, if any, sum has been retained by the county, and to deduct such indebtedness from the amount apportioned to the county by the superintendent of public instruction. The auditor does not possess ordinary judicial functions. He may pass upon the validity and amount of ordinary claims against the state as provided by law. The treasurer surely may require the county of Jefferson to pay over to him any moneys which properly belong to the state, and there is ample power to enforce the collection of such moneys. The revenue law has segregated the public moneys into various funds. Of these different funds each has its special obligation to meet, and so long as such obligation exists a fund may not be diverted to another purpose. The county maintains that the moneys referred to by the auditor in his answer were collected under the current revenue law to meet current school expenses (Laws 1895, p. 297), and that such funds were properly distributed. But it is not necessary to construe the current revenue law to determine this controversy. Under the law directing the superintendent of public instruction to apportion all said school funds to the respective counties, it becomes the duty of the state auditor to issue his warrant to the proper county officer for the amount due each county. The answer of the auditor is deemed insufficient, and the writ will issue.

DUNBAR, C. J., and FULLERTON, AND
ERS, and WHITE, JJ., concur.

(23 Wash. 753)

JONES v. CITY OF SEATTLE.

(Supreme Court of Washington. Jan. 11, 1901.)

MUNICIPAL CORPORATIONS—APPROPRIATION FOR STREET—ASSESSMENT OF DAMAGES—GRADING—ACTION FOR NEGLIGENCE—INSTRUCTIONS—RES JUDICATA.

1. A decree in favor of a lot owner, assessing damages for the grading of a street, rendered before the grading was done, and specially confining the assessment to damages resulting from ordinary grading, is not *res judicata* as to a subsequent action by the lot owner for negligent grading, injuring his premises.

2. In an action against a city for appropriating for a street a strip off an abutting lot, the court properly instructed that the jury might consider the difference, if any, between the value of the lot after and before the strip was taken off, and that, if they found that the lot was actually benefited by the grading, they could set off such benefit against the value of the strip taken.

3. In an action for negligence in grading a street, the instructions excluded the rule of damages of the difference between the market value of the property before and after it was taken or damaged, as having no application thereto. *Held* misleading, and, the court not having stated any rule in lieu of the rule rejected, to constitute reversible error; there being a substantial conflict in the evidence as to damages.

Appeal from superior court, King county; O. Jacobs, Judge.

Action by Isabel C. Jones against the city of Seattle. From a judgment for plaintiff, defendant appeals. Reversed.

W. E. Humphrey and Edward Von Tobel, for appellant. Wm. H. Brinker, R. S. Jones, and John Arthur, for respondent.

REAVIS, J. There are two causes of action stated in the complaint. The first is the appropriation of nine feet of plaintiff's premises for a street; the second, negligence in grading the street. The answer to the first cause of action set up certain condemnation proceedings taken by the city a number of years before, and that the land by virtue of such proceedings had been appropriated. The answer to the second cause of action, after denials, was the former adjudication of damages in a suit for damages to plaintiff's premises in the grading and improvement of the street. The objections to the first cause of action are disposed of in *City of Seattle v. Fidelity Trust Co.* (Wash.) 60 Pac. 133, where it was determined such proceedings for condemnation were void. The decree in the assessment of damages for the grading of the street was rendered before the grading was done, and specially confined the assessment of damages therein to the damages resulting from the ordinary grading of the street. The second cause of action in the present suit is for negligent and unskillful grading; that the plans were so inherently bad and the work so unskillfully done that it occasioned a subsidence of the soil supporting plaintiff's lot, and thereby injured plaintiff's premises. The instructions offered by defendant

have all been examined, and we find no error in their rejection by the court. The jury returned a verdict of \$500 damages on the first cause of action, for the appropriation of the nine feet. The evidence amply sustains the verdict, and the instruction of the court upon the measure of damages for the appropriation of the nine feet is correct. The court instructed the jury that they might take into consideration the difference, if any, between the value of the lot after the nine feet were taken off and before they were taken off, and that, if the jury should find that the lot was actually benefited by the grading, they could set off such benefit against the value of the strip taken off. Upon the second cause of action the court, in substance, instructed that if the city brought to the performance of the grading ordinary care and skill, and was guilty of no negligence in either the plan or the execution of the work, then the amount recovered as damages in the former suit was full compensation, but if the city in doing the work had not exercised ordinary care and skill in either the plans or performance of the work, by which damage resulted to plaintiff, then plaintiff could recover all the damages resulting to her from the want of such care or skill on the part of the city. The court then added: "The rule invoked, that the true rule of damages is the difference between the market value of the property taken or damaged, before it was thus taken or damaged, and its market value after it was so taken and alleged to be damaged, has no application to the second cause of action set forth in the complaint, which pertains principally to the sloping. The law allows no such defense to an action founded on negligence or want of care,—due care and proper skill. This is all I desire to say to you on the second cause of action set forth in the complaint." The defendant excepted to the instruction given upon the second cause of action, in the following form: "The defendant excepted to the above and foregoing charge for the reason that it was not an instruction upon the law of the case. It had no application to the law of the case, and had a tendency to mislead the jury; and for the further reason that the court did not in its instructions define what the measure of damages would be under the second cause of action, but only instructed the jury that the measure of damages would not be the difference in value between the property before the injury was done and the value of the property immediately after the injury was done."

The last exception taken is the only one deemed of any merit. It is perhaps unfortunate that the attention of the court and counsel in the progress of the trial seems to have been directed almost entirely to the legal import of the affirmative defenses to the two causes of action. The evidence sustaining the allegations of damage under the second cause of action was, as usually in proof of damages, somewhat conflicting in the val-

ue placed upon the premises before and after the grading was done; but substantial testimony supports the verdict, and, if a correct rule for the measurement of damages had been stated, the verdict should be sustained. The rule rejected was not wholly inapplicable. The instruction of the court, excluding the rule of damages of the difference between market value of the property taken or damaged before it was taken or damaged, and the market value after it was so taken, as having no application to the second cause of action, was certainly misleading. While it is true that the damages for the taking or appropriation of property or careful grading thereof are properly measured by the difference in value of the lot, considered as a unit, before the taking, and its value after the injury done, and the rule for the negligent or unskillful performance of such work may not be the same (that is, in damage by unskillful and negligent performance of the work all damages proximately arising therefrom are recoverable), in the second cause of action stated in the complaint before us the elements of damage stated are referable to the lot and improvements thereon alone. For the removal of lateral support to land the rule is stated by Mr. Sutherland in his work on Damages (volume 3 [2d Ed.] § 1053): "The measure is not the cost of restoring the lot to its former situation, or building a wall to support it, but it is the diminution of value by reason of the defendant's act. In estimating the difference in the value of the land, the entire lot and the improvements on it may be taken as the value of the land alone. All the damages which may reasonably be apprehended to result from the wrong done are recoverable in one action." And 3 Sedg. Meas. Dam. (8th Ed.) § 939, thus states the rule: "In an action to recover for injuries to the plaintiff's land, occasioned by its falling in, in consequence of excavations made by the defendant in his own land adjoining, the measure of damages is not what it will cost to restore the lot to its former condition, or to build a wall to support it, but the amount by which the lot is diminished in value by reason of the acts of the defendant." See, also, *Keating v. City of Cincinnati*, 38 Ohio St. 141; *Williams v. Furnace Co.*, 13 Mo. App. 70. The court cannot omit, when its attention is directed to the issues of the trial, to instruct upon a material issue. Certainly an instruction upon the measure of damages alleged in the second cause of action should have been given. It will be observed that the defendant's exception to the rejection of the rule and to the omission to instruct was duly taken. The court stated a rule which it deemed inapplicable, and did not direct any rule. The jury were, therefore, not advised as to how the damages should be estimated. It is urged

with much force, however, by counsel for respondent, that notwithstanding this error the verdict is right and should be affirmed. But, as has been observed, there was substantial conflict in the evidence as to the estimate of damages by the witnesses, and we cannot say it affirmatively appears that there was no injury. We think, as a matter of legal right, the defendant was entitled to have the jury instructed properly upon the measure of damages, and upon this assignment of error alone the cause is reversed and remanded for a new trial.

FULLERTON and ANDERS, JJ., concur.

(22 Wash. 699)

HALE v. STENGER et al.

(Supreme Court of Washington. Dec. 27, 1900.)

BUILDING AND LOAN ASSOCIATIONS—LOAN—CREDITS—INSOLVENCY—APPEAL—REHEARING.

1. Where the subscription for premium stock of a building association was merely a contract of borrowing and lending, the subsequent insolvency of the corporation does not affect the borrower's right to be credited on the loan with all payments made, whether as premiums, fines, or otherwise.

2. Where, on reversal on appeal of a judgment in favor of defendants in an action to foreclose a mortgage, the appellate court omitted to direct that plaintiff be allowed in the decree of foreclosure the attorney's fee provided for in the mortgage, the omission will be corrected on rehearing.

Appeal from superior court, Whatcom county; H. E. Hadley, Judge.

On rehearing. Modified.

For former opinion, see 61 Pac. 156.

PER CURIAM. The appellant, in a petition for rehearing, requests this court to define more minutely its position on the questions whether the sums paid as premiums on the so-called premium stock subscribed for are to be treated as payments on the loan, and whether the rule announced in the main opinion is intended to apply to solvent building and loan associations. Both of these questions are answered affirmatively. As we have construed the contract, it is one of borrowing and lending money; and the borrower is entitled in equity to be credited with all sums paid on account thereof, no matter by what name the payments may be called in the contract. This being the nature of the contract in its inception, the subsequent insolvency of the corporation is immaterial. In disposing of the case we omitted to direct that the appellant be allowed in the decree of foreclosure the attorney's fee provided for in the mortgage. With this modification of the main opinion, the cause is directed to be remanded forthwith.

(23 Wash. 698)

VAN DE VANTER v. DAVIS et al.

(Supreme Court of Washington. Jan. 3, 1901.)
ATTACHMENT—SHERIFF'S INDEMNITY BOND—
LIABILITY OF SURETIES—EXTENT.

An attachment bond indemnifying the sheriff, whose duty it was, under the attachment law (2 Ballinger's Ann. Codes & St. § 5306 et seq.), to retain the attached property, and, if any judgment was recovered, to sell it as in other cases on execution, indemnified him from all damages, etc., he might sustain by reason of the attachment, seizing, levying, taking, or retention in his custody thereunder of the property described in the bond. *Held*, that damages resulting from a sale of the property under an execution issued on the judgment pursuant to the statute were within the meaning of the bond.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by A. T. Van De Vanter against T. E. Davis and others. From a judgment for plaintiff, defendants M. L. Farwell and another appeal. Affirmed.

Greene & Griffiths, for appellant Farwell. Bausman, Kelleher & Emory, for appellant Agassiz. Brady & Gay, for respondent.

WHITE, J. This is an action to recover damages from Davis & West, as principals, and appellants, as sureties, for alleged breach of an attachment indemnity bond given respondent while sheriff. In the case of Davis & West against Burton Lumber Company a writ of attachment was issued July 12, 1895, and levied upon a lot of lumber. The bond in question was executed July 19, 1895, the condition of which is as follows: "The condition of the above obligation is such that whereas, under and by virtue of a writ of attachment issued out of the superior court of said King county, state of Washington, in an action wherein said T. E. Davis and C. E. West, partners as Davis & West, was plaintiff, and the Burton Lumber Company, a corporation, was defendant, against said defendant, directed and delivered to said sheriff of King county, Washington, the said sheriff was commanded to attach and safely keep all the property of said defendant within his custody, not exempt from execution, or so much thereof as may be sufficient to satisfy plaintiff's demand, amounting to \$415.74, as therein stated, and the said sheriff did thereupon attach the following described goods and chattels, to wit, 268 bunches of siding, 522 bunches of shingles, and about 60,000 feet of rough lumber; and whereas, one R. L. Oake has claimed the said goods and chattels, or a part thereof, as his property; and whereas there are other persons about to claim other portions of said property; and whereas, the above-named plaintiffs, notwithstanding said claims, made or to be made, require of said sheriff that he shall retain said property under said attachment, and keep the same in his custody under and by virtue of such writ: Now, therefore, the condition of the

above obligation is such that if the said T. E. Davis and C. E. West, partners as Davis & West, plaintiffs and principals above named, and the said M. L. Farwell and L. A. Agassiz, sureties, their heirs, executors, and administrators, shall well and truly indemnify and save harmless the said sheriff, his successors, heirs, executors, and administrators, of and from all damage, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his successors, heirs, executors, or administrators, shall sustain or in any wise be put to for or by reason of the attachment, seizing, levying, taking, or retention by the said sheriff in his custody, under said attachment, all the property hereinbefore described, whether claimed by the said R. L. Oake or any other person or persons, then this obligation to be null and void; otherwise, to be of full force and virtue." In this attachment case judgment was rendered by default against the Burton Lumber Company, August 3, 1895. The sheriff's levy of the writ of attachment was made July 12, and the return to the writ of attachment was made August 2 and filed August 3, 1895. On this last day a writ of execution was issued and levied upon the attached property, the sheriff in his return reciting that it was already in his possession by virtue of the attachment, and on August 19th the sheriff, under this writ of execution, sold the property. Thereafter one Campbell and one Hatch, claiming to own the property, sued the sheriff for its conversion, and recovered a judgment against the sheriff, which judgment the sheriff afterwards paid. On the trial by jury, respondent, over appellants' objection, offered oral and documentary evidence tending to prove the levy of the writ of attachment on the 12th day of July, 1895, the levy of the writ of execution August 3, 1895, on the same property, then in custody of the sheriff under said attachment, and the sale of the same on the said execution on August 19, 1895. At the conclusion of the defendants' testimony the court ordered judgment for the plaintiff, and judgment was entered against the appellants on March 8, 1900, for the sum of \$850.

The sole point presented for our consideration is, did the attachment bond cover the damage resulting from the seizure and sale of the property attached? The contention of the appellants is that on the issuance of the writ of execution the writ of attachment became functus, and whatever damage thereafter occurred was by reason of the sale under the writ of execution, and that the attachment bond did not cover such damage. The law relative to attachments provides that:

"All moneys received by the sheriff under the provisions of this chapter and all other attached property shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected

to execution upon another judgment recovered previous to the issuing of the attachment."

"If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant as in this chapter provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose,—1. By applying on the execution issued on said judgment the proceeds of all sales of perishable or other property sold by him, or so much as shall be necessary to satisfy the judgment. 2. If any balance remain due, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notice of the sale shall be given and the sale conducted as in other cases of sales on execution."

"If, after selling all the property attached by him remaining in his hands, and applying the proceeds, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment."

"If the defendant recover judgment against the plaintiff, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom."

"If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action."

"Such bond shall be part of the record, and if judgment go against the defendant, the same shall be entered against him and sureties."

2 Ballinger's Ann. Codes & St. §§ 5366, 5370, 5371, 5373-5375.

The recital in the bond is that the sheriff was commanded to attach and safely keep within his custody all the property of the defendant not exempt, etc., sufficient to satisfy plaintiff's demand, etc.; and the sheriff did thereupon attach (here follows a description of the property afterwards sold). By the terms of the bond the respondent was to be indemnified and saved harmless from all

damages, expenses, costs and charges, loss and liability, which he might sustain or in any wise be put to for or by reason of the attachment, seizing, levying, taking, or retention in his custody, under the attachment, the property described in the bond. This language, analyzed, shows that the sheriff was protected against the following: (1) He was protected against all damage by reason of the attachment in any wise occurring. (2) He was protected against all damage by reason of seizing the property under the writ of attachment. (3) He was protected against all damage by reason of levying upon the property under the attachment. (4) He was protected against all damage by reason of taking the property under the attachment. (5) He was protected against all damage by reason of the retention in his custody of the property under the attachment. An examination of the sections of the law cited shows that the very object of the writ of attachment was to seize and hold the property of the debtor for sale to satisfy any judgment recovered against him; that the lien justifying the sale of the property for its satisfaction attached at the moment of the levy of the writ of attachment, and remained a continuous lien until the property was finally sold. *Shepard v. Guisler*, 10 Wash. 41, 38 Pac. 759. The writ of execution in such case is but the means to discharge the lien, and, if the judgment is not thereby satisfied, may be further executed as an independent writ, as in other cases. The damage that was caused by the sale of the property related back to the seizure of the property under the attachment writ for the purpose of sale in the event of a judgment against the debtor. When the sureties on the bond agreed to indemnify and save the sheriff harmless from any damage by reason of the attachment, that agreement obligated them to protect the sheriff against any damage arising from the attachment. Under the statute it was the duty of the sheriff to retain the attached property to answer any judgment that might be recovered in the action, and when the judgment was recovered the sheriff was required to sell the property which had been attached by him, and the law simply directed that the sale should be as in other cases on execution. These provisions are clearly set forth in the attachment law. This law was in force when the appellants signed the bond. When the appellants executed and delivered the bond to the sheriff, and agreed to indemnify and save him harmless from all damage by reason of the attachment, they obligated themselves to protect the sheriff against each and every act that the law required him to do under the attachment. The law required him to keep his levy and seizure good, to retain the property to answer any judgment that might be recovered in the action, and to satisfy the judgment out of the property attached, and to sell the same, and conduct the sale as in other cases of sales on execution. That is

all he did in this case. By reason of the performance of his duties in seizing the property, and in retaining it to satisfy the judgment, and in selling the same as in other cases of sales on execution, he was damaged in the amount of money that he was compelled to pay Campbell and Hatch. From that damage the appellants agreed by their bond to save him harmless. It was within the contemplation of the parties to the bond that they should protect the sheriff against any damage that he might sustain by reason of his doing what the law requires him to do under the attachment. The law contemplates a sale of the property attached to satisfy the plaintiff's claim. If the property be perishable, or in danger of waste or decay, it may be sold by order of the court before judgment is obtained, and the proceeds retained by the sheriff, and applied to the judgment when recovered. If such were done in the case at bar, the appellants could with equal consistency contend that they were not liable because the sale was not made under the attachment writ, but under an order of the court, and that the order of court authorizing the sale was what caused the damage to the respondent. The fallacy of the position is very apparent. The appellants, in their brief, say the office of the writ of attachment expired as soon as the writ of execution was issued, and in fact as soon as the judgment was rendered. This is an incorrect statement of the law. The attachment law specifically directs what shall be done under the attachment after the judgment has been obtained, and that is that the sheriff shall satisfy the judgment out of the property attached by him in the manner provided by statute. The sheriff's return in the case at bar shows that the property at the time of the receiving of the execution was already in his possession by virtue of the writ of attachment, showing thereby the continuous holding of the property by him under the attachment law. This sale, as we have already said, related back to the seizure of the property for that purpose under the writ of attachment; and the damage resulting therefrom was not only within the contemplation of the parties to the bond, but is within the terms and limitations of the bond. The judgment of the court below is affirmed.

DUNBAR, C. J., and FULLERTON and REAVIS, JJ., concur.

(23 Wash. 656)

STATE v. SURRY.

(Supreme Court of Washington. Dec. 29, 1900.)

ASSAULT AND BATTERY — CRIMINAL LAW — TRIAL — COMMENTS ON EVIDENCE — HARMLESS ERROR — EVIDENCE — CHARACTER — CRIMINAL INTENT — PROOF — NECESSITY — ARREST — WARRANT — INSTRUCTIONS.

1. Const. art. 4, § 16, provides that judges shall not charge the jury with respect to matters of fact, nor comment thereon, but shall

declare the law. Defendant, a deputy sheriff, shot a suspected party while chasing him after night, and claimed that the shot was fired to scare the party, and struck the walk, and glanced upward, hitting him. *Held*, that a remark by the court to the attorneys, in overruling objections to testimony, that it was common knowledge that if a bullet struck the sidewalk its motion would be much impeded, and that the angle it described after it left the sidewalk would be precisely the same as the angle it made from the mouth of the pistol, was not prejudicial to defendant, since the remark did not amount to a comment on the evidence, and was not addressed to the jury.

2. Where defendant, in an action for assault with a deadly weapon, claimed the ball glanced and hit the prosecutor, and the court, in deciding an objection to the introduction of testimony, made a statement as to the principle of physics in regard to the angle at which a bullet would glance, error in such remark, as a comment on the evidence, was cured by the court informing the jury at the time that they should pay no attention to his remarks.

3. Where defendant, who was hired to watch a building next to a vacant lot, testified that there was property on the lot, remarks by the court, in overruling objections to the cross-examination of defendant, that the witness had spoken several times about buildings on the lot, was not prejudicial to defendant as a comment on the evidence.

4. Defendant, a patrolman, shot the prosecuting witness while chasing him after night, and the ball entered the thigh, glancing upward. Defendant claimed that he did not intend to shoot the witness, but that the ball struck the walk, and glanced upward, hitting him, and that the revolver would shoot through a 2½-inch fir plank at 150 feet and go half a mile beyond. *Held*, that the refusal to admit a cartridge in evidence to show that, if the ball had not been impeded, it would have produced a much greater wound than was received by the prosecutor, was not prejudicial error, since it could not have enlightened the jury as to whether the witness was struck by a glancing ball.

5. On trial of defendant, a patrolman, for shooting a suspected party, whom he was chasing after night, evidence to show defendant's reputation as a careful, conservative, and conscientious peace officer in the community in which he resided was properly excluded, since it did not tend to show it unlikely that he would not commit the particular crime with which he was charged.

6. Defendant, a patrolman, shot a suspected party, whom he was chasing after night, and was indicted for assault with a deadly weapon and for assault and battery. The court charged that there could be no implied criminal intent in an assault to do bodily harm, and that if the jury were satisfied that defendant did not aim to shoot the party, and that the shooting was an accident or mistake, they could not find him guilty of the highest crime charged, "but that doctrine did not apply to the other charges embraced in the information." *Held*, that the instruction was not objectionable as authorizing a conviction even if defendant acted without criminal intent, since it merely told the jury that criminal intent might be implied in assault and battery, but not in assault to do bodily harm.

7. On trial of defendant, a patrolman, for assault to do bodily harm in shooting a suspected party, whom he was chasing after night, it was proper to charge on the right to arrest without a warrant.

Appeal from superior court, King county; O. Jacobs, Judge.

Henry Surry was convicted of assault and battery, and he appeals. Affirmed.

Wm. Parmerlee, for appellant. James F. McElroy, John B. Hart, and Walter S. Fulton, for the State.

ANDERS, J. The appellant was charged by information, under section 23, Hill's Pen. Code (Ballinger's Ann. Codes & St. § 7058), with an assault with a deadly weapon (a revolver) upon one Edward May, with intent to do bodily injury, no considerable provocation appearing therefor. On the trial, upon the information, the jury returned a verdict of guilty of assault and battery, and the court, after denying his motion for a new trial, sentenced the appellant to pay a fine and to imprisonment in the county jail. It appears from the record that about 2 o'clock on the morning of October 7, 1898, the appellant, who was then a "merchants' patrolman" and deputy sheriff, and two police officers, discovered the prosecuting witness, Edward May, then a youth of the age of 17 years, together with three companions, in or about a vacant lot near Madison street and Second avenue, in the city of Seattle. Suspecting from their movements that these four young persons were about to engage in some unlawful transaction, appellant and the two policemen concluded to apprehend them, and ascertain what they were doing at that place. The vacant lot seems to have been considerably lower than the adjacent street and sidewalk, and was approached by a flight of stairs or steps. While the officers were looking at these boys, three of them climbed over the fence into the adjoining vacant lot close to a candy and cigar store, while the fourth remained upon the sidewalk. Immediately after the boys went over the fence, the appellant and the policemen left the place where they had been standing unobserved in the shadow of a building, and went in search of them. One of the officers went down to the lot, and very soon thereafter the complaining witness, May, came up the steps to the sidewalk not far from where the appellant was standing, and ran down Madison street towards First avenue. The appellant ran after him, and, as he says, called upon him several times to stop. After he had pursued May for some distance without overtaking him, appellant drew his revolver, while he was running, and fired. After firing the shot he continued the pursuit for the distance of a block and a half, and then gave up the chase. May continued running until he reached the residence of his mother, where he informed her that he had been shot. Physicians were immediately summoned, and, upon examination, it was ascertained that the bullet from the pistol struck May in the back part of the thigh, and, passing upward, lodged near the groin.

It is claimed by appellant that the court erred in commenting on the evidence in the presence of the jury. It was admitted by the appellant at the trial that he fired the

shot that struck May, but he claimed as a defense that he did not shoot, or intend to shoot, at him; that he fired at the sidewalk, and that May's injury was caused by the accidental glancing of the ball. During the course of the trial, appellant, as a witness in his own behalf, testified as to the size, style, and penetrating power of the pistol fired by him on the morning in question, and stated that it "shoots almost like a rifle"; and thereupon his counsel proposed to introduce in evidence a cartridge like the one discharged from the revolver, for the purpose of showing that such a ball, having behind it such a charge of powder as the cartridge contained, and fired from such a powerful weapon, would penetrate a great deal further than the ball which struck May did, unless it met with some obstruction; and also to show, further, "that this was a glancing shot, and could not have come directly from the gun of Surry." Counsel for the state objected to the introduction of the cartridge in evidence for the alleged reason that it was irrelevant, immaterial, and incompetent, and then proceeded to argue to the court that every one who has had experience with pistols and firearms knows that loaded cartridges of the same kind do not all shoot with equal strength; that some are strong, some weak, and others do not explode at all; whereupon counsel for appellant requested the court to direct the jury to disregard the statement of the prosecuting attorney as to his and other people's experience with balls of this kind, as being entirely unfounded, and an unwarranted statement, for the purpose of prejudicing the jury. At this juncture the court remarked: "I don't suppose the force of the ball changed its direction. I don't see anything so very improper about that at all. Your motion is refused." The court then observed, "The jury, anyhow, has no business to pay any attention to it;" and continuing: "I don't think the testimony is material or admissible to prove the facts. If that bullet struck the sidewalk, its motion was impeded. It is common knowledge, if that bullet struck the sidewalk, its motion was very much impeded, and on the same angle that it went— The angle that it described after it left the sidewalk would be precisely the same as the angle it made from the mouth of the pistol." Counsel for appellant then stated to the court: "The defendant desires to except to the statement of the court made before the jury as to the angle that might have been taken by the bullet, or as to its motion, as a comment upon the evidence." Thereafter, on cross-examination, appellant testified that there was property on the vacant lot on the corner of Madison and Second avenue (where the boys were) which he was employed to watch, mentioning particularly Thedinga's hardware store. Counsel for the state then asked him the question, "What other property is there?" to which

he replied, "The Burke Building,—Burke Block." Question: "And you wish to tell this jury the Burke Block is in this vacant lot?" Answer: "It is adjoining the vacant lot,—have to go through the vacant lot to get to that property." Appellant's counsel then objected to this line of cross-examination, and said to the court: "He has answered those questions that it was properly adjoining the vacant lot he was employed to watch, not necessarily in that lot. He has testified to that time and time again. I don't know the object of counsel in pressing the matter,—a matter of this kind that is so plain and fully understood by the jury." In response to this objection the court said to counsel: "Objection overruled. Witness stated several times about buildings in the vacant lot. He has stated that there were things in that vacant lot. Go ahead." These remarks of the court were also objected to as a comment on the evidence.

Section 16 of article 4 of the state constitution provides that "judges shall not charge the jury with respect to matters of fact, nor comment thereon, but shall declare the law," and this court has uniformly held that a violation of this provision by the trial court necessitates a reversal of the judgment. See *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1008; *State v. Hyde*, 20 Wash. 234, 55 Pac. 49. In both of these cases it will be observed the objectionable remarks were addressed to the jury, and hence were literally violative of the mandate of the constitution. Here the case is different, the observations objected to having been directed to counsel. We do not, however, wish to be understood as holding that a judge, under this provision, is at liberty, during the progress of a trial, to comment in the presence of the jury on the facts which the jury must determine, in a way calculated to influence their action; yet it is manifest, from the language of the constitution, that its primary and special object was to prevent comments on the facts in evidence in connection with the instructions by which the jury are to be guided, and at a time when such comments would be likely to affect their minds. Prior to the adoption of the constitution, it was said to be the custom of some of our judges, either inadvertently or purposely, to indicate their opinions as to the facts in cases before them in their instructions to the jury; and it seems to have been the object of the framers of the constitution, in formulating the provision in question, to correct this supposed evil. But we do not think it was intended by this provision to prevent the judges from giving counsel the reasons for their rulings upon questions presented during the progress of a trial, or to prohibit them, in all cases, from stating, when necessary, the facts upon which they base their conclusions.

In regard to the objection first made, that the court below erred in making the statement in the presence of the jury respecting

the angle described by the bullet, if it struck the sidewalk, all we deem it necessary to say is (1) that, strictly speaking, the observations of the judge did not amount to a comment on the evidence, but simply to an expression of his opinion as to "a well-known law of physics"; (2) that the remarks were directed solely to counsel for appellant, and were not intended to influence the jury or to be considered by them; and (3) that, if any possible error was thereby committed, it was cured by the statement of the judge at the time, in the presence, and presumably in the hearing, of the jury, to the effect that the jury had no business to pay any attention to what was said.

Nor do we think that the learned counsel for the appellant has any substantial reason to complain of the declaration of the judge that "witness stated several times about buildings in the vacant lot; he has stated that there were things in that lot." Counsel, as we have seen, was objecting to the method pursued by the opposing counsel in cross-examining the witness, and was insisting that the witness had testified that it was property adjoining this lot—not in or on it—that he was employed to watch, and the remarks of the court which appellant's counsel now criticises were made in passing upon his objection, and as a reason for the court's ruling. And in view of the further fact that the witness himself, almost immediately thereafter, testified that he had stated that the property he was referring to was on the vacant lot, but meant to say, and to be understood as saying, that it was next to or adjoining the lot, we are unable to see how appellant could possibly have been prejudiced by the statement of the court. Had the statement under consideration been addressed to the jury when, or even before, the cause was submitted to them, the case would be different, and the rule announced in *State v. Walters* and *State v. Hyde*, supra, might reasonably be said to be applicable. While we are not disposed to overrule the prior decisions of this court as to the object and scope of this constitutional provision, we are not prepared to extend the rule enunciated in those cases so far as to hold that every casual, inadvertent, or unnecessary remark made by the judge in reply to a proposition or suggestion of counsel constitutes a sufficient ground for reversing the judgment. In our opinion, it is only such remarks of the presiding judge during the course of a trial as might reasonably influence the mind of an ordinary juror that can justly be said to be inimical to the constitution. And whether error has been committed in a given case must therefore depend upon the particular facts and circumstances therein disclosed.

At the trial the appellant offered in evidence a cartridge like that discharged from his revolver, but the court excluded it, and its ruling is assigned for error. It seems,

as above indicated, that the object of the evidence offered was to show that a ball propelled by such a charge of powder as the cartridge apparently contained would have inflicted much greater injury than the one did which struck May, if it was not impeded or deflected from its course by striking some solid substance. Before the appellant proposed to introduce this cartridge in evidence, he had shown by his testimony that he had made tests of the power of the pistol when loaded with such a cartridge, and that it would penetrate a 2½-inch fir plank at a distance of 150 feet, and then go about half a mile further. Under this state of facts, it is not apparent that an examination of the cartridge by the jury would have cast any additional light upon the question whether May was struck by a point-blank shot or by a glancing ball. We think the evidence offered was properly excluded, but, even if it was not, its exclusion was not prejudicial to the appellant.

Complaint is made of the action of the court in refusing to permit the appellant to prove his reputation as a careful, conservative, and conscientious peace officer in the community in which he resided, and it is insisted that the particular trait of character sought to be proved was in issue, and hence admissible in evidence. But we are unable to assent to that proposition. It is a general rule in criminal cases that evidence of the character of the accused, when offered by him, is relevant, and therefore admissible. But the character or reputation he is entitled to prove must always be such as would make it unlikely that he would commit the particular offense with which he is charged. *Whart. Cr. Ev. (9th Ed.) § 60*. In this case the appellant's character as a peace officer was not involved, but his character as an individual was involved in the offense charged against him, and therefore evidence of his reputation as a peaceable and quiet citizen in the community where he resided would have been admissible. But no such evidence was offered. *State v. King, 78 Mo. 555*.

The court, in its instructions as to the several offenses charged in the information and the proof necessary to a conviction, said to the jury: "If you come to the conclusion from this testimony, or from the examination of this testimony, you have a reasonable doubt as to whether he intended to shoot this young man, why you should acquit him of the higher offense. In other words, if you are satisfied that it was a mistake or accident, why probably you would have the right to find him not guilty of the highest offense stated. But that doctrine does not apply to the other offenses embraced in this information at all." And it is urged that the court, by this instruction, virtually told the jury that they might find the defendant guilty, even though they found he acted without any criminal intent. If the above-quoted excerpt from the instruction constituted all that

the court said with reference to the different offenses charged in the information and the proof necessary to sustain a conviction, there might perhaps be some force in appellant's contention. But, when the part objected to is read in connection with the whole instruction, it does not appear to us that appellant has any just cause of complaint. The court had previously defined assault and assault and battery in the statutory language, and at the time of making the statement complained of was explaining to the jury what must be proved in order to find the defendant guilty of the highest offense charged in the information, and had already stated to them that, in cases of assault with intent to do bodily injury, there can be no implied intent, and that "the intent necessary to sustain a conviction must be an express and positive intent to do bodily injury, and must be proved by competent testimony, like the other facts in the case." In order to show the applicability of the law as thus stated to the case in hand, the court told the jury that if they were satisfied beyond a reasonable doubt that appellant did not intend to shoot May, or, in other words, if it was an accident or mistake, they should find him not guilty of the highest offense stated. It is true that the court also told the jury that "that doctrine does not apply to the other offenses embraced in this information." But obviously the "doctrine" referred to was simply what the court had stated, namely, that a specific intent to do bodily harm must be proved in order to convict the defendant of the highest crime stated, and it was not error to say to the jury that that doctrine is not applicable to cases of simple assault, or of assault and battery, because such intent is not of the essence of those offenses, and need not be alleged in the information. *1 Bish. New Cr. Law, § 60*.

But we do not wish to be understood as saying that a crime may be committed without a criminal intent or by inevitable accident; for it is a well-established rule that, to constitute a crime in law, there must be an act coupled with an evil intent. But the intent is generally inferred from the doing of the act. It is said by Mr. Bishop that "there is little distinction, except in degree, between a will to do a wrongful thing and an indifference whether it is done or not. Therefore carelessness is criminal, and, within limits, supplies the place of the affirmative criminal intent." *1 Bish. New Cr. Law, § 313*. And in volume 2, § 692, of his work, the learned author says: "One who accidentally kills a man by discharging his gun at another's fowls in sport, the thing he supposes himself to be doing being a mere civil trespass, incurs the guilt of manslaughter; and it is the same where the firing of the gun which results in death is meant simply to frighten another, or when one carelessly discharges the contents of firearms into the street." In *State v. Myers, 19 Iowa, 517*, the defendant

was tried and convicted of an assault with intent to inflict a great bodily injury, and it was held, on appeal, that recklessly shooting into a crowd of people, and wounding one of them, though not intended, is criminal, and the conviction was sustained. In the case at bar the appellant's weapon was recklessly and willfully, not accidentally, discharged, and, under the authorities and the evidence, it seems clear that he was rightfully convicted of assault and battery.

Lastly, it is claimed that the court erred in its instruction as to the right to arrest without warrant. The particular ground of error relied on in this connection is that the instruction given has no application to the evidence in the case. But in that regard we think the learned counsel for the appellant is in error. The judgment is affirmed.

FULLERTON and REAVIS, JJ., concur.

(23 Wash. 646)

BRACKA v. FISH et ux.

(Supreme Court of Washington. Dec. 27, 1900.)

TAXATION—TAX DEED—RECORDING—ADMISSIBILITY IN EVIDENCE—PRIMA FACIE EVIDENCE—PARAMOUNT TITLE—BURDEN OF PROOF.

1. In an action for the possession of real property, plaintiff offered in evidence a tax deed executed June 26, 1895, to A., for city taxes, and a quitclaim deed from A. to plaintiff executed December 27, 1897, conveying the grantor's interest in the property. The tax deed and certificate were not recorded as required by Laws 1891, § 5, providing that purchasers of real estate at tax sales prior to November 1, 1891, shall have no lien on the realty as against purchasers for value and in good faith, unless they shall file their certificates of purchase or tax deeds in the office of the county auditor on or before November 1, 1892. Held that, in the absence of evidence that defendant was a bona fide purchaser for value, the refusal to admit the tax deed in evidence was erroneous, since it was prima facie evidence of title in plaintiff as against all others.

2. Where, in an action for possession of land, plaintiff offered in evidence a tax deed conveying the property to A., and a quitclaim deed from A. to plaintiff conveying A.'s interest, the burden was on defendant to prove a title paramount to the tax title.

Appeal from superior court, Spokane county; William McDonald, Judge.

Action by A. A. Bracka against William H. Fish and wife. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Walter E. Leigh and Robertson & Miller, for appellant. A. D. Wilson and James Hopkins, for respondents.

WHITE, J. The complaint in this action, omitting formal parts, is as follows: "(1) That the plaintiff is seised in fee of the following described premises: Lot eight (8) in block four (4) of Chamberlain's addition to the city of Spokane Falls, now Spokane, Spokane county, state of Washington. (2)

That the defendants are in the possession thereof, and unlawfully withhold the same from him. Wherefore the plaintiff demands judgment for the possession," etc. The answer, omitting formal parts, is as follows: "Comes now William H. Fish, one of the above-named defendants, who, answering for himself and himself only, says: (1) That he denies each and all of the matters, facts, and things set up and alleged in plaintiff's complaint herein filed, and in every paragraph thereof. (2) Defendant, further answering, says that he is the owner in fee simple, and for a long time past has been, and is in the peaceable possession of, said lot eight (8) in block four (4) in Chamberlain's addition to the city of Spokane Falls, Washington, now Spokane, Spokane county, Washington, and being the property described in the plaintiff's complaint, sought to be recovered by the plaintiff. (3) Defendant further says that the said plaintiff has no right, title, or interest, of any kind or nature whatsoever, in or to said property or any part thereof; that he has no legal claim of any kind whatever therein or thereto; and that his pretended claim for possession is not based upon any legal or valid instrument or proceeding or any color of right, and is wholly false, and his claim for one hundred dollars damages for withholding the possession of the same from said plaintiff wholly unfounded. Wherefore the said defendant prays," etc. The reply, omitting formal parts, is as follows: "Comes now the plaintiff, and, for replication to the affirmative matter set up in paragraphs two and three (2 & 3) of the answer of the defendants, denies each and every allegation, and all of the allegations, therein contained. Wherefore," etc. On the trial of the cause the plaintiff testified that he was the owner of the property in controversy, and, to sustain his title to the property, offered in evidence a deed dated the 26th day of June, 1895, from the city of Spokane, formerly the city of Spokane Falls, by W. H. Wiscombe, the city treasurer thereof, as grantor, to Louis Anderson, as grantee; the deed reciting as follows: "That whereas, in the assessment roll of the city of Spokane Falls, now Spokane, for the year 1890, the following described real estate, to wit, lot eight (8) in block four (4) of Chamberlain's addition to the city of Spokane Falls, now Spokane, according to the recorded plat thereof on file with the county auditor of Spokane county, state of Washington, the county and state in which said real estate is situated, was assessed, entered, and taxed by the proper authorities of said city for the municipal taxes for the said year in the name of 'unknown owner,' for the sum of six and 15/100 (6 15/100) dollars; and whereas, the said tax so assessed was not paid when the same became due and payable, and the said real estate and the said tax due thereon was duly entered in the delinquent list of all the per-

sons and property owing municipal taxes for the said year; and whereas, J. S. Watson, treasurer of the said city of Spokane Falls, now Spokane, Washington, did on the 27th day of April, 1891, at the door of the city-hall building in said city, pursuant to notice thereof duly given, and the statutes in such cases made and provided, put up and strike off and sell the said aforesaid real estate to said second party, Louis Anderson, at public auction, for the sum of six and $\frac{15}{100}$ ($6\frac{15}{100}$) dollars, the same being the highest and best bid, and the same having been twice before offered at said time, and there being no other bid for any parcel or lot of such premises at either of such offers, and such sum being the whole amount due upon said premises, taxes, penalties, and costs for said year 1890, and which said sum was then and there paid by the said purchaser to said city treasurer; and whereas, said city treasurer did thereupon issue a certificate of sale as required by law, stating therein the name of the person to whom said property was assessed as aforesaid, with a description of said real estate sold, as herein described, the amount paid therefor, the name of the said purchaser, that it was sold for the said taxes, giving the amount and the year of the assessment, as hereinbefore stated, and which certificate was signed by said city treasurer, J. S. Watson, after the said city treasurer had duly entered in the proper book the description of the land so sold, and the other matters required therefor by the city charter of the said city, he duly delivered said certificate of sale to said purchaser; and whereas, more than three years have elapsed since said tax sale, and no person has redeemed said premises within the time allowed by law or at all, nor has offered to redeem the same or any part thereof; and whereas, said purchaser has returned said certificate to the treasurer of the said city, and has demanded and is entitled to a deed in pursuance of said sale for the said premises, and has established to the satisfaction of the treasurer of the said city that he is entitled to a deed for said aforesaid premises: Now, therefore, for and in consideration of the sum of six and $\frac{15}{100}$ ($6\frac{15}{100}$) dollars, the amount of taxes, penalties, interest, charges, and costs, for which said premises were sold, the said first party, by virtue of the law in such cases made and provided, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm, unto said Louis Anderson, party of the second part, his heirs and assigns, the tract, parcel, and piece of real estate hereinbefore described, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and all rents, issues, and profits thereof, and all right, title, and interest as well in law as in equity of the former unknown owner, and of all owners known and

unknown, of, in, and to the said premises, to have and to hold the premises to the said party of the second part, his heirs and assigns, forever." This deed was recorded in the auditor's office of Spokane county on July 3, 1895. The plaintiff also offered in evidence in connection with said tax deed a quitclaim deed, acknowledged December 27, 1897, from said Louis Anderson to the plaintiff, purporting to convey to the plaintiff the property described in said tax deed. Objection was made by the defendant to receiving in evidence the tax deed and the deed from Anderson, and the court excluded the same, to which proper exceptions were taken. The certificate issued by the treasurer when the property was sold at tax sale was never filed for record in the auditor's office of Spokane county.

The appellant assigns as error the refusal of the court to receive in evidence the tax deed to Anderson and the deed from Anderson to him. The court excluded these deeds because the tax certificate and tax deed were not recorded as provided in section 5 of the Laws of 1891, being an act entitled "An act to cure defective titles to real estate, by providing for the collection of unpaid taxes and assessments, and by securing record evidence in relation to real estate sold for taxes or assessments, in the offices of county treasurers and auditors." As preliminary to the exclusion of the deeds, the court made inquiry whether the defendant claimed title subsequent to the plaintiff, and it was ascertained that defendant claimed title under a deed dated June 7, 1895, from P. A. Klein, as grantor. Section 5 of the Laws of 1891 is as follows: "Purchasers of real estate at tax sale prior to the first day of November, 1891, shall have no lien against said real estate for the amount of their payments, nor any title to said land, as against purchasers or incumbrancers for value and in good faith, unless they shall duly file their certificates of purchase, or tax deeds in case the same may have been issued, for record in the office of the county auditor on or before the first day of November, 1892."

The respondent claims that inasmuch as the appellant had not filed his certificate of purchase, as required by the act of 1891, the court committed no error in excluding the tax deed and the deed from Anderson. He further claims that the law of 1891 was a general statute to secure record evidence in relation to real estate sold for taxes, and applied to previous tax sales by cities as well as to sale of lands for delinquent state and county taxes. Appellant contends that the law of 1891 related solely to sale of lands for delinquent state and county taxes, and had no application to sale of lands by cities for delinquent city taxes. It is an established rule in the construction of statutes that a subsequent act, treating a subject in general terms, and not expressly contradicting the

provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. Black, *Interp. Laws*, 116. Under this rule the appellant contends that the act of 1891 did not apply to the sale of lands for city taxes. Be that as it may, we do not think this question is fairly raised on this appeal, and we will not pass upon it at this time. The taxes for which the land in question was sold were levied, sale conducted, and deed issued under a special act of the legislature of the territory of Washington approved February 1, 1886, being an act to amend an act to incorporate the city of Spokane Falls. The act in question provides for a city assessor, for an annual assessment of real and personal property, and the levying of a tax thereon for municipal purposes. It was provided by ordinance within what time taxes were to be levied. Within five days from the expiration of the time limited for paying taxes to the city treasurer, the treasurer was required to return the tax roll to the council, distinguishing thereon the taxes paid and those remaining unpaid. A warrant having the force of an execution was then issued to the treasurer, and he was to sell personal property to pay the taxes. On the first Monday in March of said year the treasurer was also required to make and return to the council a delinquent tax roll. The city clerk within ten days entered in such tax roll an order, under the seal of the city, commanding the treasurer to sell, for the payment of the delinquent taxes, the real estate mentioned therein. On the fourth Monday in April of such year, at a place named in the act, the treasurer or his deputy, after certain notice, commenced to sell the real estate mentioned in the roll, for delinquent taxes. He executed to the purchaser a certificate of purchase for the lands or lots sold to him, stating the amount paid therefor, etc., and it was provided that such certificate should be prima facie evidence of the regularity of all prior proceedings. The former owner or his grantee might, within three years from the date of the certificate of purchase, redeem, etc. "Should no redemption be made within the period of three years, the treasurer shall, on demand by the purchaser or his assigns, and the surrender of the certificate, execute to him a deed for such lands and lots therein described. Such deed shall be executed only for the lands and lots named in the certificate, and after payment of all subsequent taxes thereon. The deed shall be executed in the name of the city of Spokane Falls, and shall recite in substance the matters contained in the certificate, and that no redemption has been made of the property within the time allowed by law. Such deed shall be signed and acknowledged by the city treasurer, as such, and shall be recorded

within six months from its date. The deed shall be prima facie evidence that the property was assessed as required by law; that it was equalized as required by law; that the taxes were not paid; that the property was sold as required by law; that it was not redeemed, and that the person executing the deed was the proper officer, and the deed shall be conclusive evidence of the regularity of all other proceedings from the assessment by the assessor, inclusive, up to the execution of the deed." *Laws 1885-86*, p. 320. The tax deed was offered in evidence as the source of title of the appellant back to June 21, 1891. The respondent purchased the lot from one Klein in 1895. The only objection made in the court below and the only one urged here by the respondent is that the certificate of purchase was not recorded as required by the law of 1891, and therefore the deed founded on that certificate was not admissible. Conceding that the law of 1891 is as claimed by respondent, he is not in a position in this case to avail himself of the objection he makes. It will be observed that the act of 1891 applies only to purchasers or incumbrancers for value and in good faith. Against every one else, including the original owner, the certificate and deed, whether recorded or not, are prima facie evidence. The plaintiff does not plead that he is a purchaser for value and in good faith. If he had so pleaded, he could show these facts to overcome the title resting on the tax deed. But the tax deed was admissible in evidence as prima facie proof of the title of the appellant. *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. If section 5 of the law of 1891 bears the construction contended for by the respondent, this deed might be overcome and its effect destroyed, but that could be done only by the respondent showing affirmatively that he was a purchaser for value and in good faith. That would be a question of fact for the jury. By "good faith," as judicially interpreted, is meant a purchase made not merely for a consideration, but also without notice to the purchaser of an adverse claim to the property by others; for "the taking an estate after notice of a prior right makes one a mala fide purchaser." *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477; *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872. The testimony of the defendant shows that he paid a valuable consideration for the property to one Klein. Nothing is shown as to Klein's title. The only evidence of title the respondent offers is a deed from Klein to himself dated June 7, 1895, and that he was in possession when he purchased. He does not show any possession by Klein, or how long he was in possession. He says he relied upon an abstract of title when purchasing from Klein. The abstract was not introduced or offered in evidence. He further says he did not examine as to the taxes, but relied upon the statement of a gentleman he paid for that

purpose. This evidence, even if he had pleaded that he was a purchaser for value and in good faith, falls far short of showing that the respondent had any title to the property or that he was a purchaser in good faith. If the respondent desired to contest the regularity of the tax proceeding, he should have pleaded the irregularity. The burden of proving the same is cast upon him. *Ward v. Huggins*, supra. The court erred in refusing to receive in evidence the deed from Anderson to appellant and the tax deed to Anderson; and, under the state of the pleadings, the court erred in holding that the law of 1891 applied to lands sold by municipal corporations for delinquent taxes. As we have before indicated, the court reserves the determination of the question whether this act applies in any such event. The court erred in refusing to permit the jury to consider the deeds offered in evidence by the appellant, and in instructing the jury to find from a fair preponderance of the evidence who was the owner of the land described in the complaint. It erred, also, in not holding that the respondent must prove a title paramount to the tax title of appellant. The judgment of the court below is therefore reversed, and this cause is remanded for a new trial, with leave to respondent to amend his answer generally, if he so elects; the appellant to recover his costs on appeal.

DUNBAR, C. J., and REAVIS and FULLERTON, JJ., concur.

(23 Wash. 723)

MITCHELL et ux. v. MATHESON et ux.
(Supreme Court of Washington. Jan. 7, 1901.)
LANDLORD AND TENANT—FAILURE TO SURRENDER—ACTION FOR DAMAGES—WAIVER OF NOTICE TO QUIT—SPECIAL AND GENERAL VERDICT—EFFECT OF INCONSISTENCY—SPECIAL FINDING—MATERIALITY—ANSWER TO INTERROGATORIES—CONCLUSIVENESS.

1. In an action begun October 16, 1899, for failure to surrender the premises, based on a notice to do so within 30 days from July 26, 1899, "or as soon thereafter as you have completed the harvesting of your crop," a special finding that plaintiff was entitled to possession on November 1, 1899, is material, under the notice, to determine when lessee had completed harvesting, which the jury found was on October 31, 1899, and to show action prematurely brought.

2. Where a question is submitted to the jury, the party submitting it is bound by the answer in so far as it affects the general verdict in his favor.

3. Special findings control a general verdict if inconsistent with it.

4. In an action by a lessor's assignee against the lessee for failure to surrender, it appeared that prior thereto lessor, pursuant to the lease on a sale of the premises, gave lessee notice to surrender within 30 days from July 26, 1899, "or as soon thereafter as you have completed harvesting your crop," and that subsequent thereto, and prior to the action, plaintiff's attorneys wrote lessee that the premises had been sold to plaintiff, and that they had been retained to secure defendant's removal; that they understood he had 30 days to vacate after notice of sale; that this had been served and

received, and in reply defendant wrote that he did not wish to enter into a lawsuit; that he understood that he had rented the place for a year, and that, if they intended to force him off, then the sooner they started their action the better it would suit him. *Held*, that he did not thereby waive the notice required to be given under the lease, or the notice that was actually given and recognized in the letter of plaintiff's attorneys.

Appeal from superior court, Lincoln county; C. H. Neal, Judge.

Action by W. G. and L. A. Mitchell, husband and wife, against Dan W. and Mary Matheson, husband and wife. There was a verdict for plaintiffs, and from an order granting a new trial they appeal. Affirmed.

Myers & Warren, for appellants. Martin & Grant, for respondents.

WHITE, J. This is an appeal from an order granting a new trial. The action was begun to recover possession of certain real property and for damages. At the trial it was stipulated that respondents had yielded possession of the premises, and the damages was the only issue. The respondents were lessees in possession under a lease providing for vacation of the premises in case of a sale thereof. The appellants were purchasers of the premises and assignees of the lease. The jury signed special findings and a general verdict for appellants for \$100. The lower court granted a new trial solely upon the ground of conflict between the general and special verdicts; the order of the court being as follows: "Wherefore it is hereby ordered, adjudged, and decreed that the verdict of the jury in the above-entitled cause be, and the same is hereby, set aside, and the defendants are hereby granted a new trial on the grounds that the general and special verdicts of the jury are in conflict." The action was commenced in the superior court of Lincoln county on the 16th day of October, 1899. It is set forth in the complaint that the defendants entered into possession of the premises by virtue of a written lease, the terms of which were partially set forth. There is no dispute as to the terms of the lease. It was in evidence. By its terms the premises (farm lands) were leased from the 1st of March, 1899, to the 1st of March, 1900, subject to certain covenants, one of which was as follows: "It is especially provided hereby and agreed upon that the said party of the first part shall have the right to sell this land, or any portion thereof, at any time, and in the event of any such sale the said party of the second part is to remove from the premises, or from any such part thereof as may have been sold, on receiving thirty (30) days' written notice to so remove. And it is covenanted and agreed between the said parties hereto that, if such sale shall be made prior to the first day of May, 1899, then, and in that event, the said party of the second part is to be paid for all land plowed for the purpose of being cropped at the rate of \$1.00 per acre, and also to be paid for such grain or

other seed as he shall have sown upon such plowed land at the market value of such seed at the time the same was sown; and he shall be paid for the labor of seeding the same at the rates customary in the district for such work. And for all land plowed for the purpose of being summer-fallowed \$— per acre shall be paid in addition for each time said summer-fallowed land has been cultivated after being plowed. And, should such sale of land take place after the first day of May, 1899, then, and in that event, said party of the second part shall have the right to himself and his heirs to harvest the crop on the conditions above set forth; but in any and all events the crop grown upon this land is the property of the party of the first part, its successors and assigns, until the said rental share thereof has been delivered over as hereinbefore provided, anything in this agreement to the contrary notwithstanding." The complaint further alleged: "(5) That on or about the 10th day of July, 1899, the said United Trust, Limited, a corporation, sold all of the above-described land to the plaintiff W. G. Mitchell, who is now, and ever since said time has been, the owner and entitled to the possession of said premises. (6) That a few days after said sale, and on, to wit, the 20th day of July, 1899, the said United Trust, Limited, a corporation, served written notice upon said Dan W. Matheson that said land and premises had been sold, and said notice required said Matheson to remove from said premises within 30 days after the service of said notice, as provided in the lease aforesaid; and said notice was duly received by said Matheson on or about the — day of July, 1899, and before the 27th day of said month. (7) That after the sale of said premises to plaintiff, and on, to wit, the 8th day of September, 1899, said United Trust, Limited, a corporation, the lessor in the lease aforesaid, for a valuable consideration, duly sold, assigned, transferred, and delivered said lease and all its right, title, and interest therein to the plaintiff, who thereupon became, ever since has been, and now is, the owner thereof. (8) That thereafter, to wit, on the 13th day of September, 1899, this plaintiff demanded of defendant that he deliver possession of said premises to plaintiff, which demand was in writing, and was received by said Matheson; but said Matheson refused so to do, and notified plaintiff that he would not deliver possession thereof, but that he would hold said premises until the first day of March, 1900. (9) That the term for which said premises were demised as aforesaid, according to the lease, has terminated, and that said defendants hold over and continue in possession of said demised premises without the permission of plaintiff, and contrary to the terms of said lease; and before the commencement of this action said Matheson had fully completed his harvesting and threshing on said premises. (10) That more than 30 days have elapsed since the

making of the demands for possession as aforesaid, and the defendants have refused and neglected, and now refuse, to deliver up and surrender possession of said premises. (11) That the monthly value of the rents and profits of said premises is the sum of \$100." These allegations are denied. Evidence was introduced tending to show that between the 26th and 29th days of July, 1899, the lessor notified the defendants in writing of date July 26, 1899, that it had sold the land described in the complaint. The notice contained the following: " * * * And we have now to give you notice that we require you to surrender possession of said premises within thirty days from date, or as soon thereafter as you have completed the harvesting of your crop. This notice is given you in accordance with the terms of your lease, and we hope to hear from you at an early date that you have arranged to comply herewith." On September 13, 1899, Myers & Warren, attorneys for the plaintiffs, wrote to defendants as follows: "Dear Sir: The farm which you have leased and are now occupying has been sold to Mr. Mitchell, and the lease assigned to him. We have been retained to secure your removal from the premises. We understand you have 30 days to vacate after notice that the place has been sold, which notice we understand has been served, and received by you. We do not desire any litigation over this matter unless necessary, and hope you will vacate the premises without any trouble. We write you that you may have an opportunity to know and understand the condition of the matter before action is begun. We send this by register, that we may be assured of its reception by you." On September 19, 1899, Mr. Matheson replied to this letter as follows: "Dear Sir: I am just in receipt of your letter stating that you are retained to secure the removal of me from the place that I am living on. Now, I do not wish to enter into a lawsuit; but it seems that I am to be forced into one, or else give up what justly and honestly belongs to me. My understanding when I rented this place was that I leased it for one year, and that is my understanding yet. So, if your intention is to force me off this fall, the sooner you start your action the better it will suit me." It will be observed that these letters refer to the notice given by the lessor, and the notice given by the lessor required the defendants to surrender the premises within 30 days from July 26, 1899, "or as soon thereafter as you have completed the harvesting of your crop," leave being given to the defendants by this notice to remain in possession of the premises until the crop was harvested. Under the terms of the lease the lessor was interested in the crop, and the lessee was to care for that interest. One of the material questions, then, was, when was the crop harvested? The lease, according to the allegations of the complaint, was assigned to the appellants on September 8, 1899, and the appellants, there-

fore, stand in the same position in reference to respondents as did the corporation lessor prior to the assignment of the lease. When the case was submitted to the jury, the plaintiff asked the court to submit the following interrogatories, which request was granted: "Was the plaintiff entitled to the possession of the land in dispute prior to March 1, 1900, and, if so, when?" "What was the rental value of the premises in dispute from the time plaintiff was entitled to possession of the same until March 1, 1900?" To the first question the jury answered, "November 1, 1899;" to the second question, "One hundred dollars." The defendants also asked the court to submit certain questions, and this request was granted. The questions so submitted, with the jury's answers, were as follows: "At what time, if at all, was the 30-days notice in writing mentioned in the lease given by plaintiff to the defendants, or either of them? Answer. September 19, 1899." "On what day did defendant finish harvesting his crop raised on the land in question during the year 1899? Answer. October 31, 1899." "What is the date of the sale, if sale was made of the premises in question, to this plaintiff? Answer. September 1, 1899." "Who are the owners of the premises in question now, and who owned it at the date of the commencement of this action? Answer. W. G. Mitchell." "When did the lease mentioned in the complaint expire? Answer. October 31, 1899." "When was the conveyance from the United Trust Company to the plaintiff delivered to this plaintiff, if at all? Answer. September 1, 1899." "At what time during the year 1899 was plaintiff first entitled to the possession of the premises mentioned in the complaint? Answer. November 1, 1899." The appellants contend that the finding that plaintiff was entitled to possession on November 1, 1899, is immaterial, and a mere conclusion of law. We think it became material under the notice to surrender the premises, to determine when the respondents had completed harvesting their crop. The jury found that that was on the 31st day of October, 1899, and from that fact found that the plaintiff was entitled to possession on November 1, 1899. These findings are not conclusions of law, but are facts deducible from the evidence. The appellants submitted the interrogatory which drew forth the answer, "November 1, 1899," and the establishment of the right of possession of the appellants was one of the principal questions in issue. The appellants having submitted this question to the jury, it must have been submitted upon the supposition that there was testimony upon the subject, and the appellants are bound by the answer. *Dixon v. Bausman*, 17 Wash. 304, 49 Pac. 540. Special findings control a general verdict when they are inconsistent with it. *Sillsby v. Frost*, 3 Wash. T. 388, 17 Pac. 887. This action was commenced on October 16, 1899. According to the special findings of the jury, the appellants were not en-

titled to possession of the premises until November 1, 1899. The action was prematurely brought under this finding. The letter of the defendant Matheson to the attorney of the plaintiff, dated September 19, 1899, did not waive the notice required to be given under the lease, or the notice that was actually given and recognized by the appellants in the letter of their attorneys of date September 13, 1899. There was no abuse of discretion in setting aside the verdict and granting a new trial. The judgment and order of the court below in granting a new trial is therefore affirmed.

DUNBAR, C. J., and REAVIS, FULLERTON, and ANDERS, JJ., concur.

(23 Wash. 679)

WHEELER v. F. A. BUCK & CO.

(Supreme Court of Washington. Jan. 3, 1901.)

SALES — BROKERS — WITNESSES — WRITTEN STATEMENTS — EXPLANATION THEREOF — REASONABLE COMMISSIONS — PROFITS — EVIDENCE — RELEVANCY.

1. Where plaintiff, in an action to recover commissions for the sale of goods, introduced a paper, signed by the buyers, certifying that plaintiff took them to the sellers, from whom they purchased the goods, it was error to attempt to impeach the testimony of one of the buyers by introducing such paper to contradict him, and then preventing him from explaining his motives and the circumstances of signing the paper, since the paper was not a contract, but a mere statement, made outside of court, by persons who were not parties to the suit.

2. In an action to recover commissions, defendant offered to prove by a witness that the purchase of the goods by the witness was entirely unconnected with any act of plaintiff. *Held*, that the refusal of such offer was error, since such evidence would tend to show the improbability that the sale for which commissions were claimed was made by plaintiff.

3. Plaintiff sought to recover commissions under a contract with defendant. Defendant denied making the contract, but admitted that plaintiff had sold some goods for it, for which it owed him a reasonable commission. *Held*, that testimony as to defendant's profits on such sales was relevant on the issue of what were reasonable commissions for the sales made, and hence admissible.

4. Where plaintiff alleged a contract for commissions and sales made thereunder, and defendant denied the contract, but admitted some of the sales, and that it was indebted to plaintiff in a reasonable sum for commissions thereon, an instruction that, if the jury did not find that there was a contract, then they should award plaintiff reasonable commissions, was proper, such issue being raised by defendant.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by J. C. Wheeler against F. A. Buck & Co., a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Preston, Carr & Gilman, for appellant. Upton, Arthur & Wheeler, for respondent.

WHITE, J. This action was brought by the respondent to recover from the appellant the sum of \$256.05, with interest at the legal rate from September 9, 1899, for services alleged to have been rendered by the re-

spondent to the appellant in procuring the firm of Schmitz & Anderson to purchase from the appellant a bill of goods; the appellant being a wholesale liquor merchant, doing business in the city of Seattle. The complaint alleged the employment by the appellant of the respondent to act as agent in procuring Schmitz & Anderson to purchase the bill of goods upon an agreed commission of 10 per cent. of the selling price of all liquors in the bill except alcohol and champagne, and 5 per cent. of the selling price of alcohol, champagne, and other goods; that in pursuance of that employment he procured Schmitz & Anderson to purchase the goods; that the compensation agreed upon amounted to \$306.05, of which he had been paid \$50. The answer denied the employment, but admitted that the respondent procured the sale of a portion of the goods, to wit, \$1,934.11 out of \$3,891.11, and that he was entitled to a reasonable commission, not greater than the sum of \$100, therefor. The case was tried before a jury, who returned a verdict in favor of the respondent for the full amount of his demand. A motion for a new trial was interposed on the following, among other, grounds: Excessive damages; error in the assessment of the amount of the recovery, in that the same is too large; insufficiency of the evidence to justify the verdict; that the verdict is against law; and error in law occurring at the trial, and excepted to at the time. The motion for new trial was denied, and judgment entered upon the verdict, from which judgment this appeal is prosecuted.

The respondent testified to the agreement as alleged in the complaint, and that he procured Schmitz & Anderson to purchase the goods from the appellant. His testimony as to the making of the contract was corroborated by one Richardson. Appellant's manager, Buck, with whom the respondent testified he made the contract, testified in relation thereto that respondent came to the store of the appellant on the 4th of September, 1899, and said that there were a couple of persons in town going to buy three or four thousand dollars worth of goods, and said, "If I bring them down, will you give me a commission?" and he (Buck) said, "Yes." He further testified that nothing was said as to the amount of the commission; that the two persons were mentioned as Schmitz and Anderson. The testimony of Anderson was to the effect that the respondent solicited him to buy from appellant before he knew Mr. Schmitz, and before the partnership of Schmitz & Anderson was formed, but that he informed respondent that he thought he would buy from Mr. Goldstein, but that he had not determined yet; that after the partnership was formed he left the buying to Mr. Schmitz. The partnership between Schmitz and Anderson was formed on September 8, 1899. It appeared from the evidence that Schmitz or-

dered from Buck & Co. a bill of goods amounting to about \$2,000, and afterwards formed a partnership with Anderson, and then increased the original order until it amounted (including bills bought from other merchants, to wit, Schwabacher Bros. & Co., Incorporated, Schwabacher Hardware Company, Harrison & Treat, and Rainier Beer Company, and included in appellant's bill) to \$3,891.11. Respondent testified that, prior to the giving of the first order by Schmitz, he had been introduced to Schmitz, and had suggested to him that he buy his bill of goods from Buck & Co. This was denied by Schmitz, who testified that he did not meet the respondent until after he had given the \$2,000 order to appellant, and by Buck, who testified that the respondent came into the store while Schmitz was ordering the goods, and he (Buck) then and there introduced Schmitz to the respondent, they not having previously met. The respondent, a short time previous to the formation of the partnership, had urged Anderson to form a partnership with Schmitz. After the partnership was formed, respondent solicited Anderson to have the firm buy their bill from appellant, but Anderson answered that Schmitz would do all the buying in that line for the firm, and the uncontradicted testimony is that Schmitz did do the buying by doubling up the bill which he testified he had ordered from appellant before he formed a partnership with Anderson, and before he knew the respondent. Because of these facts, appellant conceded that respondent was entitled to a commission upon the increase in the order made after the partnership was formed, designating them in its answer as the goods bought by Anderson as distinguished from those bought by Schmitz. Mr. Schmitz testified positively that at the time he gave the \$2,000 order he did not know the respondent, and that the respondent had nothing to do with procuring either that order or the increased order. He further testified that the \$2,000 order for himself was given several days before he formed a partnership with Mr. Anderson, and that while giving the order the respondent came into the appellant's place of business, and he was there introduced to him for the first time. The final order was given on the 9th of September, 1899. During the cross-examination of Mr. Schmitz, a paper writing to the following effect was produced by the respondent, and designated "Exhibit C": "Seattle, Wash., Sept. 12th, 1899. This is to certify that we purchased our goods from F. A. Buck & Co. It was through Mr. E. Chilberg that we were introduced to Mr. J. C. Wheeler, who in turn took us to the above firm. H. P. Anderson. A. F. Schmitz. Witnesses: W. T. Moore. F. Dimmock." The respondent testified that Mr. E. Chilberg, mentioned in Exhibit C, was the person who introduced him to Anderson, and made known to him that Anderson contem-

plated going to Alaska with a stock of liquors, and that he was not introduced to Anderson by Chilberg until after he had made his arrangement with the appellant. It was also shown that Chilberg was a friend and acquaintance of Anderson's. Anderson testified that Mr. Wheeler had been around quite frequently, and wanted him to sign a paper similar to Exhibit C, but that he refused, and told him if there was any commission coming it was to Mr. Chilberg; that he was the man who was actually entitled to it; that he told Mr. Chilberg the circumstances; that Mr. Chilberg went home, and wrote out Exhibit C; that Anderson and Wheeler looked it over, and he (Anderson) signed it; that he signed it through his acquaintanceship with Chilberg, supposing that he would enable Mr. Chilberg to get a commission. On cross-examination, he testified as to his reasons for signing it, and the circumstances of the signing, and he further testified as to the circumstances and conversations about signing it, and reasons for Mr. Schmitz signing it. In rebuttal, Mr. Chilberg was called as a witness for respondent. He testified that Anderson denied that Wheeler was entitled to anything, and that the writing was prepared with the view that, if any commission was paid, he (Chilberg) should be entitled to some of it on account of introducing Mr. Wheeler to Mr. Anderson. The paper was signed on the steamship, in the hurry of departure. No representative of appellant was present when it was signed, and the appellant knew nothing about the signing of this paper. Mr. Chilberg and Mr. Moore both testified for the respondent in rebuttal as to the circumstances of the signing of the paper by Mr. Schmitz. This paper could not have been introduced as evidence against the appellant, and was admissible only as tending to contradict and impeach testimony of Schmitz and Anderson. Yet it is fair to presume that it greatly controlled the action of the jury. Upon cross-examination of the witness Schmitz, counsel for the respondent produced Exhibit C aforesaid, and examined the witness in relation thereto. On redirect examination, counsel for appellant undertook to inquire from the witness as to the circumstances surrounding the execution of the paper, and, after many objections and adverse rulings by the court, finally obtained a partial explanation of the surrounding circumstances, and then asked the following question: "Did you know at the time you signed that paper that it contained anything relating to the subject of the instrumentality through whom—the persons through whom—you made the purchase from Buck & Co.?" This question was objected to by counsel for respondent as leading, immaterial, irrelevant, and cross-examination of his own witness. The objection was sustained. Counsel for appellant then questioned the witness as follows: "Did you know, at the time you signed that paper—"

At this point the court interrupted, and ruled that no further question should be asked the witness upon that point, saying that if it desired to put any further questions on any other subject it might do so; otherwise, the witness could stand aside. "Any further questions in reference to that paper the court will rule out." This action of the court appellant assigns as error. This signed statement was not in the nature of a contract in writing. It was a mere statement or declaration of the witness, made at another time, different from, and inconsistent with, that made by him on the witness stand. "Since such attempted impeachment is a direct attack upon the testimony of the witness, and may result in serious consequences, it is important that the practice should be so regular that the witness may have full opportunity to admit, deny, or explain any statement which is thus assailed." Jones, Ev. § 848. Notwithstanding the fact that other witnesses testified fully as to the circumstances of the signing of the writing by Schmitz, we think Schmitz himself should have been allowed to fully explain how he came to sign, and his motives in signing. He was the only witness who could testify as to his reasons for signing such a paper. We think that the court erred in restricting the examination of the witness, and in not allowing the witness to explain at length and fully why he signed the writing, and what he intended to accomplish by so doing.

The appellant asked Schmitz, during the course of his examination in chief, the question, "What was it that took you to Buck & Co. to buy your goods?" to which the court sustained an objection. Thereupon appellant offered to prove by the witness Schmitz on the stand what the cause was that took him to Buck & Co. to buy; that it was entirely disconnected with the respondent; that the respondent had nothing to do with it. This offer the court refused, over respondent's objection. This is assigned as error. We think this was a proper question. The witness should have been allowed to show the circumstances that caused him to go to appellant to buy his goods, as rendering improbable the testimony of the respondent. For instance, that he had dealt with Buck & Co. before, or that some one else procured him to go there, or any circumstance showing that it was improbable that it was through the solicitation of the respondent. Such testimony is not positive in its character, but it is admissible, and the weight of it is for the jury. Jones, Ev. § 901; Insurance Co. v. Weide, 11 Wall. 440, 20 L. Ed. 197.

The appellant's answer admitted that the respondent procured Anderson to purchase \$1,934.11 worth of merchandise from appellant, but denies that it was on the contract alleged by respondent. And the appellant admits that the respondent by reason thereof became entitled to receive from the appellant \$100 and no more. Appellant further

pleads that on account of such services it has paid the respondent \$50. In effect, the appellant pleaded a contract of quantum meruit between it and the respondent for respondent's services in procuring Anderson as a purchaser. The court accepted this theory, and instructed the jury as follows: "If you believe from a preponderance of the evidence that the rate of commission—the rates of commission—were fixed by the parties in their conversation on September 4th, then you will compute the amount due plaintiff on the basis of the commissions so agreed upon. If you do not believe from the evidence that the parties in fact fixed the rates of commission, then you will determine from the evidence what rate of commission was a reasonable one on the date of the sale, and in that event you will compute the amount due plaintiff at such reasonable rate of commission." Portions of the bill of goods going to make up the total of \$3,891.11 were purchased by Schmitz & Anderson from other merchants, and were billed to Buck & Co., and by them to Schmitz & Anderson. Appellant offered to prove, as bearing upon the question of fact as to whether there was an agreement to pay 5 per cent. commission on these goods, that the commission allowed by the other merchants to Buck & Co. was less than 5 per cent. The court excluded the evidence upon respondent's objection. In the exclusion of this evidence error is assigned. As bearing on the same question, appellant sought to prove the profit of Buck & Co. upon the entire transaction. The court excluded the evidence, and error is assigned for this. The witness Buck testified that one of the items of the bill (alcohol) would bear no commission whatever, in answer to an inquiry as to what was the reasonable commission on that item. The answer of the witness to the inquiry, "Why?" was excluded by the court, which action is assigned as error. As to another item of the bill (beer) respondent asked the witness Buck what was the reasonable commission. He answered: "No commission; spot cash. They had gone to the brewery, and had the lowest spot cash price." This answer was stricken out by the court, on motion of counsel for respondent. Error is assigned for this. As to another item of the bill, to wit, the hardware bought from the Schwabacher Hardware Company, the witness Buck was asked by appellant's counsel whether appellant had any interest or profit in that item. His answer was excluded by the court, and error is assigned for so doing. The same assignment of error is made to cover the same question relating to the Harrison & Treat item, and the reasonable commission upon the item of champagne. We will consider all these assignments together.

The appellant, by his pleadings, denied the special agreement alleged by respondent, and Mr. Buck, the manager, with whom the respondent testified he made the contract, de-

nied in his testimony that any agreement was made for special commissions, and the appellant by its pleadings says that there was no agreement to pay any commissions save reasonable ones, and that the services rendered by the respondent were reasonably worth \$100, and no more. We think the testimony was relevant, as bearing upon the probabilities of the alleged contract. Was it reasonable to suppose that the appellant, who was a merchant carrying on his ordinary business, would pay commissions of 5 or 10 per cent. on the sale of goods when the profits on the sales would not justify such payment, and in many instances not equal the commissions? The authorities sustaining the admission of this kind of testimony are numerous. In an action on a contract for work when the testimony is conflicting as to the price agreed upon for the work, it is competent to show the value of such work at the time the contract was made, as tending to show what the agreed price was. In the case of Allison v. Horning, 22 Ohio St. 138, in which the plaintiff claimed that the agreed price for the work was \$1.50 a perch, and the defendant claimed that the contract price was \$1.35 a perch, the plaintiff was permitted to prove what it was worth to do the work embraced in the contract. The court says: "The only point of difference between the parties was the price for which it was agreed the work should be done. The evidence was admitted for no other purpose than to enable the jury to decide which of the prices claimed by the respective parties was the true price agreed upon. Of course, the weight of the evidence would be more or less affected by the other circumstances of the case, and be increased or diminished in proportion to the difference between the price claimed and the actual value of the work. But it was of some value, as tending to show the improbability of the claim of the defendant, and to enable the jury to arrive at the truth upon the point at issue between the parties, and was therefore admissible for what it was worth, in connection with the other evidence in the case. We are sustained in this view of the case by authority. In Kidder v. Smith, 34 Vt. 294, it was held that, 'when the testimony is conflicting as to the price agreed upon in the sale of personal property, it is competent to show the value of the property at the time of sale, as tending to show what the real contract was.' The chief justice, in delivering the opinion, said: 'The parties were in dispute, and their evidence conflicting, whether the defendant was to pay thirty-five or sixty dollars for the mare, and it became necessary to resort to circumstances and probabilities to determine which was right. As showing a probability in favor of the defendant's version of the trade, we think it was competent for the defendant to prove the value of the mare to be even less than the sum he agreed he was to pay. * * * To the same effect are the

cases of *Kimball v. Locke*, 31 Vt. 683; *Bradbury v. Dwight*, 3 Metc. (Mass.) 31; and *Swain v. Cheney*, 41 N. H. 232. The action in *Swain v. Cheney* was brought on a special contract for drawing lumber over a particular route. The controversy between the parties was as to the price agreed upon for the work. The plaintiff claimed that it was one dollar and fifty cents per thousand, and the defendant claimed it was one dollar per thousand. Each party gave evidence to establish his claim. The court held that 'evidence was admissible, as bearing upon the probabilities of the case, to show what was the usual and common price paid at that time and place for similar services.' " *Rubino v. Scott*, 118 N. Y. 662, 22 N. E. 1103, was an action brought upon an alleged contract of employment of plaintiff by defendant to assist him in purchasing certain railroad bonds for an agreed compensation. The making of the agreement and the rendition of the services were put in issue. The judgment in the court below was against the plaintiff. The supreme court says: "Defendant was allowed to prove, under objection and exception, the usual rates of commission in the city of New York, where the agreement was alleged to have been made, for buying and selling railroad bonds. The court say: 'In *Weidner v. Phillips*, 114 N. Y. 458, 21 N. E. 1011, it was held that, when the fact of an agreement for the sale of property for a specific price is in dispute upon the trial, evidence of its value may be given as bearing upon the question. There is no reason why the same rule may not be applicable to that arising out of the disputed fact whether the defendant, by agreement, undertook to allow and pay to the plaintiff the amount of commissions, etc., for services as claimed by him. In that view, the exceptions were not well taken.'" In *Banghart v. Hyde*, 94 Mich. 49, 53 N. W. 915, an action to recover \$100, the facts as claimed were that defendant held plaintiff's note for \$1,200, purchase price of certain property. Plaintiff could not pay. It was agreed that the note should be surrendered to plaintiff if plaintiff would turn over to defendant certain property. This was done, and the note surrendered. Plaintiff claimed that in addition he was to receive \$100. The defendant admitted the transaction as stated, but denied that he agreed to pay the additional \$100. For the purpose of showing the reasonableness of his claim, plaintiff offered to show by his own testimony what the value of the property transferred by him to defendant actually was. Defendant was also asked on cross-examination what was the value of the threshing machine and all the other property at the time it was turned over to him by plaintiff. These questions were objected to, and the objections sustained by the court. Plaintiff further offered to show that the value of the property was \$1,400 or \$1,500, which offer was excluded by the court, and no testimony was allowed upon the subject by the trial court, who

not only excluded the testimony, but charged the jury specially that it must not consider it. The court said: "We think this testimony competent. If the property largely exceeded in value the note which defendant surrendered, it was a circumstance which the jury had a right to consider in determining which of the parties was entitled to belief. It was an issue squarely made; one testifying that the \$100 was agreed to be paid, and the other denying it in toto. As was said in *Campau v. Moran*, 31 Mich. 282: 'When the parties were thus distinctly at issue upon the terms of the contract, evidence that the cost of performance of such a contract as the defendant set up would be greatly in excess of the contract price would certainly afford some reasonable ground for believing that defendant is in error on the facts.'" See, also, *Rauch v. Scholl*, 68 Pa. St. 234; *Raymond v. Day*, 111 Mich. 443, 60 N. W. 832; *Moore v. Davis*, 49 N. H. 45; *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77. "The rule of law seems to be, in controversies where a special agreement is alleged to have been made on one side and is denied on the other, that it is relevant to put in evidence any circumstances which tend to make the proposition at issue either more or less improbable; and this, not to change the contract, but as evidence of what it was, and the probability that the agreement or one of the other was made." *Standish v. Brady* (City Ct. N. Y.) 41 N. Y. Supp. 651.

There is another reason for the admission of the proposed evidence. The appellant admitted that the respondent—but not under the alleged contract—performed services for it in procuring Anderson as a purchaser, but alleged, in effect, that such services were reasonably worth only \$100. This was denied by the respondent. The court, in considering the pleadings, held that the plaintiff was entitled to recover on his alleged contract, or a reasonable rate of commission. We think the pleadings justified such instruction. That being so, the appellant had a right to show his profit on the transaction as a basis, among other things, upon which the reasonableness of the commissions might be computed. *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007.

It is extremely doubtful whether the evidence justifies the recovery of any commissions on the goods sold by Schwabacher Bros. & Co., Incorporated, Schwabacher Hardware Company, Harrison & Treat, and on the Rainier beer; but, as this case will have to be retried, we will not now pass upon that question.

The tenth error assigned, to the effect that the court instructed the jury that, if they did not find that the contract was made as alleged by respondent, they should award respondent reasonable commissions, we do not think is well taken. The appellant, by its pleadings, called for a determination of this question. The answer was not a simple denial. The issue of the reasonableness of

compensation was made by the appellant, and it cannot now complain because the court instructed on the issues made by it. The judgment of the court below is reversed, and this cause is remanded for a new trial, the appellant to recover its costs on this appeal.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

(22 Wash. 748)

McGEE et al. v. WINEHOLT.

(Supreme Court of Washington. Jan. 11, 1901.)

RES JUDICATA—BREACH OF CONTRACT—DAMAGES—INSTRUCTIONS.

1. A judgment by default in foreclosure for the sum advanced by the mortgagee and retained by the mortgagors is not a bar to a recovery in an action by the mortgagors for damages resulting from the mortgagee's breach of his agreement to loan them the full amount secured by the mortgage, though that issue was tendered by his complaint in the foreclosure suit, such issue being immaterial in that suit.

2. Where a mortgagee's breach of his agreement to loan the full amount secured by the mortgage results in no damages other than that the mortgagors are compelled to pay a higher rate of interest, no other damages should be awarded.

3. It is error to refuse to give instructions which are fairly within issues made by the pleadings, where there is evidence to support them.

Appeal from superior court, King county; O. Jacobs, Judge.

Action by H. J. McGee and Lizzie McGee against George H. Wineholt. Judgment for plaintiffs. Defendant appeals. Reversed.

Frank P. Lewis, for appellant. Wm. C. Keith and Bo Sweeney, for respondents.

FULLERTON, J. This is an action brought by the respondents against the appellant to recover damages for the breach of a contract to loan money. In their complaint the respondents alleged, in substance, that they were the owners of an undivided half interest in a certain lot in the city of Seattle, and had deeded the same to one Sanders to secure a loan of \$225 made to them by Sanders; that they were indebted also in certain other amounts then being pressed for settlement, and that they applied to the appellant for a loan of \$500 on the security of the lot, for the purpose of paying off this indebtedness; that the appellant agreed to loan them the sum of \$500, whereupon they executed and delivered to him their note for that sum, together with a mortgage upon the lot, and that appellant paid over to them \$300, but refused to pay over anything more; that because of such refusal they were unable to pay off the Sanders loan, and that the real property was for that reason lost to them, to their damage in the sum of \$2,000. It was further alleged that the appellant had knowledge of the purpose for which the money retained by him was intended to be used, and that he wantonly, knowingly, maliciously, and

fraudulently withheld the same for the purpose of defrauding respondents of their interest in the mortgaged property. The appellant, answering the complaint, put in issue by general denials all of its material allegations, and for a first separate answer pleaded a judgment entered in his favor, and against the respondents, in an action brought by Sanders to foreclose his lien upon the mortgaged property, in which the appellant appeared, and by cross complaint obtained a foreclosure of his mortgage. For a second separate answer, he alleged that the respondents represented that they desired to obtain the loan of \$500 for the sole purpose of expending the same in improving the property, paying the taxes, and insuring the building thereon; that they agreed that they would at once secure a segregation and partition of the lot between themselves and the owner of the other undivided half; that when he learned that they did not desire to expend the \$200 in improving the property, but to pay the Sanders loan, he entered into another agreement with respondents, by which it was agreed that the full sum of \$500 should not be loaned, but that the loan should stand as a loan for \$300, and that the \$200 retained by him should be indorsed on the note and mortgage. The respondents put in issue the new matter in the answer, and a trial was had, resulting in a verdict and judgment for respondents.

The learned trial judge refused to instruct the jury that the judgment in the foreclosure action constituted a bar to a recovery in the present action, and his refusal to so charge is assigned as error. The record of the foreclosure proceedings introduced in evidence shows that the appellant set out in his cross complaint his version of the contract; that the complaint was duly served on the respondents, who failed to answer thereto; and that the trial judge found that \$300 were actually loaned, and that on "certain conditions" the respondents were to have \$200 more, and that the judgment was silent as to any of these matters, being in form that of an ordinary decree for the foreclosure of a mortgage. It is contended by the appellant that, inasmuch as he tendered the issue of the breach of the contract in that case, the respondents were obligated to litigate it with him there, under the penalty of being barred from maintaining the contrary in any other action. But the rule invoked is not so broad as the appellant contends. Issues which are not material to the controversy, although determined, do not become *res judicata*. As was said by the court of appeals of New York in *People v. Johnson*, 38 N. Y. 63: "And, although a decree in express terms professes to affirm a particular fact, yet if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact." It is clear that the issue tendered was not material in the action to foreclose

the mortgage, as its maintenance was not an essential to the right of appellant to foreclose. Jones, Mortg. § 378. When the appellant refused to pay over to the respondents the balance of the loan, the respondents had the choice of two remedies. They could either return the money advanced, and require a return of the note and a cancellation of the mortgage, or they could retain the money advanced, and recoup in damages such losses as they suffered because of the breach of contract, which were directly traceable thereto, and which could not have been prevented by reasonable effort on their part. By electing to retain the money advanced, they affirmed the contract in so far as it was executed, which gave the appellant the right to foreclose for that amount, when his note became due and payable, as if the loan had been originally made for that sum. The right to foreclose, and the right to maintain an action for damages, were thus separate and distinct rights, in no way connected with each other, and the respondents, by refusing to accept the issue tendered, were not barred of their right to recover for the breach of the contract in an independent action. *Allen v. Wall*, 7 Wash. St. 316, 35 Pac. 65; *Long v. Eisenbeis*, 21 Wash. 23, 56 Pac. 933.

The appellant challenges the sufficiency of the evidence to sustain the verdict, and in this we think he must be sustained. After a careful examination of the whole record, we are unable to find any evidence which, even remotely, tends to show that the respondents lost the mortgaged property as a result of the failure of appellant to pay over the money retained by him. Taking the testimony in its most favorable light, it shows no damages directly resulting from the breach of the contract on the part of the appellant, other than that the respondents were compelled to pay a higher rate of interest on \$200 for the time between the execution of the note to appellant and the time it fell due than they would have been compelled to pay had the appellant advanced to them the full amount of the loan agreed upon. This sum was capable of mathematical demonstration, and the jury should have been confined to it as the measure of damages, in case they found the issues on which the right of respondents to recover depended in their favor. The question of excessive interest charges, the amount due upon the note, and in fact all matters growing out of the transaction, save only the damages arising from the retention of the \$200, were conclusively adjudicated in the action brought to foreclose the mortgage.

The appellant requested the court to charge the jury to the effect that if they found from the evidence that after the note and mortgage had been executed, and after \$300 of the sum named therein had been advanced, it was agreed between the parties that the balance of the loan should be retained by the appellant and credited upon the note, then they should find for the appellant. This in-

struction, or one of similar import, should have been given. It was fairly within the issues made by the answer and reply, and there was evidence tending to prove that such an agreement was made. The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and REAVIS, J., concur.

(23 Wash. 710)

DOREMUS v. ROOT et al.

(Supreme Court of Washington. Jan. 7, 1901.)
MASTER AND SERVANT—NEGLIGENCE—ESTOPPEL—APPEAL.

1. Where a fireman was injured in a collision owing to a train conductor failing to obey his orders, and he sued the railroad and the conductor jointly, and a verdict was rendered against the railroad company, nothing being said about the conductor, and the court entered judgment in favor of the conductor, it was error to enter judgment against the railroad, since, if the conductor was not negligent, the railroad could not be liable, and the judgment in favor of the conductor operated as an estoppel in favor of the railroad.

2. No retrial of the issues between the conductor and plaintiff or between him and the railroad could be ordered on appeal, since, even if the judgment should be regarded as one under Ballinger's Ann. Codes & St. §§ 6500-6521, declaring a judgment may be appealed from in part, there was before the appellate court only the judgment against the railroad; and, the judgment in favor of the conductor being at the most voidable, it could not be reversed, and, operating as an estoppel in favor of the railroad company, the judgment against it should be reversed without retrial.

3. It was not necessary that the judgment in favor of the conductor should be pleaded and proved before it could constitute a bar to a judgment against the railroad, since the court could judiciously notice its orders and judgments entered in the cause before it.

4. A contention that the railroad company could not avail itself of the judgment in favor of the conductor because it did not except to the court's construction of the verdict as amounting to a verdict in favor of the conductor was not well taken, the railroad not being adversely affected by such construction.

Appeal from superior court, Whitman county; William McDonald, Judge.

Action by F. C. Doremus against Samuel Root and another. From a judgment against defendant the Oregon Railroad & Navigation Company, it appeals. Reversed.

Cotton, Teal & Minor, for appellant. M. O. Reed, for respondent.

FULLERTON, J. This is an action brought by the respondent against the appellant, the Oregon Railroad & Navigation Company, and the defendant Samuel Root, to recover damages for a personal injury alleged to have been caused by the negligence of Root while acting as conductor on one of the appellant's freight trains. The respondent and the defendant Root were employes of the appellant, the one in the capacity of fireman and the other as conductor. On November 13, 1898, a freight train known as "Extra 149," drawn by the engine on which respondent

was acting as fireman, left Starbuck, in Columbia county, and proceeded in the direction of Winona, in Whitman county, both places being in this state. At about the same time a freight train known as "Extra 151," on which Root was conductor, left Winona, and proceeded in the direction of Starbuck. The conductor and engineer on each train were notified, before leaving their respective stations, of the approach of the other train, and were instructed to meet and pass at a station known as "Canyon Siding," where there was a side track, by means of which trains running in opposite directions could pass each other with safety. The rules of the company, as shown by the evidence, required the train first reaching a station where opposing trains were ordered to meet to enter the side track, and there wait until the opposing train passed. For some reason Conductor Root did not obey his orders, but permitted his train to run past Canyon Siding, and collide a short distance from that place with extra 149. The collision caused the injury to the respondent for which this action was brought. In his complaint the respondent alleges that Root, by virtue of his employment, had the charge and control of all trains on which he was employed as conductor, and of all persons employed on it, and is responsible for its movements while on the road; that as such conductor he had charge of the train hereinbefore mentioned known as extra 151, and negligently, carelessly, and recklessly permitted said train to run past Canyon Siding, well knowing that the same was liable to collide with the train on which the respondent was acting as fireman; that "by reason of the carelessness, negligence, and recklessness of the said Samuel Root, and through no fault of this plaintiff whatsoever," the injuries suffered by said plaintiff were received. While there is a general allegation in the complaint that the appellant itself was negligent, the complaint as a whole negatives the idea that there was any negligence on the part of the appellant, or any of its officers or employees other than the negligence of the defendant Root. Issue was taken upon the allegations of the complaint by both the appellant and the defendant Root, each answering separately, denying the allegations of negligence. A trial of the cause was had on the issues as thus framed, and the following verdict was returned by the jury: "We, the jury sworn and impaneled to try the above-entitled cause, find for the plaintiff and against the defendant the Oregon Railroad & Navigation Company, and assess his damages at the sum of \$15,100 and the costs of this action." After the verdict was read, but before the jury were discharged, the attorney for defendant Root inquired of the court what construction the court would place upon the verdict with respect to the defendant Root, "and thereupon," to quote from the record, "the court ruled that said verdict was and

should be considered as a verdict in favor of defendant Root." The verdict was then recorded, and the jury discharged. Afterwards, and on June 19, 1899, a judgment was entered in favor of Root and against the plaintiff for the amount of Root's costs. Within the statutory time after the return of the verdict the appellant moved for a new trial and in arrest of judgment, which motion being overruled, it moved for judgment in its favor on the whole record, which was also overruled, and on July 23, 1900, judgment was entered against it for the amount of the verdict. This appeal is from the last-mentioned judgment.

The general rule undoubtedly is that, where one has received an actionable injury at the hands of two or more persons acting in concert, or acting independently of each other if their acts unite in causing a single injury, all of the wrongdoers, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and he may enforce the liability in an action against them all jointly, or any one of them severally, or against any number of them less than the whole. While the wrong committed is the joint wrong of the several parties participating therein, it is also, in contemplation of law, the several wrong of each of the participants. Cooley, Torts (2d Ed.) p. 153. On this principle, at common law, a jury in actions *ex delicto* against several persons, contrary to the rule in actions *ex contractu*, were permitted to find against one or more of the defendants and in favor of the others. The rule with regard to actions *ex delicto* remains the same under the Code; and the practice now permits the jury in an action for tort against several defendants to return a verdict against so many of them as the proofs show are guilty of the wrong charged, and in favor of the others. As it is the peculiar province of the jury to determine the guilt or innocence of the several defendants, a verdict finding in favor of some and against others, even though there may be no very apparent reason for the distinction made, is not for that reason alone so far arbitrary or inconsistent as to require a reversal of the judgment entered thereon against those who have been found guilty. *Railway Co. v. James*, 73 Tex. 12, 10 S. W. 744. It seems to be equally well settled, also, that silence of the verdict as to one of the defendants will not vitiate it as against the others. Such a verdict is treated as a finding in favor of the defendant not named on all of the issues, on which he is entitled to a judgment that plaintiff take nothing by his action. *Howard v. Johnson*, 91 Ga. 319, 18 S. E. 132; *Kinkler v. Junica*, 84 Tex. 120, 19 S. W. 359; *Railway Co. v. James*, 73 Tex. 12, 10 S. W. 744; *Jones v. Grimmet*, 4 W. Va. 104; *Milling Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399. These general rules are relied on by the respondent to sustain the judgments entered in the court below.

It must be borne in mind, however, that there are wide distinctions between the ordinary action for injuries, where all of the defendants participated in the wrongful act which caused the injury, and actions like the one before us, where one is liable because he committed the act and the other by operation of law, both with respect to the relations of the defendants to each other and to the injured person. Joint tortfeasors are liable to the injured person (other than that he may have but one satisfaction) as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tortfeasors, nor does their liability to the plaintiff rest on the same or like grounds. The act of an employé, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employé not directed or ratified by the employer the employé is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior,—the rule of law which holds the master responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment, and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employé, and when the employer is compelled to answer in damages therefor he can recover over against the employé. *Oceanic Steam Nav. Co., Limited, v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987; note to *Village of Carterville v. Cook* (Ill. Sup.) 16 Am. St. Rep. 248 (s. c. 22 N. E. 14); *Shear. & R. Neg.* (5th Ed.) § 242; 2 *Van Fleet*, Former Adj. p. 1162. So, where the employer is sued separately for the wrong, he can bind the employé in any judgment that may be obtained against him by notifying the employé to come in and defend the action. This rule is well stated in *Littleton v. Richardson*, 34 N. H. 179, in the following language: "But when a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not." See, also, *Strong v. Insurance Co.*, 62 Mo. 289; *City of Boston v. Worthington*, 10 Gray, 496. So, also, in such an action, whether brought against the em-

ployer severally or jointly with the employé, the gravamen of the charge is, and must be, the negligence of the employé; and no recovery can be had unless it be proven, and found by the jury, that the employé was negligent. Stated in another way: If the employé who causes the injury is free from liability therefor, his employer must also be free from liability. This was held in *Railroad Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. In that case the plaintiff below was a passenger on the train of the defendant, and while such passenger was shot by the conductor of the train, and seriously injured. The trial court ruled that the plaintiff was entitled to recover compensatory damages from the company, even though it was made to appear that the conductor had reasonable cause to believe that an assault with a knife was about to be made on him by the plaintiff, and that it was necessary to shoot the plaintiff in order to protect himself from great bodily harm; holding that such belief on the part of the conductor would not relieve the company if the facts were that the plaintiff had no design to injure the conductor, and was not intentionally acting so as to indicate such design. This was held error by the supreme court. In the course of the opinion it was said: "It would seem, on general principles, that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity. * * * If the immediate actor is free from responsibility because his act was lawful, can his employer—one taking no direct part in the transaction—be held responsible? Suppose we eliminate the employé, and assume a case in which the carrier has no servants, and himself does the work of carriage. Should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that, if sued as an individual, he would be held free from responsibility, and the act adjudged lawful. Can it be that, if sued as a carrier for the same act, a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which, as an individual, he was justified in doing? The question carries its own answer; and it may be generally affirmed that, if an act of an employé be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor." See, also, *Whart. Neg.* § 157. So, too, from the principle that there can be no liability on the part of an employer for the act of his employé in which he took no part, if the employer is free from liability, it follows that a judgment in favor of the employé in an action brought against him for an injury caused by such an act is a bar to a recovery against the employer in an action brought against him for the same cause of action. And it has been held that an em-

ployer can avail himself of a judgment in favor of his employé, when subsequently sued, without calling on the party primarily liable to come in and plead the judgment for him. In the case of *Emma Silver Min. Co. v. Emma Silver Min. Co. of New York (C. C.)* 7 Fed. 401, the rule was announced as follows: "The weight of authority, however, is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both." In *Hill v. Bain*, 15 R. I. 75, 23 Atl. 44, the action was for personal injuries received by plaintiff while driving on a highway, caused by coming into collision with an obstruction left in the highway by two persons named Budlongs. The defendant pleaded in bar of the action a judgment in favor of the Budlongs, rendered on the verdict of a jury in an action brought by the plaintiff against them for the injury complained of, alleging that the Budlongs were the authors of the obstruction or defect. On demurrer this was held a good plea by way of estoppel. The court, after citing and reviewing a number of cases, said: "We think, on the authority of these cases, it is competent for the defendant town to set up, by way of estoppel in the case at bar, the judgment recovered by the Budlongs. Certainly, if the town had notified the Budlongs of the pendency of this action, and the Budlongs had, in consequence of the notice, assumed the defense, it would be competent for them, on the authority of these cases, to plead the former judgment in bar; for they would then be the real defendants, though defending in the name of the town, and ought not to be required to try over a question which they have already tried, with the result of a final judgment against the plaintiff in their favor. But the Budlongs, if they assumed the defense, would have to make it in the name of the town, and we see no good reason why the town should not be permitted to make, without calling upon them, any

defense which they could make, if called upon, in the name of the town." In *Featherston v. President, etc.*, 71 Hun, 109, 24 N. Y. Supp. 603, the facts were similar to the case last cited. There it was said: "The statement in the answer shows that Shafer was the wrongdoer, and that his act was the cause of the injury sustained by the plaintiff. So it seems to follow that, if Shafer was not liable for creating and maintaining the obstruction, the defendant cannot be liable for the failure to remove them. If Shafer was not liable because the plaintiff's own negligence produced the injuries of which she complains, the defendant is not liable for the same reason. Shafer and the defendant were not joint wrongdoers, and the rule that one wrongdoer cannot recover against or compel contribution by another does not apply. The relation between Shafer and the defendant was analogous to that of principal and agent, or principal and surety, or master and servant; and the rule in such cases is that a judgment in favor of the principal or the surety upon a ground equally applicable to both should be accepted as conclusive against the plaintiff's right of action. *Herm. Estop.* 169; *Castle v. Noyes*, 14 N. Y. 329. * * * Under this rule of law the turnpike company would be entitled to recover from Shafer any amount the plaintiff might recover against it. Such right would rest upon the principles of subrogation. The turnpike company would be entitled to be subrogated to plaintiff's right of action against Shafer, but the judgment on the merits in Shafer's favor in the plaintiff's suit against him relieves him of all liability to the plaintiff, or any person claiming under her, for the same cause of action. The plaintiff, therefore, by being barred by the judgment in Shafer's favor, is equally barred from any action against the company under the rule that whatever discharges the principal discharges the surety. As she had no cause of action against Shafer, she can have no cause of action against the defendant, and therefore the portion of the answer to which the demurrer relates does set up, in our judgment, a valid defense to the action, and the order appealed from should be reversed." In *King v. Chase*, 15 N. H. 9, it was held that a judgment in favor of a deputy sheriff is conclusive evidence for the sheriff in a subsequent action, where both actions are for the seizure of the same goods. In *Emery v. Fowler*, 39 Me. 326, it was held that a judgment in favor of a master in an action against him for the act of his servant, rendered in a trial of the action on the merits, is a bar to an action against the servant for the same act. In that case the court said: "To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same

acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others. A familiar example is presented in suits against a sheriff or his deputy, which being determined upon the merits against or in favor of one will be conclusive upon the other." See, also, *Atkinson v. White*, 60 Me. 396; *Spencer v. Dearth*, 43 Vt. 98; *Glaze v. Bank*, 116 Ind. 492, 18 N. E. 450; *Williams v. McGrade*, 13 Minn. 46 (Gil. 39); *Inhabitants of Lower Alloways Creek v. Moore*, 15 N. J. Law, 146; *Railroad Co. v. Hutchins*, 34 Ill. 108, 111; *Van Fleet*, *Former Adj.* § 572.

From these considerations it is clear that the trial court erred in entering judgment against the appellant after it had entered judgment in favor of the defendant Root. It becomes important, therefore, to inquire what disposition shall be made of the case by this court. Were the judgment against Root void, or were it before us for review on this appeal, or on a separate appeal by the present respondent, we would have no hesitancy in reversing both judgments, and remanding the cause for a retrial on the whole of the issues. But the judgment in favor of Root is not void. True, the verdict of the jury was silent as to him, and it may be that the rule that silence of the verdict as to one of the defendants is a finding in favor of that defendant is not strictly applicable to this class of cases; yet the action of the trial court in construing the verdict as one in his favor, and entering judgment thereon, was at most error merely, rendering the judgment voidable, and subject to be vacated or reversed if seasonably attacked by some one or more of the methods pointed out by the Code for vacating or reversing erroneous judgments. Inasmuch, however, as it was not so attacked, so far from being void, it stands as a conclusive bar to a recovery against Root, not only in the present action, but also in any action brought against him for the same cause of action. As against a collateral attack it is as conclusive as a judgment would be entered upon a verdict finding directly or in terms in his favor. Nor is the judgment before us for review. This is true no matter what view we may take of the judgments entered by the trial court; that is, whether we consider them as separate judgments, or, taken together, as constituting but one judgment. Under the statutes of this state a party aggrieved may appeal from a part only of a judgment entered against him in an action not triable de novo in this court (*Ballinger's Ann. Codes & St.* §§ 6500, 6503, 6521); hence, if the judgments are in law but one judgment, this appeal brings before us only

that part of it which affects the appellant. We can, therefore, neither reverse nor ignore the judgment in favor of Root, and are powerless to order a retrial of the issues as between him and the respondent. This being so, there can be no retrial of the issues between the respondent and the appellant. We are aware that the principles of the cases above cited, in so far as they permitted the party secondarily liable to plead directly in estoppel a judgment in favor of his principal on the same cause of action, have been criticised as controverting the rule that estoppels, to be binding, must be mutual. See, particularly, *Mr. Freeman's note to Hill v. Bain* (R. I.) 2 Am. St. Rep. 873, 876 (s. c. 23 Atl. 44). But, if we were to accept this criticism as just, it can have no application to a case presenting the conditions shown by the record before us. Here the judgment constituting the bar to a recovery was entered in the action then being tried by the court. Certainly there is no rule of law which requires that such a judgment should either be pleaded or proved in order to make it available to all of the defendants against whom or in favor of whom it operates. The contrary view would imply that the court could not judicially notice its orders and judgments entered in the very cause before it.

We have not overlooked the contention made by the respondent to the effect that the appellant cannot avail itself of the judgment in favor of Root because it did not except to the construction put by the court upon the verdict of the jury. This was not, however, a duty which devolved on the appellant. It was the respondent who was adversely affected by that construction, and, inasmuch as he consented thereto, he must abide by all the consequences which such construction entails. We conclude, therefore, that the judgment appealed from must be reversed, and the cause remanded, with instructions to enter a judgment for the appellant in accordance with the prayer of its answer; and it is so ordered.

DUNBAR, C. J., and ANDERS and REAVIS, JJ., concur.

(23 Wash. 730)

HAYS v. HILL et al.

(Supreme Court of Washington. Jan. 9, 1901.)

NAVIGABLE WATERS—TIDE LANDS—EXCAVATION OF WATER WAYS—EVIDENCE—PRESUMPTIONS—DAMAGES.

1. Under Act March 9, 1893, authorizing the excavation of water ways through public lands, and the filling in of tide lands, by private contract, and giving the contractor, on the completion of the contract, a lien on all tide lands "that he may fill in," subject to which lien all purchasers from the state shall take, the state is not required to retain all the land included in the contract until its completion, but may sell lands not filled in.

2. There being nothing to show that a corporation taking possession of tide lands included in a fill contract with the state, imposing a

lien for filling, but not filled in, and digging a ship canal thereon, had no license from the state, it will be presumed that authority of the state was first obtained.

3. Where a contract for the excavation of a water way through public tide lands reserved the right to the land commissioner to modify the plans, and he notified the contractor to suspend work until new plans should be prepared, which the latter did, but he was not ordered to proceed, and took no steps to compel the furnishing of new plans, his interest in damages caused thereby was too uncertain at this stage to call for redress at law, or for the interposition of a court of equity in his behalf.

Appeal from superior court, King county; O. Jacobs, Judge.

Suit by W. F. Hays against James J. Hill and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. F. Hale, Lewis, Hardin & Albertson, and W. F. Hays, for appellant. Burke, Shepard & McGilvra and Will H. Thompson, for respondents

WHITE, J. The contract and modifications thereof mentioned in the complaint are therein referred to and made part of the same. The complaint alleges, in substance: That on the 3d day of August, 1895, the state of Washington, by its duly-authorized agent, the commissioner of public lands, entered into a contract with the appellant and respondent Frank Shay, and on the 26th day of February, 1896, made and entered into a modification of said contract, which said contract and modification thereof were made under and by virtue of an act of the legislature of the state of Washington approved March 9, 1893, entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract; providing for liens upon tide and shore lands belonging to the state; granting rights-of-way across lands belonging to the state,"—such act being made, by reference, an integral part of said contract, and embodied therein, which said contract so made was duly approved by the governor of the state of Washington on the 7th day of March, 1896, pursuant to said act. That afterwards, on the — day of March, 1896, appellant and said Frank Shay duly filed with the commissioner of public lands a bond in the penal sum of \$25,000, the same being the amount of the bond provided by said contract, which said bond was then and there duly approved by said commissioner of public lands as provided by law; the bond being conditioned for the faithful performance of said contract. That said contract provided for the excavation of a certain water way, and the filling in and raising above high tide of certain tide lands belonging to the state of Washington, and provided further that appellant and said Shay, and their heirs and assigns, should have a lien, as in said act provided, upon said tide and shore lands described in said contract, which said appellant and Shay, their heirs and assigns, should fill above high tide

under said contract, and that the said state would hold such tide lands subject to the operation of said contract pending its execution, and subject to the ultimate lien thereunder. That said contract further provided for, and specified the character of, the retaining walls or bulkheads to be used and constructed in carrying out such contract; reserving, however, the right to the commissioner of public lands to modify such plan of bulkhead or retaining wall, as to "shape, form, and kind of material," as might be shown necessary, from experiment or otherwise, with ample power of deviation to meet the necessary requirements, etc. That said contract further provided that said state should appraise the title and shore lands affected by said contract after the date of the execution of said contract, forthwith, at their actual value at the time of the letting of said contract, and that said lands so appraised should never be disposed of by the state for less than said appraised value; and said state further undertook and agreed in said contract that all of said lands to be filled should be retained by the state in the same condition, as regards necessary cost of filling, as they were in at the date of the execution of said contract. Said act of the legislature further provided that the commissioner of public lands should have the right to extend the time for the beginning or completion of said work under said contract. That on the 25th day of July, 1895, said respondent Shay, for a valuable consideration, duly sold, transferred, and assigned to the appellant all his right, title, and interest in and to the application made for said contract, and for all contracts made thereunder, and on, to wit, the 7th day of March, 1896, said respondent Shay sold, transferred, and assigned to appellant all his right, title, and interest in and to the above-described contract, which said assignments were duly filed with and accepted by the commissioner of public lands, and that appellant has ever since been, and now is, the owner and holder of said contract. That afterwards, on the 4th day of May, 1896, and within the time provided by said contract, appellant duly entered upon the performance of said contract and commenced actual work thereunder, but that on the 5th day of May, 1896, while appellant was so at work under said contract, he was duly notified by the commissioner of public lands of Washington, as was his right under the law and the contract above referred to, that said commissioner had elected to exercise his right under said contract of changing the form of bulkhead to be used in the execution thereof, and would proceed to formulate and prescribe plans and specifications of his proposed change for the construction of such new style of bulkhead; and said commissioner thereupon notified, required, and ordered appellant to suspend operations under said contract until such plans and specifications for such new style of bulkhead should

be determined upon and communicated to appellant, whereupon appellant, as required by such order and direction of said commissioner, suspended work under said contract, and neither said commissioner nor any one else acting on behalf of the state has since said last date advised appellant of the kind of bulkhead required, or withdrawn the order made as aforesaid for suspension of work. That shortly after said last-named act of the commissioner, commanding appellant to suspend operation under said contract, and on or about the 13th day of November, 1898, said commissioner further notified this appellant to further suspend operations under his contract on account of the construction of the proposed government canal, known as the "North Canal," referred to in said contract, but continued said contract in all its provisions, rights, and privileges, in every wise, as the same was theretofore. That thereafter, and prior to the bringing of this action, on the 17th day of November, 1898, appellant duly notified the state of Washington of improper and illegal encroachments upon the lands covered by said contract by the respondents James J. Hill and said railroad company. That after the execution of the contract hereinabove described the said respondents James J. Hill and the Seattle & Montana Railroad Company unlawfully entered upon certain of the lands covered by the terms of said contract, and engaged in the wrongful work of excavating material from said land, and otherwise infringing upon and interfering with the rights of appellant under said contract, by excavating a private water way or ship's channel through said lands, 1,500 feet long, 200 feet wide, and 30 feet deep, which they continued to keep open, and by depositing material upon such lands, which unlawful acts and things thus being done by the last-named respondents were intended to, and would materially, interfere with the rights of the said appellant under said contract, to his irreparable damage. Appellant further alleges that said respondents Hill and said railroad company had at the date of the commencement of this action so excavated a large amount of material in places upon lands affected by this contract at the date of its execution, and had created embankments upon such lands with such material, in opposition to and violation of appellant's right under said contract; that said Hill and said railroad company would, unless prevented by order of the court, by the performance of the unlawful acts and things threatened and being performed by them, withdraw from the operation of appellant's said contract the lands described in appellant's said contract with the state of Washington, and would cause and compel appellant to commit a breach of his said contract, and a forfeiture of the bond given by him as aforesaid to the state of Washington. Said complaint further alleges that the state of Washington did not appraise the lands em-

braced in said contract between it and appellant and said Shay, as required by law, nor has it at any time since the letting of said contract caused any appraisal thereof, or of any thereof, to be made; that appellant cannot proceed with work under his contract until such appraisal is made, and until the state has determined upon the character of bulkheads required to be made in connection with said work, and until said state has performed the matters and things required of it, by keeping and maintaining the lands covered by such contract in the condition required of it by said contract and act above referred to; that appellant has no plain, adequate, or speedy remedy at law. Appellant claims that, by reason of the matters and things complained of in his said complaint, he has been damaged in a large amount by the wrongful acts and deeds of the said respondents Hill and the railroad company, wherefore he prays (1) that said respondents Hill and the railroad company, and those acting through, by, or under them, be permanently enjoined and restrained from further proceeding in the execution of the wrongful things complained of, and from in any way interfering with appellant under his said contract; (2) that respondent Frank Shay be decreed to have no interest in said contract; (3) that appellant have and recover of and from respondents Hill and the railroad company the damages complained of, and for the costs of this action; (4) that the state of Washington be decreed to be in default in having failed to appraise said lands as required by law; (5) for such other and further relief as may be just and equitable.

On the 17th day of July, 1899, respondent Frank Shay appeared and filed in this case an answer disclaiming any interest whatever in this action, or in the contract which is the subject of this litigation. On the 13th day of January, 1900, respondent the state of Washington appeared and filed its demurrer to said complaint upon the following grounds: "(1) The court has no jurisdiction of defendant herein in this case; (2) the complaint does not set up facts sufficient to constitute a cause of action as against this defendant; (3) that there is no equity in the complaint as against this defendant, and no relief asked against this defendant by the plaintiff, in the power of this court to grant." On the 30th day of January, 1900, respondents Hill and the railroad company filed their demurrer to plaintiff's complaint, setting forth the following as the grounds of such demurrer: "That there is a defect of parties plaintiff to this action, in this: that Frank Shay, who is mentioned in said fourth amended complaint, is a necessary party plaintiff to this action, jointly with the plaintiff, William F. Hays. (2) That there is a defect of parties defendant to this action, in this: that the state of Washington is a necessary party defendant thereto, but, although formally joined as such in said

fourth amended complaint, cannot lawfully be sued herein in this court. (3) That said fourth amended complaint does not state facts sufficient to constitute a cause of action against these demurring defendants, or either of them. (4) That said fourth amended complaint does not state facts sufficient to constitute a cause of action in equity against these demurring defendants, or either of them. (5) That, if any cause of action whatever is stated in said fourth amended complaint, the plaintiff has a plain, speedy, and adequate remedy at law thereon; and this court, before which this action has been brought, and the plaintiff's alleged cause of action therein has been set forth in said fourth amended complaint as one of equitable cognizance, has no jurisdiction, sitting as a court of equity, of the matters and things alleged in said fourth amended complaint, or of any thereof." On the 24th day of March, 1900, the court rendered its decision upon said demurrers, in which he sustained said demurrers; and, the plaintiff having elected to stand upon his complaint, upon motion of defendants the court dismissed this action on the merits, to which order and judgment of dismissal plaintiff at the time took exception. Thereupon plaintiff appealed to this court from such final order.

The errors assigned are as follows: The lower court erred in sustaining the demurrer of respondent state of Washington, and in making the final order dismissing appellant's complaint herein. The lower court erred in sustaining respondents' demurrer to plaintiff's (appellant's) complaint, and in dismissing this case.

The appellant, in his brief, says: "Frank Shay, one of the respondents, is easily disposed of, in the light of his assignment of all his right, title, and interest in the contract in question, and his answer herein, in which he expressly disclaims any interest whatever in said contract or in this case; and these actions on his part remove any question of his being a party in interest either in said contract or in this case. The demurrer of the state of Washington cuts but little, if any, figure in this case. The question as to whether or not the court has jurisdiction of the state in this case, or as to whether or not the complaint states a cause of action against the state, is of but little consequence to the appellant, in determining his right to the relief sought against respondents Hill and the railroad company. The state and Frank Shay were brought into this case to satisfy the requirement of the lower court, and appellant would not be damaged or his case weakened if they were both dismissed from this case." In these respects we view the complaint in the same light as the appellant, and no error was committed by the court below in sustaining the demurrer of the state of Washington to the complaint. The state was not a necessary

party to the action, and the complaint stated no cause of action against the state. As to whether or not the court had jurisdiction over the state in this action, we express no opinion, as we do not think it necessary to pass upon that question at this time. Shay, by his disclaimer, is no longer a necessary party.

We have examined the contract in this action, it being made part of the complaint by apt reference. There is nothing in the contract on which to base the allegation of the complaint that the state "undertook and agreed * * * that all of said lands to be filled should be retained by the state in the same condition, as regards necessary cost of filling, as they were in at the date of the execution of said contract." The law of the state relative to the excavation of water ways by private contract, under which the appellant claims, does not contemplate a retention of the tide lands by the state until the contract of filling in is complied with. The state retained the right to sell its tide lands or lease its harbor areas. By the act in question there was reserved to the contractor a lien only on the lands filled in under such contract. The complaint now under consideration is the fourth amended complaint. The license or right of Hill and the railroad company to enter the lands partially covered by the terms of the contract, and to fill in the same, and to excavate the private ship channel, does not clearly appear from the complaint. An amended complaint filed in this action before the complaint under consideration, and brought here by respondents by way of a supplemental record, alleges that the state of Washington duly sold and conveyed to the defendant Hill the lands he is now alleged to be trespassing upon, subject to the lien claim and right of the appellant under said contract. It may be that, under the strict rule that the fourth amended complaint must be construed without reference to former pleadings, we should not take this fact into consideration. The allegation of the fourth amended complaint that Hill and the railroad company unlawfully entered is a mere conclusion of law. The state has been made a party, and has admitted by its demurrer all matters well pleaded. The character of the work alleged in the complaint is such that, if the parties doing it were mere trespassers, the officers of the state charged with the sale and control of its tide lands must have known of the work. The appellant also alleges in his complaint that he notified the state of the acts of the respondents before bringing this action, and as early as the 17th of November, 1898. It is presumed that the board of state land commissioners, on whom devolves the duty of looking after such matters, would not have permitted the respondents Hill and the railroad company to enter upon the public lands and commit such a trespass as is alleged. The law constantly presumes that

public officers charged with the performance of official duty have not neglected the same. *Kimball v. School Dist. No. 122* (decided December 13, 1900) 63 Pac. 213; *Mechem, Pub. Off. § 579*. There are no facts alleged in the complaint showing that the respondents Hill and the railroad company had no license or authority to enter upon the lands and excavate the channel mentioned; and, as the state has the right to sell notwithstanding the contract of the appellant, we are justified in presuming that the respondents are and have been rightfully in possession.

The respondents contend that the contract pleaded was invalid originally; that it has lapsed through nonperformance and the expiration of the time limit therein provided. As we view this case, it is not necessary to pass upon these questions at this time, and we express no opinion in that respect.

There is nothing in this complaint showing that the respondents Hill and the railroad company have in any way compelled the appellant to desist from actual work under his contract. The contract provides and reserves the right to the commissioner of public lands to modify the plans and specifications of bulkhead and retaining walls, as to shape, form, and character of material, as might be shown, by experiment or otherwise, to be necessary to impound in a secure manner the material of the embankment provided for therein, with ample power of deviation to meet the necessary requirements, etc. The complaint further alleges that on the 4th of May, 1896, the appellant entered upon the performance of his contract; that on the 5th of May, 1896, appellant was notified by the commissioner of public lands of Washington, as was his right under the law and the contract, that said commissioner had elected to exercise his right under said contract of changing the form of bulkhead to be used, and that he would proceed to formulate and prescribe plans and specifications of his proposed change for the construction of such new style of bulkhead, and said commissioner thereupon notified, required, and ordered appellant to suspend operations under said contract until such plans and specifications for such new style of bulkhead should be determined upon and communicated to appellant; that under the contract the appellant, by reason of such notifications, suspended work. The complaint further alleges that no new style of bulkhead has been furnished, and the commissioner has not advised the appellant of the kind of bulkhead required, and that the commissioner has not withdrawn his order commanding the plaintiff to cease work, etc. There is no allegation in the complaint that the appellant has ever requested, or that he has taken any steps whatever to compel, the commissioner to furnish the new style of bulkhead. The commissioner may never furnish such new style, or it may be years before he furnishes

the same. The contract in the meantime is in a state of suspension. When a new style of bulkhead is furnished, and the appellant then proceeds with his contract, it will be time enough to determine what damages he has sustained or may sustain by reason of the acts of the respondents. The damages now claimed may never belong to the appellant, and his interest in the same depends wholly upon the action of the state land commissioner in furnishing a new style of bulkhead. This interest is too uncertain to now call for redress in a court of law, or for the interposition of a court of equity in his behalf. The judgment of the court below is therefore affirmed.

DUNBAR, C. J., and REAVIS, FULLERTON, and ANDERS, JJ., concur.

(9 Wyo. 297)

SHERLOCK v. LEIGHTON.¹

(Supreme Court of Wyoming. Jan. 10, 1901.)

MINES AND MINERALS — ADVERSE CLAIM — DEVELOPMENT—WORK ON ADJOINING CLAIM — FORFEITURE—CITIZENSHIP—PROOF.

1. Where, in an action to determine the ownership of a mining claim, plaintiff relies on a forfeiture for nonperformance of work on the claim, and shows that no work was performed within the limits of the claim for two successive years, he establishes a prima facie case of forfeiture, casting on defendant, claiming the performance of work outside the claim for the benefit thereof, the burden of showing the performance of such labor, and its reasonable tendency to benefit the claim; and hence plaintiff may show in rebuttal that the work relied on did not benefit the claim.

2. An adverse claimant of a mining claim relied on a forfeiture for neglect for two successive years to perform labor in its development. The claimant showed work done in a tunnel on an adjacent claim, which was performed in good faith for the development of the claim in dispute. The location of the claim and the direction pursued by the tunnel, as well as the location of the vein as disclosed by the outcroppings, showed that, if the tunnel was continued on its course as laid, it probably would have intersected the vein on the disputed claim. The adverse claimant alone expressed the opinion that the tunnel did not benefit the claim. Held insufficient to support a judgment of forfeiture, since the conflict in the evidence as to the benefit of the tunnel to the claim in dispute was not such as to authorize the court in refusing to disturb the judgment.

3. In an action by an adverse claimant basing his right to a mining claim on a location after an alleged forfeiture, that the original locator for a patent failed to prove citizenship cannot entitle the adverse claimant to judgment, since the absence of proof of citizenship authorized the refusal of a judgment for the original claimant, but did not authorize a judgment for the adverse claimant.

4. Where an adverse claimant sues for possession of a mining claim, evidence that when the claim was originally located the four corners were marked by posts set in the ground, indicating the particular corner which each represented, and that a party acquainted with the claim subsequently noticed that the corner and side posts were up, is sufficient to justify a finding that the original location was so distinctly marked as that its boundaries could be readily traced.

¹ For opinion on rehearing, see 63 Pac. 334.

Error to district court, Fremont county; Charles W. Bramel, Judge.

Action by George H. Leighton against Peter R. Sherlock for possession of a mining claim. From a judgment in favor of plaintiff, defendant brings error. Reversed.

M. C. Brown, for plaintiff in error. Henry McAllister, Jr. (Blackmer & McAllister, of counsel), for defendant in error.

POTTER, C. J. Plaintiff in error applied at the United States land office for a patent to the Cleveland lode mining claim. Defendant in error filed a protest and adverse claim, and instituted this suit in support thereof to determine the ownership or right of possession, in pursuance of the provisions of section 2326 of the Revised Statutes of the United States. The claim of defendant in error is based upon a location of the Dewey lode, July 11, 1898, covering practically the same ground as that included within the exterior boundaries of the Cleveland lode. Plaintiff in error and his grantors had been in possession of the Cleveland lode for several years, and had done considerable work in the direction of its development. By an amendment to the petition it was alleged that during the years 1896 and 1897 the claimants of the Cleveland had neglected to perform \$100 worth of labor and improvements, or any amount upon or for the benefit of that lode or claim; and that thereafter, and before resumption of work thereon, the defendant in error located the Dewey lode; and that, in consequence of the nonperformance of said work, the right and title of plaintiff in error or his grantors was forfeited, if any such right or title had ever been acquired. The case was tried to the court without a jury, and resulted in a judgment for defendant in error, who was the plaintiff below. The trial court found that defendant in error had established his right and title to the Dewey lode mining claim, and he was adjudged to be the owner and entitled to the possession of the premises in controversy. The case is brought here by proceedings in error.

In support of the averment of forfeiture the plaintiff below confined his evidence in chief to proof that in 1897 no work was performed or improvements made within the boundaries of the Cleveland claim. The defense introduced evidence showing the performance of the requisite amount of work during that year in a tunnel outside the boundaries of the claim, but near one of the end lines thereof, upon an adjoining patented claim known as the "Carisa," or "Mono," and that the work in such tunnel was performed as assessment work upon the Cleveland, as well as another claim known as the "Sampson," and for the purpose of developing both said claims. According to the testimony produced by the defense, the object of working the tunnel was the intersection of the vein upon the Cleveland, and thereafter a continuance

of the tunnel by the owners of the Sampson until it should reach their claim, which was situated beyond and adjoining the Cleveland. The owner, or one of the owners, of the Sampson was also interested in the Cleveland. It was testified by the witnesses for the defendant (plaintiff in error here) upon this subject that the tunnel was dug in a favorable place to reach the ore on the Cleveland lode. In rebuttal the plaintiff was permitted, over objection, to introduce testimony to the effect that the tunnel did not tend to the benefit of nor to improve or develop the Cleveland claim. The ruling of the court in that regard is assigned as error. It is contended that the burden of proof to establish forfeiture rested upon the plaintiff below, who had alleged the same; and that the evidence permitted to be introduced in rebuttal was improperly received, as it should have been offered in chief as a part of the plaintiff's case. It is undoubtedly well settled that the party relying upon a forfeiture must allege and prove it, and the burden of proof in the first instance rests upon him to establish the forfeiture. When, however, such party shows that no work was performed within the limits of the claim, he makes out a prima facie case; and thereafter, should his adversary depend upon labor done outside the claim, the burden is cast upon him of proving the performance of such labor, and that its reasonable tendency is to the benefit of the claim. *Hall v. Kearny*, 18 Colo. 505, 33 Pac. 373; *Mining Co. v. Barclay* (C. C.) 82 Fed. 554. If the work has in fact been done for the development of the claim, it may properly be considered as annual assessment work, although it may have been performed without the exterior boundaries of the claim. And in such case it is held to be immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties in doing the work. *Strasburger v. Beecher* (Mont.) 49 Pac. 740; *Hall v. Kearny*, supra; *Mining Co. v. Barclay*, supra; *Mining Co. v. Callison*, 5 Sawy. 439, 9 Morr. Min. Rep. 616, 1 Fed. Cas. No. 9,886. The reason of the rule which shifts the burden of proof in such cases is, we think, obvious. It is not a legal presumption that all labor done outside a claim by the owner is performed as representation work. If so performed, and it was intended as the required annual labor, the fact must be peculiarly within the knowledge of the claimant; and one charging a forfeiture can hardly be expected to be informed as to all work which may have been performed off the claim, or as to the intention or purpose thereof. The court did not err, therefore, in admitting the testimony introduced in rebuttal upon the question of the effect or tendency of the work done in the tunnel. And for the same reason it was not error for the court to reject the testimony offered by the defendant below in surrebuttal to show that such work did tend to inure

to the benefit and development of the claim. It was incumbent upon the defense to show that fact, as a part of its main case, after the plaintiff had made out a prima facie case by proof of the nonperformance of work within the boundaries of the claim.

This brings us to the questions involved in the assignment of error that the judgment is not sustained by the evidence. In this connection it is argued on behalf of plaintiff in error that the evidence is insufficient to establish a forfeiture of the Cleveland claim. There seems to be no question but that the owners of the Cleveland made a sufficient expenditure, in 1897, in the way of labor in the tunnel; and that such labor was performed as representation or assessment work for the Cleveland lode. The contention of the locator of the Dewey lode (defendant in error) is that such labor did not tend to the benefit of the Cleveland. It is argued, with some basis therefor in the testimony, that a continuation of the tunnel in its original direction without a shifting thereof would intersect the Cleveland vein outside the boundaries of the claim. The direction of the tunnel originally was northerly, and slightly to the east, but perhaps not enough to the east to strike the Cleveland ground upon reaching the vein. At least that may be assumed to be the case. Subsequently, however, the tunnel was caused to proceed more sharply towards the Cleveland end line; and we do not regard this shifting of the original direction as indicating an absence of purpose at the inception of the work in the tunnel to intersect the vein upon the Cleveland ground. The testimony is positive that the work in the tunnel by the owners of the Cleveland was performed as assessment work for that claim, and with the purpose and intention of intersecting the vein. The only question which requires consideration in this connection, we think, is the effect of that work,—whether or not its tendency was for the benefit or development of the claim. Mr. Williams, who owned a one-third interest in the Cleveland, and was foreman of the Carisa, or Mono, upon whose ground the tunnel was located, testified that when the work upon the tunnel was commenced it was believed to be close to the Cleveland line, and that it was run to develop that claim as well as the Sampson; that, according to his original calculation, the tunnel would be 58 feet below the surface when it should strike the lead upon the Cleveland. He testified that it was run in a proper place for the discovery of ore upon the Cleveland. Mr. Sherlock's testimony was, in substance, that the object of the tunnel was to crosscut the formation; and to strike a lead on the Cleveland that would pay. Mr. Luellan, a miner of 18 years' experience, testified that the tunnel was run in a favorable place to discover ore on the Cleveland; and that, as it was so close to the Carisa property, it

would be a benefit. Another miner, who had been in that country since 1886, testified that the tunnel was run in a favorable place to reach the ore on the Cleveland. Stating his reasons, he said that it would cut the lead of the Carisa, which was producing valuable mineral; and it was presumed to be just where the lead could be cut through quicker than at any other place. His opinion was that the tunnel would intersect the Cleveland at about the center of the vein. Upon being questioned, on cross-examination, whether it would not have been advisable to start the tunnel on the Cleveland, he stated that he did not know as that would make any particular difference. He was asked if another method of working, mentioned by counsel interrogating him, would not have disclosed the vein, and he responded that he thought the tunnel much the best. It appears that after the completion of the work done in 1897 the tunnel was approached by an open cut of more than 20 feet, and was about 60 feet in length under ground. In explaining his testimony Mr. Williams stated that: "It was a favorable place to run a tunnel for the discovery of ore on the Cleveland. The distance was less, and we knew more of the existence of the ore here." Asked from where the distance was less, he said: "From where we started it would be less to where we would find the ore. We were near the Carisa, and, did we not strike ore, we were that much nearer to the ore bed." In opposition to the testimony of the above-named witnesses, the defendant in error was, in rebuttal, produced as a witness on his own behalf, and also a Mr. Hinkley. The latter was asked whether or not the tunnel, or the working therein, tended to the benefit of, or to improve or develop, the Cleveland claim. He stated that he did not consider it of any benefit; that he did not consider it good mining to go 135 feet to strike the vein 30 or 35 feet away; that the vein was already exposed. He also testified that, had the tunnel been extended on its original course, it would have passed through the vein, as shown by the outcropping, outside the Cleveland ground; leaving the impression that it would, however, enter the Cleveland before intersecting the vein by pursuing the course given to it in 1897. Upon cross-examination the witness denied saying that the work in the tunnel did not in any way develop the claim, and explained by stating that he did not consider it good judgment to run the tunnel in that way; admitting that others might differ from him. The effect of his testimony is exactly what he finally stated it to be, viz. that, in his opinion, work might have been done at some other place which would have accomplished more for the development of the claim. Mr. Leighton, the defendant in error, testified that, in his judgment, the tunnel did not tend at all to the benefit of the claim; and his reason, as stat-

ed, was that the ground is so flat there that he did not see how the tunnel could be of any benefit. He stated further that, had he owned the claim, he would not have done the work there. The finding of the court was general, and no special reference was made in the findings to the question of forfeiture. The court found that the defendant in error had established his right and title to the Dewey lode, and adjudged that, as against the plaintiff in error, he was the owner and entitled to the possession of the premises in controversy. The finding may have been based upon a matter yet to be considered; but, in view of the general character of the finding, defendant in error is doubtless entitled to rely upon the alleged forfeiture, if the evidence is sufficient to establish it.

The conflict in the evidence respecting the beneficial tendency of the work performed in the tunnel is not of such a character, in our judgment, as to authorize a court of error to refuse to disturb the judgment for the sole reason that it was based upon conflicting evidence. The work in the tunnel, as shown by the undisputed testimony, performed by the owners of the Cleveland, or under their direction and at their expense, was done as assessment work upon that claim, in good faith, for the purpose of developing the same; and they believed at the time that the work would tend to develop it. All the witnesses on behalf of the plaintiff in error who were interrogated upon the subject testified that the tunnel was run in a place favorable for the discovery of ore in the Cleveland claim. In addition thereto, taking the expressed intention and purpose of the parties running the tunnel, and the location of the claim and tunnel, and direction pursued by the latter, as well as the location of the vein as disclosed by the outcroppings, it appears probable that, if continued along its course as laid out, the tunnel will intersect the vein upon the Cleveland territory. Mr. Hinkley, it is true, testified that he thought more advantageous work could have been performed elsewhere. But the law does not require that the annual expenditure to protect a claim shall be applied in the way of the best possible development of the claim. As to that matter miners of equal experience and judgment might honestly differ. The testimony of Mr. Hinkley presents no material conflict. He was careful to deny having stated that the tunnel did not tend at all to the benefit of the claim. In the case of *Mining Co. v. Callison*, 5 Sawy. 439, 9 Morr. Min. Rep. 616, Fed. Cas. No. 9,886, it was said, concerning the annual labor required upon a mining claim to save it from forfeiture, "Congress plainly required this work to be done by way of a continuous, annual assertion, or renewal of the original claim and location; nothing more;" and it was stated that the amount of expenditure required is too small to be of any practical conse-

quence as a development of the claim. With the single exception of the testimony of the adverse claimant, who expressed as his opinion that the tunnel in no way tended to the benefit of the claim, there is no support in the evidence of the allegation of forfeiture. To hold, upon the strength of his testimony alone, as against all the other facts in the case and the judgment of other experienced miners, that there had been an abandonment or forfeiture, although the locator had, in good faith, made the required expenditure, believing that the work done would inure to the advantage of his claim, and assist in its development, would shock our sense of justice. It would amount to substituting for the honest judgment of the locator the judgment, doubtless equally as honest, of his adversary, who has sought to get possession of the property by taking advantage of the supposed forfeiture. It seems to us that in determining the question as to the beneficial character of a tunnel such as was constructed in this case, where the opinions of expert witnesses differ upon the question, some force should be given to the honest intention and good faith of the locator, and in a doubtful case that might be sufficient to turn the scale. But, according to most of the witnesses in the case at bar, the work was of benefit, and that opinion appears to us to be supported by the facts in the case. The great weight of the evidence upon the proposition is clearly opposed to the theory of the defendant in error. We regard the conflict, so far as the facts are concerned, as so slight and unimportant that the case does not call for the application of the rule by which an appellate court is guided where a decision upon a question of fact is found to rest upon conflicting evidence. In our judgment, the evidence is insufficient to sustain the allegation of forfeiture of the Cleveland lode.

But counsel for defendant in error urges that the judgment must be affirmed for the reason that plaintiff in error, the original locator and applicant for patent, failed to prove citizenship on his part. Proof of citizenship in an adverse suit is required only to enable a party to recover a judgment in his own favor. *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; *Rosenthal v. Ives*, 2 Idaho, 244, 12 Pac. 904; *McFeters v. Pierson*, 15 Colo. 201, 24 Pac. 1076; *Keeler v. Trueman*, 15 Colo. 143, 25 Pac. 311; *Jackson v. Dines*, 13 Colo. 90, 21 Pac. 918; 1 Lindl. Mines, §§ 233, 234. The absence of such proof may prevent a recovery by the one party, but it does not operate to authorize a judgment, for that reason alone, in favor of his adversary. 1 Lindl. Mines, § 234; *Billings v. Smelting Co.*, 3 C. C. A. 69, 52 Fed. 250; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 562; *McCarthy v. Speed*, 11 S. D. 362, 77 N. W. 590. The result of the authorities upon this question is that an alien locator of a mining claim may,

until "inquest of office," hold and dispose of the same in like manner as a citizen. His citizenship is subject to question only by the government; but proceedings to obtain patents, and adverse suits brought in connection therewith, are held to have the effect, or to be the equivalents, of "inquest of office," as the government is interested in the outcome of the proceedings or suit; and so, by and through the right of the government, as it is said, either party to an adverse suit may question the citizenship of the other. After reviewing the authorities, Mr. Lindley concludes: "That a qualified locator may relocate a claim in the possession of an alien who has not declared his intention to become a citizen, if such relocation may be made without force or violence, and prior to the naturalization of the alien; that the relocater would then be in a position to contest the alien's right to a patent; but that the alienage of the original locator would not avail the subsequent citizen locator so as to permit the court to award the claim to him for that reason, but the latter would be enabled, through the patent proceedings, which are the equivalents of 'inquest of office,' to have alienage established, and thus clear the records." 1 Lindl. Mines, § 234. An objection on the ground of alienage, if sustained, would only defeat the claim of the alien. "It would not, in any sense, sustain the title of the objector." *Billings v. Smelting Co.*, 3 C. C. A. 69, 52 Fed. 250. The effect of a mere failure of proof of citizenship cannot be greater or more far-reaching than an affirmative showing of alienage. The absence of evidence on the question of the citizenship of plaintiff in error authorized the court to refuse to award a judgment in his favor, but it did not authorize a judgment in favor of defendant in error.

It is further contended by counsel that the evidence is not sufficient to justify the court in holding that the location of the Cleveland lode was so distinctly marked as that its boundaries could be readily traced. We deem it unnecessary to rehearse all the testimony bearing upon the original location. In regard to marking the boundaries, Mr. Sherlock testified that he was present when the claim was located in 1885, and that the four corners were marked by posts set in the ground, and that each post was marked so as to indicate the particular corner which it represented; the post at the northeast corner being marked "N. E. Corner of Cleveland Lode," and the other corner posts having similar information marked upon them. He was not positive as to the placing of posts on the side lines. Mr. Williams testified that he became acquainted with the claim in 1885, and noticed that "the posts were up,—the corner and side ones." We think the evidence sufficient; especially so when the length of time is considered during which the locators and their grantees had possession of the property. They had done con-

siderable work upon the claim, and, so far as the evidence discloses, had been in undisputed possession until the location of the Dewey lode by defendant in error. Moreover, the defendant in error did not seek by testimony to dispute the sufficiency of the original location. It is questioned in this court apparently for the first time, solely upon the evidence produced by the plaintiff in error. Our conclusion is that, upon the evidence, the defendant in error was not entitled to a judgment in his favor, and, as such a judgment was rendered, it will be reversed, and the cause remanded for a new trial. Reversed.

CORN and KNIGHT, JJ., concur.

(9 Wyo. 315)

COAD v. COWHICK et al.

(Supreme Court of Wyoming. Jan. 10, 1901.)

STATUTE OF ANOTHER STATE — ADOPTION — CONSTRUCTION — JUDGMENT OF DISTRICT COURT—AFTER-ACQUIRED LANDS—LIEN.

1. Where a statute adopted by enacting the Code of another state was not peculiar to that state, and the construction placed on it by such state was contrary to that generally given to similar statutes in most states, the rule that the adoption of the statute was also an adoption of the construction placed on it by the state from which it was taken does not apply.

2. Under Rev. St. § 3829, providing that "lands and tenements of a judgment debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which the judgment was rendered," a judgment of the district court constitutes a lien on after-acquired lands of the judgment debtor.

Reserved question from Laramie county.

Action by Mark M. Coad against Oscar F. Cowhick, as administrator of the estate of Winfield Scott Cowhick, deceased, and others. The question whether a judgment of the district court constituted a lien on after-acquired lands of the judgment debtor was reserved for the supreme court. Question answered in the affirmative.

John W. Lacey and Burke & Fowler, for plaintiff. Clark & Breckons, for defendants.

CORN, J. The sole question submitted in this case is whether, in this state, a judgment of the district court is a lien upon after-acquired lands. Our statute upon the subject is as follows:

Rev. St. § 3828: "Lands and tenements including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution, and sold as hereinafter provided."

Rev. St. § 3829: "Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments

by confession, and judgment rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution."

At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. But by St. Westm. II. (13 Edw. I.), c. 18, the judgment creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant, except oxen and beasts of the plow, and a moiety of his lands, until the debt should be levied by a reasonable price and extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an "elegit." *Hutcheson v. Grubbs*, 80 Va. 254. While this statute did not in direct terms create the lien, courts so construed it as to infer a lien from the power to take the lands in execution. *Scriba v. Deane*, 1 Brock. 170, Fed. Cas. No. 12,559. And this lien has been held by the English courts and by the almost unanimous opinion of the courts of this country to extend to the after-acquired lands of the debtor. Most of the states have enacted statutes declaring the lien, and, almost without exception, and without regard to whether such statute in terms extended the lien to after-acquired lands, they have held that such lands were bound by the judgment from the time of their acquisition by the debtor. *Freem. Judgm.* 367. So far as I can find, the only two exceptions are Pennsylvania and Ohio. There was also a similar holding in Iowa. *Harrington v. Sharp*, 1 G. Greene, 131. But the rule laid down in that case was subsequently changed by an amendment to the statute expressly providing that judgments should be a lien upon after-acquired lands, thus bringing it into line with the mass of opinion in this country. *Ware v. Delahaye*, 95 Iowa, 682, 64 N. W. 640. The Mississippi court is also cited as adopting the same construction. But an examination of the cases shows that that court simply rejected the contention that lands subsequently acquired were bound from the date of the judgment, and held that "the lien attached on after-acquired property from the time it was acquired by the debtor." *Moody v. Harper*, 25 Miss. 492; *Cayce v. Stovall*, 50 Miss. 402.

But it is contended that, our legislature having adopted the language of the Ohio statute, we are bound by the construction given to it by the Ohio courts. The case of *Roads v. Symmes*, 1 Ohio, 314, which settled the law in that state, is not a construction of the statute under consideration, but is an exposition of the rule at the common law or under St. Westm. II. The court deem it un-

necessary to decide whether it was a maxim of the common law, or was first introduced by St. Westm. II., as they say both are equally the law in Ohio. And the decision is expressly based upon the reasoning in the Pennsylvania case of *Colhoun v. Snider*, 6 Bin. 145. But the decision in the Pennsylvania case is not based upon the common law nor St. Westm. II. The author of *Freeman on Judgments* says of the decision: "As long ago as the year 1813, in the case of *Colhoun v. Snider*, the judges in Pennsylvania, in deference to a long course of decisions in that state, were constrained to decide that no judgment could ever attach as a lien upon lands in which the judgment debtor had no interest at the date of its rendition. The judge delivering this opinion at the same time said, 'I am well satisfied that by the English common law lands purchased by the defendant after judgment, but aliened before execution, were bound by the lien.' Forty-seven years later it was said in the same state that 'whatever may be thought of the doctrine of *Colhoun v. Snider*, that a judgment lien does not bind after-acquired real estate, it is too firmly established in the jurisprudence of this state to be shaken at this day.' *Waters' Appeal*, 35 Pa. St. 523. The rule thus established in Pennsylvania, and confessedly repugnant to the common law, was adopted in a few other American cases. It is, nevertheless, clearly repudiated, in favor of the common-law rule, by the vast majority of the American decisions, declaring judgments to be liens upon real property acquired by the defendant after their rendition." *Freem. Judgm.* § 367. The Ohio court in 1829, in *Stiles v. Murphy*, 4 Ohio, 92, reaffirmed the doctrine as laid down in *Roads v. Symmes*. But, while they construe the statute then in force in that state, they base their decision upon *Roads v. Symmes*, and they say in conclusion: "That decision may have been an innovation upon established principles of law. It may have been a departure from true policy, under the circumstances in which we are placed. But it would be a more dangerous innovation, and a wider departure from true policy, now to disturb it." The language of the statute, as quoted in *Stiles v. Murphy* is, "The lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered," and, it will be observed, is not in terms the same as the one subsequently in force in that state, and adopted by the legislature of Wyoming. We fully concede that the rule relied upon, that, in adopting the statute of another state we also adopt the construction which it has received, is one of great importance and very generally applied; but it is based upon a specific and sufficient reason, which is that the legislature are presumed to have known the construction which the words of the statute have received, and, if they had intended

any other construction, they would have used apt words to express the change. But this statute is not peculiar to the state of Ohio. Other states have the same provision, using either the identical words, or language which is in substance the same. And they have, almost without exception, given to the language a different construction. Must it not also be presumed that the legislature knew the construction given to it generally by the courts of this country and England? The adoption of the identical words of the Ohio statute is not specially significant, in view of the fact that they are but a part of our Code of Civil Procedure, covering more than 200 pages of our Revised Statutes, and adopted bodily, almost without change, from the Code of Ohio. This construction has from time to time been urged upon the courts of other states, but with practical unanimity they have declined to adopt it. The language of the Kansas statute was: "Judgments shall be liens on the real estate of the debtor within the county in which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which judgment was rendered." Brewer, J., in delivering the opinion of the court, says: "Counsel for plaintiff in error contend that our statute resembles the Ohio statute, and that therefore, adopting it, we adopt the construction given there. Our statute is not a copy of the Ohio statute, and, while it resembles it very closely, yet little if any more so than it does the statutes of some of the other states,—as, for instance, Tennessee. Nor do we understand the Ohio court, in the case in 1 Ohio, in which the question was first decided, as resting their decision upon the peculiar language of their statute. It should, perhaps, be stated that the statute now in force in Ohio, and from which it is claimed ours was taken, is not exactly like the one in force at the time of the decisions quoted." And the Kansas court held that the lien did bind after-acquired lands. *Babcock v. Jones*, 15 Kan. 233. In Nebraska the statute was in the words of the Ohio statute; they, like ourselves, having adopted the Ohio Code of Procedure. The supreme court of that state had stated in *Filley v. Duncan*, 1 Neb. 134, that the lien of a judgment did not attach to lands acquired after its rendition, so as to affect bona fide purchasers. But upon the question being presented to the court in *Colt v. Du Bois*, 7 Neb. 392, they disregard the dictum in *Filley v. Duncan*, and hold that the lien attaches to after-acquired lands. The question again came before that court in *Berkley v. Lamb*, 8 Neb. 392, 1 N. W. 320, and the adoption of the Ohio view was insisted upon. One of the justices, in a separate opinion, not only maintained that the Ohio decision was binding upon the Nebraska court, but

that such was the proper construction of the language of the statute itself; contending that, as lands not then owned by the judgment debtor could not be affected by the lien on the first day of the term at which the judgment was rendered, the expression "all other lands" must include lands not then owned by the debtor. But the Nebraska court has adhered to the rule as stated in *Colt v. Du Bois* and *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932. And the true construction of the language of the statute seems to be found in the fact that the judgments of the English courts of general jurisdiction were liens upon the lands of the debtor throughout the kingdom, whether owned at the time or afterwards acquired. The object of the American statutes was to limit the lien to lands within the county where the court was held; lands without the county to be bound only from the time they are seized in execution. That this is the meaning of our statute is still more apparent from the language of the succeeding section (3830), establishing the lien of judgments of the supreme court: "A judgment of the supreme court for money shall bind the lands and tenements of the debtor, within the county in which the suit originated, from the first day of the term at which judgment is entered, and all other land, and the goods and chattels of the debtor, from the time they are seized in execution." Here the distinction is very clearly drawn between lands within the county and all other lands, and it would be a violent assumption to suppose that the general purpose of the two sections is not the same. The decisions in Pennsylvania and Ohio, as before observed, are substantially conceded by the courts of those states to have been erroneous, and are only adhered to under the rule of *stare decisis*. That rule is not in any measure persuasive with us; the question not having been passed upon before by this court, and no such rule of property having been established in this state. Most of the states have enactments similar to our own, to which they have given a construction extending the lien to after-acquired lands, and this was the prevailing construction long prior to the adoption of the statute by us.

Our conclusion is, therefore, that, having adopted St. Westm. II. into the legislation of this state, we adopted the construction given to it with substantial unanimity by the courts of England and this country,—that the lien of the judgment attaches to the after-acquired lands of the debtor,—and that our enactment upon the subject was framed for the purpose of adapting that statute to our conditions by defining the territorial limits of the lien existing by force of it, and not to change the character or extent of the lien in any other respect.

POTTER, C. J., and KNIGHT, J., concur.

(22 Utah, 438)

FISSURE MIN. CO. v. OLD SUSAN MIN. CO.

(Supreme Court of Utah, Dec. 3, 1900.)

EVIDENCE—SUFFICIENCY — REVIEW—MINING CLAIMS—CONSOLIDATION FOR DEVELOPMENT—WORK ON ONE FOR BENEFIT OF ALL—TUNNEL LOCATION—DISCOVERY AND DEVELOPMENT—ABANDONMENT—EFFECT—WITNESSES—CROSS-EXAMINATION—NOTICE OF LOCATION OF MINING CLAIM—DESCRIPTION OF GROUND—SUFFICIENCY.

1. Where there is evidence to support the findings, the weight of such evidence being within the province of the trial court, its determination thereof will not be disturbed on appeal unless manifestly erroneous.

2. Where the testimony tends to show that respondent's mining claims were consolidated or worked for development purposes, that work on the tunnel and shafts was done to apply on the respective claims, that respondent had an interest in all of these claims, and that the development work was a benefit to all the claims, the testimony is sufficient to sustain the finding that the work done in the tunnel and shafts was beneficial to respondent's claims, under the provisions of section 2324, Rev. St. U. S.¹

3. The provisions of section 2323, Rev. St. U. S., and the privilege granted thereby, apply to one who locates a tunnel for discovery purposes as well as for development purposes; but failure to prosecute work on such a tunnel for six months works an abandonment of the right to all undiscovered veins on the line of such tunnel, and the owner of such tunnel is not entitled to a blind vein subsequently discovered, but only to the bore of the tunnel, and a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes.

4. A party has a right upon cross-examination to draw out anything which would tend to contradict, weaken, modify, or explain the evidence given by the witness on his direct examination, or any inference that may result from it tending to support in any degree the opposite side of the case.²

5. The construction of a notice for a mining location should be liberal and not technical, and the sufficiency of a notice with reference to natural monuments or permanent objects is a question of fact.³

(Syllabus by the Court.)

Appeal from district court, Fifth district; E. V. Higgins, Judge.

Action by the Fissure Mining Company against the Old Susan Mining Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. Moyle and D. H. Wells, for appellant.
E. D. R. Thompson, for respondent.

MINER, J. This action was brought to determine the adverse right to certain mining claims by the appellant against the respondent, and to obtain a patent, under section 2326, Rev. St. U. S. The appellant claims the Fissure and Contrary lodes, which were located in June and July, 1896, respectively. The respondent claims the General

Sheridan tunnel site, located in 1892 on what is called the "Calumet Claim," and which, in its course, crosses the Franklin, Calumet, and Clift claims. Respondent also claims the Franklin lode claim, located in 1893, the Calumet, located in 1899, and the Calumet No. 1, located in 1899; the last being a blind vein, claimed under the General Sheridan tunnel site, which was discovered during the prosecution of the work in said tunnel, and is claimed by the respondent under section 2323, Rev. St. U. S. A conflict is alleged to exist between the Contrary and Fissure lodes, claimed by the appellant, and the Franklin and Calumet lodes and the General Sheridan tunnel, claimed by respondent. The former overlap the latter claims in part. All of the respondent's claims were located by Dennis Sullivan, from whom title was derived. The court found, among other facts, that Dennis Sullivan, respondent's grantor, performed the annual assessment work for the Franklin lode for the year 1895 by work performed in the General Sheridan tunnel, and that the work so performed was worth more than \$100, and that since the year 1894 the work on the Franklin lode has been done each year through the General Sheridan tunnel, or through the shafts or drifts in the Clift lode, which adjoins the Franklin; that the course of the tunnel is across and through the Franklin and Clift lodes, which belong to the respondent, and which adjoin each other, and that any work done in said tunnel or shafts materially tended to the development of the Franklin and Clift lodes; that all the work done on the tunnel and the Franklin claim since the year 1895 was done for the purpose and intention of having it apply upon the annual assessment work for the Franklin and Clift lodes, and not for the purpose or intent to use said tunnel as a means for the discovery of blind veins or ledges, but that the work done in said tunnel was not performed with such diligence as would entitle the owner to any blind veins discovered therein, under section 2323, Rev. St. U. S., and that the work on said tunnel has not been abandoned; that in July, 1899, the defendant located a blind vein or ledge called the "Calumet No. 1," discovered in said tunnel. As conclusions of law the court found that the work on the said tunnel was not prosecuted with such diligence so as to entitle the defendant to the blind vein or ledge found under the tunnel; that the respondent is the owner and entitled to the possession of the General Sheridan tunnel site, and to 50 feet each side of the mouth thereof, extending in front 100 feet for dumping purposes; that the bore of the tunnel had not been abandoned; that the respondent was the owner and entitled to the possession of the Franklin lode mining claim, together with all the conflicting area, and that the appellant was not entitled to any part of the Fissure lode mining claim where it conflicts or overlaps the

¹ Wilson v. Mining Co., 56 Pac. 300, 19 Utah, 66.

² Cahoon v. West, 57 Pac. 715, 20 Utah, 73.

³ Wilson v. Mining Co., supra; Farmington Gold-Min. Co. v. Rhymer Gold & Copper Co., 58 Pac. 832, 20 Utah, 363.

Franklin lode, but was entitled to the balance of said claim; and that the appellant was the owner and entitled to the possession of the Contrary lode mining claim, except so far as it was subject to the ownership by respondent by reason of the location of the General Sheridan tunnel.

The appellant contends that the testimony does not support or sustain the findings. We have examined the testimony with reference to the objections made, and, while we find it conflicting, yet it is clear to our minds that there was testimony given upon which the facts and findings could (properly) be predicated. Under such circumstances this court will not review the facts or question the findings. Where there is evidence to support the findings, the weight of such evidence being within the province of the trial court, its determination thereof will not be disturbed on appeal unless manifestly erroneous. *Strickley v. Hill* (Utah) 62 Pac. 893; *McCornick v. Mangum* (Utah) 57 Pac. 428; *Dooly Block v. Salt Lake Rapid-Transit Co.*, 9 Utah, 31, 33 Pac. 229.

The appellant contends that the work on the tunnel and the shafts of the Clift claim should not be credited as work on the Franklin and Clift claims; that the tunnel was located as a tunnel site, under section 2323, Rev. St. U. S., and not for the development of other claims, under section 2324. The testimony tends to show that these claims were consolidated or worked for development purposes, and that work on the tunnel and shafts was done to apply on the respective claims; that the respondent had an interest in all of these claims, and that the development work was a benefit to all the claims. Under such circumstances the testimony sustains the finding that the work done in the tunnel and shafts was beneficial to respondent's claims. Section 2324, Rev. St. U. S.; *Wilson v. Mining Co.*, 19 Utah, 67, 56 Pac. 300. It is true, as claimed by the appellant, that there is some discrepancy in respondent's testimony tending to show that the work on the tunnel was not prosecuted with reasonable diligence for a period of six months. Under section 2323, a failure to prosecute the work on the tunnel for six months is considered an abandonment of the right to all undiscovered veins on the line of such tunnel. Because of this the court properly found that the respondent was not entitled to the blind vein discovered under the tunnel, called the "Calumet No. 1," and was only entitled to the bore of the General Sheridan tunnel site, and to a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes. The balance of the claim on which the

mouth of the tunnel is located was awarded to the appellant. We are of the opinion that this finding is sustained by the testimony. The owner of mining claims may develop them by means of a tunnel. The privilege granted by section 2323 applies to one who locates a tunnel for discovery purposes as well as for development purposes.

Several objections are urged on account of the improper admission or rejection of testimony. We have given these questions attention, but do not find that any reversible error was committed by the court, although greater latitude could properly have been given on the cross-examination of one of the witnesses. A party has a right upon cross-examination to draw out anything which would tend to contradict, weaken, modify, or explain the evidence given by the witness on his direct examination, or any inference that may result from it tending in any degree to support the opposite side of the case.

It is next claimed by the appellant that the notice of location of the Franklin and Clift claims was indefinite and uncertain as to locality, and should not have been received in evidence. It appears that the Clift claim was located in 1888, and was a relocation of the Old Susan ledge. It was where the Old Susan mine was located. The testimony shows that the Old Susan had been a shipper of ore and a dividend payer for years. The notice recites, "This claim shall be known as the Clift mining claim, and was known as the Susan ledge, about 2 miles south of Diamond City, Tintic mining district, Utah." The Franklin claim was located in 1893, about 1½ miles south of Diamond City, on the west side of the Clift claim. One was located adjoining the other. The testimony shows that Diamond City and the Old Susan mining ledge had a notoriety in that vicinity, and were well known. Work had been performed on these mines to keep up the assessment work since their location. Taking all the facts into consideration, we are of the opinion that the notices were sufficient. The construction of a notice for a mining location should be liberal, and not technical, and the sufficiency of a notice with reference to natural monuments or permanent objects is a question of fact. *Wilson v. Mining Co.*, 19 Utah, 66, 56 Pac. 300; *Farmington Gold-Min. Co. v. Rhymney Gold & Copper Co.* (Utah) 58 Pac. 832.

Other questions are presented, but they do not merit further discussion. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

(22 Utah, 473)

McLAUGHLIN v. PARK CITY BANK.**CUPIT v. McLAUGHLIN.**

(Supreme Court of Utah. Dec. 10, 1900.)

ASSIGNMENT FOR CREDITORS—OBLIGATION OF CREDITOR—ACCEPTANCE—CONFLICTING RIGHTS—CREDITOR NOT ENTITLED TO BOTH—INSURABLE INTEREST—ATTACHMENT CREDITOR—PROCEEDS OF INSURANCE—TRUST—ASSIGNMENT OR RECEIVERSHIP—EXECUTION CREDITOR—POSSESSION OF PROPERTY LEVIED UPON—HOSTILE CREDITOR—INSURANCE EFFECTED BY RECEIVER—BENEFIT OF THE ESTATE.

1. While a creditor is under no obligation to accept the provisions of an assignment made for his benefit, yet he cannot hold an assignment good in part and bad in part. Neither can he receive the benefits of the assignment while he is in actual hostility to it, claiming in the courts that it is fraudulent and void, and refusing to accept its benefits.

2. A creditor is not entitled to two inconsistent, adverse, or conflicting rights. If he accepts the benefit of an assignment knowing the facts, he cannot, ordinarily, impeach or repudiate it thereafter, on the ground that it is illegal and fraudulent; nor can he, having repudiated it, take under its provisions as other creditors who have accepted it.

3. An attaching creditor as well as a receiver has an insurable interest in the attached property, but in either instance the insurance would be a personal contract between the company and the party insuring, and, unless there be some contract or trust relation between them, in the event of loss the insurance money collected would belong to each in his individual or official right.

4. While an assignee, or a receiver, as his successor, holds the assigned property in trust for such creditors as accept the provisions of the assignment, the trust relation cannot exist between the receiver and a creditor who repudiates the assignment as well as the trust relation.

5. An execution creditor is not entitled to possession and rents of the property levied upon, before sale and before the time for redemption has expired.¹

6. An attachment creditor who sits back, during the pendency of legal proceedings, and allows the receiver of the estate to insure the attached property for the benefit of the estate, and who all the time is maintaining a hostile attitude towards the receiver and the assignment under which he holds, cannot, after money is collected by the receiver on an insurance policy, claim a trust in his favor on account of his attachment on the burned building, which might have satisfied his execution had it not burned.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Edward McLaughlin, executor, against the Park City Bank. D. C. McLaughlin was thereafter appointed receiver of the defendant bank. Thomas Cupit filed a petition of intervention, and from the judgment appeals. Affirmed.

On July 12, 1893, the Park City Bank made an assignment of its property to Edwin Kimball, who qualified as such assignee, and subsequently, in October following, said assignee died. On July 12, 1893, Thomas Cupit, the petitioner, and a creditor of the bank, commenced an action in attachment

to recover \$6,000 from said bank, and levied his attachment upon the property in question in this case, consisting of real estate and a bank building located thereon. The attachment proceedings were subsequently held regular by a decision of this court. See Cupit v. Bank, 10 Utah, 294, 37 Pac. 564. In July, 1896, Cupit recovered judgment for \$7,256.88, and \$441.75 costs, and in October, 1897, brought a suit in equity to set aside the assignment of the bank, claiming that it was fraudulent as to him, and to subject the property levied upon to his attachment lien, and the supreme court directed a decree in his favor, and for the enforcement of the lien against the property. See 58 Pac. 839. On October, 1898, after the death of Kimball, D. C. McLaughlin was appointed receiver to hold and take charge of the assigned property, and has continued to act as such receiver ever since. When the receiver took possession the bank building in question was insured, and thereafter, in the years 1895, 1896, 1897, and 1898, said receiver kept the property insured in his name as receiver. The insurance agent knew of the situation of the property and of the attachment upon it. The premiums were paid out of the funds in the hands of the receiver. In June, 1898, the bank building was destroyed by fire, said building being covered by \$5,000 insurance, which was paid to the receiver. Mr. Cupit knew of the insurance, but paid nothing towards the premiums. The receiver occupied the building after his appointment for his own purposes as receiver, and for the benefit of the bank, and collected rents from tenants occupying portions of it, and paid the taxes, insurance, and for the repairs thereon. The appellant claims:

That the receiver occupied the building for 56 months, and that a fair rental value would be.....	\$ 2,800 00
That said receiver collected rents of.....	4,346 45
Received insurance money.....	5,000 00
Total	\$12,146 45
That he paid for taxes.....	\$1,803 67
Paid insurance	240 00
Repairs	281 91
Heat, light, water, etc....	2,768 40
	5,093 98

Leaving a balance in his hands of \$ 7,052 47

On January 29, 1900, Mr. Cupit's judgment aggregated \$10,266.55, and on that day the land was sold on execution for \$4,500, which sum was credited upon the judgment, leaving unpaid thereon \$5,766.55, with interest. The petitioner in this proceeding claims that this sum should be paid him by the receiver out of the \$7,052.47 so claimed to be in his hands.

The general creditors, with the exception of Cupit, have all assented to the assignment, and have received from the funds of the bank their respective dividends, amounting to 25 per cent. of their respective claims; but Cupit, the petitioner, refused to receive any of said dividends, and has denied the

¹ Cupit v. Bank, 58 Pac. 839, 20 Utah, 292.

validity of the assignment, and the right of the receiver to the title or possession of the property, claiming that the assignment was fraudulent, and was made for the purpose of defrauding the creditors of the bank, and was invalid, illegal, and inequitable. In his petition in intervention the petitioner alleged that said assignment was fraudulent and void as to the petitioner, and that he, the said Thomas Cupit, had never assented or in any way participated in said assignment, or the benefits thereof, and prayed that said assignment be declared fraudulent and void as to the petitioner and all other creditors joining with him in this request, and that the property levied upon by virtue of said execution against the bank be discharged from such receivership. This court held, on appeal of said cause, that neither the assignee nor receiver acquired any title to the property in controversy, and that it was subject to petitioner's attachment lien. The petition in intervention in this cause was denied by the lower court, and petitioner, Cupit, appeals to this court.

Richards & Varian and W. I. Snyder, for appellant. Brown & Henderson, for respondent.

After stating the facts, MINER, J., delivered the opinion of the court.

By his petition, Thomas Cupit seeks to obtain the proceeds of the fire insurance policies, amounting to \$5,000, in the hands of the receiver of the Park City Bank, and received by him at a time when Cupit, by virtue of his attachment levy, had a lien upon the property upon which the buildings were burned; and claims that McLaughlin, the receiver, was a trustee, and a representative of a court of equity, and, whether he was Cupit's trustee for any other purpose than merely to see that this insurance money should go in satisfaction of the debt which the property it represented would have paid, and to see justice done, he was certainly Cupit's trustee for that purpose, and should be held liable for the insurance money; that, as the court had possession of the property through its receiver, whose title is fraudulent as to Cupit, equity will convert him into a trustee, to prevent fraud, and to restore the insurance money to the lienors; that because Cupit had rights under the attachment as a creditor of the bank, and because the insurance was upon the property he had attached, although his equity of redemption had not expired, he was still entitled to the insurance money, although he paid nothing towards the premiums, and refused to recognize the rights of the receiver in the premises. We cannot concede such asserted rights upon the part of Mr. Cupit, the intervener. At the inception of the assignment Mr. Cupit was one of a class of creditors who were entitled to its benefits, and, had he accepted it, and claimed under it,

he would have been entitled to the rights of a general creditor. So, also, after the attachment proceedings against the property of the debtor, if they had proved unavailing, or when they were abandoned, a creditor may, under certain circumstances, still assent, and take under the assignment. But the petitioner did not accept or claim under the assignment; on the contrary, he rejected the assignment, and has continually refused to claim under it, and has obtained a decree of court, which, as to him, rendered the assignment void.

The right of a creditor to share in the benefits of an assignment is based in part upon his assent. This is one of the conditions upon which he takes under an assignment, and this assent is presumed, unless his repudiation is made known. While a creditor is under no obligation to accept the provisions of an assignment made for his benefit, yet he cannot hold an assignment good in part and bad in part. If he ratifies it at all, he must stand by it. He cannot accept that part which is beneficial to him, and repudiate the balance of it. Nor can he receive the benefits of the assignment while he is in actual hostility to it, claiming in the courts that it is fraudulent and void, and refusing to accept its benefits. He cannot claim benefits under it, and at the same time attack it for fraud, and utterly destroy its validity as to him. Burrill, Assignm. §§ 476-479; Jefferis' Appeal, 33 Pa. St. 39; Valentine v. Decker, 43 Mo. 583; Beifeld v. Martin (Colo. App.) 37 Pac. 32; Adler-Goldman Commission Co. v. People's Bank (Ark.) 46 S. W. 536; O'Bryan v. Glenn (Tenn.) 17 S. W. 1030. If a creditor accepts the benefits of an assignment knowing the facts, he cannot, ordinarily, impeach or repudiate it thereafter, on the ground that it is illegal and fraudulent. So, having repudiated it altogether, he cannot take under its provisions as other creditors would do who have accepted it. The reason of this rule is that he is not entitled to two inconsistent, adverse, or conflicting rights. One is necessarily a denial of the other. Burrill, Assignm. (6th Ed.) 441; Adler-Goldman Commission Co. v. People's Bank (Ark.) 46 S. W. 536. Because of the continued, open, and hostile acts of the petitioner towards the assignment, and his continued refusal to accept its terms, he is not in a position to claim benefits under it, as other creditors who have assented to it are entitled to.

But Mr. Cupit still claims that he is entitled to the \$5,000 insurance obtained by the receiver on a policy of insurance procured by said receiver when he held an attachment lien upon the property. The property in question was assigned by the bank. The receiver had possession of it, and received the rents, and repaired it as receiver. As to the creditors of the bank who had accepted the assignment, the receiver had title, and was entitled to take charge of the property, and

hold it until such time as Mr. Cupit's attachment lien would ripen into title by sale thereunder, and until the time for redemption from the sale should expire. The receiver had the same right to the property that the bank would have had had no assignment been made. As such receiver, he had the right to insure the property for the benefit of the creditors of the bank, and to pay the premiums from any assets in his hands. He had an insurable interest in the property, and was entitled to use it, receive rents from it, repair it, and preserve it from loss, the same as any other owner would have; and this right would continue until the title was lost by sale on the execution and the time for redemption had expired. So Mr. Cupit, as attaching or execution creditor, and owner of an equity of redemption, had an insurable interest in the property. 1 May, Ins. § 83; Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. 239; Insurance Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473; Carpenter v. Insurance Co., 16 Pet. 495, 10 L. Ed. 1044. The receiver and the attaching creditor had an insurable interest, and could insure the property for their own benefit. Under such circumstances the insurance would be a personal contract between the insured company and each party insuring; and, unless there be some contract or trust relation between the insured parties to the contrary, each would hold the money derived by loss of the property by fire in their individual or official right. In such cases the contract is personal, and does not run with the title to the property. As held in Carpenter v. Insurance Co., 16 Pet. 495, 10 L. Ed. 1044, the insurance is a mere special agreement with a party seeking to insure himself against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to and transferable with the subject-matter, and in case of loss satisfaction must be to the person insured. 2 May, Ins. § 6; Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. 239; Plimpton v. Insurance Co., 43 Vt. 497; King v. Insurance Co., 7 Cush. 1; McDonald v. Black's Adm'r, 20 Ohio, 185; Quarles v. Clayton (Tenn.) 10 S. W. 505, 3 L. R. A. 170. There are many cases holding that, as between a vendor and vendee, the insurance money, in case of a distribution of the property, represents the property itself, because of some express or implied contract relation existing between the parties. Many cases so hold because of a contract, express or implied, existing between the parties. In this case no such relation is shown or exists. See Grange Mill Co. v. Western Assur. Co., 118 Ill. 306, 9 N. E. 274. Had the petitioner insured the property in his own right to cover his interest therein, it could not be claimed that the receiver would have any right therein. So, where the receiver insured it, and paid the premiums out of funds in his hands belonging to the estate, the insurance became a personal indemnity to the receiver for the benefit of the creditors

of the estate he represented. Mr. Cupit is not one of the creditors who had acquiesced in the assignment. He had never consented to the assignment in any manner, and has continually opposed it on all occasions, and still continues to do so. He is not now asking to come in as a common creditor, and receive his just proportion of the estate, including the insurance money, in accordance with the provisions of the assignment; but he now demands at the hands of the court the entire fund received under the policy of insurance, while refusing to acquiesce in the assignment, and while still holding the proceeds of the sale of the real estate under his execution. The property of the bank was, in effect, conveyed in trust for such creditors of the bank as should come in and accept the provisions of the assignment. The assignee and receiver no doubt held the property in trust for such creditors, and this trust relation could not exist between the receiver and a creditor who wholly repudiates the assignment as well as the trust relation. There was no contract relation between the receiver and Mr. Cupit. The real estate in controversy was rightfully held by the receiver with the right to the use, rents, and profits thereof for the benefit of the estate until Cupit should acquire title by a sale on his execution. He held an equity of redemption, and had and would have the same rights as the bank would have had no assignment been made. An execution creditor is not entitled to possession and rents of the property levied upon before sale, and before the time for redemption has expired.

The case of Cupit v. Bank (Utah) 58 Pac. 839, is not in conflict with this position. In that case it was no doubt the intention of the court to hold that the receiver acquired no title to the property that conflicted with the right of Cupit under his attachment lien, and it did not intend to hold that Mr. Cupit would have the right to the title of the property, and the possession thereof, before sale upon his execution. Under such circumstances Cupit had no right to charge the receiver with the rents and use of the premises, which at most would about cover the expense of operating and keeping the building, etc., in repair; nor has he any right to recover the insurance money claimed in this case. As said in Collumb v. Read, 24 N. Y. 515: "If the plaintiff and the other creditors had affirmed the assignment, the trustee would have been compelled to account for these rents according to its provisions; but the plaintiff, claiming in hostility to it, must treat the trustee as a stranger, whose only fault has been in suffering himself to be made an instrument by means of which the debtor has been enabled to apply the rents towards the payment of other creditors." The receiver was not a trustee for Mr. Cupit in the sense that it was his duty to see that the money collected on these insurance policies should be held for the benefit and be paid over to Mr. Cupit to

satisfy the execution which the property might have paid if the building had not been consumed by fire. After careful consideration of the very able arguments and briefs of counsel, we can arrive at no other conclusion than as before expressed. The judgment of the district court is affirmed, with costs.

BASKIN, J., and McCARTY, District Judge, concur.

(7 Idaho, 421)

THORN v. ANDERSON, Sheriff, et al.

(Supreme Court of Idaho. Dec. 17, 1900.)

MARRIED WOMAN'S SEPARATE PROPERTY—INCREASE—EXEMPTED FROM EXECUTION AGAINST HUSBAND.

Under the provisions of section 4479, Rev. St., the increase of a married woman's separate property (in this case consisting of cattle) is exempt from execution against her husband.

(Syllabus by the Court.)

Appeal from district court, Cassia county; C. O. Stockslager, Judge.

Action by Elizabeth R. Thorn against Oliver P. Anderson, as sheriff, and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Hawley & Puckett, for appellants. W. L. Maginnis, for respondent.

SULLIVAN, J. This action was brought by the respondent against the appellants to recover the sum of \$2,500, the alleged value of 48 head of cattle taken by the defendant Anderson, as sheriff, under a writ of attachment, and thereafter sold under execution issued out of the district court of Cassia county against the property of A. S. Thorn, the husband of respondent. The answer put in issue the material allegations of the complaint. The cause was tried by the court with a jury, and a verdict was rendered in favor of the respondent for the sum of \$832.50 damages, and judgment was duly entered in favor of respondent for that sum and costs of suit. A motion for a new trial was denied, and this appeal is from the judgment and an order denying the motion for a new trial.

It appears from the record before us that in the year 1888 George Rutherford, an uncle of respondent, made her a birthday present of 10 cows and 10 calves, which were taken to the ranch of her husband, A. S. Thorn, and branded with his brand and cared for by him, and the increase branded by him, and some of them disposed of by him up to the time of the levy of the execution aforesaid. It is conceded that all of the cattle levied upon and sold as aforesaid, except 5 head thereof, were the increase of said 10 cows and calves. Counsel for appellants do not seriously contend that said original 10 cows and 10 calves were not the separate property of Mrs. Thorn, the respondent; but they contend that the increase of the sepa-

rate property of the wife is community property, under the provisions of section 2497, Rev. St., and hence liable for or subject to the payment of the husband's debts. Said section is as follows: "All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband or wife, is community property; unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife and they are not liable for the debts of the husband." Counsel for appellants, as well as counsel for respondent, overlooked section 4479, Rev. St., which provides as follows: "All real and personal estate belonging to any married woman at the time of her marriage, or to which she subsequently becomes entitled in her own right, and all the rents, issues and profits thereof and all compensation due or owing for her personal services, is exempt from execution against her husband." Said sections 2497 and 4479, having been adopted as one act of the legislature, must be construed in pari materia; and by the provisions of said section 4479 the rents, issues, and profits of the separate property of the wife are exempted from execution against the husband. The judgment of the court below must be affirmed, and it is so ordered. Costs of this appeal are awarded to the respondent.

HUSTON, C. J., and QUARLES, J., concur.

(7 Idaho, 453)

ANDREWS v. BOARD OF COM'RS OF ADA COUNTY.

(Supreme Court of Idaho. Dec. 28, 1900.)

STATUTE—TITLE OF ACT—BRIDGES—LETTING CONTRACT.

1. The title to an act approved March 14, 1899 (Sess. Laws 1899, p. 443), held a sufficient compliance with the provisions of section 16, art. 3, Const. Idaho, in that it states the subject of said act.

2. Under the provisions of section 1762, Rev. St., before the board of commissioners can legally advertise for competitive bids for the erection of a bridge they must adopt plans and specifications of such bridge, and said notice must contain explicit specifications of the proposed bridge.

3. If no plans and specifications are adopted, the board has no standard by which the lowest bid can be determined.

4. In the matter of advertising for bids and letting contracts for public buildings or improvements, the provisions of section 1762 applicable thereto must be substantially followed.

(Syllabus by the Court.)

Appeal from district court, Ada county; George H. Stewart, Judge.

Action by De Forest H. Andrews against the board of commissioners of Ada county. Judgment for plaintiff. Defendant appeals. Affirmed.

S. H. Hays, Atty. Gen., and E. J. Frawley, for appellant. Fremont Wood and Milton G. Cage, for respondent.

SULLIVAN, J. This is an appeal from a judgment of the district court that reversed and annulled an order of the board of county commissioners of Ada county authorizing a contract with the Gillette-Herzog Manufacturing Company for the construction of a wagon bridge across Boise river, near Boise City, at the agreed price of \$15,335. It is stipulated that it was the purpose of the board of commissioners to construct said bridge under the authority of the provisions of an act approved February 7, 1899, entitled "An act providing for the issuance of negotiable coupon bonds for the funding and refunding of county indebtedness, amending chapter six, title 13, Revised Statutes of Idaho, and the subsequent amendment thereto approved March 14, 1899."

First. It is contended that the title of said act of February 7, 1899, is not sufficient to support the provisions of section 3604 thereof, which authorizes the construction of bridges and other public improvements, and the issue of bonds in payment therefor, as that subject or purpose is not expressed in the title; that the title of said act recites that the purpose of the act is "for the issuance of negotiable coupon bonds for the funding and refunding of county indebtedness"; and that the issuance of bonds for the purpose of building bridges and the construction of such other public improvements as are named in said section is not included in said title, and for that reason said provisions are void, under the provisions of section 16, art. 3, of the constitution of Idaho, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject must be expressed in the title. Conceding, for the purposes of this case, that said title refers only to the issuance of coupon bonds for funding and refunding county indebtedness, and does not include the issue of bonds for the purpose of constructing such public improvements as are mentioned in said section 3604 when such proposed indebtedness exceeds the income or revenue of the county for that year, we find that said act of February 7th was amended by an act approved March 14, 1899, the title to which act is as follows: "To amend section 3604 (concerning issue of bonds by counties for certain purposes in excess of the income or revenue of the county for the year) in section 1 of an act of the legislature of the state of Idaho, entitled 'An act providing for the issuance of negotiable coupon bonds for the funding and re-funding of county indebtedness, amending chapter 6, title 13 Revised Statutes of Idaho,' approved February 7th, 1899, by adding thereto authority to issue bonds to assist any city or village in constructing a free bridge over any navigable stream, within, or partly within or adjoining

the limits of any such city or village." It will be observed that it is stated in the title of the last-mentioned act that it is an act to amend section 3604, and also recites that the subject of said section is concerning the issue of bonds by counties for certain purposes in excess of the income or revenue of the county for the year. The subject, object, or purpose of said section is sufficiently set forth in said title, and comes within the requirements of said section 16, art. 3, of our constitution. We therefore hold that said title is sufficient. *State v. Doherty*, 2 Idaho, 1105, 29 Pac. 855. See, also, 23 Am. & Eng. Enc. Law, p. 234 et seq.

The second point raised involves the authority of the board to provide for an issue of bonds for the construction of the bridge in question until such time as the contract price for the bridge has been first legally determined by the board. It is contended that it was the duty of the board first to determine the necessity for the construction of said bridge: then to adopt plans and specifications, advertise for proposals for construction thereof in accordance with such plans and specifications, and thereafter enter into a conditional contract for the construction of such bridge subject to the ratification by the electors of the county, and then submit the question of the issuance of a sufficient amount of bonds to pay such contemplated liability, after deducting all funds in the county treasury available for that purpose. It is evident that the amount necessary to construct the contemplated improvement must be ascertained in some manner before the amount of bonds to be issued can be determined; and, before persons desiring to bid for such contracts can make competitive bids, they must have plans and specifications of the contemplated public improvement before they can make an intelligent bid. It therefore follows that the board must adopt plans and specifications sufficient to enable a contractor to make an intelligible estimate of the cost of such public improvement. If each several bidder bids on separate plans and specifications, it will not be contended that such bids are competitive; and where, as in the case at bar, bids for the construction of a two-span 500-foot bridge were called for, and a three-span bridge less than 500 feet long was let under said call, no competitive bidding was allowed or had. It is evident that said contract was not let to the lowest responsible bidder for the reason that no proposals were invited for the construction of a three-span bridge less than 500 feet in length. In discussing the question of competitive bidding for the construction of a public building, the supreme court of California has very pertinently stated in *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1, as follows: "To permit each bidder to propose the plans and specifications according to which he will construct the building not only prevents competition in bidding for the work, but gives to

the board an opportunity for the exercise of favoritism in awarding the contract, instead of being required to let it to the lowest responsible bidder, for, since neither of the bidders can know the plans and specifications under which the others are making their bids, there is no standard by which the board can determine which is the lowest bid." See, also, *Hardware Co. v. Erb*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

The third point raised involves the question of procedure in submitting to the electors the question of issuing bonds. It is shown by the record that the order for the election, and also the election notices, stated that specifications for the construction of said bridge were on file in the office of the clerk of said board, when, as a matter of fact, no plans or specifications had been adopted. The disposition of the second point raised disposes of this specification of error in favor of respondent's contention.

The fourth assignment of error is to the effect that said contract was void, for the reason that plans and specifications for said bridge were not adopted by the board prior to the notice for sealed proposals for the construction of said bridge, and for the further reason that the bridge contracted for does not comply with the plans and specifications adopted by the board. That assignment of error is well taken. The contract is void for both reasons stated in said specification. The record shows that the contract was let to the Gillette-Herzog Manufacturing Company upon plans submitted by it, and not upon the specifications stated in the notice inviting bids for the construction of said bridge. No standard having been fixed by the board by which to determine the lowest bid made, the commissioners could not determine who was the lowest bidder, and for that reason the contract was not let to the lowest responsible bidder, and is void for that reason. The trial court held that said contract was void for the reason that the board failed to follow the provisions of section 947, Rev. St., in letting the contract. Said section is as follows: "No bridge, the cost of the construction or repair of which will exceed the sum of one hundred dollars, must be constructed or repaired except on order of the board of commissioners. When ordered to be constructed or repaired, the contract therefor must be let out to the lowest bidder, after reasonable notice given by the board of commissioners, through the road overseer, by publication at least two weeks in a county newspaper; and if none, then by three posted notices, one at the court house, one at the point to be bridged, and one at some other neighboring public place; the bids to be sealed, opened, and the contract awarded at the time specified in the notice. The contract and bond to perform it must be entered into to the approval of the board of commissioners." We gather from the record that the board intended to let the contract under

the provisions of section 1702, Rev. St., which section is as follows: "When a petition signed by at least one third of the taxpayers who are qualified voters of any county is presented to the board at any regular meeting, asking that a court house, jail, or other public buildings or improvements be built for the use and benefit of the county the cost of which will exceed one thousand dollars, the board must not act upon the said petition until the next regular meeting; and at least for four weeks before the next meeting the clerk of the board must give notice by publication in a newspaper or otherwise, as ordered by the board, of presentation of said petition, and the nature and cost of said buildings, or improvements contemplated, and that the petition will be acted upon by the board at their next regular meeting. If they deem the interest of the county demands it, the board must order the said improvements or buildings to be made or erected, and must thereupon advertise for sealed proposals for making said improvements or erecting said buildings. Such notice for sealed proposals must be given by the clerk in a newspaper or otherwise, as ordered by the board, for at least thirty days, and must contain explicit specifications of the improvements or buildings to be made or erected, and state the day when said proposals will be opened. Proposals may be received until the opening of the session on the day they are to be opened, and they must be opened and considered publicly, and the contract let to the lowest responsible bidder, unless they all be rejected, which the board shall have power to do if they are too high; and the board may proceed to advertise again or let the same by private contract, provided it be for a less sum than that proposed by the lowest bidder. The person or persons awarded the contract must give a good and sufficient bond to be approved by the commissioners for the completion of the contract according to the specifications. The building or improvements may be paid for by warrants upon the proper fund, or by the levying of a special tax, not exceeding fifty cents on each one hundred dollars of assessable property, to be paid into a special fund for that purpose; against which warrant may be drawn in payment for buildings or other improvements constructed or made under the provisions of this section." Said sections must be read in the light of the provisions of section 3, art. 8, of the constitution, which section is as follows: "No county, city, town, township, board of education or school district, or other subdivision of the state, shall incur any indebtedness or liability in any manner or for any purpose exceeding in that year the income and revenue provided for it for such year without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the

collection of an annual tax sufficient to pay the interest on such indebtedness, as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void; provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state." Upon a careful consideration of this matter we are of the opinion that, so far as the advertising for bids and letting contracts like the one under consideration are concerned, the provisions of said section 1762 must be substantially followed. See *Dunbar v. Board* (Idaho) 49 Pac. 409. The judgment of the court below is affirmed. No costs to be charged in this court to either party.

HUSTON, C. J., and QUARLES, J., concur.

(7 Idaho, 435)

THOMAS v. POCATELLO POWER & IRRIGATION CO.

(Supreme Court of Idaho. Dec. 22, 1900.)
**NEGLIGENCE IN MAINTAINING FOOT BRIDGE—
 EVIDENCE OF.**

1. When an action is brought to recover damages for the negligent and careless construction and maintenance of a foot bridge, and the evidence wholly fails to establish the allegations of the complaint in that regard, the judgment for plaintiff must be reversed.

2. When there is no substantial conflict in the evidence, and the verdict of the jury is contrary to such evidence, a judgment based upon said verdict will be reversed upon appeal. (Syllabus by the Court.)

Appeal from district court, Bannock county; J. O. Rich, Judge.

Action, by David B. Thomas against the Pocatello Power & Irrigation Company. Judgment for plaintiff. Defendant appeals. Reversed.

Dietrich, Chalmers & Stevens, for appellant. Winters & Guheen, for respondent.

SULLIVAN, J. This is an action brought by the respondent to recover for the death of his minor son, alleged to have been drowned in the canal of appellant by reason of its carelessness and negligence in constructing and maintaining a walk across said canal. The cause was tried before a jury, and a verdict was rendered in favor of the respondent for the sum of \$1,975, and judgment entered for that amount. A motion for a new trial was denied. This appeal is from the judgment and order denying a new trial. It is shown that the appellant constructed a foot bridge in question for its own use and convenience. It was not intended for public use, but for the exclusive use of appellant. The bridge was constructed in a manner suited to the purpose for which it was intended. There was no secret mechanism connect-

ed with it. Nothing about it was loose or changeable. It was built on the upper side of one of appellant's headgates in said canal. Between the bridge and headgate was a space of 9¼ inches in width, left there for the purpose of breaking the ice away that gathered there. The floor of the bridge was composed of three planks laid lengthwise across said canal, and made a solid floor 3 feet and 8 inches wide. It had been in that condition for about four years. It appears from the record that the deceased was a boy about 9 years of age, and that he and a playmate by the name of John Pierpont were playing about an old shack situated about 75 feet from the bridge in question. The boy Pierpont testified that he and the deceased were sitting in the door of the shack eating cookies, and the deceased ran from him, stumbled, and fell through the crack between the headgate and bridge into the water; that his foot struck a board in the middle of the bridge. Witness tried to help him out, but the deceased went under the head gate, and was drowned. It is agreed that the place against which deceased struck his foot is a cleat on the framework of the headgate, about 2 inches thick and 6 or 8 inches wide, and not a board in the middle of the bridge, as testified to by the boy Pierpont; that it is a part of the framework of defendant's headgate; and that deceased fell through into the water at the point noted on a plat introduced in evidence marked "Exhibit A." It is shown that the bridge was not unsafe or dangerous even for children to pass over. If the deceased had been crossing said bridge in the ordinary way, he would not have fallen off the same. The evidence tends, at least, to show that deceased ran carelessly and rapidly upon said bridge at an angle, and struck his foot against said cleat that was nailed to the framework of the headgate, stumbled, and fell through the 9¼-inch opening between the bridge and the headgate. Had he gone upon the bridge in the usual way, it is very evident that the sad accident would not have happened. He was an unusually bright lad, over 9 years of age. He had lived with his parents, within 2½ blocks of said bridge, for 7 or 8 years. It is shown that those who resided near the bridge frequently crossed it, and saw children playing about and upon it, and never warned them to stay away, or cautioned them to be careful. The father of the deceased did not consider the bridge dangerous, as he was raising a family of small children near it, and neither warned his children that it was dangerous for them to play there, or suggested to the appellant's officers that he considered said bridge dangerous, or that any alteration be made therein. This action was brought and tried upon the theory that appellant knew, or should have known, that said bridge was dangerous. The appellant was charged with knowingly maintaining a dangerous bridge. The record contains no

evidence that shows, or even tends to show, that said bridge was dangerous. It consisted of a solid plank floor, 3 feet 8 inches wide, with a handrall on one side; and deceased fell therefrom because of his own carelessness, he having carelessly ran upon said bridge at an angle, and struck his foot against a cleat 2 inches thick, nailed to the headgate, and which was about $4\frac{1}{2}$ feet from the handrall on said bridge. The evidence fails to show any negligence or carelessness on the part of the appellant, either in the construction or maintenance of said bridge, and for that reason the judgment must be set aside. The evidence shows that said bridge was constructed in a substantial, workmanlike manner, and well adapted to the purpose for which it was constructed, and that it was safe for all to pass over who desired to do so. And it is also shown that the death of the deceased occurred through his own carelessness or recklessness in running upon said bridge at an angle, and striking his foot against a cleat on the headgate. There is no substantial conflict in the evidence, but the verdict is contrary to it. The judgment is reversed, and the cause remanded, with instructions to enter judgment dismissing this action. Costs of this appeal are awarded to the appellant.

HUSTON, C. J., and QUARLES, J., concur.

(7 Idaho, 460)

WORK et al. v. KINNEY, Sheriff, et al.

(Supreme Court of Idaho. Dec. 29, 1900.)

ANSWER—DENIALS—MATTERS OF RECORD—WAIVING DEFECTIVE PLEADING—PEREMPTORY INSTRUCTIONS—SETTING ASIDE VERDICT—NEW TRIAL.

1. The denial of matters of record which are within the reach of the defendant, based upon want of knowledge, while not sufficient, will be so treated upon appeal, when it appears that the plaintiffs treated such denials as sufficient on the trial.

2. Where plaintiffs' evidence is sufficient to authorize a verdict for the plaintiffs, and the defendant introduces none, the trial court should direct, peremptorily, the jury to find for the plaintiffs.

3. An order denying a new trial will be reversed upon appeal where the evidence is uncontradicted and sufficient to warrant a verdict in favor of the plaintiffs, and the jury nevertheless find for defendant.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Action by Work Bros. & Co. against P. H. Kinney, sheriff of Alturas county, and others. Judgment for defendants, and plaintiffs appeal. Reversed.

S. B. Kingsbury and Geo. M. Parsons, for appellants. R. F. Buller, for respondent Burns.

QUARLES, J. This action was commenced by the appellants against the respondents to recover damages against the respondent

Kinney upon his official bond as sheriff of Alturas county, the other respondents being sureties of said sheriff upon said official bond. The case was tried before the court and a jury, and a verdict rendered in favor of the respondents. The appellants moved for a new trial, which was denied, and they appeal to this court from the order denying them a new trial.

The facts alleged in the complaint are, briefly stated, as follows: February 9, 1888, appellants commenced an action against one Callahan to recover a debt amounting then, as alleged, to \$1,685.85, and caused a writ of attachment to issue therein, which was placed in the hands of said Kinney, as sheriff of said county, who, under said writ, seized a stock of general merchandise, the property of said Callahan, subject, however, to a certain chattel mortgage upon the said stock of merchandise, valued at \$13,000 or more. A portion of said merchandise was sold to satisfy said mortgage, and the remainder thereof inventoried at the sum of \$6,531.77. The writ of attachment was not returned by said sheriff until October 18, 1889, when the following return was made thereon, to wit: "Sheriff's Office, County of Alturas—ss.: I, P. H. Kinney, sheriff of the county of Alturas, do hereby certify that under and by virtue of the hereunto annexed writ of attachment, by me received on the 9th day of February, 1888, at 11:30 o'clock a. m., I did, on the 9th day of February, 1888, attach the following described personal property in the possession of Warren P. Callahan, viz. all of his stock, consisting of general merchandise, dry goods, clothing, groceries, and fixtures in the building known as 'Callahan's Store,' in the town Broadford, county of Alturas, territory of Idaho; which writ of attachment was the first attachment levied by me upon said property, and attached the same by taking it into my custody and putting a keeper in charge. [Signed] P. H. Kinney, Sheriff of Alturas County, by P. H. McPhee, Deputy Sheriff." The said return was dated February 9, 1888, but not filed in the office of the clerk of the district court until October 18, 1889. On October 4, 1889, the appellants, having secured a judgment against said Callahan for the sum of \$1,618 and costs, sued out a writ of execution thereon in said attachment suit, and placed the same in the hands of the said Kinney as sheriff, who, on the 18th day of October, 1889, returned said execution indorsed, "Nothing made on this execution." The facts pleaded in the complaint, with the exception of the partnership between the plaintiffs, are matter of record in the district court of Blaine, formerly Alturas, county, yet, strange to say, the denials are not based on knowledge, but upon want of knowledge. This is not good pleading, and such denials of matter of record within the reach of the defendants is insufficient. But the plaintiffs treated said denials as sufficient, and treated the allegations

of the complaint as having been denied, and, under the rule laid down in *Toulouse v. Burkett*, 2 Idaho, 265, 13 Pac. 172, we will regard the answer as denying the allegations of the complaint.

The cause came on for trial, and the parties admitted before the jury that the plaintiffs were and are partners; that the defendant Kinney was, during the time mentioned in the complaint, sheriff of Alturas county. The judgment roll in said cause of *Work Bros.* against said Callahan and said execution were offered and received in evidence. Then plaintiff offered in evidence the said writ of attachment, which was received with the return thereto as hereinbefore given. Then plaintiffs produced witnesses who testified, in effect, that the stock of goods attached as aforesaid was of the value of about \$13,000, and that, after satisfying said chattel mortgage, the goods attached were appraised or invoiced by the sheriff at the sum of \$6,531.77. Plaintiffs introduced S. B. Kingsbury as a witness, who, among other things, testified that the defendant Kinney told him that he (Kinney) had sold the goods that were attached, and had the money to pay plaintiffs' debt when they got their judgment, and that the witness frequently urged said Kinney to pay the debt. The affidavit of attachment in the original suit and the undertaking therein were in the usual form. The undertaking for attachment was proven to have been lost. The official bond of said sheriff was introduced and received in evidence, and was in the usual form, executed by the defendant Kinney as principal and by the other defendants and others as sureties. The defendants introduced no evidence whatever, and the court instructed the jury, which brought in a verdict in favor of the defendants. This verdict was unauthorized, contrary to the evidence, and the trial court should have set it aside without motion. The trial court should have directed a verdict in favor of plaintiffs, as requested by the plaintiffs. There was no conflict in the evidence, and the evidence was sufficient to justify a verdict for the plaintiffs. The evidence showed a breach of official duty on the part of the said sheriff; showed that he, under a writ of attachment, seized goods of the attachment defendant of the value of three times the amount of plaintiffs' debt; that plaintiffs had a first lien upon merchandise of the value of over \$6,000 to secure about \$1,600; that said Kinney, as sheriff, refused to account for said goods, or to pay the value thereof, and more, that he and his duly-appointed deputy, McPhee, without authority, sold the said chattels which he had lawfully seized under and by virtue of the said writ of attachment, and refused to pay any part of the plaintiffs' debt. The return upon the writ of attachment was sufficient to bind the sheriff, unless he could show the loss of the attached chattels, and that such loss was not on account of his or his said deputy's negli-

gence. Under sections 401, 402, Rev. St., the sureties of the said sheriff were liable, and we are unable to see why this verdict was permitted to stand in the trial court. This is the second time that this cause has come into this court on appeal. See *Work v. Kinney*, 51 Pac. 745. To prevent further litigation, we feel it our duty to reverse the order denying the plaintiffs a new trial, and to remand the case to the district court, with instructions to set aside the verdict, and to enter judgment in favor of the plaintiffs for the amount of their judgment obtained against said Callahan, \$1,618, with interest thereon from October 2, 1889, at the rate of 10 per centum per annum, less the sum of \$344.10, paid thereon by said defendant Kinney December 17, 1889, as shown by the evidence, and costs of this suit against the defendants to this cause who are before the court; and it is so ordered. Costs of this appeal awarded to appellants.

HUSTON, C. J., and SULLIVAN, J., concur.

(62 Kan. 353)

STATE v. EASTMAN.

(Supreme Court of Kansas. Jan. 5, 1901.)

EMBEZZLEMENT—EVIDENCE—TENDER—VERDICT.

1. On the trial of a prosecution for embezzlement brought under Gen. St. 1897, c. 100, § 95, against an agent for failure to deliver to his employer on demand money belonging to him, less the agent's reasonable charges, etc., and when it appears that the amount due the employer was in dispute between him and the agent, it is error to reject an offer by the agent to prove a tender of the sum really due, for the reason that such tender had not been made until after prosecution began.

2. It is not necessary, in a verdict finding a defendant guilty of embezzlement of a sum of money, to state the value of the money in order to assess the punishment as for grand or petit larceny, because money is not to be valued in its own terms, and the courts judicially know that the different kinds of money current in this country circulate at their par value.

(Syllabus by the Court.)

Appeal from district court, Lyon county; W. A. Randolph, Judge.

J. W. Eastman was convicted of embezzlement, and appeals. Reversed.

Cunningham & Hamer and C. B. Graves, for appellant. A. A. Godard, Atty. Gen., and J. S. West, Asst. Atty. Gen., for the State.

DOSTER, C. J. This is an appeal from a judgment of conviction of embezzlement, as defined by Gen. St. 1897, c. 100, § 95. The case has been once before in this court. *State v. Eastman*, 60 Kan. 557, 57 Pac. 109. The gravamen of the offense, under the statute cited, is the neglect or refusal of agents to deliver to their employers, on demand, moneys and other property which may have come into the possession of the agents by virtue of their employment. The principal ground of

appellant's contention is the refusal of the court to allow him to prove, and the jury to consider, a tender of the amount alleged to have been embezzled, made after the prosecution was begun. The appellant was the agent of L. D. Morris to rent and care for real property, collect rents, etc. He did so, and out of rents collected made expenditures in the interest of his employer. Morris was absent from the state a number of years. Upon his return he at several times asked for a "settlement," at all of which times excuses for not making it, and requests for delay to make it, were made and granted. Finally, in December, 1897, appellant exhibited to his employer a statement of account of moneys collected and disbursed for him, showing the amount of \$164 still due and in his hands. This amount was not then demanded. The jury found that a demand for it was not made until January 1, 1898. On that day Morris, with an attorney, called upon appellant, and, as they say, made demand for the amount shown by his statement to be due. The making of the demand was denied by the appellant. His excuse for failure to then pay the amount was that he had in the meantime discovered the stated balance to be incorrect; that he was entitled to credits not included in the statement; and he said that Morris and the attorney left without giving him an opportunity to explain and to tender the sum really due. Prosecution was instituted against him on the 12th day of February. Once or twice thereafter, and before the commencement of the preliminary trial, he tendered, as he says, the real sum due, to wit, \$118. At one point in his testimony he stated the making of this tender without objection, but afterwards, upon being further questioned by his counsel, the court refused to allow him to again state the fact of the tender, not because he had already testified to it, but because it appeared to have been made after the institution of the prosecution. To this refusal exception was taken. The jury was not at that time directed to disregard his testimony previously given as to the tender, but they must have understood the court's ruling rejecting it when latterly offered as tantamount to an injunction to not consider it as previously given. At the proper time appellant requested the court to give to the jury the following instruction: "While a tender by the defendant after the commencement of this prosecution would not excuse him for any offense before that time committed, at the same time that act of his is proper for you to consider, in connection with all the other evidence in the case, in determining whether or not, at the time he refused to pay over to Morris upon demand, such refusal was made with a criminal intent, and for this purpose you may consider the evidence before you as to such tender." This request was refused, and exception taken.

We think the court was in error in its rul-

ings upon the offer of evidence and upon the refusal of instructions asked. It is true that restitution of property stolen or embezzled, or an offer to return it, does not obliterate the offense, and this is as true when the return or offer was made before the institution of the prosecution as afterwards; but there is no rule authorizing the rejection of evidence of a return, or offer to return, stolen or embezzled property, simply because the return or offer was made after prosecution began. Such evidence may possess but little weight, but nevertheless it goes to the question of intent with which the property was taken or withheld. It cannot, as matter of law, be said to manifest mere contrition of spirit, or be an effort to avert the consequences of wrongdoing. In the case of embezzlement, it may evidence a bona fide belief by the defendant that the money or property was rightfully taken or rightfully withheld by him, and a recent discovery of mistake as to that fact. This is especially true in cases of embezzlement arising under the statute cited. Under that statute, the crime is not complete until demand is made by the employer, and a neglect or refusal by the agent, and not then, if the employer had permitted the agent to use the money or property, nor if the demand was of a sum of money which did not allow to the agent "his reasonable or lawful fees, charges, or compensation for his services." Now, in this case, the jury found the amount embezzled to be \$118, but the demand by the employer was for a sum largely in excess of the one the jury found to be due,—was for a sum which did not allow to the agent credits to which he was rightfully entitled. Considering the fact that until January 1, 1898, no demand upon the agent for money had really been made, but only a demand for a "settlement," and that on that day the demand was for a sum of money considerably greater than the jury found to be due, although the appellant had once mistakenly admitted it to be due, it would seem difficult to find ground upon which to rest a conviction; and we therefore think that the defendant, in view of the special circumstances of the case, and apart from the general rule to which we have adverted, was entitled to the evidence offered and the instruction requested.

The verdict of the jury recited "that the amount of money in his [the defendant's] hands belonging to D. L. Morris on January 1, 1898, the date when the demand was made for the money, was \$118." Objection was made to this verdict, because it did not state the value of the \$118 embezzled. Inasmuch as, under the section before cited, the punishment for the offense is the same as for grand or petit larceny, according as the value of the property embezzled may be above or below \$20, it is said that the jury should have found the value of the money in question. No cases in support of or against this claim of error were cited to us, but the novelty of the proposition induced us to make search.

among the authorities. We found none, excepting the case of *Gerard v. State*, 10 Tex. App. 690. That case supports appellant's contention, but we cannot regard it as an authority to follow. Money is not a thing to be valued in its own terms. It is itself the measure of values. The value of a dollar can be ascertained only by comparing it with another dollar. When thus compared, they are perceived to be exact equivalents, but their equivalence was as well known before the comparison as afterwards. It cannot be said that the verdict was uncertain because the "dollars" embezzled may have been in the currency of some other nationality. No nations other than the United States name their units of value "dollars." They give them other designations. As to the different kinds of dollars of this country, issued by authority of the general government, we take judicial notice that by the practice of the United States treasury department, and in the economic habit of the people, such dollars are maintained at a parity of value, and that they circulate at par; and we also take judicial notice that state bank money, some of which was formerly not accepted at its face value, is now no longer in circulation. We therefore conclude, as matter of law, that the \$118 mentioned in the verdict of the jury meant \$118 of United States currency, each one of the actual value expressed on its face.

Other claims of error are made. Some of them are not well taken, and we have not considered it necessary to examine as to the validity of the remainder. The judgment of the court below is reversed, with directions for a new trial. All the justices concurring.

(62 Kan. 349)

LEROY & C. VAL. AIR-LINE R. CO. v. SIDELL.

(Supreme Court of Kansas. Jan. 5, 1901.)

PROCESS—SERVICE—FOREIGN CORPORATION.

A railroad company was organized in Kansas, after which it built a line of railroad in the state. When the road was built the company leased and surrendered possession of the same, together with all other property owned by it, to another company for a period of 40 years. After the lease was executed it never operated a railroad nor held any business relations in the state, except as lessor of the railroad. An action was brought against the company, and a certified copy of a summons was served by leaving a copy thereof at the depot of the leased line, which was in charge of an agent of the lessee company, who had no connection with the lessor company. *Held*, that the service was insufficient.

(Syllabus by the Court.)

Error from district court, Wilson county; L. Stillwell, Judge.

Action by Cornelius V. Sidell against the Leroy & Caney Valley Air-Line Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. H. Richards, C. E. Benton, and N. P. Willets, for plaintiff in error. S. S. Kirkpatrick & Son, for defendant in error.

JOHNSTON, J. This proceeding brings up for decision the sufficiency of the service of a summons attempted to be made upon a railway corporation. In 1886 the Leroy & Caney Valley Air-Line Railroad Company constructed a railroad through Wilson county, and at the same time constructed depots at various points along the line, one of which was at the city of Fredonia, in Wilson county. When the railroad was constructed it was leased to the Missouri Pacific Railway Company, together with all sidings, depot buildings, and other property belonging to the railroad company, for a term of 40 years, and the Missouri Pacific Railway Company immediately entered into the possession of the property, and has continually operated it ever since that time. An action was brought against the Leroy & Caney Valley Air-Line Railroad Company in Wilson county upon a judgment against the company previously recovered in New York. A summons was issued, and the sheriff in whose hands it was placed returned that he had served the same by leaving a certified copy thereof at the depot of the company at Fredonia, with E. E. Munger, who was in charge of it. It was agreed, however, that Munger was not in the employ of the Leroy & Caney Valley Air-Line Railroad Company, but was in the employ of the Missouri Pacific Railway Company, and that he never was either in the employ or under the direction and control of the Leroy & Caney Valley Railroad Company. While the last-named company maintained an organization in the state, it had no officers or agents in Wilson county, and was not in possession of or operating any line of railroad in the state, and was not doing business in the state, unless the mere fact that it was the lessor of the line of railroad as above set forth shows that it was doing business in the state. There is a further stipulation that it had never designated any person in Wilson county upon whom process could be served.

It is contended that, under section 68c of the Civil Code (Gen. St. 1889, § 4147), a service upon any one in charge of a station which was built and is owned by the company is sufficient to bind the company. The section cited is to be read and interpreted in connection with the two sections immediately preceding, as they are part of the same act, and relate to the same subject. In section 68a it is provided, in substance, that every railroad company doing business in Kansas, or having agents doing business therein for the company, is required to designate some person in each county through which its railroad runs or its business is transacted on whom process and notices may be served. In section 68b it is provided that a certificate of the appointment of the person so designated shall be filed in the office of the clerk of the district court, and that service upon such person shall be deemed to be effectual and complete. In section 68c it is provided that, if any company fails to designate such person

as required, process "may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper, of such company or corporation in such county; or such process may be served by leaving a copy thereof, certified by the officer to whom the same is directed to be a true copy, at any depot or station of such company or corporation in such county, with some person in charge thereof or in the employ of such company or corporation, and such service shall be deemed complete and effectual." It is obvious from the language employed that these provisions relate only to companies and corporations doing business within the state. A service upon the officers or agents enumerated is to be made upon the officers and agents of a company doing business in the state, and a service by leaving a copy at a depot or station of "such" company or corporation certainly contemplates the depot or station of a company or corporation doing business in the state, and which is in charge of some person connected with, or employed by, the company. It is stipulated that the defendant company was not doing business in the state, unless the fact that it was the lessor of the railroad shows that it was doing business. The mere fact that it had executed a lease to another company for a term of 40 years, and had surrendered the possession of the road and all of its property, and was not engaged in the operation of any railroad in the state, is strong evidence that it was not doing business in the state. Apart from this view, however, we think the statute contemplates that the summons shall be left at a depot or station occupied by the company, and with some person in charge thereof for the company, or who is in the employ of the company. Evidently it was the purpose of the legislature that notice of the institution of an action should be brought to the attention of some one connected with the business operations of the company. A summons left at a depot occupied by another company, or by a stranger, would hardly serve as a notice to the defendant company, which had neither possession nor right of possession to the depot or the railroad, and which was not engaged in operating a railroad or any other business within the limits of the state. Reasonable notice is essential to the maintenance of an action, and certainly the legislature did not intend that notice served on one corporation or person should be regarded as notice to a different corporation or person. The words, "depot or station of such company," fairly mean the building used by the company as its depot or station; and the words, "with some person in charge thereof," mean some person in charge thereof for such company; and the words, "or in the employ of such company or corporation," mean in the employ of such company or corporation, whether in charge of the depot or not. In our view, jurisdiction of the com-

pany was not obtained by the service that was made, and therefore the judgment of the district court will be reversed, and the cause remanded, with directions to sustain the motion of the defendant to set aside and vacate the service of summons. All the justices concurring.

(62 Kan. 374)

BOARD OF EDUCATION OF KANSAS CITY v. CITY OF KANSAS CITY.

(Supreme Court of Kansas. Jan. 5, 1901.)

TOWN SITES—DEDICATION—PUBLIC USE.

1. A tract of ground belonging to a town-site company, designated as "Seminary Place" on a plat of the town site filed by such company, and on which plat is indorsed a memorandum made by the company stating that the square of ground of which Seminary Place forms a portion has been set apart as "public grounds," will be presumed, in the absence of sufficient contrary evidence, to have been dedicated by the company to public-school purposes.

2. In a case as above stated, the right of the public to the use of the dedicated ground for school purposes cannot be strengthened by a resolution of the council of the city in which the ground is situated authorizing its use for such purposes, nor can such city council lawfully devote to school purposes ground which had been dedicated by the original owner to other public purposes.

(Syllabus by the Court.)

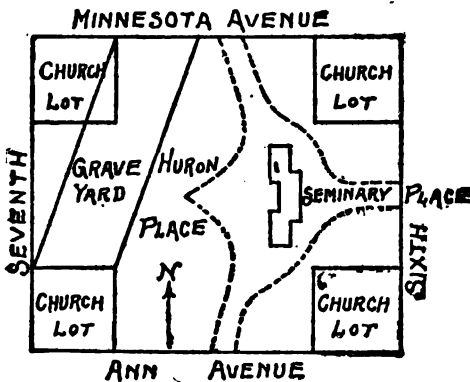
Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the city of Kansas City against the board of education of Kansas City. Judgment for plaintiff. Defendant brings error. Reversed.

Hutchings & Keplinger, for plaintiff in error. F. D. Hutchings and T. A. Pollock, for defendant in error.

DOSTER, C. J. This was an action brought by the defendant in error, the city of Kansas City, against the plaintiff in error, the board of education of Kansas City, to enjoin the erection of a high-school building upon what the plaintiff in said suit claimed to be ground dedicated to public park purposes, but which the defendant claimed to be ground dedicated to it for school purposes. The defendant in its answer prayed for affirmative relief quieting its title to the disputed tract. Judgment was rendered in favor of the plaintiff denying affirmative relief to the defendant, and in addition enjoining the erection of the school building. The facts were agreed upon in the court below, a summary of which was that in 1837 a number of persons associated themselves together as a town-site company, under the name of the "Wyandotte City Company," for the purpose of purchasing lots and devoting them to town-site purposes. Among other things, the town-site company appointed one John McAlpine trustee to receive conveyances for it, and to plat its lands and to execute deeds to its lots. In 1859, McAlpine, in pursuance

to the authority conferred, platted the company's lands, and filed a plat designating the streets, alleys, parks, and public grounds. On the plat was indorsed the following matter, indicating a dedication of some of the grounds to public purposes: "Public Grounds. The levee, extending from the northern boundary of the ferry tract to the northern boundary of the town, and from the front lots of the river; also a public square known as 'Oakland Park,' bound by Washington avenue on the north, Eleventh street on the west, Kansas avenue on the south, and Tenth street on the east, said square being 650 feet long by 628 feet wide; also Huron Place, excepting a lot on the southwest corner, one on the southeast corner, and also one on the northeast corner, which are, respectively, 150 feet square, and dedicated to church purposes; also excepting so much as is occupied by the Methodist Church South, and by the burying ground adjoining said church, as represented on the map." The tract now in dispute and the adjoining grounds were represented on the plat as follows:



The city of Wyandotte, the predecessor in municipal interest of the defendant in error, immediately upon the filing of the plat began to claim and exercise authority over the tract designated by the above plat, and it and its successor, the defendant in error, have continued to claim and exercise authority over it. However, the only instances of the exercise of such authority were in planting shade trees, in allowing or refusing the use of the grounds for circus shows, baseball playing, political meetings, and the like. These uses of the grounds, under the authority of the city, were made with the knowledge and without the objection of the plaintiff in error. In June, 1867, the board of directors of school district No. 1 of Wyandotte county, the predecessor in interest of the plaintiff in error, filed with the city council the following petition: "To the City Council of Wyandotte—Gentlemen: The undersigned school board of district No. 1 for Wyandotte county, which is the city of Wyandotte, request you, if it is not deemed in-

consistent or improper, to convey to them that portion of Huron Place dedicated for seminary purposes, in their official capacity, for the purpose of erecting a school house thereon, in such manner as Oakland Park has been conveyed for the purpose of the state asylum of the blind." The city council granted the prayer of the petition by resolution in the following words: "Resolved, that the mayor be authorized to execute such papers as may be necessary to convey to school district No. 1, of Wyandotte county, for the erection of a school house on that part of Huron Place bounded on the east by Sixth street, on the north and south by church lots named on plat of Wyandotte city, and west by a line drawn from the western boundaries of said church lots, reserving twenty feet on the north and south sides of said land so to be conveyed." In the month following the board of school directors addressed another petition to the city council, asking an additional amount of ground for school purposes. The petition was in the following language: "To His Honor the Mayor and Council of the City of Wyandotte—Gentlemen: We, the undersigned, would respectfully represent that if, deeming it not inconsistent or improper, you could grant us an additional sixty-five feet on the back part of the ground recently granted to district No. 1 of Wyandotte county, in Huron Place, it would greatly benefit said school district, and allow us the opportunity to erect the proposed school house in said district in a far more eligible situation. The land we seek will be a strip 65 feet wide, the length of the original grant, on the west side of said tract." Action by the city council upon the last petition was taken as follows: "Mr. Washington presented a petition from the school board of district No. 1, praying for the grant of an additional tract in Huron Place for the same purpose, and on the same terms, as for the tract heretofore granted. Whereupon Mr. Washington moved that a strip 65 feet wide and the length of said original grant be conveyed to said school district by the mayor for the same purpose and on like conditions as for the conveyance heretofore made. Carried." No conveyances or other writings were ever executed by the city in pursuance to either of the above-quoted resolutions. The board of school directors entered upon the grounds designated "Seminary Place," and erected thereon a school building, at a cost, as alleged in the defendant's answer, of about \$10,000. This building is indicated by the figure drawn within the dotted lines in the above plat. The fact of the erection of this school building was admitted in the agreed statement, but the time of its erection was not set forth in the statement. The time was alleged in the answer to have been the latter part of 1867, and the case was discussed before us upon the assumption of that being the correct

time, and we shall therefore accordingly consider it correct. The value of the school building erected, while alleged in the petition, was not set forth in the agreed statement. This, perhaps, is immaterial. It must be assumed, in the light of other agreed facts, to have been sufficiently valuable to evidence the expenditure of a substantial sum of money, and to evidence in a substantial manner claims of possessory right. The new school building, the erection of which the defendant enjoined, will cover a greater area of ground than the old school building. As to its exact location, the language of the agreed statement is peculiar. It is either contradictory or ambiguous. It says: "Such new building will be erected partly, if not wholly, within said dotted lines, and partly within the tracts described in said resolution." The dotted lines are the lines of the irregularly shaped tract marked "Seminary Place." To say that the building will be erected partly, if not wholly, within such lines, and partly elsewhere, affords no very satisfactory idea of its proposed location. Since the city brought the injunction suit the board of education purchased a site for the high school, and has nearly completed the construction of a high-school building thereon. Previous to the date of any of the matters hereinbefore mentioned the association called the Wyandotte City Company made an entry upon its records as follows: "Wyandotte, April 18, 1857. Association meet pursuant to adjournment. Reading minutes of the last meeting dispensed with. Members present: Silas Armstrong, Joel Walker, Isaiah Walker, and Thomas H. Swope. It was moved and carried that the park, including the cemetery, be called 'Huron Place.' Moved and carried that the church lot of the southwest corner of Huron Place be to the Methodist Church South, as applied for by the Rev. Mr. Scarritt, on conditions to be attached. [Signed] Thomas H. Swope, Secretary pro Tem."

The above are all of the agreed facts to which it is necessary to advert. In our opinion, they show that the court below was in error in refusing the affirmative relief asked by the plaintiff in error, and in enjoining it from the erection of its school building upon the disputed tract. The question is, was there sufficient evidence of a dedication by the Wyandotte City Company of the tract in dispute for seminary purposes. *Board v. Wilgus*, 42 Kan. 457, 22 Pac. 615, in its facts is so nearly like the present case as to constitute sufficient authority without looking beyond our own decisions, and without undertaking to reason from general principles. In that case a town company had filed a plat designating on it a tract as "Seminary Square." After the lapse of about 20 years the town company assumed to convey this square. It was held, however, that the deed passed no title; that the filing of the plat by

the town company designating the tract as "Seminary Square" sufficiently evidenced an irrevocable dedication to the public for seminary purposes. The case before us is stronger than that one. In that case, the tract dedicated had not been entered upon and used for seminary purposes; in this one, the tract was entered upon and improved and used for school purposes. The only question that could arise—and that question has not been raised—is whether the dedication for seminary purposes meant for public-school purposes. We think it does. In the case of *Board v. Wilgus*, supra, it was remarked: "A seminary is certainly such a public institution that the public may take charge of and operate the same. See our constitution and laws relating to schools and institutions of learning." In the case of *Chegaray v. Jenkins*, 5 N. Y. 378, it is said that "a seminary of learning is a school, and a school is a seminary of learning." In the case of *Curling v. Curling*, 33 Am. Dec. 475, it is held that "a devise to a public seminary is a valid charity"; and see the definition of the word "seminary" in any of the dictionaries. It cannot be claimed that the dedication for seminary purposes was a dedication to a private or denominational school of learning, because, if so, to what school, or in the interest of what denomination, was the dedication made? It will be observed that the tract designated on the plat for seminary purposes is a part of that which in the memorandum indorsed on the plat was designated as "Public Grounds." This is conclusive evidence that the seminary purposes contemplated by the donors were to be public-school, and not private or denominational school, purposes.

In order to trace the history of the tract of ground represented by the above plat, and to show as to it the passing of a somewhat general and indefinite intention of the original proprietors into one of specific and settled character, it will be important to note the action taken by such proprietors at several times, as evidenced by some of the matters above quoted. It would seem that by the minutes of the town-site company dated April 18, 1857, the tract of ground now called "Huron Place" had been intended as a park, because on that day it was ordered that "the park, including the cemetery, be called 'Huron Place.'" How much ground was covered by the tract theretofore called the "Park," and thereafter to be called "Huron Place," was not shown. Presumptively it covered the entire square,—not only that which was designed for general public purposes, but also that which had been set apart, or was intended to be set apart, for specific public purposes. The cemetery grounds which had theretofore been included under the designation "Park" were still to be included under the new name of "Place," and a certain corner of the old "Park" or new "Place" was to be given to the Methodist

Church South. It is fair, therefore, to assume that the entire square, including those portions of it dedicated to special public purposes, was to be designated as "Huron Place." In 1859 a town-site plat was filed. On this plat Huron Place was listed under the head of "Public Grounds," excepting the cemetery and lots on the four corners dedicated to church purposes. This memorandum of public grounds made no exception of any portion of Huron Place for school purposes, but the plat itself made such exception by noting the irregularly shaped tract before spoken of as "Seminary Place." Now, seminary or school purposes are public purposes in the most emphatic and significant sense, and it was entirely proper for the donors to omit under the designation "Public Grounds" that portion designed for school purposes. Had they put Seminary Place in the list of exceptions out of the public grounds, as they did the cemetery and church lots, they would have contradicted themselves in meaning, and would have confused every one as to their real intention. It would, of course, have been proper for them to have noted, under the list of public grounds, that portion of Huron Place which they designed for seminary purposes. This, however, they did, but in another way. They did it by indicating it on the plat, and calling it "Seminary Place."

We do not attach importance to the petitions of the school authorities for the allotment and conveyance of portions of the disputed tract for school purposes, nor the resolutions of the city council granting the prayer of such petitions. They did, however, evidence a recognition by the city authorities of the fact that some of these grounds were rightfully devoted to school purposes; but, in our judgment, the school authorities did not by such action acquire any rights they did not already possess, nor did the city lose any rights which up to that time it possessed. The right to lands dedicated for public purposes is acquired from the dedicators, and such right is likewise limited in territorial extent by the boundaries of the donors' grant. In this case the donors granted nothing but the tract called "Seminary Place." The adjoining grounds, although donated by the same persons, were dedicated to other public purposes. For what public purposes the adjoining grounds were dedicated is immaterial. It is sufficient that they were not dedicated to seminary purposes. A dedication to such purposes of a particular portion of the general tract implies that no other portion of such general tract was intended for the one specific public purpose; hence the city authorities, in so far as they attempted to grant portions of Huron Place outside the particular tract designated as "Seminary Place," undertook that which they could not rightfully do, viz. to divert the donors' grant to uses other than those designed by them. "After a complete dedication of lands to

public uses has been made, neither the dedicator nor the municipal authorities may apply them to other uses. It is only by the assent of all those for whose benefit the dedication was made—that is, the local lot owners, whose private interests are affected, and the town authorities, as representatives of the public interests—that any change can be made." 9 Am. & Eng. Enc. Law (2d Ed.) 80.

One J. V. Lane, who was made a party to the action in the court below, testified that he had resided in Wyandotte county since 1857; that he was acquainted with the members of the Wyandotte City Company; that they repeatedly stated to him that they had dedicated Huron Place for public use as a park, and never stated that they had dedicated any part of it for school purposes. He further testified that he had purchased property abutting one of the streets bounding Huron Place, and that his principal reason for doing so was that Huron Place was a park. This evidence was introduced for the purpose of showing that private rights had been acquired upon the faith of the dedication of Huron Place as a public park, and that such rights would be impaired by its diversion to other purposes. We do not stop now to inquire whether evidence of conversations with the original donors was admissible. It is sufficient to say again that the intention of the donors of the disputed tract of ground to devote such tract to school purposes, as evidenced by their public and recorded acts, is, and at the time testified to by Mr. Lane was, manifest. The judgment of the court below is reversed, with directions to ascertain the location and boundaries of the tract designated as "Seminary Place," and to refuse the injunction restraining the erection of the school building on such tract, and to quiet the title of the plaintiff in error thereto as against the defendant in error. All the justices concurring.

DOE v. CALLOW et al.

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 15, 1901.)

NOTES—GUARANTY ATTACHED—NEGOTIABILITY.

A note payable to order, and having attached thereto, on a separate piece of paper, a guaranty thereof by the payee, was not negotiable.

Appeal from district court, Bourbon county; W. L. Simons, Judge.

Action by L. W. Doe against Charles W. Callow and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Nelson Case, for plaintiff in error. C. E. Cory and W. D. Burke, for defendants in error.

PER CURIAM. This action was commenced by L. W. Doe, plaintiff in error, in the

district court of Bourbon county, against the defendants in error, defendants below, to recover upon the following promissory note:

"Kansas City, Mo., May 23, 1890. On the first day of June, A. D. 1895, for value received, I promise to pay to the order of the Globe Investment Company, at its office in Boston, Massachusetts, the sum of two hundred and fifty dollars in gold or its equivalent in United States money, with interest until maturity at the rate of 6 per cent. per annum, payable semiannually according to the terms of ten coupons hereto attached. If said sum is not paid at maturity, the amount unpaid shall bear interest thereafter at the rate of 10 per cent. per annum, payable semiannually; and, if any interest remains unpaid ten days after it becomes due, the principal shall at once become due, at the option of the holder, without notice. Charles W. Callow.

"Attest: E. J. Chapin."

"This note is secured by a first mortgage on the W. $\frac{1}{2}$, W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, 17-27-24 east, Bourbon county, Kansas."

On a separate piece of paper attached to said note is the following:

"Guaranty. In consideration of value received, and the agreements hereinafter made by the holder of this note, the Globe Investment Company hereby guaranties the payment of each coupon hereto attached at maturity, and the payment of this principal note within two years after June 1, 1895, with interest after maturity at the rate of 6 per cent. per annum, payable semiannually. Said holder receiving this note agrees that he will assign and deliver to said company said note and deed securing it on the payment or tender of the amount thereof with accrued interest at the rate of 6 per cent. per annum. He further agrees that in case of default by the maker in any condition of said deed he will, on demand, deliver this note and said deed securing it to said company, with authority to foreclose said deed at its own expense, and to cause the premises to be purchased at the sheriff's sale thereof in the name of its chosen trustee for said holder and said company; that said trustee shall manage and sell said premises subject to the approval of said company; and that payment of the amount of this note with accrued interest at the rate of 6 per cent. per annum shall cancel and satisfy all right and claims of said holder in and to said premises and to the proceeds of the sale thereof. In witness whereof said Globe Investment Company has caused its corporate seal to be here-to affixed, and this guaranty to be signed in its name and behalf by its treasurer this 31st day of December, 1892. Globe Investment Company, by Lowell J. Moore, Treasurer. [Seal.]

"Attached to note 206,168."

On the back of said note is the following indorsement: "Pay to the order of — without recourse. Globe Investment Company, by Lowell J. Moore, Treasurer."

From our examination of the authorities, we are satisfied that the instrument above set forth is not negotiable. 1 Daniel, Neg. Inst. § 151; Briggs v. Latham, 36 Kan. 209, 13 Pac. 129; Killam v. Shoeps, 26 Kan. 310, and cases there cited; Lyon v. Martin, 31 Kan. 413, 2 Pac. 790.

The only other question presented to the trial court was whether the Globe Investment Company was the agent of the holder of the note and mortgage. The court found in the affirmative, and there is sufficient evidence to support the finding. The judgment of the district court is affirmed.

(10 Kan. App. 532)

HORNER et al. v. SIMPSON, Clerk of District Court.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.)

BILLS AND NOTES—JAIL SENTENCE—RELEASE—COSTS—NOTE TO SECURE PAYMENT—VALIDITY—POWER OF BOARD OF COUNTY COMMISSIONERS.

Gen. St. 1897, c. 102, § 255, provides that any person imprisoned for failure to pay any fine or costs may be discharged by the board of county commissioners on satisfactory proof that he is unable to pay the fine. The board of county commissioners ordered a prisoner serving a jail sentence to be released on his execution of a note to secure payment of all costs. Held, that the note was void, and without consideration, the board having no authority to require its execution.

'Error from district court, Sumner county; J. A. Burnette, Judge.

Action by J. D. Simpson, clerk of the district court, against S. H. Horner and another. From a judgment in favor of plaintiff, defendants bring error. Reversed.

O. G. Eckstein and Kos Harris, for plaintiffs in error. Herrick & Rogers, for defendant in error.

PER CURIAM. This action was brought by defendant in error, as clerk of the district court of Sumner county, against plaintiffs in error, to recover upon a promissory note signed by them as sureties for one B. H. O'Connor. It appears from the record that O'Connor was confined in the jail of Sumner county because of his having violated the provisions of the prohibitory liquor law. A short time before the expiration of his sentence he made application to the board of county commissioners to be released from jail, and the board, having considered the application, made the following order: "Ordered, that Barney O'Connor be released from jail when his term expires, upon the payment of all costs, or the securing of the payment of all costs." In pursuance of this order, O'Connor executed to Simpson, as clerk of the district court of Sumner county, his note for \$268.75, the same being the note sued upon, and was released. Trial was had before the court, and judgment rendered in favor of the plaintiff, defendant in error herein, in the sum of \$256.05. From this

judgment the defendants appealed, and bring the case here for review.

It is contended by plaintiffs in error that the note is "absolutely void, as being against public policy, and also that it was given without any valid consideration." In these contentions we concur. Being creatures of statute, boards of county commissioners can only exercise such powers as are expressly conferred upon them, or are clearly and necessarily implied to enable them to carry out and accomplish the objects and purposes of their creation, and such grants of power must be strictly construed. 7 Am. & Eng. Enc. Law (2d Ed.) 976; *State v. Commissioners of Lincoln Co. (Neb.)* 25 N. W. 91. Under the laws of this state a person confined in jail under a sentence to pay a fine and costs, and to stand committed until such fine and costs are paid, may secure his liberty—First, by paying the fine and costs, or, if a jail sentence has been imposed, by serving his time and paying the costs; and, second, under section 255, c. 102, Gen. St. 1897, which provides: "Any person imprisoned for failure to pay any fine or costs may be discharged from imprisonment by the board of county commissioners of the county where the conviction took place, on satisfactory proof to them that said person is unable to pay the same: provided, said discharge shall not discharge or release said person from his liability to pay said fine and costs, but the same may at any time thereafter, be collected by execution as on judgments in civil cases." It was upon this provision that the board of commissioners evidently relied for authority to direct Simpson to take the note in question. There certainly is nothing in this section which authorized the board to take a note in payment of the costs, nor can it be said that the board had any implied power to take the note. The judgment of the district court will be reversed.

MISSOURI, K. & T. RY. CO. v. CAMBERN, County Treasurer, et al.

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.)

LEVEES—DAMAGES—COLLECTION—INJUNCTION—ESTOPPEL—LEVEE ACT—EMINENT DOMAIN—DELEGATION—CONSTITUTIONAL LAW.

1. Levee Act, § 4 (Laws 1893, c. 104; Gen. St. 1897, c. 146, art. 3), provides that the decision of the viewers as to damages and benefits shall be deemed the decision of the board of county commissioners, and an appeal may be taken therefrom, as from the board in other matters. Held that, a levee having been constructed without objection, a landowner was estopped to enjoin collection of the amount levied against his land because of irregularity in the proceeding, the question of jurisdiction not being involved.

2. The levee act (Gen. St. 1897, c. 146, art. 3), authorizing the construction of levees by boards of county commissioners, does not constitute an unauthorized delegation of the legislative power of eminent domain, in violation of Const. art. 2.

Error from district court, Neosho county; L. Stillwell, Judge.

Injunction by the Missouri, Kansas & Texas Railway Company against L. S. Cambern, as county treasurer, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

T. N. Sedgwick, for plaintiff in error. C. A. Cox and W. R. Cline, for defendants in error.

PER CURIAM. This is an action commenced by the plaintiff in error in the district court of Neosho county to enjoin the collection of \$331 levied against its property in said county under the provisions of article 3, c. 146, Gen. St. 1897 (chapter 104, Laws 1893), as a special tax for the construction of a levee along the Neosho river. In the judgment of the viewers, the plaintiff in error was damaged in the sum of \$1.80 by the taking of .06 of an acre of land, and they estimated the sum of \$300 as its benefits.

The principal assignment of error argued by counsel for plaintiff in error is: "(1) The court erred in holding and deciding that the county clerk was authorized to extend the amount of the tax or assessment complained of upon the tax roll against the property of the plaintiff." The case was tried by the court without a jury, and the prayer of plaintiff's petition denied, and judgment rendered for the defendant for costs. From an examination of the record, we conclude that the plaintiff in error was duly served with notice, as required by law, of the time and place where the viewers would meet to consider the question of laying out and establishing a levee district. Section 4 of the levee act (Laws 1893, c. 104) provides: "The decision of the viewers as to damages and benefits, shall be deemed the decision of the board of county commissioners and an appeal may be taken therefrom to the district court in the same manner provided by law for appeals from the board of county commissioners in other matters." No appeal was taken. The levee was constructed without objection on the part of the plaintiff in error. The plaintiff in error is now estopped. *Hutchinson S. R. Co. v. Board of Com'rs of Kingman Co.*, 48 Kan. 70, 28 Pac. 1078; *Chicago, K. & W. R. Co. v. Chase Co.*, 49 Kan. 399, 30 Pac. 456. The proceedings in this case may not be free from irregularities, but, "where the tribunal has acquired jurisdiction in the particular case, its proceedings will be good collaterally, notwithstanding the intervention of mere errors or irregularities."

It is further contended that the law authorizing the construction of levees is in violation of article 2 of the constitution of the state, in that it makes an unauthorized delegation of legislative power. We have been unable to find any decision of our supreme court where this statute has been consider-

ed, but, from our examination of the authorities upon similar statutes wherein power is conferred to take the property of the citizen for public use under the law of eminent domain, we hold the act constitutional. The judgment of the district court will be affirmed.

SCHALLEHN v. HIBBARD.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.)

On rehearing. Affirmed.

PER CURIAM. This case was decided by this court (53 Pac. 1132), and a rehearing granted. We have again examined the record and considered the authorities cited. In our opinion, there is no error sufficient to require a reversal of this case. The judgment of the district court is affirmed.

PONCELOR et ux. v. CAMPBELL et al.
(Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.)

HOMESTEAD—SALE UNDER EXECUTION.

Where defendants' lots were separated from the homestead by a fence, and were within one inclosure, which contained three frame houses, rented, with the grounds and outbuildings adjoining, to various tenants for some seven years previous to the execution, and never occupied by defendants as their homes or their servants' homes, they were not a part of the homestead.

Appeal from district court, Franklin county; Samuel A. Riggs, Judge.

Action by Martha J. Campbell against C. J. Poncelor and others. From a judgment confirming a sale of defendants' lands on execution, defendants Poncelor appeal. Affirmed.

John W. Deford, for plaintiffs in error. E. H. Gamble, for defendants in error.

PER CURIAM. Defendant in error obtained a judgment in the district court of Franklin county against plaintiff in error for the sum of \$1,200. Execution was issued, and lots 5, 7, 9, 11, 13, and 15 in block 4 of the city of Ottawa levied upon and sold as the property of C. J. Poncelor and Harriet Poncelor. The Poncelors, defendants below, filed a motion to vacate and set aside the sale. Mrs. Campbell, defendant in error, filed a motion to confirm the sale only as to "all land so sold south of the fence separating the premises and residence of C. J. Poncelor and Harriet Poncelor from the property adjoining said residence on the south." These motions were heard by the court below, and judgment rendered as follows:

"February 4, 1898. Now, on this day of the regular January term of this court, this cause coming on to be heard upon the motion of the defendants, C. J. Poncelor and Harriet Poncelor, to vacate and set aside the sale of

lots 5, 7, 9, 11, 13, and 15, block four, Bowles, Sheldon & Topping's addition to the city of Ottawa, Franklin county, Kansas, heretofore made by the sheriff of said county, under and by virtue of an execution herein to him directed out of this court, as the property of the said defendants, to said plaintiff, Martha J. Campbell, on the 15th day of November, 1897, as shown by said sheriff's return upon said execution, and the counter motion of said plaintiff to confirm said sale. The plaintiff, Martha J. Campbell, appeared by her attorney, E. H. Gamble, and the defendant's C. J. and Harriet Poncelor also appeared by their attorney, John W. Deford. Said C. J. Poncelor appeared in person. By consent of the court and parties hereto, the affidavits heretofore filed in support of and against said motion to set aside said sale were not introduced nor read in evidence, nor presented to the court, but the hearing was to and by the court upon said execution, the return of the sheriff to the same, and oral evidence adduced, and first upon the aforesaid motion to set aside and vacate said sale. And now, the evidence having been heard, the said plaintiff, who is also the purchaser at said sale, Martha J. Campbell, offered to remit any and all claim in or to or upon any or all of said lands which the court may find to be included in the homestead of said defendants, and moves the court to treat her bid at said sale as a bid for the remainder of said lands so sold to her, and to confirm said sale as to the remainder. And the court, having heard all the evidence and the argument of counsel, and having examined said execution and all the proceedings connected with said sale, reserves its decision, and takes all the motions under advisement until the 4th day of March, 1898.

"March 4, 1898. And now, upon this day, at the regular January term of this court, the day to which further consideration of this cause had been continued as aforesaid, said cause came on for decision upon said motion to vacate and set aside said sale, and the counter motions of the plaintiff to confirm the same. The plaintiff appeared by E. H. Gamble, her attorney, and the defendants by John W. Deford, their attorney; and the court, having fully considered the said motions, the evidence adduced thereupon, the argument of counsel, and being fully advised in the premises, doth find: That the said sale should be confirmed as to all the land sold, save and except that portion of lot five lying north and east of the following described lines: Beginning at a point in the west boundary of the alley in block four, Bowles, Sheldon & Topping's addition to the city of Ottawa, one foot north of the south line of lot 5; thence west along the fence running parallel to the south line of said lot to the east line of the house which stands upon lots 5 and 7; thence north along the east line of said house (which is known as 'No. 929 North Poplar Street') to the north line of the same; thence west

along the north line of said house to the west line of the same; thence northwest along the line of the fence extending from the northwest corner of said house to the street (Popular street), at a point six and one-tenth ($6\frac{1}{10}$) feet from the south line of said lot five. That, as to all of that portion of lot five lying north and east of the lines above described, the said sale should be set aside; the same being a portion of the homestead of these defendants. It is therefore by the court decreed, ordered, and adjudged that the said sale be vacated and set aside as to all that part of lot five lying north and east of the above-described lines of said fences and said house, and confirmed as to all of said lands lying south and west of said lines; that a certificate of purchase issue to said Martha J. Campbell, the purchaser at said sale, entitling her to a deed for that portion of the lands as to which said sale is confirmed as aforesaid, at the expiration of eighteen months from said sale, unless the same shall be redeemed as by law provided."

The only question presented is whether or not that part of the land sold, and to which the sale was confirmed by the trial court, was a part of the homestead of plaintiffs in error. It appears from the record that the lots to which the sale was confirmed were separated from the homestead by a fence, and were within one inclosure, of which said fence formed the north boundary. Within this inclosure were three frame tenant houses, a well, and separate outbuildings for each house. The houses had a frontage of 26 or 28 feet, and had been there for at least seven years, and had been rented to various tenants during all that time, and were never personally occupied by Poncelet or his family in any way. These tenants had the use and possession of the houses, grounds, and outbuildings, and occupied them as their homes, and were not servants or employees of Poncelet. We are satisfied from an examination of the record that no error was committed. The judgment of the district court is affirmed.

(10 Kan. App. 536)

WERNER v. VOGELI.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.)

LIBEL—BAD DEBTOR'S LIST.

Where defendant was a member of an organization known as the "Merchants' Protective Association," which published and distributed lists to members of names of persons unworthy of credit, and among them that of plaintiff, who was not indebted at the time to said defendant, as alleged on the list, the defendant will be liable in damages.

Error from district court, Sedgwick county; D. M. Dale, Judge.

Action by Rosalla Vogell against Emil Werner. From a judgment for plaintiff, defendant brings error. Affirmed.

Dyer & Day, for plaintiff in error. O. G. Eckstein and Adams & Adams, for defendant in error.

SCHOONOVER, J. It is conceded by counsel for defendant in error that the statement of facts in the brief of counsel for plaintiff in error is substantially correct. We quote from plaintiff in error's brief: "Statement of the Case. The defendant in error, plaintiff below, filed her petition in the district court of Sedgwick county, alleging that she was a married woman, and the wife of one J. L. Vogell, both living in the city of Wichita, state of Kansas, during the months of April and May, 1893. That Emil Werner, plaintiff in error, caused the name of Mrs. J. L. Vogell, the defendant in error, to be placed on what is termed the 'Bad-Pay List,' or the list of the Merchants' Protective Association, as a person unworthy of credit. The said association is a voluntary association, formed for mutual protection, and not for gain or profit, nor is it in any sense a collection agency. The pledge of the persons joining said association is as follows: 'We, the undersigned, hereby pledge ourselves to report to our secretary, monthly, the name of every person trading with us who has proven himself or herself unworthy of credit; and we do further covenant between ourselves not to give any credit whatever to a person whose name shall thus be reported, and retained on the bad-pay list for want of satisfactory settlement.' Some time in the spring of 1893, Mrs. Vogell, in company with her mother, Mrs. Sandleback, went to the hardware store of Emil Werner, plaintiff in error, and a stove was purchased of Werner by either Mrs. Vogell or her mother; Werner thinking he was trading with Mrs. Vogell, but Mrs. Vogell claiming that she had nothing to do with buying the stove, but that her mother purchased it. The stove was delivered to the house where Mrs. Sandleback and Mr. and Mrs. Vogell lived, but was never paid for. Some days after the delivery of the stove, word was sent to Mr. Werner that the stove was not satisfactory, and Mr. Werner went to the house and examined the stove, and refused to take it back, claiming that it was all right. The people at the house, after one or two weeks, set the stove outside the house, and refused to pay for it. The stove had been charged to Mrs. Vogell, and Mr. Werner had never seen either lady until the day they went to see the stove. Mr. Werner made out a bill of \$23 for the stove, and first placed it in the hands of one O. G. Eckstein, an attorney at law, for collection, who reported to Mr. Werner that the debt could not be collected. He said: 'They have got nothing, and you will have the costs to pay.' Werner then put the claim in the hands of one W. S. Morris, an attorney at law, for collection. Mr. Morris was also at this time secretary of the Merchants' Protective Association. Mr.

Morris could not collect the bill, and returned it to Mr. Werner, without bringing suit on the account. Some time afterwards Mr. Werner reported the bill, together with the name of Mrs. J. L. Vogeli, to Mr. Morris, as secretary of the Merchants' Protective Association, in accordance with the pledge of each member of the association. Mr. Werner was a member of this association. At the next meeting of the board of directors of said association, Mr. Morris, in accordance with the custom of said association, and carrying out his duties as secretary, reported the name of Mrs. J. L. Vogeli to the board, with the bill of \$23 for hardware, and the board ordered the name of Mrs. J. L. Vogeli to be placed on the bad-pay list." A trial was had before a jury, and a verdict returned, and judgment rendered against the plaintiff in error, defendant below, for \$400 and costs. A motion for a new trial was overruled, and the defendant below brings the case here for review.

The object of the Merchants' Protective Association, as declared by its constitution, is as follows: "We, the undersigned, hereby pledge ourselves to report to our secretary, monthly, the name of every person trading with us who has proven himself or herself unworthy of credit; and we further covenant between ourselves not to give any credit whatever to a person whose name shall thus be reported and retained on the bad-pay list for want of satisfactory settlement." It is also provided by the by-laws of the association:

"Sec. 4. * * * Each member shall hand his pass book to the secretary, together with a list of any names he may have of bad-pay customers, the 10th of each month.

"Sec. 5. No member shall give credit to any person who may be reported by one or more members of the association until such a one shall have satisfied all."

"Sec. 7. The secretary will furnish members of the association with a full and complete list of all names reported, and each member stands pledged to refuse all so reported any credit whatever."

The president of the association testified as follows: "Q. What action must a party take whose name appears before it is taken off? A. They must pay the account on which the name was placed on there. * * * No name is placed on except by order of the party,—member of the association. Q. State what the object of placing the name of persons on lists,—whether for collection or otherwise. A. For collection, partly. Q. State what other object there is other than for collecting accounts. A. To aid the members in regulating their credit."

A letter written by Mr. Morris, secretary of the association, was introduced in evidence. The letter is as follows: "The board of directors of the Merchants' Protective Association has ordered me to buy new books.

All the names now reported will be printed in these new books, except those who have moved away, those who have paid up, and those who pay up in the next fifteen days. Your name is on the old books, and I would like to see you, and help to arrange with the party who reported you to have your name omitted from the new books. I want as few as possible of the old names to come out on the new books, and none except those well known to be very poor pay. I am not sending this circular to any one except those I think will appreciate it, and make an effort to keep their names clear. The old books are to be burned. Now is a good chance to fix up the old matter. Please call soon."

It is clear from the record that the defendant below directed the officers of this association to place the name of Mrs. J. L. Vogeli on the bad-pay list, which was published and distributed to the members of the association. We also conclude that one of the objects of the association was the collection of bad debts due its members. In this case the machinery of the association was used in the attempt to collect a debt alleged to be due from Mrs. Vogeli to Emil Werner for the purchase price of a stove. The jury found, in answer to a special question, that Mrs. Vogeli did not purchase the stove in controversy from Emil Werner. The trial court instructed the jury as follows: "The plaintiff, for her cause of action against the defendant, says that she is a resident of the city of Wichita, Sedgwick county, Kansas, and that she has always been a woman of honor and integrity, and paid all her debts and obligations; that the defendant, Emil Werner, did on or about the 15th day of April, 1895, in the city of Wichita, Sedgwick county, Kansas, falsely and maliciously publish the hereinafter libelous words of and against the said plaintiff; that the said defendant, intending to injure the said plaintiff in her character, reputation, and feelings, and causing it to be believed by merchants and citizens of the said city of Wichita, did on or about the 15th day of April, 1895, have published, or cause to be published, in a certain book or pamphlet issued by the Merchants' Protective Association of the said city of Wichita, the name of the said plaintiff under the name of Mrs. J. L. Vogeli, meaning said plaintiff, and that said organization or association was contributed to by members belonging thereto by buying said books or pamphlets of said organization that were printed from time to time, which said books contained a large list of names, consisting of citizens of the city of Wichita and Sedgwick county, Kansas, whose names have been placed in said book or pamphlets, and caused to be placed in said book and pamphlet by the person or persons who purchased said books from said association; that the circulation and publication of these books or pamphlets containing said list of names aforesaid is very large, and the

same has been sent to several thousand subscribers throughout the city of Wichita, Sedgwick county, and that the said Emil Werner was, at said time, and has been for several years past, a member of said association, and contributing to the same, by buying or purchasing said book from said association, and that said defendant had been a member thereof at said time; that said book purported to contain the names of persons who are dishonest, unworthy of credit, dead beats, unworthy of the confidence of their fellow men, and persons who fail to pay their debts or obligations, and that this was also the accepted meaning and interpretation as understood by the public at said time, by reason of individual names being found in said list or published in said book or pamphlet; and that the said defendant herein, knowing all these facts, and understanding the meaning and interpretation as understood by the public or people who read said book or pamphlet as what they understood by the individual's name being placed or published in said lists as aforesaid, did knowingly, willfully, maliciously, thereby meaning this plaintiff, and intending to injure her in her good name, reputation, and credit, and expose her to ridicule, published, and caused to be published and promulgated, to the public generally, at the time aforesaid, of and concerning this plaintiff, this plaintiff's name, among or in said list of names aforesaid, as follows, to wit, Mrs. J. L. Vogell, meaning this plaintiff, and did so set forth and publish in said book as aforesaid, and at the time of the commencement of this action continued to have said name of the plaintiff published in said book or pamphlet as containing said plaintiff's name as aforesaid, was issued, published, and sent forth by the defendant to a large number of individuals throughout the city of Wichita and Sedgwick county at the time aforesaid; and said plaintiff further claims that, at the time said Emil Werner did publish, or cause to be published, this plaintiff's name among the list of names as aforesaid in said book or pamphlet, this plaintiff was not indebted to the said defendant in any sum whatever, and that said defendant had no authority or right to publish, or cause to be published, this plaintiff's name in said book or pamphlet as aforesaid among said list of names aforesaid, but that the same was done by said defendant as aforesaid, and for the further purpose of injuring her in her good name, standing, and reputation, and for the purpose of bulldozing and intimidating the said plaintiff into paying said defendant money, when said plaintiff was not indebted to said defendant in any sum, as said defendant well knew. Plaintiff further claims that, by reason of the facts aforesaid, she has been greatly damaged and injured in her credit, character, good name, and reputation, and also, by the ridicule, humiliation, mental anguish, and distress of mind, that she has been damaged in the sum of ten thousand

dollars, and demands judgment for that amount. The defendant has filed a general denial of all these charges. You are instructed that it is incumbent upon the plaintiff to prove, by preponderance of the testimony, all the material allegations in the plaintiff's petition, and this includes proof, by a preponderance of the evidence, that the defendant caused the publication of the acts alleged in plaintiff's petition to be made; and that the same was maliciously done, and that the plaintiff was damaged thereby. (1) You are instructed that a libel is a malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy tending to provoke a person to wrath, or to expose her to public hatred or contempt, or to deprive her of the benefits of public confidence and social intercourse. (2) The jury are instructed that every person who makes or composes, dictates or procures the same to be done, who willfully publishes or circulates, such libel, or in any way knowingly and willfully assists in making or publishing a pamphlet, the same would be a libel to the person injured thereby. (3) The jury are instructed that no printing, writing, or other thing is a libel unless there has been a publication thereof. But, further, the delivery, selling, reading, or otherwise communicating the libel, or causing the same to be delivered, sold, read, or otherwise communicated, to one or more persons or to the party libeled, is a publication thereof. (4) The jury are instructed that if you find from the evidence in this case that the defendant, Emil Werner, at the times charged in the plaintiff's petition in this case, was a member of the organization known as the 'Merchants' Protective Association,' and that said association at said time published, and caused to be distributed to the members of its association, books or pamphlets purporting to contain a list of names of delinquent debtors or persons unworthy of credit, and you further find that at said time said plaintiff was not indebted to the said Emil Werner, then you are instructed such publication would be malicious and libelous, and the defendant would be liable to the plaintiff for damages. (5) If the jury find that the defendant published, or caused to be published, a libel of and concerning the plaintiff, as charged in the plaintiff's petition, he is held to have acted maliciously in law against her, whatever his motive in fact might have been, and the law presumes this as malicious on the part of the defendant against the plaintiff, and the said plaintiff does not have to prove it in the first instance. (6) If the jury, under the evidence and instructions of the court, find the defendant maliciously published, or caused to be published, a libel as alleged in plaintiff's petition, in assessing the plaintiff's damages they are not confined to such damages as will simply compensate the plaintiff for her injuries as the evidence shows that she has received from the publication of the libel charged in the pe-

tion, but you may, in addition thereto, assess against the defendant, by way of punishment and as an example to others, such damages as you, in your sound judgment, under all the evidence in the case, believe the defendant ought to pay, not to exceed, in any event, the amount claimed in her petition. (8) The jury are instructed that malice in law, as used in these instructions, is not confined to personal spite of one individual against another, but it consists of the violation of the law to the prejudice of another. In other words, malice, in its common acceptance, means ill will against a person, but in the legal acceptance it means the wrongful act, done intentionally, without just cause or excuse. You are exclusive judges of all the facts appearing in the case, of the weight of the evidence, and the credibility of witnesses, and, in determining the weight to be given to the testimony of any such witness, you may properly consider the testimony of any such witness in the result of the trial, his apparent candor or lack of it, his demeanor upon the witness stand, and any other circumstances properly appearing in the case. If you should find that any witness willfully testified falsely to any material fact, you are justified in disbelieving all that such witness may have testified to, unless such witness is corroborated by other witnesses whom you believe."

These instructions, in our opinion, state the law applicable to the facts as they appear in the record. Many decisions are cited by counsel for both parties. From our examination of the authorities, we are satisfied that the case was fairly tried, and that no error sufficient to justify a reversal of the case appears in the record. The judgment of the district court will be affirmed.

(38 Or. 261)

HOFFMAN v. HABIGHORST et al.

(Supreme Court of Oregon. Jan. 21, 1901.)

BILLS AND NOTES—PAROL EVIDENCE OF SURETYSHIP.

Where several parties signed a note as makers, but in fact, and to the payee's knowledge, were mere sureties for the debt of another, parol evidence of suretyship should not be excluded as tending to vary the terms of a negotiable note, even though the principal debtor's name did not appear on the note, since it is always competent to show that any obligation, whatever its form, was made in fact for the debt of another.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Judge.

Action by Julia E. Hoffman, as executrix of the estate of Lee Hoffman, deceased, against E. H. Habighorst and others. From a judgment in favor of plaintiff, certain of the defendants appeal. Reversed.

This action was brought on a promissory note for \$15,000, executed by the appealing

defendants and five others, payable to Mrs. Sarah Werthelmer, and by her assigned to the plaintiff after maturity. The complaint is in the usual form, setting out the note in *hæc verba* as follows: "\$15,000. Portland, Oregon, Feb. 29th, 1892. One year after date, without grace, we jointly and severally promise to pay to the order of Mrs. Sarah Werthelmer, fifteen thousand dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid, principal and interest payable in U. S. gold coin; and, in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit. Interest payable quarterly. [Signed] E. H. Habighorst. G. W. Williams. D. L. Edwards. J. P. Looney. S. A. Stansbery. Maria A. Smith. G. W. Staver. R. Kelly. Osmon Royal. John Corkish. E. P. Fraser. J. P. Rasmussen. Alfred Kummer. Thos. Van Scoy. F. L. Posson." The answering defendants deny the allegations of the complaint, and as a further defense plead, in substance: That the Portland Guarantee Company, a corporation, desiring to obtain from Mrs. Werthelmer a loan of \$15,000, applied to them and their co-makers to act as its sureties, and, by way of inducement, represented, with the knowledge of Mrs. Werthelmer, that it was solvent, and promised that, if they would sign the note, and permit it to be pledged as collateral security for the loan, it would execute to them its own note for a like amount, and secure the same by deed to real property of the value of \$30,000. That, relying on such representations, they signed the note as sureties only, without any consideration whatever moving to them, and it was delivered to and accepted by the payee, with knowledge of the facts, as collateral security for a loan made by her to the guarantee company. That the company failed and neglected to keep and perform its contract with the defendants, but sold and disposed of a large amount of its property and applied the proceeds to other uses. That in consideration of an increase in the rate of interest from 8 to 10 per cent., to be paid by the guarantee company, and additional security by deed of conveyance to her from the company of 100 lots in University Park, Mrs. Werthelmer, the payee of the note, after its maturity, and without the knowledge or consent of the defendants or the other makers, entered into the following contract in writing with the guarantee company: "Whereas, Sarah Werthelmer, on the 29th day of February, 1892, loaned to E. H. Habighorst, G. W. Williams, and thirteen others the sum of \$15,000 for one year, and took their promissory note therefor, bearing interest, payable quarterly, at the rate of 8 per cent. per annum, and said note remains unpaid; and whereas, said Habighorst, Williams, and others borrowed said sum for the Portland

Guarantee Company, a corporation, and said company at the time of said borrowing received said sum, and has ever since had and used the same, and paid to said Wertheimer the interest thereon quarterly as it has fallen due; and whereas, said company desires a further extension of the time of said loan, and, in order to further secure the repayment thereof has this day executed and delivered to said Wertheimer the deed conveying to her the following described lands in the city of Portland, county of Multnomah, state of Oregon, to wit, all of blocks 49, 51, 53, 57, as shown and described on the duly-recorded plat of University Park,—in consideration of all of which it is now hereby agreed by and between said Wertheimer and said company that said Wertheimer shall and will extend the time for the payment of said loan so that it may be paid by said company on or before the 20th day of August, 1894; that she will reconvey to said company all of the lands described in said deed upon the repayment of said loan in full; and that said company shall and will pay or cause to be paid to said Wertheimer, at Portland, Oregon, interest quarterly on said note to August 29, 1893, at the rate of 10 per cent. per annum. Witness our names hereunto set by our authority this 21st day of August, 1893. Executed in duplicate. [Signed] Sarah Wertheimer, by Ben Selling. [Signed] Portland Guarantee Company, by P. L. Willis, Secretary." That afterwards, on the 24th of September, 1895, Mrs. Wertheimer, without the knowledge or consent of the makers of the note, released to the guarantee company all the security for the payment of such indebtedness which she had previously received from it. That the security so released was worth more at the time than the amount of such indebtedness, and was wholly lost to defendants. That the plaintiff, at the time she received the note from Mrs. Wertheimer, had full knowledge of all the foregoing facts. These matters are presented in detail as three separate defenses; (1) As a failure of consideration; (2) as a release and discharge from liability thereon because of the agreement extending the time of payment in consideration of an increase in the rate of interest, and of further and additional security, and the subsequent release to the company of such security without the knowledge or consent of the defendants or their co-makers; and (3) as, in legal effect, a payment by the guarantee company of the debt or obligation for which the note was executed. A demurrer to the first and second further and separate defenses was sustained by the court below on the ground that they did not state facts sufficient to constitute a defense, and a portion of the third was stricken out on motion. A trial was subsequently had before a jury, resulting in a verdict and judgment in favor of the plaintiff, from which the defendants appeal.

W. D. Fenton and Dell Stuart, for appellants. P. L. Willis, for respondent.

BEAN, C. J. (after stating the facts). The position of the plaintiff is that the demurrer to the answer was properly sustained, because it cannot be shown by parol that the defendants were in fact accommodation makers, or sureties, for the Portland Guarantee Company. It is argued in support of this position that to permit the introduction of such evidence would be a violation of the well-settled rule that parol evidence is not admissible to vary, alter, or affect the terms of a written contract. There is some conflict in the authorities, and especially among the earlier adjudications, as to the right of one who appears on the face of a negotiable promissory note as a maker to show at law by parol that he was in fact a surety for a co-maker. But the doctrine of this court, supported by the great weight of authority, is that he may do so for the purpose of affecting the creditor, who, having notice of the true relationship of the parties, is bound to act so as not to impair the legal rights or diminish the remedies of the surety. *Findley v. Hill*, 8 Or. 247; *Brown v. Rathburn*, 10 Or. 158; 1 Am. & Eng. Enc. Law (2d Ed.) 343; 1 Brandt, Sur. (2d Ed.) § 29; *Coleb. Coll. Sec.* (2d Ed.) § 203; *Tied. Com. Paper*, § 422; 2 *Rand. Com. Paper* (2d Ed.) § 909; *Investment Corp. v. Marquam* (C. C.) 62 Fed. 960; *Hubbard v. Gurney*, 64 N. Y. 457; *Riley v. Gregg*, 16 Wis. 666; *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; *Bank v. Kent*, 17 Am. Dec. 414, and note. The question first came before this court in *Findley v. Hill*, supra, which was an action on a joint and several promissory note executed by two parties. One of them set up as a defense that he was a surety for the other, and that the payee, without his assent, had entered into an agreement with his principal by the terms of which the time of payment was extended; and the court said: "If this was a valid agreement, it is quite clear that it operates as a discharge of the appellant, for it is well settled that, where time is given to the principal debtor without the assent of the surety, by a valid agreement which ties up the hands of the creditor, the surety is discharged." *Brown v. Rathburn*, supra, was also an action on a joint and several promissory note, and it was held that one of the makers might allege and prove at law that he was in fact a surety, for the purpose of showing that he had been discharged because of a voluntary relinquishment by the creditor, with knowledge of his suretyship, of collateral security of equal or greater value than the amount of his debt. And in the recent case of *Hughes v. Pratt*, 37 Or. —, 60 Pac. 707, it was held that one joint maker of a promissory note might set up and prove at law that he was a mere surety for a co-maker who had subsequently paid and discharged the note, but caused it to be

assigned to another, who brought an action thereon to recover from the surety. The admission of parol evidence to show the true relationship of the makers of a promissory note, and that the payee had notice thereof, does not alter or vary the terms of the original contract, or affect its integrity. It is merely proof of an independent or collateral fact, which operates to relieve the surety from liability when the creditor, with knowledge of the fact, has changed the original or made a new contract with the principal debtor, without the knowledge of the surety, or released any security he may hold for the payment of the debt. "The fact that one debtor is a surety for the other is no part of the contract with the creditor," says Mr. Chief Justice Gray, "but is a collateral fact showing the relation between the debtors; and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence." *Guild v. Butler*, 127 Mass. 386. The creditor may rely upon the note as it is made, and hold the makers thereof to a strict performance of their contract, and it cannot be contradicted or varied by parol. If a creditor, however, has knowledge that they are in fact sureties for another, he may not deal with such person in relation to the debt without incurring the risk of releasing the sureties. The right of the surety to be thus protected against the acts of the creditor does not depend upon the terms of the contract, but upon the equities arising out of the circumstances of the case, and the creditor is affected by the knowledge of the true relation of his debtors, acquired at any time before he does the act altering the position of the surety.

It is contended that, while parol evidence may be admissible to show that one or more of the makers of a promissory note are sureties, such fact, although known to the payee, cannot be shown as to all the makers, where the real debtor does not join in the primary obligation. But, within the meaning of the rule under consideration, every one who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a surety, whatever may be the form of his obligation. It is true that generally the primary obligor or real debtor joins in the contract with the sureties. This is not, however, believed to be necessary or essential. "The relation of suretyship," say the editors of *White & Tudor's Leading Cases in Equity*, "grows out of the assumption of a liability at the request of another, and for his benefit. It may, consequently, arise, although the name of the principal does not appear in the instrument which constitutes the evidence of the debt." 1 *Lead. Cas. Eq.* (4th Ed.) 149. And in 2 *Am. Lead. Cas.* (5th Ed.) 441, it is said: "In this, however, as in other cases, equity has regard to the substance of the transaction. If a promise be

made for the benefit of another, without sharing in the consideration, the promisor will be a surety, whatever may be the form of the agreement. * * * The obligation of the surety may be indirect that another shall perform or direct that he will perform himself; he may be jointly bound or appear on the face of the writing as the sole debtor without his being on that account less a surety, or losing the equitable rights which belong to him in that capacity." And Mr. Chief Justice Cooley, in speaking to the same question, says: "Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities,—as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but, if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding his debt he shall not lose sight of the surety's equities." *Smith v. Sheldon*, 35 Mich. 42. Within these principles there seems no valid reason why it may not be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence, because, as said by Mr. Justice Campbell, in *Bank v. Coumbe*, 47 Mich. 358, 11 N. W. 196, "It is always competent to show that any obligation, whatever its form, was in fact made for the debt or liability of another; and, where this is the case, the contract is one of suretyship, and the surety, if he is held to pay it, may sue for reimbursement. * * * And when a creditor knows that his debtor is a surety he is bound to take no steps which will change the liability of the principal, without the surety's consent. * * * This doctrine is too elementary to require any discussion." Mr. Brandt says: "The sole maker of a promissory note is sometimes entitled to stand in the position of a surety." 1 *Brandt, Sur.* (2d Ed.) § 38. This statement of the text writer is supported by *McQuesten v. Noyes*, 6 N. H. 19, in which it appeared that some time before the date of the note sued on, Noyes, the defendant, had signed a note

to a bank as surety for one Wyatt; that, shortly before it became due, Wyatt, who had gone from home, wrote to Noyes, saying that he should not be able to return in season to make payment, and requesting him to obtain the money of plaintiff, and pay the note, promising that he would replace it on his return. Noyes showed the letter to plaintiff, and obtained the money by giving his individual note, joined in by a third party, and paid the amount received over to the bank. Wyatt, on his return, offered to pay the note, but the plaintiff permitted him to retain the money, and agreed to wait for the amount due until some future time. It was held that Noyes was entitled to stand in the position of a surety, and that, under the circumstances, Wyatt's offer to pay should be regarded as a payment, and the agreement to wait as a new loan to him. Richardson, C. J., speaking for the court, said: "The defendants in this case gave the note on account of Wyatt, who promised to replace the money on his return from Canada; and all this was known to the plaintiff. The defendants, then, are, in our opinion, entitled to stand on the ground of sureties with respect to the plaintiff, in the same manner as if Wyatt's name had been upon this note as a principal." The doctrine that the offer of Wyatt to pay the note, and the agreement of the holder that he might retain the money, were sufficient to justify the jury in finding that there was a contract for an extension of payment, has been doubted (*Hoyt v. French*, 24 N. H. 198, 203), but the holding that Noyes was entitled to the rights of a surety has not been questioned, so far as we are advised. It is a familiar rule that, when property of any kind is mortgaged or pledged by the owner for the debt of another, it occupies the position of a surety or guarantor, and anything that would discharge an individual surety who was personally liable will, under similar circumstances, discharge such property. 1 Brandt, Sur. (2d Ed.) § 34; 24 Am. & Eng. Enc. Law, 722. And no reason is apparent why the same rule should not apply to one who has loaned the credit of his name as security for the payment of another's obligation. There is no greater virtue, as a matter of law, in a tract of land or a chattel that may be pledged to secure the payment of a debt than in the name of the owner. According to the answer, the individual credit of the makers of the note upon which the action is founded was given for the debt of the guarantee company, to the knowledge of the payee; and under such circumstances the principles of equity and natural justice would prevent her from dealing with the real debtor in any way so as to change the status of the parties or the contract without the consent of all. Now, it is elementary law that a surety will be discharged where a valid contract is made between the creditor and the principal debtor extending the time of payment, or where

securities held by the creditor are voluntarily surrendered without the consent of the surety, at least to the value of such securities. The answer alleges and the demurrer admits that Mrs. Wertheimer, the original payee of the note, not only made a contract with the guarantee company extending the time of the payment of the debt, but at the same time, took a mortgage on real property from it as additional security, of greater value than the amount of the debt, and afterwards released such mortgage without the knowledge or consent of the defendants. If this is true, and the defendants were in fact sureties for the company, or entitled to stand in the position of sureties, it is a complete defense, for the reason, stated by Mr. Colebrooke, that: "The surety is entitled upon payment to be subrogated to the collateral securities held by the creditor from the principal debtor, whether such securities were received at the time the contract of suretyship was entered into or subsequently, or without the knowledge of the surety. This right of the surety is one not founded upon contract, but is supported upon principles of equity and natural justice, and the tendency is to enlarge and extend its application." Coleb. Coll. Sec. (2d Ed.) § 212. This question arose in the case of *Baker v. Briggs*, 8 Pick. 122, where the surrender of a horse and gig of the principal, which had been received from him as security after the debt was contracted, was held to exonerate the surety; and it was said that this result would follow whenever the creditor relinquished assets or effects of any description which might have been applied in payment. "Now, it seems to be a well-settled principle in equity," says Parker, C. J., "that a creditor who has the personal contract of his debtor, with a surety, and has also, or takes afterwards, property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself; and, if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered." To the same effect is *Brown v. Rathburn*, supra; also *Denny v. Seeley*, 34 Or. 364, 55 Pac. 976. Under the law, then, and upon the facts pleaded, it seems to us clear that the defendants stand in the position of accommodation makers, or sureties, as between themselves and the Portland Guarantee Company, and that, if the payee, with knowledge of that fact, so dealt with the company as to relinquish or release to it any securities she may have had for the payment of the debt, she thereby discharged the defendants from liability to the extent and value of the securities so released; and, as the plaintiff purchased with full knowledge of all the facts, she stands in no better position than her assignor. In our opinion, therefore, the court below was in error in sustaining the demurrer to the answer, for

which reason the judgment must be reversed, and the cause remanded, with directions to overrule the demurrer, and for such further proceedings as may be proper, not inconsistent with this opinion.

(38 Or. 438)

BAYARD et al. v. STANDARD OIL CO.

(Supreme Court of Oregon. Jan. 14, 1901.)

HIGHWAYS — ESTABLISHMENT — USER — EX-TENT—COLOR OF TITLE—NONUSER—ABANDONMENT—EVIDENCE.

1. In order that a highway may be established by public user, the user must be under a claim of right, adversely, uninterruptedly, and substantially, by way of a defined road, for the period prescribed by limitations beyond which actions for the recovery of real property cannot be maintained.

2. Where the issue was whether an oil tank beside a beaten track of a highway was within the highway, and plaintiff claimed it was an obstruction because the road as traveled had been used for the period necessary for limitations to run against the recovery of real estate, and under color of title, consisting of ineffectual proceedings to lay out a highway, but it was not shown that the beaten track at the tank was within the boundaries of the road as attempted to be laid out, it was error to admit the proceedings of such attempt, since, the user not having been shown within the boundaries of the road as attempted to be laid out, the highway was established only to the extent of actual use.

3. Where the evidence tended to show that a highway had been established by user by the public, but it appeared that for 18 years subsequent to such establishment the beaten track of a portion had diverted from the highway as established, the evidence was sufficient to show an abandonment by nonuser of the portion diverted from.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by C. E. Bayard and another, as administrators of the estate of Perry Watkins, deceased, against the Standard Oil Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

By this action plaintiffs seek to recover damages for injuries resulting in the death of one Perry Watkins, alleged to have been caused by placing an unlawful obstruction in a public highway. Prior to June 27, 1896, the defendant had constructed a foundation of brick, by the side of or near the beaten track of a publicly traveled highway, and on that day was engaged in placing an oil tank thereon, 10½ feet in diameter, and 30 feet in length, cylindrical in form, and of a red or light brown color. When the tank was nearly in place, one Jullan was driving by, and as he came opposite his team became frightened, and ran upon the deceased, who was in a hack, driving ahead, causing his death. The theory of the plaintiffs is that the highway was a public county road; that the tank constituted an obstruction and a public nuisance within such road; and that the frightening of Jullan's team thereat was the proximate cause of the injuries complained of. To sustain their contention, they introduced

in evidence the records of the attempted establishment by the county court of Wasco county, Or., in 1867, of a county road from The Dalles to the Lower Deschutes bridge, consisting of the original papers on file and record proceedings relating to the matter. These were not offered for the purpose of showing a valid establishment of the highway, but to show color of title merely, to be followed by proof that it had been opened up and used by the public for about 28 years, regularly and continuously, prior to the accident. Other evidence was produced, tending to show that between the years 1867 and 1880 there was a road leading from The Dalles to the Lower Deschutes bridge, commonly known as "The Dalles and Deschutes Road," which was regularly traveled by the public; that it was worked by the road supervisor from time to time; and that the thread or beaten track thereof passed over the ground where the oil tank was being placed. The defendant produced evidence tending to show that one Mary Laughlin was the donee from the general government of the locus in quo; that on July 12, 1881, she deeded to the Oregon Railway & Navigation Company a strip of land, comprising the premises, upon which the oil tank was placed; that the Oregon Railway & Navigation Company, sometime about the year 1882, constructed an ice house near the west end thereof, and a few feet to the east of where the oil tank was subsequently erected; that since said time the traveled track turned to the south, but in close proximity to the ice house, after passing which it gradually bears back, until it connects with the old way, several rods further west. The tank extends south, even with the ice house, but not upon the beaten track of the road as now used, and the defendant claims to have the authority of the Oregon Railway & Navigation Company for erecting it at that point. There was a motion for a nonsuit at the close of the plaintiffs' testimony, and again at the close of the trial, both of which were overruled, and, the final judgment being favorable to the plaintiffs, the defendant appeals.

H. M. Cake and W. D. Fenton, for appellant. A. S. Bennett, for respondents.

WOLVERTON, J. (after stating the facts). The plaintiffs' cause of action depends upon whether the oil tank was being placed within and upon a public county road. If it was, the right of recovery is clear, the other conditions being that it must have been the proximate cause of the injury, which must have been special and peculiar,—other and greater than that sustained by the public generally. *Millarkey v. Foster*, 6 Or. 378; *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341.

The first question of material moment arises upon the motion for a judgment of nonsuit, and has relation to the competency of the ineffectual road proceedings, as showing

color of title in the public. The only way in which the record could serve the plaintiffs is to extend possession constructively to the whole, if there has been occupancy of any part within prescribed boundaries. User by the general public, under a claim of right, adversely, and not by mere possession of the owner, for the period prescribed by the statute as a limitation beyond which actions for the recovery of real property cannot be maintained, will establish an easement in favor of the public. But the use must be continuous and uninterrupted, and substantially by way of a certain and well-defined line of travel, for the entire period. *Elliott, Roads & S.* (2d Ed.) §§ 175, 176; *Jones, Easem.* § 458; *State v. Auchard* (Mont.) 55 Pac. 361; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Manrose v. Parker*, 90 Ill. 581; *State v. Keokuk, C., St. J. & C. B. R. Co.*, 45 Iowa, 139.

It is not material to the present inquiry whether such an easement is acquired by prescription, which presupposes an establishment by competent authority, or by dedication, which implies a grant; for it is clear that such an easement may be acquired by adverse user, by whatsoever name the process of establishment may be called. As a general rule, when the highway depends solely for its establishment upon adverse and continuous user by the general public, its width and extent of servitude are measured and determined by the character and extent of the user, for the easement cannot, upon principle or authority, be broader than the user. *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N. W. 606; *Paper Co. v. West*, 58 Wis. 599, 17 N. W. 554; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494; *Schelmer v. Price*, 65 Mich. 638, 32 N. W. 873; *Western Ry. v. Alabama G. T. R. Co.*, 96 Ala. 272, 11 South. 483; *Bank v. Stockwell*, 84 Mich. 586, 48 N. W. 174. Other conditions, however, may be effective to extend the exterior limits beyond the thread or course of actual travel, as where inclosures may have been permanently maintained by persons affected with reference to the highway, or the use is referable to a survey and plat recognized and adopted by owners of lands over which the way extends, or was under color of ineffectual proceedings to establish a legal road under the statute. *Whitesides v. Green* (Utah) 44 Pac. 1032; *Pillsbury v. Brown*, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; *Sprague v. Waite*, 17 Pick. 309; *Bartlett v. Beardmore*, supra. Even where the highway is founded solely upon user, its width or extent of servitude is usually a question of fact for the jury. It would seem that it ought not, where the topography of the locality will permit, to be confined exclusively to the beaten track or thread of actual travel, because of the exigency that experience has shown for the passing and re-passing of those in the use of it. And circumstances such as that the use has been

with reference to natural objects or artificial obstructions, or the character of the way requires improvement, necessitating access to the wayside, are pertinent for the consideration of the jury in determining the question. *Davis v. City of Clinton*, 58 Iowa, 389, 10 N. W. 768; *Marchand v. Town of Maple Grove*, supra.

It may be conceded, for the purposes of this case, that the irregular and ineffectual proceedings of the county court constituted color of title, so that a claim of right and continuous possession and user for the statutory period would give establishment to the highway for the full width designated in the supposed proceedings. Ordinarily, there must be an entry under, and a claim of right with reference to, the colorable title, in order to set the statute of limitations running. In such a case, actual possession need not be of the whole, but may be of a part only, and it will be extended constructively to the whole, by reason of the definite description contained in the defective or ineffectual muniment. The rule must have like application to public highways, if it has any at all; that is to say, user by the public must have been begun and continued with reference to the supposedly valid proceedings. In such a case, if there was user of a part, within defined limits, as shown by the proceedings, it would amount constructively to an occupation of the whole, and the width of the road, when thus established, would correspond with that designated by the authorities or by the law. From the very nature of things, there must be an entry and a user with reference to the color of title, as otherwise it could not be available for any purpose. Colorable title forms the basis upon which a prescriptive right to the full width of the defined limits is founded. The next step in logical course of establishment is an entry and a user with reference to it, and, when this has been continuous and uninterrupted and adverse for the statutory period, then has the right ripened into a valid title in the public. It would be fallacious reasoning, therefore, to indulge a presumption that a road as actually worked and used by the public was within and upon the way as attempted to be located, and thence to conclude that its width must be measured by that designated in the void proceedings. It must be proven that the road as used falls within the colorable title, and, when this is done, the other condition follows; that is, the possession is extended constructively to the entire designated width, or occupancy of a part is then equivalent to an occupancy of the whole. Where the highway as used runs without the exterior lines of that as surveyed and attempted to be located and established by lawful authority, the width must then be determined by the rules hereinbefore ascertained, and the ineffectual proceedings can have no bearing whatever up-

on the subject. *Marchand v. Town of Maple Grove*, supra, was a case where a highway, four rods wide, had been lawfully established by competent authority, but at one point along its course, by reason of the marshy character of the soil, the travel had been diverted wholly without the limits of the road as laid, and so continued for a sufficient time to establish an easement by user, and it was held that the width of the road thus acquired should be measured by the use. If such is the rule, where there is a diversion from a road laid by valid proceedings, it must be so by a much stronger reason where the proceedings are invalid, and constitute color of title merely. So that, in order to make the easement or title available for the designated width, the road as used at the point in question must be shown to fall within the limits of the one attempted to be laid, otherwise the easement cannot be broader than the use. *State v. Auchard*, supra.

In this view of the law, the record and files of the county court were not competent, under the evidence subsequently developed. Mr. C. Schutz, the plaintiffs' witness, who was a surveyor, attempted to relocate the road survey, but found it utterly impossible to do so. He says, in effect, that it was not possible to locate the ground where the line would run from the field notes, and that "all of his efforts put the ice house and oil tank outside of the road, according to his survey." Nor does the evidence of the defendant help the plaintiffs' case. So that there was no testimony before the jury tending to show that the road as used, and which traversed the immediate ground occupied by the ice house and oil tank, was within the exterior limits of the road as attempted to be laid at that point; hence the ineffectual record was not pertinent or competent, and should not have been allowed to go to the jury.

The plaintiffs, however, produced evidence tending to show that there had been an adverse and continuous user by the public, under claim of right, of a way passing over the ground occupied by the oil tank for a period of time extending from 1837 to 1880, and insist that it was competent for the jury to determine from the nature of the user whether the highway had been established thereby. If so established in 1880, the title thus acquired must be presumed to have continued up to the time of the accident, unless the contrary is shown. There was evidence, upon the other hand, from which it may reasonably be inferred that the road, as established up to 1880, had subsequently been abandoned at the point referred to by nonuser, caused, perhaps, by the encroachment of the Oregon Railway & Navigation Company in constructing the ice house within and upon the way. It was held, in *Grady v. Dundon*, 30 Or. 333, 47 Pac. 915, that uninterrupted obstruction of a county road for

more than 10 years bars the right of the public by adverse possession. But the way at this point, so far as the evidence tends to show, was established, if at all, by prescription; that is, by user under claim of right. As a way may be obtained and established by user, it may also be lost to the public by nonuser. "Highways may be wholly, and there is no reason to hold they may not be partially, discontinued by nonuser." *Gregory v. Knight*, 50 Mich. 61, 64, 14 N. W. 700. And, in a later case, the court say: "It has been settled in this state that a highway can be partially discontinued by nonuser, and that it stands, as against long possession, no better than any other property." *Coleman v. Railroad Co.*, 64 Mich. 160, 163, 31 N. W. 47. So it was held in *City of Peoria v. Johnston*, 56 Ill. 45, that the public loses its right to a highway where it has abandoned it, and has accepted another instead, for such a length of time, and under such circumstances, as to give it a title to the substituted road. "But," say the court, "independently of this principle, conceding this highway was laid out as claimed by appellant, and conceding there was an intention to dedicate the premises on the southeast of section 4, we are of opinion that the adverse possession of the appellee, open and exclusive as it has been, and the complete nonuser of the easement by the public for more than twenty years, are a sufficient answer to the claim now made by the city. It is said in 3 Kent (11th Ed.) marg. p. 448, that mere nonuser for 20 years affords a presumption of extinguishment, though not a very strong one, in a case unaided by circumstances; but if there has been, in the meantime, some act done by the owner of the land charged with the easement inconsistent with, or adverse to, the right, an extinguishment will be presumed." To the same purpose, see, also, *Beardslee v. French*, 7 Conn. 125; *Holt v. Sargent*, 15 Gray, 97; *Amsbey v. Hinds*, 46 Barb. 622; *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Simplot v. City of Dubuque*, 49 Iowa, 630; *State v. Culver*, 65 Mo. 607; *Bank v. Stockwell*, supra.

It would seem that by reason of the construction of the ice house, which was about the year 1882, and which has probably been maintained in the same position ever since, the thread of travel was diverted from the old highway before reaching the building from the east, and, after passing close by on the south, it again approaches the old way, and comes into it a few rods west; that this obstruction had existed, and this new way had been used, for more than 10 years, and at the same time and during all the while there has been a complete nonuser of the old way between the points of divergence. Now, if these are facts established by the proof, the jury would be warranted in finding that there was or had been an abandonment of the old way by nonuser, and an acquirement

of a new way, which should be measured, as respects its width, by the rules herein previously ascertained. If, therefore, the construction of the oil tank was without the exterior limits of the newly-acquired highway, then the defendant was not liable, and no recovery of damages could be had. The instructions of the court below, as we understand them, do not proceed under this view of the law, but, rather, upon the idea that the adverse occupancy extends no further than the space covered by the ice house, and that the construction of the tank within the limits of the old way, although not within these of the new, would constitute an obstruction for which it would be liable if injury ensued on account of it. These considerations render it necessary that the judgment of the court below should be reversed, and a new trial ordered.

(62 Kan. 363)

PEUKER v. CANTER et al.

(Supreme Court of Kansas. Jan. 5, 1901.)

NAVIGABLE WATERS—MEANDERED LINES—
ALLUVION.

1. Plaintiff is the owner of a 40-acre tract of land, which at the time of the government survey in 1865, and presumably when the patent was issued, was separated from the Missouri river on the west by two fractional 40-acre tracts belonging to defendant. By the erosion of the water a part of defendant's land was washed away until the river reached the plaintiff's said tract, and, by eating away a part of it, left the latter a shore line of about 700 feet. The river then receded, forming alluvion from

the line of contact with plaintiff's land westward within the original surveyed lines of the defendant, and past the same to the river. This alluvion also attached itself to what was left of defendant's land. *Held*, that plaintiff was not only entitled to such alluvion as formed within his original lines, but also to an equitable proportion of that formed within the original surveyed lines of defendant's land, and beyond to the river bank.

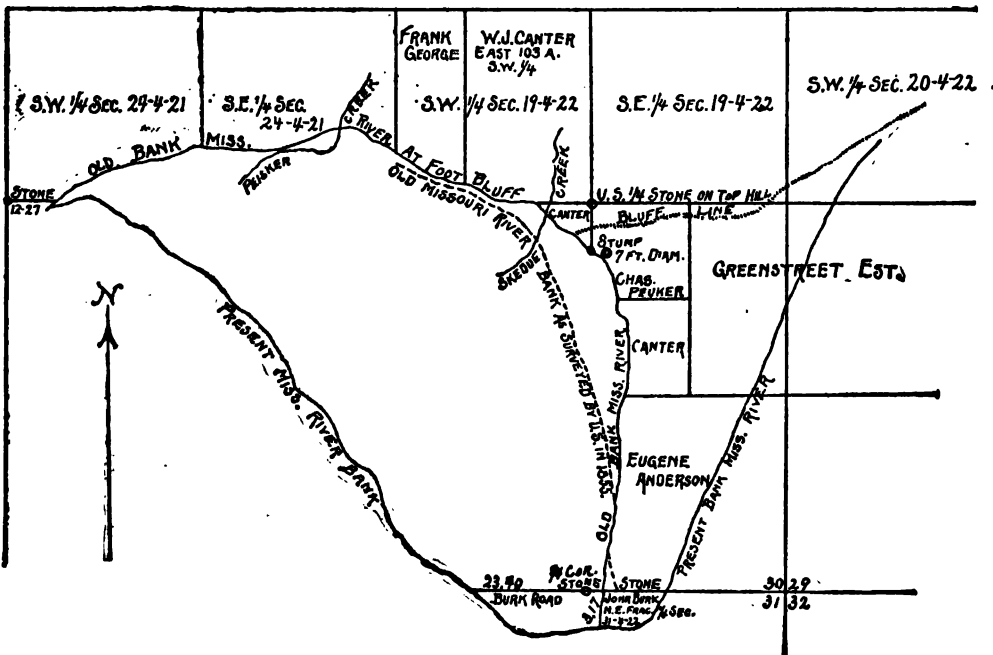
2. Meandered lines along the shore of a navigable river represent the border line of the stream, and show that the water course, and not the meander line as actually run on the land, is the boundary.

(Syllabus by the Court.)

Error from district court, Doniphan county; W. I. Stuart, Judge.

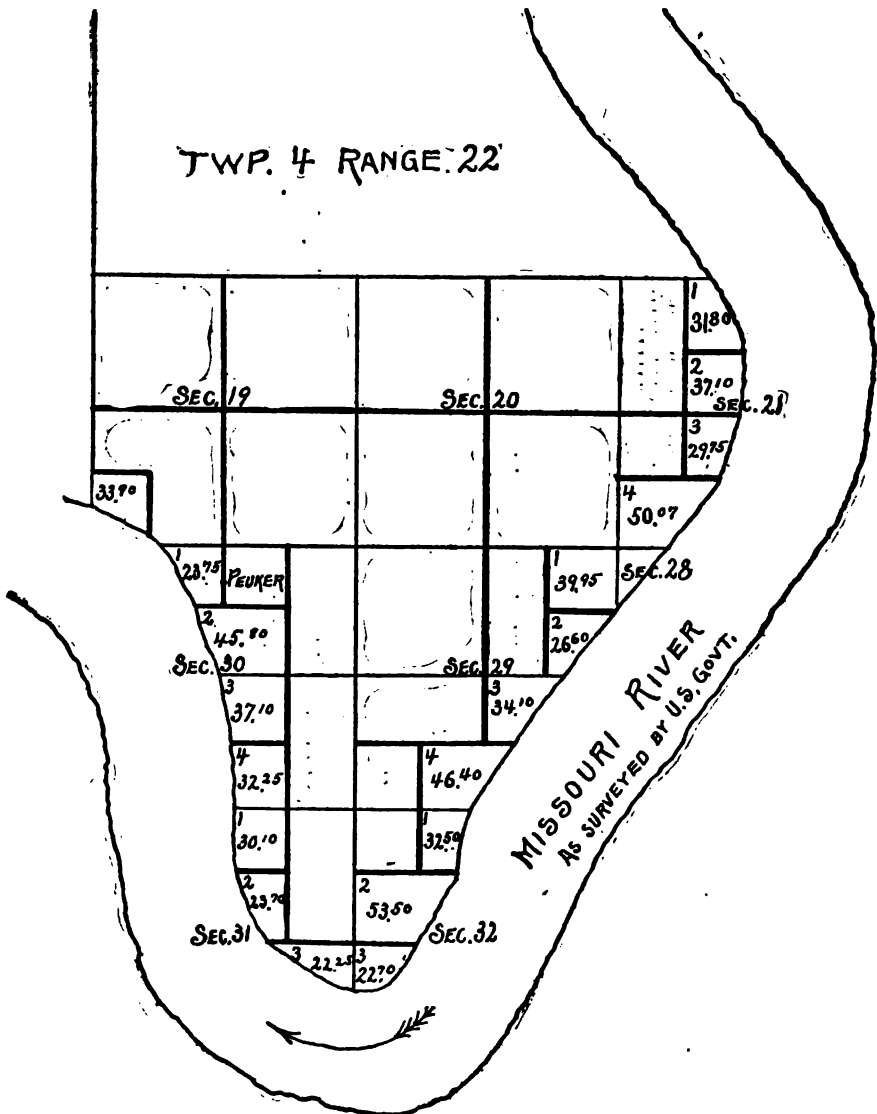
Action by Charles Peuker against William J. Canter and another. Judgment for defendants, and plaintiff brings error. Reversed.

This was an action in ejectment brought by Charles Peuker to recover from William and Ella Canter the possession of certain alluvial lands formed by the Missouri river, in the process of accretion, in front of a 40-acre tract owned by him. The tract in controversy contains about 124 acres. The plaintiff's land, to which he claims the alluvion belongs, is described as the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 30, town 4, in range 22, in Doniphan county. He has owned and been in possession of the same for more than 30 years. The following map was received in evidence by the court below as a truthful representation of the plaintiff's 40 acres, the alluvial lands, the old and the present river bed, and the government survey in 1855:



The evidence on the part of both plaintiff and defendants below showed that the alluvion in dispute was formed by gradual and imperceptible additions to the plaintiff's land (the 40 acres above described) by the action of the waters of the Missouri river. It was called and known at the trial as the "McLellan Land." It was admitted that the defendants below were the owners of lots 1 and 2 in section 30, township 4, range 22. It appeared from the evidence that prior to 1876 the river receded from the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 30, owned by plaintiff, Peuker, and also from lots 1 and 2 in the same section, owned by the defendants, and had made a large tract of land west of and adjacent to said lots prior to that time. The defendants offered in evidence a certified copy of a map showing the government survey in 1855. It is as follows:

The jury returned a verdict for plaintiff below, and made findings in answer to particular questions of fact. Those necessary to be considered are as follows: "(1) Did the original government survey along the bank of the Missouri river west of the land known as the 'McLellan Land,' to wit, the north-west quarter of the northeast quarter of section thirty, in township four, range twenty-two, in Doniphan county, Kansas, cross said described McLellan land? A. No. (2) Did the waters of the Missouri river wash away any part of the said McLellan land? A. Yes." "(4) If the last question is answered in the affirmative, then did the Missouri river wash across any of the land known as the 'McLellan Land,' to wit, the southwest corner, washing away ten chains and forty-eight links out of the west line of said forty-acre tract? A. Yes. (5) Did the Peuker



land, known as the 'McLellan land,' at one time, and after the meander line of the Missouri river was washed away, have a river front of ten chains and forty-eight links? A. Yes." "(7) Is the present river bank in front of the McLellan land one hundred and fifty-three chains and eighty-eight links? A. Yes." "(16) State the time since which Canter has had the continuous possession of the accretions immediately in front of the Peuker land. A. In 1885. (17) Did Canter tell E. A. Miller, in substance, that he and Saunders did not own all the land they had inclosed by their fence on the bar,—that others owned land in there, as well as they? A. Yes." "(1) Did the northwest quarter of the northeast quarter of section 30, township 4, range 22, in Doniphan county, Kansas, at the time of the United States government survey, border on the Missouri river? A. No. (2) Did lot 1 and lot 2 in section 30, township 4, range 22, in said county, lie between said tract mentioned in question 1 and the Missouri river at the time of the government survey? A. Yes. (3) Did the Missouri river, after the government survey, wash away a part of said lot 1, and lot 2 in said section 30, township 4, range 22, in said Doniphan county? A. Yes. (4) After the survey by the government of the United States of the said lands, did the Missouri river wash away a part of the northwest quarter of the northeast quarter of section 30, township 4, range 22, in Doniphan county, Kansas? A. Yes." "(7) Did the Missouri river at any time wash away all of lot 1 in said section 30? A. No. (8) Did the Missouri river at any time wash away all of lot 2 in section 30? A. No." The court, notwithstanding the verdict, rendered judgment in favor of the defendants below. This action is assigned as error.

W. D. Webb and Alcid Bowers, for plaintiff in error. A. L. Perry and Albert Perry, for defendants in error.

SMITH, J. (after stating the facts). The 40-acre tract of land owned by the plaintiff in error at the commencement of this action did not border on the river at the time of the government survey in 1855, but was distant therefrom the width of lot 1, now owned by Canter, on the west. Lot 2, now owned by defendants in error, then bounded the Peuker tract on the south, and extended westward to the river bank. These facts having been found by the jury, we must presume that when the land was patented by the government the boundaries were the same as described in the survey. 1 Greenl. Ev. § 41. This state of facts presents for consideration the question whether the plaintiff in error, having originally no riparian rights, after the water had washed away a part of the land which separated him from the river, and also a part of his own, and then by accretion restored his original boundary lines, together with those of the defendants in er-

ror, can claim title to any part of the alluvion so formed within Canter's original lines, and beyond. Lots 1 and 2, as described in the original survey, were at that time fractional 40-acre tracts bordering on the river. Their shore line was meandered. The river, not the meandered line, was the western boundary. Meandered lines are not boundary lines. Gould, Waters (3d Ed.) § 76; Kraut v. Crawford, 18 Iowa, 549; Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74. In the last case it is said: "In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line as actually run on the land, is the boundary." Page 287, 7 Wall., and page 78, 19 L. Ed. According to this established rule, when the western limits of lots 1 and 2 moved eastward as the river encroached upon them, ownership followed the shore line. Finally, by continued erosion, the 40-acre tract of plaintiff in error was reached. The latter then had a river front of nearly 700 feet on a navigable stream, and acquired riparian rights. In *Gifford v. Lord Yarborough* (in the house of lords) 5 Bing. 163 (a decision cited by the supreme court of the United States in *Jefferis v. Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 87), it was decided, in effect, that in cases of alternate accretion and decretion the riparian proprietors had movable freeholds; that is, moving into the river with the soil as it was imperceptibly formed, and then again receding when by attrition it was worn away. In the case of *Steele v. Sanchez*, 72 Iowa, 65, 33 N. W. 366, 2 Am. St. Rep. 233, it appeared that the defendant was the owner of one acre of land lying on the Des Moines river. He became such owner in 1875. After this the water washed away some 20 feet of the bank of the river so that the bed of the stream was changed to that extent, and that part of the land originally purchased was covered with the current of the stream. In front of this land, and in the bed of the river below ordinary high-water mark, but within the meander line of the original survey of the lot of which the land was a part, there was a ledge of stone which could be quarried by the building of dams to change the current of the stream and keep the water out. The plaintiff quarried stone in the river at the place above described, under contract with the defendant, by which he was to pay a certain price per perch, and payment was to be made by delivering stone to the defendant at one dollar per perch. He delivered the stone for which the action was brought, and demanded payment therefor on the ground that the defendant was not the owner of the quarry, because it was in the bed of the river, below original high-water mark. The trial court instructed the jury that, if the stone quarry was within the original survey line, it was the property of the defendant, al-

though the channel of the stream had changed so that the quarry was below the ordinary high-water line,—in other words, that the original meandered line of the stream remained as the boundary of defendant's land. This instruction was held to be erroneous. It was said: "When the original government surveys were made, the Des Moines river was 'meandered'; that is, the banks of the river were surveyed, and the lines thereof indicated by corners and distances. The river being then a navigable stream, the then owner of the lot now owned by the plaintiff had no title beyond ordinary high-water mark. The title to the whole bed of the river was in the public. * * * When, by the action of the water, the river bed was changed, the line of ordinary high-water mark was changed, and the defendant's ownership, or the line of his land, changed with it. The bank of a stream is what retains the water in its channel, and, if changed either by natural or artificial means, the river bank becomes the line." Pages 67, 68, 72 Iowa, pages 367, 368, 33 N. W., and pages 234, 235, Am. St. Rep. In *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565,—a well-considered case, in which elaborate briefs were presented,—the court, at page 316, 55 Conn., and page 566, 10 Atl., says: "If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist. The river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate, lot. Having become riparian, it has all riparian rights. This general principle is recognized by all the text writers and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of its bed." This doctrine was approved in the case of *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589; *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317; *Cox v. Arnold*, 129 Mo.

337, 31 S. W. 592. In the last-cited case the third paragraph of the syllabus reads: "A part of a fractional quarter section belonging to plaintiff and bordering on the Missouri river was washed away by the current, and a 'towhead' formed in the river between plaintiff's land and an island opposite thereto, and land gradually accrued to the towhead, and extended toward plaintiff's quarter section, and within the limits of the original government survey thereof. Held that, as the land sued for was not an accretion to plaintiff's land, he had no title to it, notwithstanding it was within the boundaries of the original government survey of said quarter section." In *Association v. Shriver* (N. J. Err. & App.) 46 Atl. 690, the doctrine laid down in *Welles v. Bailey* is held, by a divided court, to be unsound. The Minnesota decision (*Gilbert v. Eldridge*, 49 N. W. 679, 13 L. R. A. 411) commented on to sustain the law of the case was, however, controlled by the conditions under which the respective parties took title to the land.

The right to alluvion is founded on the principle of compensation; that the owner of land subject to erosion is entitled to indemnity for the loss of that taken away by gaining the benefit of soil added to his boundary by the process of accretion. Blackstone says (2 Bl. Comm. 262): "And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark, in these cases the law is held to be that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For 'de minimis non curat lex'; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss." In the present case *Peuker*, whose land at the time of the survey was remote from the river, suffered loss by erosion equally with *Canter*, the owner of the adjoining lots. The application of the rule stated would not deny to such originally remote proprietor the ownership of such accreted land in front of his shore line, although it may be found within the original boundaries of lots 1 and 2. When the waters washed the land of plaintiff in error, after eating away portions of lots 1 and 2, *Canter*, the owner of said lots, had the right of navigation and fishery, in common with the public, in the stream which displaced the land within his original boundaries, but he had no ownership in the bed of the river. *Railway Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559. He could not prevent others from enjoying the same rights therein which the law accorded to him. It is held in England that if the sea, by gradual and imperceptible progress, encroach upon the land of a subject, the land thereby covered with wa-

ter belongs to the crown. In *re Hull & Selby Railway*, 5 Mees. & W. 327. By the American Revolution the people of each state acquired the absolute right to all their navigable waters and the soil under them. *Martin v. Waddell*, 18 Pet. 367, 10 L. Ed. 997. In *Wood v. Fowler*, supra, Mr. Justice Brewer, in speaking of the Kansas river, which was held to be a navigable stream, said: "The title to the soil being in the state, and the stream being a public highway, obviously the ownership of the ice would rest in the general public, or in the state as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish." Page 690. When the river encroached on the Peuker land, carrying away parts of Canter's fractional tracts, the title of the latter to the submerged lands was gone. So was the title of Peuker in that part of his 40 acres which the current had eaten away, and which was submerged by the waters. When the alluvion began to form, it had a line of contact of about 700 feet on the land of plaintiff in error, and also attached itself to the irregular shore line of what was left of lots 1 and 2. The plaintiff in error is not entitled to all the made land, but only to an equitable proportion of it. There are not facts sufficient presented by the record for the establishing of a rule which will determine to just what proportion of the alluvion the parties are entitled. This should be settled by the court below on equitable grounds. *Gould, Waters* (3d Ed.) §§ 162-165; *Johnston v. Jones*, 1 Black, 209, 17 L. Ed. 117. The judgment of the court below will be reversed, and a new trial granted. All the justices concurring.

(120 Cal. 639)

NAPHTALY et al. v. ROVEGNO et al.
(S. F. 1,854.)

(Supreme Court of California. Jan. 14, 1901.)

In bank. On rehearing. Affirmed.

For opinion in department, see 63 Pac. 66.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The appellants claimed that the issues raised by their answer were properly triable by jury. When the cause was first entered upon the trial calendar of the superior court, there was a controversy between plaintiffs and defendants as to whether it was a court or jury case; and that court, holding with the plaintiffs, marked it as a court case. In that condition it remained on the calendar until, previous cases being disposed of, it was called for trial. The appellants did not then ask for a continuance, but they renewed their demand for a jury trial, supporting their demand by an argument in which they attempted to show that the nature of the issues to be tried entitled them to a jury. Noth-

ing was said about the deposit of a jury fee, and it is perfectly manifest from the record that the rule of the superior court in respect to that matter was never considered as having any bearing upon the point to be decided. The ruling of the court denying a jury trial was based simply and solely upon the ground that the defendants were not entitled to a jury, and, this ruling being made, it would have been a perfectly vain and useless act to deposit or tender the jury fee. The rule merely requires the jury fee to be deposited by the party demanding a jury before the commencement of the trial, and, if a jury trial is denied in advance, the rule can have no operation. Besides, the party making the demand has all the time before the commencement of the trial to make his deposit. Here, when the demand was made, there was no jury in attendance, and the trial by the court, to which the defendants were forced, began and ended before it was possible for a jury trial to have commenced. For these reasons I think the failure of defendants to deposit or offer the jury fee is no answer to their position. It is quite as clear that they did not waive their right to a jury by any of the proceedings referred to in the department opinion. There can be no waiver of a jury except in one of the three modes enumerated in section 631 of the Code of Civil Procedure. *Swasey v. Adair*, 88 Cal. 183, 25 Pac. 1119; *Biggs v. Lloyd*, 70 Cal. 449, 11 Pac. 831. If these conclusions are correct, the appeal has been disposed of by an erroneous decision of the only point considered in the opinion of the department, and the serious and important question in the case—the question decided in the superior court, and the question most elaborately argued by counsel here—is left untouched. I think it called for a decision, and that the appeal should not have been disposed of without a decision.

(120 Cal. 631)

SAN MATEO COUNTY v. COBURN.
(S. F. 1,450.)

(Supreme Court of California. Jan. 12, 1901.)

In bank. Rehearing denied.

For opinion in department, see 63 Pac. 78.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. A county, within the meaning of section 14 of article 1 of the constitution, is either a municipal corporation, or it is not a corporation at all; and in either case it is entitled, in condemning a right of way, to set off benefits against damages. *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547; *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958. In my opinion, a county is a municipal corporation, within the meaning of this clause of the constitution; and the decision in *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, that it is not a municipal corporation, within the

meaning of another provision (i. e. the prohibition of the creation of municipal corporations by special laws), is not inconsistent with this view. The term "municipal corporation" has a broad sense and a restricted sense, and it is used in these different senses in the two clauses of the constitution. In one it comprehends counties, and in the other it does not.

(131 Cal. 132)

McCLAIN v. HUTTON et al. (Sac. 712.)

CONTINENTAL BLDG. ASS'N v. SAME.

(Supreme Court of California. Jan. 11, 1901.)

In bank. On motion to modify judgment. Granted.

For former opinions, see 61 Pac. 273, and 63 Pac. 182.

PER CURIAM. In the judgment of the court in bank in this case it was directed that the costs should be allotted one-half to the appeals of Mrs. Hutton, and one-half to those of the Continental Building & Loan Association,—the former to be paid by the respondents, including the appellant Chandler, in amounts proportionate to their respective claims; the latter by the respondents, excluding the appellant Chandler, in the same proportions. L. H. Holt should also have been excluded with Chandler. The judgment is therefore modified in this respect, and Mrs. Hutton will be allowed to recover the costs allotted to her, in the proportions stated, against the respondent cross complainants named in her notice of appeal; and the Continental Building & Loan Association, the costs allotted to it against the respondent cross complainants named in its notices of appeal, with the exception of the cross complainants Chandler and Holt, as to whom its appeal has, in effect, failed.

(131 Cal. 369)

LAVENSON v. WISE. (S. F. 1,451.)

(Supreme Court of California. Jan. 14, 1901.)

CONTRACTS—EXECUTION — SIGNING — ATTORNEY AND CLIENT—FEES—QUANTUM MERUIT.

1. A writing signed by an attorney, reciting the receipt by him of a certain note from defendant for collection on contingent fee, was binding on the attorney, though not signed by defendant.

2. Where an attorney received a note for collection on contingent fee and assurance that there was no defense, but, on the obligors setting up fraud, the attorney went to trial without further agreement, and afterwards prepared a transcript for appeal, he could not recover on a quantum meruit for his services; the trial not having occurred until long after the answer was filed, and the attorney having had knowledge of the defense and the amount of work involved.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. H. Lavenson against J. H. Wise. From a judgment for plaintiff, and

from an order denying a new trial, defendant appeals. Reversed.

D. H. Whittemore, for appellant. Joseph Rothchild, for respondent.

CHIPMAN, C. Action for services as attorney at law rendered defendant by Joseph Rothchild, Esq., plaintiff's assignor. Defendant denied the alleged indebtedness, and, as a separate answer, alleged that the firm of Christy & Wise, composed of John H. Wise (defendant) and Harry E. Wise, was the owner of a promissory note for \$9,760, made by one James Murphy and one E. Smalley; that said Rothchild represented to said firm that he could collect the money due on said note, whereupon it was agreed between Rothchild and Christy & Wise that said firm should pay said Rothchild \$50, which was then paid, and "should, when the money due on said note was collected, and only out of the proceeds of the collection of said note, and not otherwise, further pay said Rothchild the sum of \$500, as fee in and for the collection of the money due on said note, by suit or otherwise"; that Rothchild commenced suit on said note, but failed to collect the same, or any part thereof, and has abandoned all attempt to collect the said note; that said unsuccessful attempt to collect said note was the only service performed by said Rothchild for said firm or for defendant. The cause was tried by a jury, and plaintiff had a verdict for \$1,000. The appeal is from the judgment and from the order denying motion for new trial.

The evidence of plaintiff tended to show that plaintiff's assignor performed services in relation to the collection of the note referred to in the answer which were of the value of \$1,000; also services in relation to an accounting between Wise and Murphy and Smalley, or the "Yellowstone Saloon," as the place is called, the sale of one-half interest in which was the consideration for the note; also services in relation to the sale of certain goods by Wise to Wise and Murphy. Some evidence was given as to the amount of work done by Rothchild in relation to the accounting, and in the matter of the sale of goods by Wise to Murphy and Smalley. Mr. Rothchild testified that his services in each of the two latter matters were reasonably worth \$250, and this is undisputed by the evidence, as is also his estimate of the value of his services, to wit, \$1,000, for bringing the suit on the note. The principal question in controversy arises in regard to the agreement to collect the note. The testimony tended to show that when he undertook the business it was with the understanding that it was an ordinary case on promissory note, to which there was no valid defense, and that Mr. Rothchild was employed because he had information about Murphy's business and property, from which he was assured he could collect the judgment when obtained. I think it fairly inferable

from the evidence that, when the agreement presently to be stated was entered into, Rothchild understood from what Wise told him, or led him to believe, that the case would not be litigated. With this understanding Rothchild signed and gave to Wise the following paper: "San Francisco, Dec. 9th, 1895. Received of Mr. John H. Wise a note for nine thousand seven hundred and sixty (\$9,760.00) dollars, dated April 15th, 1895, payable six months after date, with interest thereon at the rate of 8 per cent. per annum. Said John H. Wise to pay upon demand the sum of fifty (\$50.00) dollars for court costs and the sum of five hundred (\$500.00) dollars as a fee upon collection of the same. [Signed] Joseph Rothchild." On December 14, 1895, Mr. Rothchild filed a complaint in the action on the note referred to in the receipt, and on January 11, 1896, the defendants in that action filed an answer. The note was payable to D. H. Whittemore, or order, indorsed to Christy & Wise by Whittemore, and by them indorsed to John H. Wise, who brought the action and is defendant here. The answer admitted the execution of the note, but alleged that it was without consideration, and that Wise took it with full knowledge of that fact; that the consideration was a half interest in the Yellowstone saloon, its fixtures and stock of merchandise, which Christy & Wise had agreed to sell and transfer to Murphy and Smalley, the makers of the note; that Christy & Wise neglected and refused to make the transfer of the saloon, and on November 8, 1895, Murphy and Smalley notified Christy & Wise that they had rescinded said contract of purchase, and declined to pay said note; that it was agreed between Christy & Wise and Murphy and Smalley that the note was to be paid from the income of the saloon, and not otherwise, of which Christy & Wise had full knowledge; that John H. and Harry E. Wise falsely represented to the makers of the note at the time of said purchase that the daily receipts of the saloon were \$100 per day, whereas they were but \$35 per day, and that one McCallum, who they represented was an experienced saloon keeper, had agreed to buy the other half of the saloon, and could bring in much business, etc.,—all of which was alleged to be false. Other false and fraudulent representations were set up in the answer, on account of which, and the failure on the part of Christy & Wise to keep their contract, Murphy and Smalley had, in November, 1895, rescinded, and notified Christy & Wise that they would not pay said note. The trial of that action commenced on December 10, 1896, and lasted several days, and on February 25, 1897, the court made its findings in favor of defendants in the action, and judgment followed for defendants. The evidence is that Wise directed Rothchild to take an appeal to the supreme court, and the latter gave the usual notice, and prepared the transcript, comprising 340 pages of typewritten

matter. Wise paid the reporter for this work. Plaintiff testified: "I then made a demand on Mr. Wise for five hundred dollars in that matter, and he declined to pay it, and I never received a cent." Rothchild's connection with the case then ceased, and what became of the appeal is not disclosed.

It appears without conflict that upon the filing of the answer to the suit on the promissory note Rothchild had knowledge of the nature of the defense set up. An assistant in his office devoted several days to looking up questions of law likely to arise under the issues presented by the answer. The case was not tried for nearly a year after issue of fact was joined. There is no question but that Rothchild knew, or had reason to know, that the defense set up to the note would defeat payment if it prevailed, and that, in any event, it meant litigation, which he had not contemplated when he entered into the agreement with Wise. He testified: "I had a conversation with Mr. J. H. Wise about it [the answer] and he told me it was not true. These things could be disproved; they could not prove it." He testified that he received the note "on the terms set out in the receipt" and continued in the case until after the trial; that after the trial "I asked him [Wise] what he proposed to do about it, and he said he would take the case to the supreme court. Q. You had not said a word about changing this agreement? A. Not a word at all. Q. After you had received that transcript, and put him to that expense, that was the first time you suggested that you would not go on with the case? A. I did nothing of the kind. I told him to pay the \$500. Q. Was that the first intimation that you gave that you were not going on? A. After the trial. I never bothered him during the trial, because I did not have time. Q. You never bothered him during the year 1896? A. Not at all. Q. You never bothered him for a month after the trial, did you? A. Oh, I do not know the time. Some time after the trial I asked him for \$500, and he declined to pay it. Q. That was the first time there was any change in the terms of the agreement? A. I do not know what you mean by 'change.' The first time I ever asked him for money was after the trial. I signed an agreement to do certain things. He never agreed to do anything. Q. Didn't you receive the note on these terms? A. I suppose so; yes. Q. Well, was not that the agreement? A. I do not know. I do not see how you can pin a man down to an agreement if he [Wise] did not sign it. I was willing to trust him. I did not ask him for any writing. I was willing to take it that way. The receipt merely recites the terms, and Mr. Wise had a doubt about the propriety of turning over a \$9,000 note, and I had to satisfy him that I was perfectly responsible." At another part of his testimony he testified: "I went on because John H. Wise told me

these allegations [referring to the answer] were not true. He could prove they were not true." Again, he testified: "Q. Now, Mr. Rothchild, did you inform Mr. Wise in any way that you would not go on with the case on these terms? A. No, sir. Q. You never told him that, did you? A. No, sir. Q. You went on through the year 1896? A. Yes. Q. Under this agreement? A. Yes. Q. You tried the case under this agreement? A. No, I did not. Q. Did you tell him that you would not continue under the agreement? A. No, sir. Q. Did you ask him for any other agreement? A. No, sir. Q. Did you ever speak to him on any occasion about another agreement? A. I could not do it, because I was in the middle of a trial. I never knew the true state of the facts." Mr. Rothchild seems to have been of the impression that his receipt to Wise was not a contract because Wise did not sign it. This is an erroneous view of the receipt. It was an agreement on Mr. Rothchild's part to take the case on the terms proposed by him, and Wise became bound by it when he delivered the note to Rothchild under that agreement. It was not necessary for Wise to sign it. He acted under it, and this was sufficient to bind him. The serious question is: Could Mr. Rothchild go forward under his contract, and try the case, after he knew it was to be seriously litigated, and might be defeated, without informing Mr. Wise that this new phase of the matter would involve labor not previously contemplated, and that he would require a larger contingent fee, or would require some fee in the event of failure to obtain judgment? Upon the face of the agreement the fee was contingent. That agreement was not changed by Mr. Rothchild, nor attempted to be changed, until after the trial and judgment had gone against his client. Mr. Rothchild did nothing and said nothing which would lead Mr. Wise to suppose that any change was to be made in the contract of employment. It is true, Wise told him the allegations of the answer were untrue, and he could prove them to be so, and that the defendants in that action could not prove what they had alleged. Mr. Wise may have so thought and so believed, and, whether he did or not, it was Mr. Rothchild's duty to inform him that the answer so changed the matter from its original aspect that a new agreement would have to be made as to his compensation. Saying nothing and doing nothing to indicate an unwillingness to continue as he had begun, Mr. Rothchild must be held to have continued under the only agreement then existing between the parties.

Upon this phase of the case there is no conflict in the evidence. By his own testimony, we think, Mr. Rothchild has shown that he ought not to have recovered for services in the case brought against Murphy and Smalley. In the conversation which preceded the signing of the receipt there

was nothing said about paying any fee in the event the suit was litigated. It was assumed by both parties that it would not be litigated. But there is nothing in the evidence which would warrant the assumption that Wise willfully or fraudulently deceived Rothchild in this regard; and, if he did so, still, as soon as the fact came to Rothchild's knowledge (as it did when he was served with the answer), he should have promptly rescinded, or demanded some different arrangement. He could not proceed with the case as though the contract was still in force, with a mental reservation that he would repudiate it, or rescind it after the trial, should his client be cast in the suit. To justify such a course would be to allow fraud to be met by fraud, and this the law will not allow.

Respondent contends with much confidence that he should recover in this action because recovery on the note was prevented by Wise. The facts on which this claim rests were all brought to Mr. Rothchild's attention in the answer of Murphy and Smalley to Wise's suit against them, and in the course of the preparation for trial. Even though Wise gave him every assurance that he could overcome this defense, it did not change the fact that the contract of employment still bound Mr. Rothchild, and continued to do so until modified, superseded by another, or rescinded. Mr. Rothchild had good cause for rescinding the contract, or for refusing to proceed under it, but it was too late to rescind after it had been performed. Under the facts in the case as they now appear, we are unable to discover any ground upon which the present action on quantum meruit can rest as to the matter of the suit against Murphy and Smalley. The verdict was general, and we cannot, therefore, determine what part of the \$1,000 awarded plaintiff was for services other than those in the matter last above mentioned. The cause should be remanded for a new trial, and we advise that the judgment and order be reversed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

(25 Mont. 4)

TALBOTT v. HEINZEL

(Supreme Court of Montana. Jan. 21, 1901.)

BILLS AND NOTES—FAILURE OF CONSIDERATION—CONTINGENT CONTRACTS—TIME AS ESSENCE—EVIDENCE—FAILURE OF PROOF—ALLEGATIONS AND PROOF—CORRESPONDENCE.

1. A note sued on was given in consideration of the written contracts of the payee, made a few days before the date of the note, that he would, on or before a certain day, purchase or procure a purchaser for the maker's interests

in certain mines at a stated price, and that, if he failed so to do, the maker would be absolved from all liability to convey such interests. *Held*, that these contracts were admissible, under Civ. Code, § 2207, as relating to the same matters as the note in suit between the same parties, and as parts of substantially one transaction.

2. Where a note was given in consideration of the payee's written promise to pay a stated amount for the maker's interest in certain mines before a stated time, such time being expressly declared to be of the essence of the agreement, or that otherwise the maker would be released from all liability to convey such interests, failure to show that the interests were sold within the prescribed time and for the stated price, or a waiver of such conditions, was fatal to a suit on the note.

3. Where a note sued on was payable only on the sale of the maker's interests in certain mines according to the terms of certain contracts made with the payee, an offer to prove that, after a sale of such interests, which did not occur until the time expressly limited by the contracts had expired, the maker had acknowledged the note, and promised to pay it, was an effort to prove a different contract, and inadmissible.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by James A. Talbott against F. Augustus Heinze, as administrator of the estate of James Larkin, deceased. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Geo. A. Clark, for appellant. C. P. Drennan, for respondent.

PIGOTT, J. The subject of this action, as alleged in the complaint, is a supposed contract or promissory note payable upon condition, of which the following is a copy: "Butte City, Montana. October 1st, 1891. For value received, I promise to pay to Robert C. Burton the sum of five thousand dollars upon sale of the Snohomish or Tramway mines, said mines being in Summit Valley mining district, Silverbow county, Montana, and under bond to said Robert C. Burton. James Larkin. James A. Cummings, Witness." The plaintiff, as assignee of the note, sued to recover the amount thereof, the complaint stating that on the 4th day of May, 1893, Larkin sold and conveyed the Snohomish and Tramway mines to the Butte & Boston Mining Company; that thereafter Larkin was judicially declared to be of unsound mind, and the defendant Largey was appointed guardian of his person and estate; that on the 12th day of May, 1896, the plaintiff presented to the guardian his claims against Larkin upon the note, which claim the guardian rejected by omitting to take action thereon within 10 days after its presentation; and that no part of the note has been paid. The defendants, in their answer, denied that Larkin executed or delivered the note, and alleged that, if Larkin made the note, the only consideration for it was an agreement on the part of Burton, the payee, to sell for Larkin his interest in the

Tramway mine for the sum of \$65,000, and by such sale to obtain for Larkin that sum on or before the 10th day of May, 1892, and to sell for him his interest in the Snohomish mine for the sum of \$25,000, and upon such sale to obtain for him that sum on or before the day last mentioned; that Burton never effected such sale of the interest of Larkin in either the Tramway or Snohomish lode claim, and never obtained for him the price of \$65,000 for his interest in the Tramway nor the sum of \$25,000 for his interest in the Snohomish mine; that Burton wholly failed to comply with the terms of his agreement to effect a sale of the lode claims, whereby the consideration of the note wholly failed, and the note is without consideration. The answer contained another defense, which need not be stated. In reply the plaintiff denied that the consideration of the note was, in whole or in part, an agreement of Burton to sell for Larkin his interest in the Tramway mine for \$65,000, and by the sale to obtain for Larkin that sum on or before the 10th day of May, 1892, or any other day, and to sell and obtain for Larkin the price of \$25,000 for his interest in the Snohomish lode claim on or before May 10, 1892, or any other date. He denied that the only or any part of the consideration for the note was an agreement of Burton to sell and obtain for Larkin any fixed sum for both or either of the mines, or on or before any date. There was a verdict and judgment for the defendants. The plaintiff appeals from an order refusing a new trial and from the judgment. Since the taking of the appeal, Larkin, and Largey, his guardian, have died, and F. Augustus Heinze, as administrator of the estate of Larkin, has been substituted in their stead as the defendant and respondent.

Although 23 alleged errors are specified, the consideration of two of them suffices to raise a question the answer to which will obviate the necessity of determining any other point. It is conceded that prior to May 4, 1893, Larkin was the owner of an undivided two-thirds interest in the Tramway lode claim and of an undivided one-half interest in the Snohomish lode claim, the remaining interests being then owned by one McNamara. Burton, who was called as a witness for the plaintiff, testified that "the foundation for the giving of the note in suit" was the written leases and contracts hereinafter described, dated September 26, 1891, entered into between Larkin and himself in respect of the Snohomish and Tramway lode claims. Before these contracts were made, Burton asked Larkin to sign the note, which Larkin agreed to do; Burton further testifying that the note was intended "as a part of my commission for effecting a sale of the property under bond." The "bond" of which he speaks consists of the two contracts of September 26, 1891. It further appeared that a sale of his interest in the Snohomish and Tramway lode claims

was made by Larkin to the Butte & Boston Mining Company on the 3d day of May, 1893, for the sum of \$22,100, the evidence tending to prove that Burton assisted in bringing about the sale. The defendants then offered in evidence the two leases and contracts referred to by Burton in his testimony, made on the 26th day of September, 1891, five days before the date of the note described in the complaint between Larkin and Burton, by which Larkin let to Burton for a term ending with the 10th day of May, 1892, his interests in the two mining claims, and in which Larkin promised that, in the event Burton should on or before the 10th day of May, 1892, pay to him the sum of \$65,000,—the purchase price agreed upon between the parties for Larkin's interest in the Tramway lode,—or the sum of \$25,000 for his interest in the Snohomish lode claim, or the sum of \$90,000 for both interests, he would immediately upon receipt of the money convey to Burton the property so purchased. Each contract further provided that, if Burton failed to pay to Larkin the purchase price mentioned therein on or before the 10th day of May, 1892, Larkin should be absolutely released from his agreement to convey, and should no longer be held or bound thereby; time being declared to be of the essence of the agreement to convey. The time prescribed in the lease and agreement with respect to the Snohomish lode claim for performance by Burton of the conditions was extended so as to include October 1, 1892. The defendants also offered in evidence two contracts dated September 26, 1891, between McNamara and Burton, containing the same provisions as those set out in the contracts between Larkin and Burton, except that the interests which McNamara promised conditionally to convey were one-half and one-third, respectively, in the Snohomish and Tramway lode claims, the price agreed upon therefor being \$30,000 for McNamara's interest in the Snohomish and \$80,000 for his interest in the Tramway. To the introduction of these four contracts the plaintiff objected upon the grounds that they were immaterial, irrelevant, and incompetent, and as contradicting, altering, or varying the note sued upon by evidence contained in other written agreements which do not appear to have been contemporaneous therewith. The objection was overruled, the plaintiff excepting, and the papers were received in evidence. The admission of these contracts is specified as error.

Whether the contracts between Burton and McNamara were relevant, we do not inquire. If irrelevant, their admission did not prejudice the plaintiff. The contracts between Larkin and Burton of September 26, 1891, and the contract or note in suit related to the same matters, were between the same parties, were made as parts of substantially one transaction, and all of them were, therefore, relevant and material. They should be

taken together as one contract. This common-law rule has been incorporated into section 2207 of the Civil Code. So reading the contract which is the subject of the action, it manifestly appears that the \$5,000 therein mentioned was to be paid by Larkin to Burton only in the event that Larkin's interest in the Snohomish lode claim should, on or before October 1, 1892, be sold to or through Burton for the sum of \$25,000, and his interest in the Tramway lode claim should be sold to or through Burton for the sum of \$65,000, on or before the 10th day of May, 1892. There was no evidence tending to prove that a sale of either interest was made within the prescribed period, nor that the purchase prices agreed upon in the contracts of September 26th were ever paid; on the contrary, the only sale was the one of May 4, 1893, the purchase price of both pieces of property being \$22,100. Time was expressly declared to be of the essence of the contract of sale, and the payment of the full sum of \$90,000 was also a material and essential part of these agreements. For aught that appears in the pleadings or evidence, the conditions of the contracts of September 26, 1891, had not been performed by Burton. Unless those conditions were waived by Larkin, or the contract was modified, or a new contract made, the plaintiff failed to make a case sufficient to go to the jury. This brings us to the only other specification of error which need be noticed. Plaintiff offered to prove by Burton that on May 4, 1893, after the sale was made to the Butte & Boston Mining Company, the witness had a conversation with Larkin, in which Larkin acknowledged the note, and promised to pay it. An objection to the offer as an attempt to prove a contract other than the one sued upon was sustained, the plaintiff excepting. In this there was no error. The subject of the action was the note of October 1, 1891, which, as the evidence disclosed, was payable by Larkin only upon the performance by Burton of certain conditions expressed in two other contracts of date September 26, 1891. The cause of action stated was the alleged breach by Larkin of the supposed obligation imposed upon him to pay \$5,000 upon a sale being made of his interests in the mines at any time whensoever and at any price whatsoever. The plaintiff's offer was an effort to prove a subsequent contract by which Larkin waived the performance by Burton of the conditions imposed upon him, and not the contract upon which the action was based. The plaintiff counted upon one contract and sought to prove a different contract as the basis of his action. No new contract was pleaded, nor was it alleged that Larkin had waived the performance of the conditions as to time and price. The allegations and proofs must correspond. The conditional liability of Larkin under the contracts of September 26 and the note of October 1, 1891, had ceased by the

very terms of the contracts themselves before the day—May 4, 1893—when Larkin's interests in the lode claims were sold for \$22,100, instead of \$90,000. A plaintiff must recover for the breach of the contract forming the basis of his action, and will not be permitted to prove as his cause of action the breach of a different contract. Although the evidence offered would, if received, have tended to support the averment that Larkin executed the note, yet this could not have aided the plaintiff, for upon the pleadings and admitted facts he was not entitled to submit the case to the jury. Though the defendants had conceded that Larkin made the note, the vital defect in the case would still exist. The liability of Larkin depended upon the performance or fulfillment of certain conditions by Burton. Burton confessedly failed to perform them.

Being of the opinion that upon the evidence the plaintiff did not make, and that under the pleadings and his offers of evidence he could not have made, a sufficient case to go to the jury, we refrain from deciding any of the other questions presented by the record. The judgment was clearly in favor of the party entitled to it. The order refusing a new trial and the judgment are therefore affirmed. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

(25 Mont. 11)

STATE v. WHORTON.

(Supreme Court of Montana. Jan. 21, 1901.)

CRIMINAL LAW—LARCENY—EVIDENCE—INSTRUCTIONS.

1. Evidence, in a prosecution for a grand larceny, showed that defendant and prosecuting witness were seen together on the day of the crime; that prosecuting witness exhibited, in the presence of defendant and others, two \$20 gold pieces; that he met with an accident; that defendant and a physician accompanied him in a wagon to the hospital; that during the doctor's absence from the room defendant asked prosecuting witness for more money "to eat on"; that defendant was "pretty handy" in the room until the broken leg of witness was set; that two hours afterwards the two \$20 gold pieces were missing from the pocket of witness' coat, where he carried them loose; that a few days thereafter defendant was seen to have "a lot of bills," and two \$20 gold pieces, while he had claimed to have no money on the day of the accident. *Held*, that such evidence was not sufficient to convict defendant.

2. In a prosecution for grand larceny, an instruction that "in this case there is no allegation in the information that the property was in excess of fifty dollars; therefore it must have been taken from the person of the said G., or else defendant must be found not guilty,"—though not perspicuous, correctly stated the law, when considered with other instructions defining grand larceny.

Appeal from district court, Choteau county; Dudley Du Bose, Judge.

Ben Whorton was convicted of grand larceny, and he appeals. Reversed.

Wm. G. Downing, for appellant. Jaa. Donovan, for the State.

MILBURN, J. The defendant, Ben Whorton, was tried in the district court of Choteau county on the 24th day of February, 1900, upon an information charging him with the crime of grand larceny, in that, as it was alleged, he did feloniously steal, take, and carry away from the person of one George Pulliam two \$20 gold pieces, coin of the United States, of the value of \$20 each, the property of the said George Pulliam. The record recites that the defendant was duly arraigned, and that, it appearing to the court that he was without means and without counsel, the court assigned counsel to defend him; that thereafter, it appearing that the court had been misinformed as to the poverty of the defendant, the court revoked its order assigning counsel; that, as appears from the record, the case was on February 23d set for trial; that, the cause coming up for trial on the 24th, the defendant elected to go to trial without counsel, and, the jury being duly impaneled and sworn, the cause proceeded to trial, and, being submitted to the jury, the defendant was convicted, and sentenced to a term of eight years in the state prison. The defendant having employed counsel after conviction, a motion for a new trial was duly made, heard, and denied, and an appeal taken from the judgment and the order denying such new trial.

The points relied upon by counsel in his brief and argument are as follows: (1) That the verdict is contrary to the law and evidence; (2) that the defendant was not arraigned as required by law; (3) that the defendant was not represented by counsel at the trial; and (4) that instruction No. 7 was against the law.

This court is of the opinion that the verdict of guilty is not supported by the evidence. Without considering the evidence which is favorable to the defendant, but taking into consideration that only which might tend to prove his guilt, it appears from the evidence that on the day of the alleged crime the prosecuting witness, George Pulliam, and the defendant had been in a saloon together at Fort Benton, where the defendant had been "hanging around" Pulliam, and where they had been gambling together, and where the prosecuting witness exhibited certain \$20 gold pieces and other money to several persons, including the defendant; that in the night of the same day the prosecuting witness engaged in a scuffle with some one not the defendant, severely injuring his leg, so that it was necessary to take him to the hospital, and that he was carried in a wagon which had a seat running lengthwise on each side thereof; that defendant went with the surgeon and the prosecuting witness, holding the head and shoulders of the latter while the doctor held

the foot and ankle of the injured man; that, arriving at the hospital, the doctor went to the building to inform the nurse, and while he was gone the defendant asked the prosecuting witness to give him some money "to eat on"; that the prosecuting witness said that he would give him some money after he got over his pain; that defendant was "pretty handy there" in the room until the leg was set; that the prosecuting witness had two \$20 gold pieces loose in the pocket of his mackinaw, and one \$20 gold piece in his purse besides; that the prosecuting witness found his two \$20 gold pieces were missing and gone about half an hour after his leg was set at the hospital; that two or three days thereafter the defendant was seen to have "a lot of bills" and two \$20 gold pieces, which he was "flourishing around"; and that on the day of the accident, and before, defendant had been heard to make statements showing that he was without money. These appear to be all of the incriminating facts. The court is of the opinion that this evidence does not raise more than a suspicion of the alleged guilt of the defendant, and that the defendant should not have been convicted thereon.

Instruction No. 7, complained of, is as follows, to wit: "In this case there is no allegation in the information that the property was in excess of fifty dollars; therefore it must have been taken from the person of the said George Pulliam, or else the defendant must be found not guilty." When read with the instructions defining grand larceny, instruction No. 7 correctly states the law, but is not, perhaps, a model as to the style of language used to express the idea intended to be conveyed to the jury, and upon a new trial may well be remodeled by the court. As the other questions raised are not likely to arise upon a new trial, they are not passed upon in this opinion. The judgment and order appealed from are therefore reversed, and the cause is remanded for a new trial. Reversed and remanded.

BRANTLY, C. J., and PIGOTT, J., concur.

(23 Utah, 1)

LEBCHER v. LAMBERT.

(Supreme Court of Utah. Dec. 10, 1900.)

TESTIMONY ADMITTED WITHOUT OBJECTION — OBJECTIONS WAIVED — NEGOTIABLE INSTRUMENTS — TRANSFER WITHOUT INDORSEMENT — EFFECT — ACTION ON NOTE — EVIDENCE OF NO INDORSEMENT — HOLDER IN POSITION OF ORIGINAL PAYEE — DEFENSE — EVIDENCE SUFFICIENT TO SUPPORT VERDICT — THEORY OF CASE — CHANGE BETWEEN TRIAL AND APPEAL — PRACTICE — INSTRUCTIONS — EXCEPTIONS — APPEAL.

1. Where counsel on a trial remain silent, and permit testimony, now complained of, to go to the jury, all objections that might legally have been interposed to its introduction are waived, and this court will not review the same on appeal.¹

2. A transferee of a note made payable to order without indorsement takes it subject to all equities attached to the note, and this although the holder was a bona fide holder for value. He stands in the position of an assignee. He may transfer the note, but he owns and transfers it subject to the rules applicable in case of an assignment of any chose in action; and, although he subsequently obtains the indorsement, if he has in the meantime acquired knowledge of the equities, or if the indorsement be after maturity, he still holds the instrument subject to the same defenses.

3. Respondent having produced evidence at the trial tending to prove that the indorsement on the note was not made by payee, and that appellant purchased the note, if at all, after maturity, he was entitled to avail himself of and prove any defense that he could have interposed had the action been brought by payee.

4. Where the great preponderance of the evidence as shown by the record supports the theory and contention that the indorsement was not made by payee, but was a forgery; that appellant, at the time she claims to have purchased the note, was the wife of payee; that no attempt was made to collect the note until after the death of payee, and for more than a year after it became due; that payee visited Salt Lake City, the residence of the maker of the note, and after its maturity, partly on business connected with it; that payee retained the note after maturity; and that appellant was not a bona fide holder before maturity, — there is sufficient evidence to support a verdict by the jury in favor of respondent, defendant below, and it will not be disturbed on appeal.

5. For an appellate court to permit a party who has tried his case in the lower court wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position, and adopt another and different theory on appeal, would be not only unfair to the trial court, but manifestly unjust to the opposing litigant; especially when, as in the case at bar, respondent insisted on trying the case in the lower court on the theory now contended for in part by appellant, but which, in pursuance of objections made by her, was overruled by the court.

6. An appellate court will not review instructions given or refused unless exceptions to the giving or refusal are taken at the time.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. G. Norrell, Judge.

Action by Lucinda A. Lebcher against George C. Lambert. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover on a promissory note executed and delivered by respondent, George C. Lambert, to David Lebcher. The note reads as follows: "\$600.00. Salt Lake City, Utah, May 11, 1892. Two years after date, for value received, I promise to pay to David Lebcher, or order, six hundred dollars, negotiable and payable at Salt Lake City, Utah, without defalcation or discount, with six per cent. interest per annum from date thereof until paid, both before and after judgment. Interest payable at maturity. George C. Lambert." David Lebcher (payee) died on the 28th day of March, 1895, at Akron, Ohio, where plaintiff at the time resided, and continued to reside up to the time of the commencement of this action. Defendant, Lambert, refused to pay the note, and Lucinda Lebcher, widow of decedent, Lebcher (payee), and only heir to

¹ Thirkfield v. Association, 41 Pac. 564, 12 Utah, 76.

his estate, brought suit in the district court in and for Salt Lake county, Utah, on the 11th day of July, 1895, to recover from defendant the principal of said note and interest thereon, claiming to be the legal owner of the note for a valuable consideration. Lambert answered, admitting the execution of the note, but denied that the same had been duly transferred to plaintiff, Lucinda Lebcher, or that she was the legal holder and owner of the note; also denied that the note was sold, or transferred, or indorsed to plaintiff by the owner thereof before maturity, or at any other time, or that the plaintiff was a bona fide owner for value. Defendant further answered plaintiff's complaint, and in substance alleged that in consideration of the execution and delivery of said note by George C. Lambert to said David Lebcher, he, the said Lebcher, undertook to and agreed to plant seven acres of grape vines in good condition, and insure the growth of said vines; that said David Lebcher planted said vines in the spring of 1892, and that said vines never grew, having been in a bad condition at the time of planting, and having been planted a month later than they should have been; that David Lebcher promised to but failed to replace said vines; that defendant, in addition to the loss of said vines, lost the use of the land upon which they were planted for a period of three years; that, therefore, defendant received no consideration for said note, and that there was no other or further consideration for the same. Plaintiff introduced in evidence the note, which purported to be indorsed in blank by David Lebcher, and rested. Several witnesses for defendant testified that they were familiar with the signature of David Lebcher, and that the indorsement on the note in question was not made by Lebcher. Other witnesses, some of whom were skilled accountants, and had had much experience in the comparison of signatures, examined the indorsement on the note and compared it with the signatures to certain letters and documents purporting to have been written by David Lebcher, one of which was admitted to be his signature, and testified that in their judgment the signature on the back of the note and those to the letters and documents were not made by the same person. One witness—an expert—testified for plaintiff that, in his judgment, the indorsement on the note and the signature to the letters and documents referred to were made by the same person. There is evidence in the record showing that nearly two years after plaintiff claims to have purchased the note it was still in the possession of and owned by David Lebcher, the payee. Defendant all through the trial persistently offered evidence to prove failure of consideration; also offered in evidence the following letter, written to the defendant by C. Weirick, who at the time was the agent of the appellant (plaintiff below): "May 17th, 1895. Mr.

George C. Lambert—Dear Sir: Mr. Lebcher, deceased, of this place, holds a note of \$600 against you. As we are settling up the estate as fast as possible, we would like to know when you can meet this note. It is past due. It bears interest at six per cent. for three years. Respectfully, C. Weirick. Box 104, Akron, Ohio." This letter, together with all evidence tending to support the allegations in defendant's answer of failure of consideration for the note, was objected to by plaintiff; her counsel at the time announcing that they relied for recovery on the ground that plaintiff was a bona fide purchaser and holder, before maturity, of the note, whereupon the court sustained the objection, and rejected all testimony offered by defendant tending to show failure of consideration for the note on the part of David Lebcher (payee). Counsel for plaintiff introduced in rebuttal depositions wherein she claims to be a bona fide legal holder and holder before maturity, for a valuable consideration, of the note in question. She testified that David Lebcher indorsed the note, but did not know where, when, or in whose presence he signed his name on the back thereof. The evidence showed also that after maturity of the note, and after plaintiff alleges she became the owner of it, David Lebcher (payee) came to Salt Lake City, and consulted the defendant and other parties about the transaction for which the note was given, and that at the time he claimed to be the owner and in possession of the note. The issues were tried by a jury, who returned a verdict for defendant of no cause of action.

R. B. Shepard and A. T. Sanford, for appellant. Ferguson & Cannon, for respondent.

MCCARTY, District Judge (after stating the facts). Appellant relies mainly upon two assignments of error for reversal of the judgment in this case. The first error alleged is that the court erred in allowing witnesses for the defendant to testify as to the genuineness of the signature of David Lebcher upon the back of the note in question by comparison with what appellant claims to be the unproven signatures to certain letters purported to have been written and signed by said Lebcher. No objections were made nor exceptions taken to the introduction and admission of this evidence. Counsel for appellant, having remained silent, and permitted the testimony complained of to go to the jury, waived all objections, if any, that might legally have been interposed to its introduction. Therefore this court will not review the same on appeal. *Thirkfield v. Association*, 12 Utah, 76, 41 Pac. 564; *Ellott*, App. Proc. § 674, and cases cited.

In their second assignment of error counsel for appellant, relying on the rule of law that possession of a promissory note is prima facie proof of ownership, contend that it

was immaterial whether the signature on the back of the note under consideration was written by Lebcher or not; that plaintiff, having proved her possession of the note and nonpayment by the defendant, was entitled to a verdict; and that the court erred in refusing to set aside the verdict and grant a new trial. The doctrine is elementary that the title to a promissory note drawn in the form of the one under consideration passes by sale and delivery without indorsement, and that the possession of the note so transferred is *prima facie* proof of ownership, but when so transferred without the indorsement of the payee it does not carry with it any of its otherwise negotiable features, and the party purchasing it takes it subject to all equities and defenses, if any, that exist between the original parties to the note. Mr. Norton, in his work on Bills and Notes (3d Ed., p. 203), lays down the following terse, and, we think, correct, rule: "That a transferee of a note made payable to order without indorsement takes it subject to all equities attached to the note, and this although the holder was a bona fide holder for value. The transferee stands in the position of an assignee. He owns the note. He, in turn, may transfer it, but he owns and transfers it subject to the rules applicable in case of an assignment of any other chose in action; and although he subsequently obtains the indorsement, if he has in the meantime acquired knowledge of the equities, or if the indorsement be after maturity, he still holds the instrument subject to the same defense." *Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595. The respondent having produced evidence at the trial tending to prove that the indorsement on the note was not made by David Lebcher, and that the appellant purchased the note, if she purchased it at all, after maturity, he was entitled to avail himself of and prove any defense that he could have interposed had the action been brought by David Lebcher himself. But, as shown by the record, appellant all the way through the trial of the case persistently contended that she was a bona fide holder in due course, before maturity, of the note, and that she based her right to recover on that ground; and in pursuance of this contention and objections made by counsel for plaintiff the trial court excluded all evidence offered by defendant tending to prove failure of consideration on the part of David Lebcher,—evidence that was both competent and material for that purpose. *Rand. Com. Paper*, § 565; *Hubbard v. Galusha*, 23 Wis. 398; *Jones v. Buffum*, 50 Ill. 277. In order to constitute appellant a bona fide holder in due course of the note in question, both indorsement and delivery of the same before maturity to her by David Lebcher was necessary. *Rev. St.* § 1582; 2 *Rand. Com. Paper*, §§ 687, 689, 983. The great preponderance of the evidence, as shown by the record, supports the theory and contention of re-

spondent that the indorsement on the back of the note was not made by David Lebcher, but was a forgery. The jury no doubt so found, and, we think, rightly. Appellant was, at the time she claims to have purchased the note, the wife of David Lebcher (payee). She made no attempt to collect it until after his death, and for more than a year after it became due, notwithstanding her husband, from whom she claims to have obtained the note, came to Salt Lake after its maturity on business in part connected with the transaction out of which the alleged consideration for the execution of the note arose. And there is evidence, as shown by the record, which, if believed by the jury, was sufficient to support a finding that David Lebcher was the owner of and retained possession of the note after its maturity, and after appellant claims to have purchased it, and that appellant was not a bona fide holder before maturity. These issues having been fairly submitted to the jury, their decision is final, and this court cannot disturb the verdict, as there is evidence to support it.

Counsel for appellant devote considerable space in their reply brief to the discussion of the proposition that, as a question of law, appellant was entitled to recover because no evidence was introduced to support defendant's defense of a failure of a consideration for the note on the part of David Lebcher. All evidence on this point having been excluded by the trial court in pursuance of objections made by appellant's counsel, and their repeated declarations that they relied for recovery on the ground that appellant was a bona fide holder in due course before maturity of the note, that question cannot now be considered, because this court will not reverse the case on some point which counsel for appellant in the lower court contended was not an issue, and which that court, in pursuance of such contention, in effect eliminated from the case. For this court to permit a party who has tried his case in the lower court wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position, and adopt another and different theory on appeal, would be not only unfair to the trial court, but manifestly unjust to the opposing litigant; and especially would this be true where, as in the case at bar, respondent insisted in the lower court on trying the case on the theory now contended for in part by appellant, but, in pursuance of objections made by her, was overruled by the court. *Elliott, App. Proc.* § 490, and cases cited. This doctrine is so well settled we deem further citation of authorities unnecessary.

Appellant complains of and assigns as error the giving of certain instructions by the court to the jury, and the refusal of the court to give certain instructions asked for by appellant; but, as no objections were made at the time to the giving of the in-

structions complained of, and no exceptions taken to the court's refusal to give those asked for by appellant, this court will not review the same on appeal. We find no reversible error in the record. The judgment of the trial court is therefore affirmed; the costs of this appeal to be taxed against appellant.

BARTCH, C. J., and BASKIN, J., concur.

(23 Utah, 139)

**BEAMAN v. MARTHA WASHINGTON
MIN. CO.**

(Supreme Court of Utah. Jan. 7, 1901.)

APPEAL—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY—DEATH OF MINOR CHILD—DAMAGES—EVIDENCE.

1. Where an instruction contains a number of distinct propositions of law, many of which are doubtless correct, an exception to the instruction in gross by mere reference to the number of the paragraph is insufficient to direct the attention of the court to the matter claimed to be objectionable, and is too general for consideration upon appeal. Appellant is estopped to complain of the giving of an instruction requested.

2. In an action by a father for the negligent killing of his minor child, under sections 2911, 2912, Rev. St. 1898, the recovery of the parent for the pecuniary loss sustained in being deprived of the society, comfort, and protection of the child is not necessarily limited to the period of the child's minority, but the parent may recover for the benefits reasonably to be expected to be received by him after majority.

3. Where the proper elements of damages are affirmatively stated, it is not error to refuse to instruct negatively what cannot be taken into consideration by the jury as elements of plaintiff's damages, in the absence of something in the testimony or arguments rendering such an instruction necessary.

4. Where a question is asked by plaintiff whether the attorneys for defendant represent in the case an insurance company, and the question is objected to and the objection sustained, and no effort is made by the defense to cure the vice, if any, of the mere asking of such question, held not to be such an abuse of the privileges of counsel as to require a new trial.

5. In an action for negligent killing while deceased was being hoisted in a "skip" out of an incline shaft of defendant's mine, it is competent to inquire how the "skip" was ordinarily operated, for the purpose of tending to show that the defendant had notice of the engineer's negligence; and experts may be asked what effect such running would have upon the "skip" when so operated upon the track described.

(Syllabus by the Court.)

Appeal from district court, Fifth district; M. V. Higgins, Judge.

Action by Jacob Beaman against the Martha Washington Mining Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This action is brought by plaintiff for the negligent killing of his minor son by the defendant. The complaint alleges the negligent construction by the defendant company of a track in one of the shafts or inclines of its mine; that the said track was uneven and rough, so that a "skip" being operated upon the same was likely to be thrown off

the track; that the bell or signal rope was negligently placed too near the track; that defendant negligently used an unsafe skip, which, from certain defects enumerated, could not be run without dumping or running off the track; that defendant negligently employed an incompetent and careless engineer, who operated the skip in a jerky and unsafe manner; that plaintiff's son, of the age of 16 years, was employed by the defendant in general work about the surface of defendant's mine, and was inexperienced in the underground workings of mines, and was unfamiliar with skips, equipments, and appliances used in lowering and raising persons and objects in said mine, and was otherwise unfamiliar with the workings and operation of mines in general; that defendant on the day in question carelessly directed said minor to the bottom of the shaft in said skip; and that by reason of all the negligent acts alleged said minor was killed. There is evidence in the record that the track down the incline or shaft of defendant's mine was not straight, but curved, and was uneven (that is, not on the same incline all the way down) and rough; that the attention of defendant's foreman had been called to the condition of the track; that upon said track an "automatic dumping skip" was operated by steam, and that the ordinary way for men to go up and down the mine was in the skip; that the hanging wall of the shaft came down in places to within 10 inches of the top of the skip; that the bell rope was placed along the side of the track on the wall plates on the bottom of the incline below the iron rails; that, to reach the bell cord while riding up or down in the skip, one had to reach over the side of the skip and down to the wall plates, and to do so there was danger of knocking one's head against the roof; that the bell cord should have been placed on the side of the shaft, even with or a little above the top of the skip, where it would have been convenient to reach; that there were only a few staples holding the bell cord in place upon the wall plates, so that, if a person were not careful in handling the bell cord, it would become entangled in the wheels of the skip; that there should have been staples every 10 or 20 feet to hold the bell cord in place; that there were no safety appliances on the skip to prevent it turning over off the track; that the dumping apparatus was defective; that the engineer in operating the skip would open the throttle of the engine, and carelessly sit back in his chair and talk to people while the men were being hauled up; that complaints of this were made to the shift boss about 10 days before the accident; and that the skip was known to jump the track some four or five times before the accident. On the day of the accident the skip was sent down for plaintiff's son and one Zuckswert, and as the skip was being drawn up it was discovered to be off the track. The skip was found at about the

200-foot level empty, dumped and turned upside down, off the track, with indications that the bell cord had wound about the wheels, and that the skip had been dragged 10 or 15 feet after turning over. Plaintiff's son and Zuckswert were found at the bottom of the shaft, about 350 feet from the surface, both dead. Deceased was hired to do chores on top of the mine, and plaintiff did not know until after the accident that his son was working down the mine. The jury returned a verdict for plaintiff for \$10,000, and a motion for a new trial was denied upon plaintiff remitting \$4,000 of the amount of the verdict, in accordance with the decision of the trial court. Defendant appeals from the judgment thus reduced.

Rawlins, Thurman, Hurd & Wedgwood and Bennett, Harkness, Howat, Sutherland & Van Cott, for appellant. Powers, Straup & Lippman, for respondent.

HART, District Judge (after stating the facts). The defendant complains of the following instruction (No. 26): "If you find for the plaintiff, you will then award such damages as in your judgment, from the evidence, the plaintiff has sustained. You cannot award any damages for the mental suffering or injured feelings of any of the relatives of the deceased. In determining the amount of damages, you may take into consideration the age, mental and physical health at the time of his death, his probable length of life, his ability and disposition to labor, his habits of living, the probable earnings of deceased before coming of age, from which should be deducted the reasonable cost of his care and maintenance during his minority; also, the loss of comfort, society, and companionship of said deceased, if any, that the plaintiff has sustained by his death, and the amount, if any, expended for funeral expenses. And you should consider all the facts and circumstances, so far as shown by the evidence, which show any pecuniary loss to the plaintiff. And, from all the above facts, award such compensatory damages, if any, as the evidence shows has been sustained." Appellant's criticism of this instruction is for what it fails to state, rather than for any error expressed therein. Among the wholesale exceptions to the instruction given, appellant excepts to the giving of instruction No. 26. Whatever may have been the actual intent of the enactors of section 3151 of the Revised Statutes of Utah of 1896, providing that "no reason need be given for such exceptions," this court has so often condemned a general exception, and held that the specific objectionable matter must be pointed out, that the writer of this opinion does not deem it necessary to discuss the matter here. It may be noted, however, that any other rule would be a hardship upon litigants, a burden to the courts, and against public interest. Where the trial

court must instruct the jury in writing before the arguments of counsel to the jury, and often has only the time while the testimony is being taken in which to consider and prepare the instructions, it would be unreasonable to place the trial court in the position of an insurer, in a sense, of the correctness of each instruction, not only as to the law given, but also as to what is omitted to be given; and this without attention ever being called to the point of the objection. The instructions being in writing, counsel have ample opportunity of knowing exactly what is charged, and taking exceptions to objectionable matter. There are a number of distinct propositions contained in said instruction, many of which were, without doubt, correct. An exception in gross by mere reference to the number of the paragraph did not direct attention to the matter objected to, and was insufficient. *Marks v. Thompson*, 7 Utah, 425, 27 Pac. 6; *Nelson v. Brixen*, 7 Utah, 454, 27 Pac. 578; *People v. Hart*, 10 Utah, 204, 37 Pac. 330; *Ruffatti v. Société Anonyme des Mines de Lexington*, 10 Utah, 388, 37 Pac. 591; *People v. Berlin*, 10 Utah, 41, 36 Pac. 199; *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481; *Lowe v. Same*, 13 Utah, 91, 44 Pac. 1050; *Wilson v. Mining Co.*, 16 Utah, 392, 52 Pac. 626; *Scott v. Milling Co.*, 18 Utah, 486, 56 Pac. 305; *Brigham City v. Crawford*, 20 Utah, 130, 57 Pac. 842; *Wall v. Smelting Co.*, 20 Utah, 474, 59 Pac. 399; *Pool v. Railway Co.*, 20 Utah, 210, 58 Pac. 326; *Nebeker v. Harvey*, 21 Utah, —, 60 Pac. 1029; *Haun v. Railway Co.*, 21 Utah, —, 62 Pac. 908; 8 Enc. Pl. & Prac. 259-264, and cases cited; 2 Enc. Pl. & Prac. 948-951, and cases cited; *Railroad Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624, and cases cited.

Appellant complains of that part of the instruction which permits a recovery for "the loss of comfort, society, and companionship of said deceased, if any, that plaintiff has sustained by his death." Appellant is estopped to so object, in view of its first request to instruct, as follows: " * * * In such action such damages may be given as, under all the circumstances of the case, may be just, not exceeding the probable pecuniary value of the loss of the comfort, society, and protection to the father, and the probable earnings of such child, after deducting the reasonable cost of his care and maintenance, to which may be added the cost of necessary funeral expenses. In such action the father is not entitled to recover for the benefit of the mother or heirs of the deceased child, or for the benefit of any other person than himself."

But the court did not instruct that any recovery for loss of comfort, society, etc., should be limited to the period of the minority of the deceased, as embodied in defendant's fourth request, as follows: "If the jury find for plaintiff, in fixing the amount of damages you should not take into account

or allow for any benefit, advantage, aid, or comfort which might have accrued to the deceased's parents, or either of them, but for his death, after said deceased child should attain the age of twenty-one years." There was no error in the refusal to so instruct. A different rule is established elsewhere, under different statutes. This suit is brought under and is determined by sections 2911, 2912, Rev. St. Utah 1898, as follows:

"Sec. 2911. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child; and a guardian, for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

"Sec. 2912. When the death of a person, not a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The recovery of the parent is not necessarily limited to the period of the child's minority, but the parent may recover for benefits reasonably to be expected to be received from the child after majority. *Boyden v. Railroad Co.*, 70 Vt. 125, 39 Atl. 771; *Holt v. Railway Co.* (Idaho) 35 Pac. 39; *Railroad Co. v. Reardon*, 157 Ill. 372, 41 N. E. 871; *Flaherty v. Railroad Co.*, 19 R. I. 604, 36 Atl. 1182; *Railroad Co. v. Cross* (Kan. Sup.) 49 Pac. 599; *Thompson v. Johnson Bros. Co.*, 86 Wis. 576, 57 N. W. 298; *Railway Co. v. Davis*, 55 Ark. 462, 18 S. W. 628; *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721; *Railway Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; *Birkett v. Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Railroad Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 953; *Hyde v. Railroad Co.*, 7 Utah, 359, 26 Pac. 979; *Wells v. Railway Co.*, 7 Utah, 482, 27 Pac. 688; *Pool v. Railway Co.*, 7 Utah, 308, 26 Pac. 654; *Chilton v. Railway Co.*, 8 Utah, 48, 29 Pac. 963.

Appellant requested that recovery for loss of comfort, society, and protection be limited to the "probable pecuniary value thereof." The court evidently attempted to so state the law in the twenty-sixth instruction, and, while the language is not as free from possible ambiguity as we would like to see it, yet it perhaps more clearly restricts a recovery to a pecuniary standard than is done in the instruction approved by this court in the *Hyde Case* and the *Wells Case*, above cited.

Other requests by appellant that were refused and excepted to are to the effect that damages could not be awarded on account of any loss to the deceased child, or suffering on his part. This is doubtless a correct statement of the law, but was appellant in any wise prejudiced by its not being given? There appears to be no testimony of any suffering by deceased. The arguments of counsel in, or the facts of, some cases might make it necessary for the court to give such a charge, but in the absence of some such showing there should not be a reversal for failure to so instruct. It was a mere negative,—a statement of what could not be considered as a proper element of damages. It was enough to state affirmatively the elements of damages, in the absence of some necessity for telling the jury what could not be considered by them.

Error is assigned to the taking of certain testimony. Mr. Hurd, one of the counsel for defendant, was called to the stand by counsel for plaintiff, and the following proceedings taken: "Q. Mr. Hurd, the firm of Rawlins, Thurman, Hurd & Wedgwood, appear as attorneys of record for the defendant here, do they? A. Yes, sir; the record so shows it is. Q. Do you know whether they represent an insurance company in this case? Mr. Wedgwood: I object to it as wholly immaterial who they represent. (Some argument by counsel on each side.) Mr. Wedgwood: We ask, if there is going to be any argument, that the jury retire during the argument. The Court: I don't care to hear any argument. The objection is sustained. Judge Powers: Note an exception. Mr. Wedgwood: I will take an exception to the argument on the objection to the question by Judge Powers. We object to the question and the argument of counsel, and we desire to take an exception to make it a matter of record. We object to the question being put in at all. The Court: Well, it can appear on the record that the exception was taken, but it will also appear that the objection was not taken in time to rule on it,—to exclude it. It was not taken in time for the court to make a ruling on it." We do not think there was such an abuse of the privileges of counsel that a reversal should be ordered on such a record. The willful asking of an incompetent question may be so prejudicial that even an instruction by the court to disregard the same may not cure the evil. Here there was no objection to the argument in the presence of the jury until after a brief argument was had. There was no effort by defendant to cure the vice of the question, if any, by a request to the court to have the jury disregard the same. Had counsel thought a jury would be less likely to return a verdict in favor of a mining corporation than an insurance company, he should have at least sought to have the court cure the evil by an oral instruction at the time.

Objection was made to the question, "What would be the effect on the skip on that track, as you have described it, if it was run rapidly?" asked of the witness Lyman C. Johnson, who had been a miner for 15 years. His answer was, "If the skip jumped the track, it would be apt to turn over if it catches anything." Substantially the same question was asked George A. McKenzie, a witness who had been engaged in mining for 30 years. His answer, given under objection and exception, was, "In my judgment, the skip would—if run very rapidly, might—tip without leaving the track." This was a question for expert testimony, and there was no question raised as to the qualifications of the witnesses. It was not a matter supposed to be within the common experience of the jury, and was not the direct question the jury were to determine. The ultimate fact for the jury to determine in this connection was whether there was negligence.

Another class of objections is illustrated by the following: "Q. About how fast was the skip ordinarily hauled up when men were in it? (Objected to by defendant as immaterial. Objection overruled and exception taken.) A. Sometimes it was run very rapidly, and sometimes slower." There are some other like questions and objections and rulings, but there was no error therein. Plaintiff had the right to inquire how the skip was ordinarily operated, and (from experts) what the probable effect would be. The judgment is affirmed at defendant's costs.

BASKIN, J., and CHERRY, District Judge, concur.

(7 Idaho, 439)

BANE et al. v. GUINN.

(Supreme Court of Idaho. Dec. 26, 1900.)

HANDWRITING—COMPARISON—APPEAL—REVIEW.

1. In this state, in an action involving the genuineness of a signature, only such papers as are admitted in evidence in the case for other purposes, and such as are admitted to be genuine, should, except in very exceptional cases, be admitted for the purpose of comparison.

2. Where, as in the case at bar, the verdict is against the evidence, there being no substantial conflict in the evidence, the judgment based upon such verdict will be reversed upon appeal. (Syllabus by the Court.)

Appeal from district court, Canyon county; George H. Stewart, Judge.

Action by John Bane and Belle Bane against M. B. Guinn, executor of M. H. Gill. Judgment for plaintiffs. Defendant appeals. Reversed.

Hawley & Puckett, for appellant. W. E. Borah and Brown & Cahalan, for respondents.

HUSTON, C. J. This action is brought by the plaintiffs against the defendant, as the

executor of the last will and testament of Mervin H. Gill, deceased, to recover from said estate the amount alleged to be due upon a certain promissory note alleged by plaintiffs to have been executed and delivered by said Gill in his lifetime to Belle Bane, a married woman, and one of the plaintiffs, for the sum of \$4,500 and interest. Said note having been presented for allowance to the said executor, and by him rejected, this action is brought for the recovery of the same. The answer of defendant denies the execution and delivery of the note by the decedent, and also alleges that there was no consideration therefor. The case was tried by the district court for Canyon county, with a jury, upon the issues presented by the pleadings. Two questions are presented by the record: (1) Was the note sued upon in this action the note of Mervin H. Gill, deceased? (2) Was said note, if executed and delivered to plaintiffs, so executed and delivered without consideration?

Upon the first proposition a large number of witnesses testified upon both sides. The first witness presented by the plaintiffs to establish the genuineness of the signature to the note is C. P. Bilderback, who testifies in substance as follows: "I have resided at Emmett, Canyon county, Idaho, for ten years, and engaged in the mercantile business most of the time, and resided about one mile from M. H. Gill, and was well acquainted with him. Have known him about twenty-five years. For the last few years he has been an invalid. I had business relations with him for six years that I was in business there. * * * The signature to that note, to the best of my knowledge and belief, is that of M. H. Gill. The writing in the body of the note is that of John McNish, a merchant in Emmett. * * * I think Mr. Gill became an invalid six or seven years ago. He apparently lost the use of his legs, and could not walk. He was not confined to his house all the time. Think, though, that the last year or two he was confined to his house. I retired from business, and ceased dealing with Mr. Gill in '96, and since that time have had no business relations with him." The next witness for plaintiffs was Sherman G. King, who testified in substance as follows: "I reside at Boise City, and have a general agency office. I was clerk of the district court, ex officio auditor and recorder of Ada county, for four years, and was acquainted with M. H. Gill in his lifetime. Knew him perhaps ten or twelve years. Don't know that I was intimately acquainted with him. Was quite well acquainted with him,—well enough to go and see him when I went out there, and I have seen him several times in Boise. I knew his signature. I have seen signatures that I believed were his upon recorded documents. I presume I have seen his signature a half a dozen times, maybe, during the last ten or twelve years. I think I would know his signature. (Plaintiffs' Ex-

hibit A handed to witness.) Q. You may state, in your opinion, whose signature that is, from your best knowledge of Mr. M. H. Gill's signature. A. I believe that is the signature of M. H. Gill, to the best of my knowledge and belief. It was from January, 1891, to January, 1893, that I saw his signature on recorded documents. Certain documents came into my possession as recorder of Ada county, purporting to be signed by Mr. Gill, and acknowledged. I have seen one of the documents since that time. Saw it on yesterday. It was a deed from Mr. Gill to some other person. I do not know whom. I examined it on yesterday. Have only examined that one document. (Counsel for plaintiffs hands counsel for defendant the deed referred to by witness, being a deed from M. H. Gill to John Bane and Belle Bane, dated August 17, 1891.) Do not recollect any other deeds or documents outside of this particular one. I examined what purported to be Gill's handwriting down here on various checks, and one petition, I believe. That deed is the only document passing through my hands as recorder that I have a distinct recollection of. I have an idea there were others, but I am not certain in regard to that. I am not positive that I ever saw Mr. Gill write. Have a faint recollection I saw him sign some papers at his home. I would not say positively, however. If I did, it was some two or three years ago. I paid no attention to it. Was just there as a visitor, calling." The testimony of Judson Allerton, a witness on part of plaintiffs, is to like effect. Howard Sebree, another witness on the part of the plaintiffs, testifies in substance as follows: "Have been in the banking business at Caldwell for over thirteen years as president of the First National Bank. I met M. H. Gill once or twice during his lifetime. He has done some business through the bank. I have become acquainted with his signature, more or less, as I would with most any class of customers. Have seen his checks and certificates of deposits. He did business seven or eight years at the bank. (Plaintiffs' Exhibit A handed witness.) Q. From your knowledge of Mr. Gill's signature, whose signature is that? A. In my opinion, that is M. H. Gill's signature, and, in my opinion, it is a genuine signature." Mr. Sebree also gives various reasons for and explanations of the grounds upon which his opinion is based. John McNish, a witness on the part of the plaintiffs, testifies in substance as follows: "I reside at Emmett, Canyon county, Idaho, and have been engaged in the mercantile business for five years, and was acquainted with M. H. Gill in his lifetime. Knew him about 13 years, and did a good deal of cash business with him. Mr. Gill had a book account at my store during the time I have been in business there, and have observed his signature, and received checks and orders from him. He would do about one hundred dollars' worth of business

a year. We cashed his checks frequently during the five years that I have been in business. He was affected with paralysis, and was not able to walk, and for the last four or five months was not able to get out of his house. I never called on him. (Plaintiffs' Exhibit A handed witness.) I wrote the body of this note. I wrote it upon a written order purporting to have been signed by M. H. Gill. I accepted it as his signature, and had no doubt about it when I received it. I wrote it according to instructions in the order, and rolled the order up with the note, and sent it back. Belle Bane presented the order. She is one of the plaintiffs herein. I heard she was stopping at Mr. Gill's at the time. I had no conversation with Mrs. Bane in regard to the note at the time that I drew it, having known Gill's signature ever since I had been in business. Q. You may state, in your opinion, whose signature that is, Mr. McNish, to that note, to the best of your opinion. (Objected to by defendant for the same reason as hereinbefore stated. Objection overruled, to which ruling of the court defendant excepts, and assigns the same as one of the grounds for new trial herein. Witness resumes:) In my opinion, it is the signature of M. H. Gill." Other witnesses were called by the plaintiffs, all of whom gave their opinions in favor of the genuineness of the signature to the note in question, and all of whose opinions were based upon a comparison of the signature to the note with other signatures of the deceased. Many witnesses were introduced by the defendant, who, with equal opportunities, and apparently of equal intelligence, unhesitatingly expressed the opinion that the signature signed to note in question was not that of the deceased, Mervin H. Gill. Numerous exhibits, consisting of checks, orders, and other papers, purporting to bear the signature of deceased, were introduced and received in evidence, as were also certain photographs of papers and signatures.

In view of this condition of the testimony, it is contended by the respondents that the appellate court should not disturb the verdict of the jury. The rule contended for is, we are inclined to think, sometimes invoked or recognized by courts to avoid responsibility; but, be that as it may, it is subject to exceptions. The rule is based upon the theory that in the trial of a case depending wholly upon questions of fact the trial court, having the witnesses before it, hearing their testimony, observing their manner of testifying, and being enabled to observe their appearance and deportment while under examination, is better qualified to judge of the weight to be given to their testimony than is an appellate court, which simply takes the testimony from the record; but when the testimony is by deposition, or, as in the case under consideration, is mere matter of opinion, and the evidence upon which such opinion is based is before the appellate court, the reason for the

rule is not apparent. There is no question of credibility of witnesses in this case. The elaborate arguments presented by some of the witnesses upon both sides in support of the grounds upon which they base their conclusions, while they exhibit careful study and industrious research, are still mere matters of opinion. A most elaborate and instructive dissertation upon this question of expert testimony in regard to handwriting will be found in an article upon the celebrated Howland Will Case, 4 Am. Law Rev. p. 625. In that case some of the most eminent scientists of the United States, including such men as Prof. Eben N. Horsford, at one time professor of chemistry of Harvard College; Prof. Benjamin Pierce, formerly of Harvard College, at the time superintendent of the coast survey; Prof. Agassiz, whose reputation is as wide as the dominion of civilization; Dr. Oliver Wendell Holmes,—are found giving diverse opinions with a most startling degree of positiveness. In fact, we think we are not far from expressing the consensus of judicial opinion when we say that of all testimony upon which courts are called to pass that of expert witnesses upon questions of handwriting is the most unsatisfactory.

Much of the briefs of both appellant and respondents is taken up with a discussion of the rule adopted by the trial court in the admission of testimony. The district court held that only such papers purporting to bear the signature of the party whose signature was the subject of controversy as were in evidence in the case for other purposes, or were conceded to be genuine, were admissible. We are inclined, in the absence of any statute establishing a different rule, to hold with the lower court upon this proposition; although we think occasions may arise where the latitude of the rule should be extended. The defendant M. B. Guinn testified as follows: "I am executor of the estate of M. H. Gill, and reside at Boise, and am in the insurance business. I knew M. H. Gill intimately about 25 years, and had business relations with him. In about 1891 he became partially paralyzed from double curvature of the spine. He first lost the use of his lower limbs entirely, but afterwards he regained some feeling in them; got so he could get out, and get into a phaeton, and ride around the country. He transacted his own business before he became a cripple. I would take checks over to the bank and deposit them for him, and also would collect interest on deposits that he would have, and figure up notes for him. I was acquainted with his business affairs to such a degree that in later years he asked me at different times to go over his papers and notes, and make a list of them. He could only write his name. He always had money in notes and cash to the extent of about \$8,000 to \$12,000, and owned some land. He owned the old homestead and 160 acres adjoining. His mother died in 1896. L. D. Gill, father of M. H. Gill, died

in 1891. To my knowledge M. H. Gill settled all of his bills, and he ran very few. He ran store bills in Emmett, but paid them every sixty days. He never was in debt but a very few dollars at a time, and that was simply store bills at Emmett. He always had money in the bank. I have assisted him in drawing checks on several occasions, and have seen him sign checks and other documents. (Witness handed plaintiffs' Exhibit B for examination. Witness resumes:) That is the will. I was present when it was signed, and he made the signature to the will. Mr. L. L. Feltham and J. M. Martin were also present. The two days we were fixing up his will for him he was under considerable strain, and I think he was a little weaker after he signed this will than before. We had been doing considerable work in settling his affairs. Gill wrote his name 'Mervin Gill' at the suggestion of his attorney, and I called his attention to it, and told him that there would have to be an 'H.' there, so that it would be 'Mervin H. Gill'; so he added the 'H.' after his name was written." "Mrs. Bane and her husband, the plaintiffs, were endeavoring to purchase the ranch belonging to Mr. Gill, upon which he was living. Mrs. Bane stated to me she would like to have the old place very much. This was about May 10 or 11, 1899, and I afterwards had a conversation with Mr. Gill in regard to the sale of the ranch. I will not be real positive, but I think Mrs. Bane was near the door of the sick room the time I asked him what his price was on the ranch. Just as I was bidding Merv. good-by (I was going home), I said to him: 'Merv., what is your price on this ranch? Belle has talked about possibly buying it, or making some trade with you?' He said, 'If she should want it, it is \$4,000, but, if anybody else wants it, it will be \$4,500; but I don't think they can raise the money to pay for it,'—meaning Mrs. Bane and John Bane, the plaintiffs. I know of an evidence of indebtedness held by Mr. Gill before his death against Mr. and Mrs. Bane, the plaintiffs. It was a note made in 1891 in the sum of \$2,000. Mr. Gill asked me to figure up the note and the interest on it. I think it was at the time the will was made,—May, 1899. I had the note in my hands at the time, and it was signed 'John Bane' and 'Belle Bane.' I made a memorandum of the amount due at the time, but do not know what became of it. In 1895 I made a general memorandum of all his notes. All the notes and papers of Mr. Gill came into my possession, after his death, as administrator. I did not find this note signed John Bane and Belle Bane among the papers. When I figured up the note and interest some time between May and the time of his death, it amounted to \$1,700 or \$1,800. Some time about the month of May I told Mrs. Bane what Mr. Gill had said to me,—what he had made up his mind to do in regard to the note,—and gave her the whole conversation, and told

her that I was satisfied that he intended to give her that note, from what he had said to me, for services in his last sickness. I simply said to her that in fact I was very glad that she was going to get the note. I thought that it was no more than right that she should have it, and she said, 'Well, all right; if he did not give it to her, she would work some way, and pay it off.' I brought the matter up here again in Caldwell, when this proposed note was handed to me in my office some time in November of last year. I asked Mrs. Bane if that \$1,800 note against her and her husband did not belong to L. D. Gill as well as to Merv.; in other words, if it did not belong to the L. D. Gill estate. No, she said, it did not; that it was Merv.'s, and belonged to Merv. personally; but said that Mr. L. D. Gill went over with Bane, her husband, to Boise, when the deal was closed up for which the note was given. In May, when we were talking of this \$1,800 note, owed by her and her husband, she did not mention anything about having a note against M. H. Gill, and did not state anything about M. H. Gill owing her anything. There was some borrowed money owed by Mr. and Mrs. Bane to Gill, amounting to about \$240. There was no written evidence of the indebtedness. I had a talk with Mrs. and Mr. Bane in regard to it right after the funeral of Mr. Gill,—the evening of the funeral. There was also an amount due on a county warrant of \$521. Before Mr. Gill's death he sent a warrant for that amount over to Caldwell by Mr. Bane, to be collected, and placed in the bank to Mr. Gill's credit. I saw Mr. Bane standing there at the gate of the old home, and told him that, 'Before Mr. Gill's death he said that you owed \$240 or \$250,' and Mr. Bane called to his wife, Belle Bane, the other plaintiff herein, and asked her how much was that that she got from Merv. long ago, and she said, '\$240'; and then I said, 'The only difference between you is \$240?' and they said, 'Yes.' I said that there was a certificate that Mr. Gill was worrying about before he died,—a \$390 warrant he sent over, with interest,—and asked what became of it, and John Bane said that Gill told him he could use the money, and I said, 'That is very strange, as he worried about it not coming over, and asked where it was;' and Bane said, 'I will try to meet you in Caldwell on Monday, and pay it.' This was on Friday or Saturday. So I said, 'All right.' After I had got a short ways below Emmett, on my way home, I heard a team coming behind me at a rapid gate, and slow up, and Mr. Bane drove up. He said, 'Here is a check for that warrant, \$550;' so I gave him the difference between \$521 and \$550, the amount that was due; so he gave me McNish and Allen's check for \$550. I again said then, 'The only difference between you and Mr. Gill at this time is \$240?' and he said, 'Yes;' and he said, 'I will pay that as soon as I sell some hay;' and I said, 'All right.' During the first con-

versation in regard to the borrowed money and the warrant Mrs. Bane was present; so was J. M. Martin. Mrs. Guinn was present when he paid me the \$550. John Bane said that Mrs. Bane got the \$240 from Gill. Just before Mr. Gill's death he made a statement to me in regard to the amounts that he owed; he seeking to inform me of his affairs, and settle up all his indebtedness before his death, as he told me at the time that he could not live very long. When he sent for me to make his will, he said he could not live through the summer, and that he wanted to straighten everything up. The Sunday before his death on Tuesday he insisted on my going over to town and getting the bills that he owed, so that he could pay them. (Counsel for plaintiffs move to strike out the above answer, commencing with 'Just before Mr. Gill's death,' as immaterial, and irrelevant, and hearsay.) The Court: It may be stricken out, except his statement as to the apprehension of death, and disregarded by the jury (to which ruling of the court counsel for defendant then and there excepted, and assigns the said exception as one of the grounds for new trial herein. Witness resumes:) Mr. Gill said on Sunday previous to his death that he could not live but a few days, and he made a statement to me in regard to the amount he owed and as to whom he owed. Q. Did he state on that occasion whether or not he was indebted to Mr. or Mrs. Bane, or both of them? A. He made a statement to me of what was owing to him at the time he named me as executor."

It seems from the evidence that the deceased had been an invalid for several years prior to his death, and for several months immediately preceding his death he was confined most of the time to his bed. Under these circumstances it would seem as though a comparison of the contested signatures with others made by deceased at or near the time when the contested signature was alleged to have been made would have been much more satisfactory. Take the signature to the will made on the 12th day of May, 1899 (about two months prior to the death of deceased), and the signature to the tax statement made on June 2, 1899 (less than two months prior to his death), and compare them with the contested signature, and the variance is so palpably apparent as to be observable upon casual inspection. The contested signature is alleged to have been made on May 20, 1899. The deceased, by reason of his enfeebled condition, as well as on account of his somewhat limited education, had for some years been compelled to trust his business affairs largely to others. Mr. Howard Sebrer, one of the principal witnesses for plaintiffs, states that from about 1895 to the time of his death the defendant attended to the business of deceased. The defendant seems to have been the trusted friend and confidential adviser of deceased. He not only managed his affairs, but, when admonished that he was approach-

ing his end, he sends for defendant to prepare his will, and make a final adjustment of his affairs. Deceased talked with defendant fully and freely concerning the obligations he felt himself under to the plaintiff Belle Bane for her care and kindness to him during his last illness, expressed his desire and intention to reward her liberally therefor, and in fulfillment of such desire and intention gave to her a note of herself and husband for some \$1,700 or \$1,800; and, when asked by defendant what price he placed upon the home ranch, deceased stated that Belle (the plaintiff) could have it for \$4,000, but to any one else the price would be \$4,500. In the several conversations had with the defendant both prior to the death of the decedent and immediately thereafter, although their attention was repeatedly called to the subject, the plaintiffs stated that the \$240 and the amount due upon the county warrant of some \$521, both of which sums were paid by plaintiffs subsequent to the death of decedent, and no word said about any claim against his estate, covered all transactions between plaintiffs and decedent. The decedent was a man of simple, frugal habits, and seems to have been possessed with an almost morbid dislike of incurring a pecuniary obligation. The record contains no evidence of his ever having given his note to any one, or for any purpose, aside from that in question. That a man of the disposition and habits of the decedent should have executed a note of an amount sufficient, if not to defeat, to at least greatly embarrass, the carrying out of his wishes and purposes as expressed in his last will, made only a few days before, and should, moreover, never mention the fact to his friend and adviser, the man whom he had not only intrusted implicitly with his affairs for years, and whom he had selected to carry out his wishes in regard to the disposition of his estate after he was gone, is a conclusion so utterly inconsistent with all the record shows us of the life and habits of the decedent as to require something more to support it than the opinion of experts, such as is shown by this record.

We do not find any reversible error in the rulings of the trial court in the matter of admitting or excluding evidence or in the instructions. This is not, strictly speaking, a case of "conflict of evidence." The only conflict is in the difference of opinion of the various witnesses upon the question of handwriting. There does not appear to be any appreciable conflict upon any other evidence in the case, and we cannot affirm a judgment based upon a verdict which, in our view, is so contrary to the evidence in the case. The judgment of the district court is reversed, and cause remanded for a new trial; costs to the appellant.

QUARLES and SULLIVAN, JJ., concur.

(7 Idaho, 466)

A. J. KNOLLIN & CO. v. JONES et al.

(Supreme Court of Idaho. Dec. 31, 1900.)

NONSUIT—CONSENT TO SALE OF MORTGAGED CHATTELS—TITLE OF PURCHASER—EVIDENCE—VERDICT—INSTRUCTIONS TO JURY—MOTION FOR NEW TRIAL—CUMULATIVE EVIDENCE—JURY—CHALLENGES.

1. A mortgagee who consents to a sale being made of the mortgaged chattels by the mortgagor waives the lien of the mortgage as to such portions of the mortgaged property as the mortgagor may sell under such consent, and the purchaser takes title free of the mortgage lien.

2. Motion for nonsuit is properly denied where the evidence shows that the plaintiff, a purchaser of the mortgaged chattels, bought the property in controversy from the mortgagor, with the consent of the mortgagee.

3. Several mortgages were given by B. & L. to the E.-S.-B. Co. on different brands of sheep. The mortgagee consented in writing that the mortgagors sell the mortgaged property in lots to pay the mortgage debts. The mortgagors did, at various and sundry times, sell portions of the mortgaged chattels, and accounted to the mortgagee for the proceeds of such sales. Later, another mortgage was given on the remnant left out of the said brands of sheep, to the original mortgagee, by the mortgagors, to secure the balance due on the original mortgage debts, with a small advance. Later, the mortgagors sold a portion of the sheep to plaintiff, and after that the mortgagee caused the sheriff to seize the sheep sold to plaintiff under the last mortgage. Plaintiff sued to recover possession of the sheep so seized by the sheriff. On the trial letters were admitted in evidence, over the objections of the defendants, in which the mortgagee advised and urged the mortgagors to sell all their sheep to meet their obligations. No showing was made that the mortgagee countermanded or recalled its consent to the two sales of said sheep by the mortgagors, and the evidence all tended to show, as did defendants' answer, that the various mortgages and transactions thereunder were treated by the parties as a continuing transaction. A letter from the mortgagee to the mortgagors was also introduced in evidence, tending to show a willingness to sales by the mortgagors. Held, that all of the letters were properly admitted in evidence, and that the evidence supported the verdict.

4. Erroneous instructions that are favorable, not prejudicial, to the appellant, will not authorize a reversal or the granting of a new trial.

5. A party who requests an instruction, which the court gives, but which conflicts with an instruction already given by the court, will not be heard, on appeal, to complain that the two instructions are inconsistent.

6. A motion for a new trial, upon the ground of newly-discovered evidence, is properly denied, where such evidence is cumulative, and could, with proper diligence, have been produced at the trial.

7. A new trial should not be granted upon the ground that an incompetent juror was drawn upon the panel, where the record shows that the complaining party accepted the trial jury without exhausting his peremptory challenges.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Action by A. J. Knollin & Co., a corporation, against L. C. Jones and others, to recover possession of sheep seized by the sheriff under a chattel mortgage executed by

Boyd & Litts to the Evans-Snider-Buel Company, a corporation, and purchased by plaintiff from said mortgagors. Verdict for plaintiff. Defendants the sheriff and mortgagee moved for a new trial, which was denied, and from the order denying the new trial defendants appeal. Affirmed.

W. C. Howie, Geo. M. Parsons, and S. B. Kingsbury, for appellants. Chas. Neal, W. E. Borah, and Lyttleton Price, for respondent.

QUARLES, J. The respondent commenced this action to recover from the appellants the possession of 7,441 head of sheep and damages for their retention. Appellants answered, alleging the following facts: That the appellant L. C. Jones, sheriff of Lincoln county, as agent for the appellant the Evans-Snider-Buel Company, seized said sheep, same being known as "Boyd & Litts' sheep." That said sheep were the property of, owned, and possessed by Boyd & Litts, a co-partnership composed of Frank W. Boyd and G. W. Litts, subject to certain mortgage liens of the appellant the Evans-Snider-Buel Company. That on October 27, 1898, said Boyd & Litts executed to appellants the Evans-Snider-Buel Company a mortgage on said sheep and other sheep to secure an indebtedness of \$29,946.48 due said Evans-Snider-Buel Company from said Boyd & Litts. Said mortgage was duly verified, executed, and acknowledged, and filed of record in the office of the recorder of Elmore county, on November 1, 1898, and copies thereof filed of record in the counties of Ada, Owyhee, and Blaine in November, 1898, and that the respondent knew of the existence of that mortgage, and knew that said sheep were so mortgaged to said Evans-Snider-Buel Company. During the year of 1897 and 1898 said Evans-Snider-Buel Company advanced from time to time to said Boyd & Litts upon loans, to secure which said Boyd & Litts, from time to time, executed mortgages on sheep owned by them in different parts of the state of Idaho, including the sheep to recover the possession of which this action was commenced by the respondent. One of said mortgages was executed June 11, 1898, to secure the sum of \$82,072.21 upon 41,654 sheep. This mortgage was subject to other mortgages given by said Boyd & Litts to said Evans-Snider-Buel Company on portions of said sheep. A number of mortgages were executed by said Boyd & Litts to said Evans-Snider-Buel Company, all of which are set forth in the answer of the appellants. The mortgage under which defendant Jones seized said sheep, executed October 27, 1898, is the last one executed between the parties, and covered 22,000 head of sheep. Each of the mortgages contained the following clause, to wit: "It is provided, however, that the said live stock and chattels shall remain in the possession of said mortgagors herein, and fed by the mort-

gagors during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed; but the mortgagors shall have no right to remove the same, or any part thereof, from the place where they are now located, excepting as may be herein provided, or to otherwise dispose of or incumber said property, without the written permission of the holders of the note or notes hereinafter mentioned. At least three days before the maturity of said note or notes, the above-described live stock shall be shipped and consigned to Evans-Snider-Buel Co., at Union Stock Yards, South Omaha, Neb., Union Stock Yards, Chicago, Ill., or Kansas City Stock Yards, Kansas City, Mo., and sold by it on commission, in the usual and customary way, and out of the proceeds it shall pay itself the hereinafter mentioned indebtedness, and a commission of fifty cents (50c.) per head on the whole number of cattle mentioned herein, and on any other of the live stock herein mentioned the regular commission provided by the exchanges where the same may be sold."

There is considerable evidence, both oral and documentary, including a large correspondence between Boyd & Litts on the one hand, and said Evans-Snider-Buel Company upon the other. The respondent, A. J. Knollin & Co., claims to have purchased said sheep from said Boyd & Litts on the 14th day of April, 1899. The contract of sale was in writing, signed by said Boyd & Litts and said Knollin & Co. Respondent took possession of the sheep in question, under said contract of sale, on the 19th day of April, 1899, some five or six miles east of Mountain Home, in Elmore county. The contract price was \$13,771.40, \$2,000 of which was paid April 14, 1899, and a draft for the balance (\$11,771.40) was delivered to said Boyd & Litts April 19, 1899, at which time Knollin & Co. took possession of the sheep in question. The sheep remained in their possession until May 4, 1899, when the sheriff of Lincoln county, the appellant Jones, seized the same under the chattel mortgage aforesaid, on October 27, 1898; whereupon this action was commenced, and in proceedings of claim and delivery the coroner of Lincoln county took said sheep from the possession of said sheriff, whereupon the appellants executed a redelivery bond, and said sheep were turned back to the possession of the appellants.

The only important question of fact in this case, and to which the evidence pointed and was directed, is whether said sale was made by Boyd & Litts to Knollin & Co. with consent of said Evans-Snider-Buel Company. There are many letters in the record from said Evans-Snider-Buel Company to said Boyd & Litts, during the existence of the prior mortgages, urging said Boyd & Litts to sell sheep covered by said mortgages in order to meet their obligations to said Evans-Snider-Buel Company secured by those mortgages. This evidence shows a willingness

on the part of said mortgagee to have the mortgaged property sold by the mortgagors, said Boyd & Litts, and the latter did at different times sell quantities of the sheep so mortgaged, accounting to said mortgagee for the purchase price of the sheep so sold. These letters were prior to the execution of the last mortgage, to wit, the one mentioned aforesaid, of date October 27, 1898. But a careful consideration of the evidence introduced before the jury at the trial, as well as the answer of the appellants, showed that this last mortgage, given to secure balances due upon the former mortgage debts, and an advance made by the mortgagee to enable the mortgagors to carry the sheep mortgaged through the winter of 1898 and 1899, was treated and regarded by the parties, to a certain extent at least, in the light of a continuing transaction. No notice was given said mortgagors by said mortgagee that sales of the sheep mortgaged were no longer to be made by the mortgagors, or that the consent of said mortgagee to such sales being made by the mortgagors was withdrawn.

It is argued on behalf of the appellants that the evidence does not show that after the execution of the last mortgage the mortgagee agreed or consented to any sale being made by said Boyd & Litts. On April 20, 1899, the following letter was written by the mortgagee to said mortgagors, to wit: "[Evans-Snider-Buel Co.'s Letter Head.] Union Stock Yards, South Omaha, Neb., April 20, 1899. Joint Letter. Messrs. Boyd & Litts, Boise City and Mountain Home, Idaho—Gentlemen: We beg to acknowledge receipt of Mr. Geo. W. Litts' letter of April 4th, asking our advice in regard to selling yearlings at \$2.00 per head. We are unable to say anything that will be of use to you, as we are not fully acquainted with the general conditions of your country, nor of your plans of working out your deal. We know of some sales of yearlings in Oregon at \$2.00 per head, but we are not posted upon the general feeling of sheep men in the Northwest country in regard to prices of sheep for the coming summer. However, it is our opinion that prices will not be as good as last year. Respectfully yours, Evans-Snider-Buel Co., by C. C. Daly, Manager." The yearlings mentioned in this letter, as shown by the evidence of Mr. Litts, are the sheep in controversy. The evidence shows that, in September preceding, said mortgagors, Boyd & Litts, sold a portion of the mortgaged sheep to said Knollin & Co., who were permitted to retain the same as their own by the mortgagee without any release of the mortgage being given by said mortgagee. A careful consideration of all of the evidence introduced before the jury convinces us that the jury were justified in coming to the conclusion, which they must have reached, that the sale made by said mortgagors on April 14, 1899, and completed by delivery

on April 19, 1899, was made by the mortgagors with the consent of the mortgagee.

At the close of the plaintiff's evidence the defendants made a motion for nonsuit in the following words, to wit: "Defendants make motion for a nonsuit on the ground that the purchasers of the sheep and the agents of plaintiff examined the records, and knew of the mortgage, and purchased the sheep, and with knowledge they made this contract of purchase, and it is not claimed that the mortgage is paid or money ever tendered." This motion was denied, and this action of the court is the ground upon which the appellants base their first assignment of error. This motion was properly overruled. Actual knowledge of the existence of the mortgage could not defeat the purchase or affect the rights of the purchasers, where the sale is made with the consent of the mortgagee. The consent of the mortgagee to a sale of the chattels mortgaged waives the lien of the mortgage as to one who purchases from the mortgagors. It is true that the consent to a certain specified portion of mortgaged chattels is not a consent to other portions. But in the case at bar the evidence was sufficient to justify the jury in finding that the mortgagee did consent to a sale of such portions thereof as the mortgagors might desire to sell.

The second assignment of error relates to the introduction of certain letters from the mortgagee to the mortgagors, in which the said mortgagee not only advises the sale of the sheep mortgaged in lots, but insists upon such sales. These letters were introduced over the objection of appellants, who excepted thereto. It is argued that owing to the fact that these letters were written prior to the last mortgage, which was executed October 27, 1898, they were for that reason irrelevant, and this is the ground upon which their introduction was excepted to, as shown by the record. We think that these letters were proper evidence, and that their admission was not error. As heretofore stated, the parties all along treated the various mortgages and acts thereunder as one continuing transaction, and the answer of the appellants so treated them, and it was upon this ground that the trial court evidently admitted said letters in evidence.

The third assignment of error is based upon the ground that the evidence is insufficient to sustain the verdict. We cannot agree with the appellants upon this contention. What we have heretofore said disposes of this alleged error, and makes it unnecessary to further review the evidence. Suffice it to say that we have given our most careful attention to the evidence, and think that it sustains the verdict.

The fourth assignment of error is that the verdict is too vague and indefinite to support the judgment. We do not think so. It is, however, unnecessary to enter upon a discussion of this question, for the reason that

the record does not show that this question was raised before entry of judgment. In *Stock Co. v. Delamue*, 2 Idaho, 1017, 29 Pac. 97, this court held that this question could not be raised after judgment. In that case this court said: "Another answer to the contention of plaintiff is that it comes too late. Objections to the form of the verdict should be made before judgment. If a verdict can be understood, it will be sustained, although informal. The language should be so construed as to sustain the verdict if possible." The plaintiff sued to recover 7,441 sheep of a certain brand, described in the complaint, of the value of \$2 per head. On the trial it was expressly agreed as follows, to wit: "The value of each head of sheep was admitted to be \$2 per head, and it was admitted that there was no dispute as to the number of sheep purchased by A. J. Knollin & Co. of Boyd & Litts, if they purchased any, and that the number that they purchased, and took in the first instance under such purchase, was seven thousand four hundred and forty-one sheep, of the value of two dollars per head." The verdict complained of is in words and figures as follows, to wit: "We, the jury in the above-entitled cause, find for the plaintiff for the return of the property set forth in the complaint, or, if return cannot be had, then the value of the same, which we assess at \$2.00 per head." We think that under the pleadings, and under said stipulation, said verdict "can be understood."

The fifth assignment of error is based upon alleged errors in giving instructions to the jury. We have carefully examined the instructions, and think that they, in the main, gave to the jury the law of the case correctly. The instructions were to the effect that the mortgagors, with the written consent of the mortgagee, could sell the mortgaged property so as to relieve it of the mortgage lien; that consent to sell a specified portion only did not give consent to sell other portions not specified. And, at the request of the appellants, the court instructed the jury that a sale of any portion of the mortgaged chattels by the mortgagors, without the written consent of the mortgagee, would be void. This is not the law, as such sale would convey the title subject to the mortgage lien.

The court also instructed the jury, at the instance and request of the appellants, that "if the mortgagor is permitted to sell the mortgaged property by the mortgagee on condition that the mortgagee shall receive all the proceeds of the sale, and release the property from the mortgage if requested so to do, such proceeding does not invalidate the mortgage." It is now contended that the instructions are contradictory, for which reason a reversal should be had.

The last instruction is, apparently, in conflict with the main instructions, but such conflict is one in appearance only. Such con-

sent on the part of the mortgagee to a sale by the mortgagor waives the lien of the mortgage to the extent of the sale so made, but does not invalidate the mortgage, or waive the lien thereof, as to the unsold mortgaged property. This instruction being asked by the appellants, they cannot now be heard to complain thereof.

The instruction that the sale of any portion of the mortgaged property by the mortgagors, without the written consent of the mortgagee, is void, is erroneous, as above stated; but, being requested by the appellants, they will not be heard now to complain, and especially so as it could and did do the appellants no harm. The verdict cannot be disturbed on account of said instructions. Whatever error was made in giving the instructions was in favor of, and not prejudicial to, the appellants.

The appellants contend that their motion for a new trial should have been granted because they had newly-discovered evidence. We have carefully examined the affidavits of the witnesses used on the motion for new trial, and think that the so-called newly-discovered evidence is, in the main, cumulative, and that none of it was beyond the reach of the appellants, who, by proper diligence, could have produced it at the trial. The affidavits do not show such surprise as will warrant the granting of a new trial. We think that the district judge did not, in denying the motion for a new trial, abuse that discretion vested in him by law, and we are not warranted in reversing the said order upon this ground.

Appellants contend that the verdict should be set aside, and a new trial granted, because women were drawn upon a regular panel of the jury. It is argued that women are not competent jurors in this state. Conceding this to be the law, can we reverse this case, and send it back for a new trial, simply because women were drawn and summoned on the panel of the jury? The record shows that no woman served on the jury that tried this case. It does not appear that the appellants were prejudiced by reason of the fact that women were summoned on the regular panel, as they did not exhaust their peremptory challenges. Their rights were not affected, and we cannot reverse for errors which do not prejudice the substantial rights of the complaining party. Having accepted the jury while they yet had peremptory challenges which they had not exercised, appellants should not be heard to complain, after verdict, that women were drawn and summoned on the regular panel. For the reasons herein stated, the judgment and order denying the motion of the appellants for a new trial, appealed from, are hereby affirmed, with costs of appeal to the respondent.

HUSTON, C. J., and SULLIVAN, J., concur.

(38 Or. 462)

ELLIS v. FRAZIER, Sheriff and Ex Officio Tax Collector.

(Supreme Court of Oregon. Jan. 28, 1901.)

TAXATION OF BICYCLES—CONSTITUTIONALITY OF STATUTE—SPECIAL STATUTE—UNIFORMITY OF TAXATION—DOUBLE TAXATION.

1. Laws 1899, p. 152, authorizing a tax of \$1.25 on bicycles within certain counties only, for the purpose of constructing, maintaining, and repairing bicycle paths on highways and in other places, creates a tax, and not a license, and is a local act, in violation of Const. art. 4, § 23, subd. 7, prohibiting special laws for laying, opening, and working on highways.

2. Laws 1899, p. 152, authorizing a tax of \$1.25 on bicycles, without regard to their value, is a violation of Const. art. 9, § 1, which provides that the legislative assembly shall provide uniform and equal rates of assessment and taxation.

3. Laws 1899, p. 152, authorizing a tax of \$1.25 on bicycles, is in violation of Const. art. 1, § 32, which provides that all taxation shall be equal and uniform, since as bicycles are taxable under Laws 1893, p. 6, authorizing the assessment of real and personal property, it is a double taxation on bicycles, from which other property is exempt.

Appeal from circuit court, Multnomah county; A. F. Sears, Judge.

Action by J. A. Ellis against William Frazier, as sheriff and ex officio tax collector. From a judgment in favor of plaintiff, the defendant appeals. Affirmed.

This is an action to recover the possession of a bicycle, or the sum of \$10 as its value, in case possession thereof cannot be had, and the further sum of \$5 damages for its alleged unlawful seizure and detention. The facts are that the defendant, as sheriff of Multnomah county, appointed one J. W. Johnson as bicycle tax collector therein, who on June 22, 1900, by reason of the plaintiff's failure to pay a special tax of \$1.25 levied upon all bicycles used in said county, seized plaintiff's bicycle, and refused to surrender it, except upon the payment of said tax, and the further sum of \$1 as a fine for having neglected to pay the same. The complaint is in the usual form, and also alleges that the act of the legislative assembly under which such seizure was made is violative of certain provisions of the constitution, particularly enumerating them. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, and the defendant declining to plead further, judgment was given as demanded, and the defendant appeals.

Geo. E. Chamberlain, for appellant. W. D. Fenton and R. A. Letter, for respondent.

MOORE, J. (after stating the facts). The question presented for consideration is whether the act of the legislative assembly approved February 18, 1899 (Laws 1899, p. 152), imposing in certain counties a tax of \$1.25 upon bicycles, contravenes the constitution of the state, thereby rendering any of the provisions of said statute void. It

may be safely said that a court of last resort, in construing a statute, will place its decision upon other grounds if possible, rather than to annul the act of a co-ordinate department of the government; the rule being well settled in this state that an act of the legislative assembly will not be declared void, in whole or in part, unless its incompatibility with the organic law is apparent and free from doubt, every reasonable intendment being invoked to uphold the validity of the statute. *King v. City of Portland*, 2 Or. 146; *Cline v. Greenwood*, 10 Or. 230; *Cresap v. Gray*, 10 Or. 345; *Crowley v. State*, 11 Or. 512, 6 Pac. 70; *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533; *Deane v. Bridge Co.*, 22 Or. 167, 29 Pac. 440, 15 L. R. A. 614; *State v. Shaw*, 22 Or. 287, 29 Pac. 1028; *Irrigation Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171.

The opinion of Mr. Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, has forever set at rest the principle that a written constitution enacted by the sovereign power is the supreme law of the land, and binding alike upon each department of the government, and, however delicate the task may be, the duty of declaring the supremacy of the organic law is imposed upon the judiciary whenever, in an appropriate manner, the repugnance of the statute is made a material issue by a party who has sustained, or will incur, injury by its enforcement. Keeping these rules of construction in view, we will examine the case made by the complaint, in which it is alleged, *inter alia*, that the act of the legislative assembly, under which the plaintiff's bicycle was seized and detained, violates subdivision 7 of section 23 of article 4 of the constitution of the state.

The provision of the organic law, invoked to annul the act in question, is as follows: "The legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say: * * * (7) For laying, opening, and working on highways, or for the election or appointment of supervisors." The act in question, the validity of which is challenged by the judgment complained of, provides, in effect, that the county court or board of county commissioners of each county shall, on or before the 1st day of March of each year, levy a special tax of \$1.25 upon each bicycle within its or their jurisdiction, except such as are kept for sale, and have not been sold, loaned, traded, or in any manner previously disposed of. Section 1. Immediately after said levy the sheriff shall appoint a bicycle tax collector (section 2), who shall collect said tax, and issue tags, which shall be attached to the bicycles of the persons paying the taxes thereon. Section 4. The absence of such tag from any bicycle is deemed *prima facie* evidence that the tax has not been paid,

and upon the discovery thereof the tax collector may seize and hold all such bicycles until said tax and the further sum of \$1 as a fine have been paid. Section 5. For the collection of said tax there shall be allowed not to exceed 25 cents of each and every tax collected. Section 8. The money collected in pursuance of the levy of said tax shall be deposited in the county treasury, and known as the "Path Fund," which shall be used to construct, maintain, and repair, along the public highways, "and such other places as may be thought advisable by the county court or board of county commissioners within the county, such suitable paths for the use of bicycles and pedestrians as may be determined upon by the county court or board of county commissioners." Section 9. "The provisions of this act shall not apply to the counties of Baker, Clatsop, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Morrow, Polk, Sherman, Union, Umatilla, Wallowa, and Wheeler." Section 13.

As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is not inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations. *Ex parte City Council of Montgomery*, 64 Ala. 463; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *Baker v. City of Cincinnati*, 11 Ohio St. 534. The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. *Ex parte Gregory*, 54 Am. Rep. 516. "The distinction between a demand of money, under the police power, and one made under the power to tax," says Judge Cooley, "is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power." *Cooley, Tax'n*, 396. It was held, in the case of *In re Wan Yin* (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expenses attending the regulation of the business, the burden is a tax, and not a license. So, too, in *City of St. Paul v. Traeger*, 25 Minn. 248, the common council of St. Paul having passed an ordinance requiring a license fee of \$25 from every peddler of vegetables in the streets of the city, and no regulation or restraint having been imposed upon the

manner of conducting the business, it was held that the exaction, being so much in excess of the reasonable expense of issuing the license, was a tax levied upon the business for revenue. "It is therefore conclusive," says Mr. Tiedeman, in his work on State and Federal Control of Persons and Property (volume 1, p. 495), in commenting upon the distinction between a tax and a license, "that the general requirement of a license, for the pursuit of any business that is not dangerous to the public, can only be justified as an exercise of the power of taxation, or the requirement of a compensation for the enjoyment of a privilege or franchise." The production of a revenue, however, is not conclusive evidence of an exercise of the taxing power; for it has been held that the legislative assembly may authorize municipal corporations to issue licenses which incidentally result in securing revenue. *Cooley, Const. Lim.* (5th Ed.) *201; *Ex parte Mirande*, supra; *City of Leavenworth v. Booth*, 15 Kan. 472; *Vansant v. Stage Co.*, 50 Md. 330; *Flanagan v. Treasurer*, 44 N. J. Law, 118; *State v. Bean*, 91 N. C. 554. The use of a bicycle by its owner as a means of cheap and speedy locomotion in attending to his business or promoting his enjoyment by reasonable exercise, thereby contributing to his health and prolonging his life, cannot well be classed as an occupation; and if it were it is not necessarily dangerous to the public, unless the absence of noise in its operation, and consequent liability to come in contact with pedestrians, make it so. The act in question does not attempt, in any manner, to regulate the speed of bicycles, or to require a bell to be attached thereto to be rung when approaching travelers, or to carry a lighted lantern at night to avoid collisions, and hence it cannot be said that the statute was enacted for protection.

Whatever the rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license.

Referring to the principal objection urged

against the statute, it will be seen that the act applies only to the counties of Benton, Clackamas, Columbia, Jackson, Marion, Multnomah, Tillamook, Wasco, Washington, and Yamhill, and hence the first inquiry which is naturally evoked by the clause of the constitution to which attention has been called is whether the act under consideration is a local law. A local act is confined in its operation to the property and persons of a limited portion of the state. *People v. O'Brien*, 38 N. Y. 183. "A local act," says Earl, J., in *People v. Railroad Co.*, 86 N. Y. 1, "is one operating only within a limited territory or specified locality." In *Maxwell v. Tillamook Co.*, 20 Or. 495, 26 Pac. 803, Mr. Justice Lord, in defining the term, says: "Statutes are sometimes distinguished as general or local, according to whether they are intended to operate throughout the entire jurisdiction, or only within a single county or other division or place. A law which applies only to a limited part of the state, and the inhabitants of that part, is local." The provisions of the bicycle tax law are operative only in 10 of the 33 counties of the state, and, under the definition of the term as adopted by this and other courts of last resort, the act in question is undoubtedly a local law.

The next inquiry is whether the act provides for laying, opening, or working on highways. A way may be public, though suitable only for footmen and horses, or when not suitable for all carriages (*Rex v. County of Salop*, 13 East, 95; *Rex v. Lyon*, 16 E. C. L. 243; *Tyler v. Sturdy*, 108 Mass. 196; *Railway Co. v. Boston*, 140 Mass. 87, 2 N. E. 943); and hence a bicycle path is a highway for bicyclists and pedestrians. It will be remembered that section 9 of the act in controversy not only authorizes the construction of bicycle paths along the public highways, but also in such other places as may be thought advisable by the county court or board of county commissioners. If the construction of a bicycle path along the public highway be deemed a reasonable use of an existing right (*Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171), the location of these paths in such other places as may be thought advisable by the county court or board of county commissioners would seem to be the laying out of a highway by means of a local law, which is in that respect, at least, inhibited by the constitution (*Maxwell v. Tillamook Co.*, supra). But, however this may be, the question is not necessarily involved herein; for it does not appear that any portion of the fund arising from the bicycle tax was being expended in laying out paths in any other places than along the public highway.

It is alleged in the complaint that the act in question is violative of section 1 of article 9 of the constitution, which, so far as applicable herein, is as follows: "The legis-

lative assembly shall provide by law for uniform and equal rates of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," etc. The value of the bicycle the possession of which is sought to be recovered in this action is alleged to be the sum of \$10. The transcript does not show whether the value thus alleged is greater or less than ordinary prices charged for bicycles by dealers therein, but, as the use of these vehicles must tend to their destruction, we think it may be safely assumed that the price of a bicycle depends upon its age, pattern, condition, workmanship, and the material of which it is composed, and that its value, being dependent upon so many elements, must necessarily be variant. The act under consideration imposes a tax of \$1.25 upon each bicycle in use, irrespective of its value, and it remains to be seen whether such a burden is equal and uniform. In *Bright v. McCullough*, 27 Ind. 223, under a clause of the constitution of Indiana prescribing that the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, etc., it was held that a specific tax of one cent on each acre of taxable land in a certain township, levied in pursuance of an act of the general assembly, which pretended to authorize the assessment of a tax not to exceed 1¼ cents on each acre of taxable land for road purposes, was inhibited by the organic law of that state. In *Smith v. Commissioners*, 117 Ala. 186, 23 South. 141, it was held that an act of the legislative assembly levying a tax of one dollar per annum upon each road wagon in Marshall county, for the benefit of the public roads, violated the constitutional provision of Alabama prescribing that all taxes shall be assessed in exact proportion to the value of such property. In *Board v. Dunn* (Colo. Sup.) 40 Pac. 357, it was held that an act of the legislative assembly of Colorado, providing that nonresidents grazing cattle in any county of that state should pay 50 cents per head therefor in lieu of taxes, was void, as being in conflict with the constitution of that state, which prescribed that all taxes should be uniform. In *Railway Co. v. State*, 49 Ohio St. 189, 30 N. E. 435, it was held that an act of the legislature of Ohio, requiring every corporation or company operating any part of a railroad within the state to pay the commissioner of railroads and telegraphs a fee of one dollar per mile for each mile of track operated within the state, contravened the constitution of that state, which declared that laws should be passed taxing by a uniform rule all moneys, credits, investments, and also all real and personal property, according to its true value in money. The

value of all bicycles not being the same, the tax of \$1.25 levied upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted.

It is also alleged in the complaint that the act in question contravenes section 32 of article 1 of the organic law, which reads as follows: "No tax or duty shall be imposed without the consent of the people or their representatives in the legislative assembly; and all taxation shall be equal and uniform." The statute makes it the duty of the assessor of each county to procure from the county clerk a blank assessment roll at the proper time, and to assess every person in the county in which he resides, on the 1st day of March of the year when the assessment shall be made, for real and personal property then owned by him within such county. Laws 1893, p. 6. Invoking the presumption that official duty has been regularly performed (Hill's Ann. Laws Or. § 776, subd. 15), plaintiff's bicycle was assessed for the year 1900, thereby rendering him personally liable for the state, county, school, and other taxes imposed thereon. In *Johnson v. Mayor, etc.*, 62 Ga. 645, it was held that the city of Macon, having taxed the property of the people doing business therein, did not prohibit the imposition of a special tax upon the business of such persons, but that a tax on a wagon kept for private use, and not employed in the business of its owner, was not a tax on the business, but on the property, rendering such tax void on account of its duplicity. In *Livingston v. City of Paducah*, 80 Ky. 656, it was held that a specific tax imposed upon all vehicles used in conducting or in connection with the regular business of the person or persons so running such vehicles was a proper exercise of the power to license an occupation, but that the statute pretending to authorize the common council of the city of Paducah to impose a tax upon all vehicles kept for family use, and which property had been regularly assessed and was liable to ad valorem taxes, was a double taxation of that class of property, rendering the clause of the charter in that respect void. So, too, in *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, it was held that an ordinance passed in pursuance of a clause of the city charter authorizing the common council to regulate the use of the streets, whereby a license fee was imposed upon all bicycles irrespective of their value, and used for private purposes exclusively as a means of locomotion, and which had been regularly assessed, and the owners thereof made liable for taxes thereon, was double taxation, and therefore void. The exaction of \$1.25 imposed upon all bicycles, in addition to the ad valorem tax levied thereon, subjects such property to a burden from which other classes are exempt, and in this respect the double

tax contravenes the clause of the constitution last adverted to. From these considerations, it follows that the judgment is affirmed.

(38 Or. 480)

STAGER v. TROY LAUNDRY CO.

(Supreme Court of Oregon. Jan. 28, 1901.)

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—SUFFICIENCY OF FACTS—CONTRIBUTORY NEGLIGENCE—NEGLECT OF MASTER—INSTRUCTIONS.

1. A servant was injured by having her hand caught between the rollers and the drum of a mangle while feeding the same, and she contended that she would not have received the injuries if the guard plate had been properly adjusted. The plate was too high, allowing her hand to pass under it and into the machine. She testified that, relying on the guard rail, she did not realize that there was any danger in operating the machine. The plate was adjusted by the managers, and employees were forbidden to change the adjustment. *Held* not to show an assumption of risk which would authorize a nonsuit on the motion of the master in an action against him for such injuries.

2. Where a servant sues for an injury received by her hand being caught between the rollers and the drum of a mangle, and it is shown that the injury was aggravated by the fact that it remained in the machine for some time because the managers did not know how to operate the machine to release it, but that they did what they could to extricate the plaintiff, it is error to instruct, in an action against the master, that, if the plaintiff was in fault and brought the injury on herself, she was still entitled to recover, if the defendant failed to do any act which would minimize her injury.

Appeal from circuit court, Multnomah county; A. F. Sears, Judge.

Action by Barbara Stager against the Troy Laundry Company for injuries received while in the employ of the defendant. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action to recover damages for injuries received by plaintiff while in the employ of the defendant, and engaged in the service of feeding textile fabrics through a mangle for the purpose of drying and smoothing them. The action is based upon the alleged negligence of the managing agents of the defendant, in adjusting or placing the guard plate too high, thereby allowing too much space or too large an opening between the guard and the table, and in their want of knowledge touching the mechanism of the machine, particularly in the use of the tension screws for raising and lowering the rollers upon the cylinder. The defense is that the danger was obvious and incident to the service in which the plaintiff was engaged, the risk was one which she assumed in her employment, and therefore that the defendant is not liable for the injury sustained. Judgment was for the plaintiff, and the defendant appeals. John Tait, a witness in behalf of the plaintiff, testified, in substance, that he was manager of the company, and had been for 4½ years; that it had a

machine, known as the "Wendell Annihilator," in operation 12 days before the accident, which occurred May 14, 1898; that what knowledge he had of the machine was obtained from seeing it set up by the agent, who was a practical man in the business, and from seeing one of the same make operated for an hour in San Francisco, but that there were other machines built practically upon the same principle, with which he had had experience for the last 10 years. The plaintiff testified: That she had been living in Portland about 23 years, had been in the employ of the laundry company 4 years, and at the time of the accident was feeding the Wendell Annihilator. That her fingers came in contact with the rollers, and, because the guard was no protection whatever, it allowed her hand to get caught, so that it was burned and crushed. That, if the guard had been any protection, it would have skinned the whole back of her hand before it could have come in between the rollers, and that the guard should not have been any higher than would allow a sheet or tablecloth to go through. That after her hand was in there was plenty of help present, but they did not know how to release her. That Mr. Sherman, president of the company, afterwards said that, if they had properly understood the machine, her hand would not have been burned so badly; that the machine was a new one, and they did not fully understand it, and after examination he found it could have been loosened quicker if he had known how to do it. That, in her estimation, the guard rail was too high, and allowed her hand to get caught in the machine, and, if it had been any protection, the accident would not have happened. That she could not say just how high the guard was, but it should not have been any higher than was necessary to let the fabrics go under. That her hand was in the mangle from 3 to 5 minutes, and before she could be released they had to get a crowbar and pry the roller up. That she had been operating the mangle about 2 weeks. On cross-examination she testified that she had worked on other mangles used by the company 5 or 10 minutes at a time, off and on, during her employment; that these were not protected, and she did not realize the danger with this machine, because there was a guard rail for protection; that during the time she was at work the guard was taken off for about an hour, at the request of her immediate superintendent, and with Mr. Sherman's consent, but when Mr. Tait came back he said it was too dangerous, and directed it to be put back; that the machine worked about the same with the guard off as with it on, all the difference being that in the one case the goods passed directly between the rollers, and in the other they passed beneath the guard; that her hand rested up against the guard, but in no way touched it while it went under; that, from her information, the guard was adjust-

ed by tension screws; that Mr. Sherman had charge of it, and the operators were not permitted to change the adjustment. Reuben Francis described the important features of the mangle. It consists of a large cylinder, 8 feet long and 4 feet in diameter, heated by steam, above which revolves a set of small rollers. A table is arranged in front, and against the cylinder; and a guard plate, consisting of an iron bar convex in form, 1½ inches in width, the length of the machine, attached at the ends by means of bolts passing through slots, so as to be adjustable, is placed in front of the line of contact between the cylinder and the first roller. At the time witness saw it the lower edge was set about an inch and a half above the table, and about the same distance from the aperture or line of contact; the oval side being towards the operator. When the mangle is in motion the cylinder revolves upward from the operator, and the rollers towards him. The fabrics are fed to the machine under the guard rail. Thence they come in contact with the cylinder, which carries them upward between the rollers, and are dried and ironed by the heat and pressure applied. This is, in substance, all the evidence introduced by the plaintiff. When she rested her case, defendant moved for a nonsuit, which was overruled, and such action of the court is assigned as error.

John M. Gearin, for appellant. Henry E. McGinn, for respondent.

WOLVERTON, J. (after stating the facts). A servant is understood to assume the ordinary risks incident to the particular service in which he voluntarily engages, to the extent those risks are known to him at the time of his employment, or should be readily discernible to a person of his age and capacity in the exercise of ordinary care and prudence. Where the employment is obviously dangerous and hazardous, and conducted in a way fully known to the servant at the outset, he assumes the risk incident to the conduct in that way or manner, although a safer method was known or could have been adopted. *Shear. & R. Neg.* (5th Ed.) § 185. Compensation is supposed to be adjusted with reference to the hazardous nature of the service, and the employment is entered upon with a view to the discharge of a particular duty; hence the risks incident are assumed by an implied stipulation under the employment. The same considerations, however, do not apply to risks which arise subsequent to the employment and during the course of the service. These the employé may avoid by quitting the service. If he voluntarily continues, however, without complaint or objection, after knowledge or notice of their existence, under conditions by which he is chargeable with an appreciation of the danger, and where ordinary prudence would require of him a dif-

ferent course, he is held also to take upon himself the responsibility entailed by the risk he continues to incur; and this applies to perils engendered by defects in appliances due to the master's fault. *Shear. & R. Neg.* (5th Ed.) §§ 209, 209a. The rule is clearly stated by Mr. Justice Devens in *Leary v. Railroad Co.*, 139 Mass. 580, 584, 2 N. E. 115, 116. He says: "The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." The rationale of this latter rule is not entirely settled, but the opinion, which appears to be adequate to the purpose, is that, where two negligent acts conduce to an injury, the responsibility attaches to the one that stands as the proximate or immediate cause. Thus, if a master culpably suffers defects in appliances to exist, that may be a contributory cause to an injury ensuing by reason of the use of such appliances; but if a servant, being cognizant of their defective character, voluntarily consents to continue in their use, his act is one of negligence, also, and, being the nearest, constitutes the proximate cause, which shifts the liability from the master, and the servant will not be heard to complain. In such a case he cannot hold the master responsible, although culpable, because his own negligence is the direct and immediate cause of the injury. *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. 464. It will be observed in this connection (and for which the case just cited is authority) that one does not voluntarily assume a risk who merely knows that there is some danger, without at the same time appreciating the danger to which he is subjecting himself by accepting or continuing in the service, while, on the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. Sometimes the circumstances may show, as a matter of law, that the risk is understood and appreciated. At other times they may present a question of fact for the jury. It is always the duty of the master to provide his servant reasonably safe tools and appliances with which to work. If he fails in this, he may be charged with culpability, unless he is relieved by the act of the servant in accepting or continuing in the service, with adequate knowledge of defects and a due appreciation of the attending danger. Risks which are incident to the business must not be confounded with such as are denominated "obvious." The former sort comprises those which accompany or arise from the natural or usual method of conducting the particular business,

and has more special relation to perils which attend the business generally, while the latter includes such as are manifest to the sense of observation, open and readily discernible, whether they arise from the nature of the business, the particular manner, in which it is conducted, or the use of defective or unsafe appliances. Now, it is urged that the risk to which plaintiff subjected herself was both an incident to the business and obvious. The authorities appear to be uniform and conclusive that, where a machine similar to the Wendell Annihilator in principle is operated without a guard plate, the operator assumes the risk; for in such case the method of operation is known, and the peril patent. *O'Connor v. Whittall*, 169 Mass. 563, 48 N. E. 844; *Hanson v. Hammell* (Iowa) 77 N. W. 839; *Greef v. Brown* (Kan. App.) 51 Pac. 926; *Jones v. Roberts*, 57 Ill. App. 56; *Berger v. Railroad Co.* (Minn.) 38 N. W. 814; *Hoyle v. Laundry Co.* (Ga.) 21 S. E. 1001; *Hickey v. Taaffe* (N. Y. App.) 12 N. E. 286. In the case at bar there was a guard plate, which was evidently designed to lessen, if not to obviate, the danger incident to feeding fabrics within the aperture between the rollers, and, if properly adjusted, would, no doubt, have afforded some protection; and it was the duty of the master to see that it was properly adjusted. *Woods v. Railroad Co.* (Sup.) 42 N. Y. Supp. 140. Indeed, the manager of the defendant realized as much, for he had forbidden the employees to regulate the machine in any form. The evidence of the plaintiff tends to show that the guard was set an inch and a half above the table, and an inch and a half in front of the aperture. She says her hand went under the guard without touching it, and that, if it had been properly adjusted, it would have skinned the whole back of her hand. If such was the adjustment, the guard was little protection, except as it may have served as a warning that there was danger behind it, for a woman's hand will readily pass within the space of an inch and a half as far as the plaintiff's was shown to have been drawn in. She further testified that in her estimation the guard was too high, and that, if it had been in any manner a protection, her hand would not have been caught; that she had worked at other mangles without the guard rail on, and did not realize the danger with this machine, because of this guard plate for protection. Thus the testimony presents the question as to whether the guard plate was properly adjusted. It is insisted, however, that, whether it was or not, the danger behind it was so apparent and obvious that the court should say, as a matter of law, that the plaintiff assumed the risk attending the service. If the guard plate was so adjusted as to give absolutely no protection at all, and this was at once apparent, the case would not be different from one where there was no attachment of the kind, and the risk would be

obvious. But, if the adjustment does in fact give some protection, a prudent person would be led to place more or less reliance upon its availability; and, the nearer perfect the adjustment, the less would be the danger in operating the machine. It may or may not remove the danger entirely. If it does, then implicit reliance may be placed upon it, and no one need apprehend any danger from the service. So, therefore, the danger becomes a matter of degree, depending upon the manner of the adjustment of the guard plate, which, being attached, the plaintiff affirms, she supposed was a protection, and therefore did not appreciate the real danger. Under these conditions, we cannot say, as a matter of law, that she assumed the risk by accepting or continuing in the service, and the question was properly left to the jury for their determination. True, the plaintiff operated the machine for an hour or so with the plate detached, but the manager directed it to be put back, saying it was too dangerous. The fact, however, was not calculated to warn her of the danger with the guard on. If it had any tendency, it was rather to lead her to believe that the guard would protect her, and thus cause her to pay less heed to the real danger. So we conclude the nonsuit was properly denied.

The next question in the case arises upon an instruction given to the jury as follows: "If in this case the plaintiff brought this injury upon herself by her own fault, there having been negligence on the part of this defendant or not, as the case may be, if it has been shown by a preponderance of the testimony that through some other acts of the defendant it failed to minimize it,—failed to lessen the effects of the injury, whereby the plaintiff sustained an additional injury than otherwise would have been incurred,—that would offer a claim for consideration, which should be regarded by the jury." This instruction is clearly erroneous, for the jury are thereby told that, even if plaintiff was at fault and brought the mischief upon herself, she was nevertheless entitled to recover, if the defendant failed to do any other act that would minimize her injury. We presume this was given in view of the testimony adduced from which it is argued that the defendant's managers were not sufficiently acquainted with the technical mechanism of the mangle to be able to release the plaintiff's hand as quickly as they would if better informed in relation thereto, thus prolonging her suffering and adding to her injury. Proprietors and managers are not required to possess themselves of technical and exact knowledge of the detailed mechanism and workings of machinery, with a view to extricating persons from perils to which they may subject themselves through their own folly or negligence. So that it cannot be charged against the defendant that it was guilty of negligence in not having a person possessed of such knowledge convenient

when the peril arose, so as to extricate the plaintiff from her dilemma. It is unusual to anticipate accident, and to provide for the most speedy relief when such an exigency arises. There is no intimation, either by the evidence or the argument of counsel, that the defendant's managers willfully or wantonly prolonged the sufferings of the plaintiff, while it must be conceded that they did all they could, with their knowledge of the machinery, to extricate the plaintiff as quickly as possible. We do not desire to be understood as intimating that they did not possess adequate knowledge to have relieved her in the most speedy manner possible, under the attending circumstances of the accident; but it seems plain that they did all they could, and hence are not chargeable with negligence in prolonging her suffering and thereby adding to her injury. For this error the judgment will be reversed, and the cause remanded for a new trial.

(33 Or. 473)

CHRISTENSON et al. v. NELSON et al.

(Supreme Court of Oregon. Jan. 28, 1901.)

APPEAL — HARMLESS ERROR — EVIDENCE — AMENDMENT—TENDER—CONDITIONAL CONTRACT—CONSTRUCTION BY JURY.

1. Where a complaint in an action to recover goods sold under a contract reserving the title in the seller alleged that the contract retained title till all payments "herein" mentioned had been made, and the cause of action was based on the failure of defendants to pay insurance premiums required by a subsequent provision of the contract, the fact that the answer admitted the contract as alleged did not render the action of the court in refusing to admit evidence of defendants' failure to pay such insurance premium reversible error; defendants having subsequently amended their answer by denying the contract as alleged, and alleging that it only required payment of sums "hereinbefore" mentioned; the contract, when introduced in evidence, being as alleged in such amended answer, and not as alleged in the complaint.

2. To allow the amendment of the answer was within the discretion of the court, since it was an obvious mistake.

3. The buyers in a conditional sale transferred their interest in the property to defendants. The sellers sued the defendants to recover the property. The defendants alleged and brought evidence to show that the transfer was made with the seller's consent. *Held*, that the written transfer was properly admitted in evidence, though it passed no title, since the buyers had a transferable interest, and moreover the seller's consent would make the transfer binding on them.

4. In an action by vendors to recover property sold on a conditional contract, evidence of a tender of certain money due thereon, though not kept good by payment into court, was properly admitted, since it was an offer of performance, and hence a defense to an action to recover the property on account of a breach of contract.

5. Where the vendees in a conditional sale transferred their interest in the property to third parties, the latter had a right to complete the purchase, the vendors were bound to accept payment from them, and evidence of the tender of such payment was properly admitted in a suit by the vendors to recover the property.

6. Where a tender was refused because an independent amount claimed was not paid, evidence of such tender could not be excluded on the ground that it did not include interest.

7. Where tender was made of the balance unpaid on a contract, though no installment was then due, evidence of such tender was properly admitted as an offer of performance, since a purchaser might perfect his title at any time by payment of the price.

8. Where the court improperly submitted to the jury the construction of a contract, but they construed it correctly, the error was harmless, and the verdict would not be disturbed.

Appeal from circuit court, Multnomah county; Arthur L. Frazer, Judge.

Action by John P. Christenson and Daniel J. McMaster, partners as the Christenson-McMaster Machinery Company, against J. R. Nelson and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

This action was commenced October 15, 1898, to recover possession of personal property. The complaint alleges, in substance, that on the 11th day of May, 1898, the plaintiffs delivered to Gustave Sundberg and Peter Lind certain planing-mill machinery, under an agreement by which they were to pay \$535 therefor,—\$225 at the time of delivery, \$50 on July 10th, \$100 on October 10th, and \$160 on November 10th following; that such contract further provides that the title to the property "shall be and remain in the party of the first part [plaintiffs] until all of the payments therein mentioned have been fully made, and it is further agreed that the party of the first part shall have said machinery insured in its own name, and the parties of the second part shall pay for the same"; that Sundberg and Lind have neglected to comply with their contract, in that they failed to pay the insurance on such property as agreed, or to make the payments as provided in such contract, and, without the consent of the plaintiffs, have delivered possession of the property to the defendants, who forcibly and unlawfully withhold and detain the same from the plaintiffs, to their damage in the sum of \$770, which is alleged to be its value. The defendants in their answer admit "the partnership as alleged in plaintiffs' complaint, also the conditional sale of the property set forth in plaintiffs' complaint," and for a further defense aver that on the 1st of August, 1898, Sundberg and Lind, with the knowledge and consent of the plaintiffs, for a valuable consideration, sold and transferred all their right, title, and interest in and to the property in dispute, and delivered possession thereof, to the defendants; that it was agreed, as a part of such contract, that the defendants should make the deferred payments due plaintiffs under the agreement between them and Sundberg and Lind, in pursuance of which, on August 3, 1898, they made the payment of \$50 due July 10, 1898, which was accepted and receipted for by the plaintiffs; that on the 10th day of October, 1898, defendants

tendered to the plaintiffs the amount then due, and have ever since been, and now are, ready and willing to pay the same, and bring the amount into court, with their answer, and deposit it with the clerk for the use and benefit of the plaintiffs. A reply was filed, denying specifically all the new matter set up in the answer. On the 21st of November, 1898, plaintiffs filed a supplemental complaint, alleging that the payment of \$160 falling due November 10th had not been made, nor any part thereof. As an answer to the supplemental complaint, the defendants admit the truth of the facts set forth therein, but allege "that since the 15th day of September, 1898, the plaintiffs have at all times refused to accept from defendants any of the payments due on said agreement, and that defendants have at all times strictly complied with the terms of said agreement, as to payments due thereunder, and tendered to plaintiffs all payments due thereunder, including payments set forth in supplemental complaint, on the date the several payments became due." The allegations of the supplemental answer having been put in issue by the reply, a trial was had, resulting in a judgment in favor of the defendants, from which the plaintiffs appeal, assigning as error the ruling of the trial court in the admission of testimony and in its instructions to the jury.

A. King Wilson, for appellants. John C. Leasure, for respondents.

BEAN, C. J. (after stating the facts). Upon the trial the plaintiffs offered to prove by Frank Dooley, an insurance agent, that on May 12, 1898, by the consent of plaintiffs and Sundberg and Lind, he insured the property in controversy for the sum of \$1,000, evidenced by a policy issued to the latter, and that the defendants in this suit assumed the payment of the premium of \$70. The court refused to admit such testimony, and, on motion of defendants' counsel, permitted the answer to be amended by interlineation so that the admission therein should read as follows: "Defendants admit the partnership as alleged in plaintiffs' complaint; also the conditional sale of the property set forth in the plaintiffs' complaint, except the word 'herein,' in line 18 of page 2 of said complaint, which in said original contract is 'hereinbefore,' and not otherwise." The refusal to admit such testimony and the allowance of the amendment constitute the first assignment of error. The amendment was evidently intended to correct an obvious mistake in the answer, and its allowance was manifestly within the power and discretion of the court. *Koshland v. Association*, 31 Or. 362, 49 Pac. 865; *Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Nunn v. Bird*, 36 Or. 515, 59 Pac. 808. Under the contract as alleged in the complaint, the title to the property in controversy was to remain in the plaintiffs

until all payments provided therein should be made, which the plaintiffs insisted included the insurance premium; and, under the admissions of the original answer, they contended they were entitled to the testimony of the witness Dooley. It was to obviate the effect of this admission that the amendment was allowed, and there was no reversible error in rejecting the testimony, although the contract between the plaintiffs and Sundberg and Lind had not at that time been offered in evidence. It was subsequently admitted, and, after setting out the terms of the payments for the machinery purchased, as alleged in the complaint, it stipulated that the title to the property "shall be and remain in the party of the first part till all of the payments hereinbefore mentioned have been fully made; and it is further agreed that the party of the first part shall have the said machinery insured in its own name, and the parties of the second part shall pay for the same. Interest on all deferred payments in this contract to be paid by the parties of the second part at the rate of ten per cent. per annum." It thus clearly appears that the payment for the insurance was not a condition precedent to the passing of the title, and hence that plaintiffs were not entitled to the evidence in reference thereto.

It is next insisted that the court erred in admitting in evidence the written transfer by Sundberg and Lind, made August 1, 1898, of their interest in the property to the defendants. This objection seems to be based on the admitted rule that under a contract of conditional sale the vendee cannot sell the property so as to pass a good title as against the vendor until the conditions are fulfilled. *Manufacturing Co. v. Graham*, 8 Or. 17; *Schneider v. Lee*, 33 Or. 578, 17 Pac. 269. But the answer alleges, and there was evidence tending to show, that the transfer was made with the consent and approval of the plaintiffs. If so, it was valid and binding upon them, and hence the testimony was competent on that ground. And, moreover, under a contract of the character now under consideration the vendee is entitled to the possession of the property, and to become the absolute owner thereof, upon complying with the terms of the contract. These are rights of which he cannot be divested by any act of the vendor, and which he can transfer to another in the absence of a stipulation in the contract to the contrary. The title to the property vests in the vendee upon the performance of the conditions of the sale, or in his vendee in the event that he has transferred his interest therein. *Benj. Sales* (7th Ed.) 300; *Carpenter v. Scott*, 13 R. I. 477; *Day v. Bassett*, 102 Mass. 445; *Crompton v. Pratt*, 105 Mass. 255; *Currier v. Knapp*, 117 Mass. 324; *Chase v. Ingalls*, 122 Mass. 381.

It is next asserted that the court erred in admitting evidence of a tender made by the defendants of the amount remaining due un-

der the contract. The testimony shows that on August 3, 1898, the defendants paid to the plaintiffs the installment due July 10th, and received from them a receipt in writing therefor; that on September 16th they tendered the entire balance remaining due, and renewed the tender, as to the partial payments, October 10th and November 10th, as they each became due; that the plaintiffs refused to accept either of the tenders so made unless the defendants would pay the \$70 premium for insurance and an open account of Sundberg and Lind for \$12. The objections to the admission of this testimony are (1) that the answer to the supplemental complaint does not allege that the tender of \$160 has been kept good by depositing the amount in court; (2) that the plaintiffs were not bound to accept the deferred payments from the defendants; and (3) that the tender did not include the interest on the deferred payments. So far as the first objection is concerned, it is sufficient to say that, as we understand the law, in a case of this character it is not necessary to keep the tender good by taking the money into court and depositing it with the answer. If the tender was properly made, it was the equivalent of payment, and was as much a discharge of the defendants' duty as an actual payment. In other words, it amounts to an offer of performance on the part of the defendants, and, if properly made, would be a defense to an action by the vendor to recover possession of the property on account of a breach of the contract. *Miller, Cond. Sales*, § 36. The second objection is without merit, because, as we have already seen, the defendants had a right to complete the purchase as the vendees of Sundberg and Lind. And so, also, is the third. The refusal to accept the tender was on the ground that defendants would not pay for the insurance and open account, and not because it did not include interest.

It is next urged that the court erred in admitting testimony tending to show a tender on the 16th of September, 1898, of the balance unpaid on the contract. The ground of this objection is that no money was then due. But in this class of cases the purchaser may perfect his title at any time before default by payment of the price, although it is payable by installments not yet due. *Cushman v. Jewell*, 7 Hun. 525.

It is next insisted that the court erred in submitting to the jury the construction of the contract between the plaintiffs and Sundberg and Lind, so far as it refers to interest upon deferred payments. It is elementary law that it is for the court, and not the jury, to construe and declare the legal effect of written contracts or instruments. *State v. Moy Looke*, 7 Or. 54; *Williamson v. Lumber Co.* (Or.) 63 Pac. 16. But it is also well settled that where a question of law has been improperly submitted to the jury for their decision, and has been correctly decided by them, the error is harmless, and their verdict

will not be disturbed. *Johnson v. Shively*, 9 Or. 333. Now it appears that in this case the jury construed the contract in accordance with the practical construction put upon it by the parties themselves. The question was whether "Interest on deferred payments" meant interest from the date of the contract, or from the time of the maturity of such payments, and the parties in their dealings adopted the latter construction. After the alleged transfer of the property to the defendants by Sundberg and Lind, they paid plaintiffs the installment due July 10th. At that time no interest was demanded or paid. So, too, objection to the subsequent tender of the other installments was put upon other grounds than insufficiency of the amount. Whatever, therefore, may be the technical legal construction of the language of the contract, standing by itself, the parties have given to it a practical construction, which the jury adopted; hence the error in submitting its construction to them was harmless.

Some objection is also made to the form of the verdict. But, as the record is silent, we must assume that the property was in possession of the defendants at the time of the trial, and, if so, the verdict is sufficient. *Nunn v. Bird*, *supra*. This disposes of the several assignments of error, and the judgment of the court below is affirmed.

(38 Or. 452)

KING v. HOLBROOK.

(Supreme Court of Oregon. Jan. 21, 1901.)

REFORMATION OF INSTRUMENTS—MISTAKE—MUTUALITY.

A written agreement respecting a sale of realty cannot be reformed by the grantor for mistake, where the grantee states that it correctly embodied the contract, and truly represented what he required as a condition precedent to the purchase, and the grantor's mistake arose from his failure to discover the plain letter of the agreement, which was not ambiguous.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Bill by A. N. King against C. A. Holbrook. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Benton Killin and C. A. Cogswell, for appellant. G. H. Durham and Thos. O'Day, for respondent.

WOLVERTON, J. Plaintiff seeks to reform an agreement entered into between himself and the defendant, June 23, 1898, which contains a stipulation that it shall be treated as a part of a deed of the same date from him to the defendant. The complaint proceeds upon the theory that there has been a mutual mistake as respects one of the conditions of the agreement, which requires that North Twenty-First street shall be opened to travel along the east line of the granted premises, it being alleged that it was the true understanding and agreement

of the parties that the land lying east of the tract conveyed should remain open only from the north side thereof to a point 108 feet from West Salmon street, and that, when said street shall be extended by the city authorities over the tract so agreed to be used as a way, it should be without expense to the defendant. Holbrook purchased the tract of land referred to for T. B. Wilcox, which is bounded on the south by West Salmon street, and on the east by North Twenty-First street, of the city of Portland, if extended southerly to an intersection with said West Salmon street. The principal factors in the negotiations leading to the purchase were I. W. Baird, acting for the defendant, and E. A. King, a son of the plaintiff, acting for him. Among the details of the transaction was an understanding that the defendant should remove from the premises a stock barn, and the plaintiff a house which stood partly upon the premises and partly within North Twenty-First street, if extended, and the matter of opening up said street, in part, at least, so as to give access to the property, was discussed. A writing was drawn up and executed by the parties, they signing by their respective agents, and it is upon this writing that the alleged mutual mistake is predicated. It recites that "whereas, Amos N. King and wife have this day sold and conveyed to C. A. Holbrook a certain tract of land in the city of Portland, Oregon, at the corner of King and Salmon streets, and particularly described in our deed therefor, to which reference is made: Now, in consideration of the premises, it is mutually understood and agreed by and between the said parties that the said grantee shall, with all convenient dispatch, remove from the said granted premises the old stock barn now standing thereon, to the end that the said King may dismiss his suit against the city of Portland relating to said barn with safety to himself; that the said King shall, with like convenient dispatch, remove from said premises, and the lot adjoining the same immediately on the east, the old dwelling house occupied by a family named Smith as a residence; and that North Twenty-First street shall be opened to travel so far as the same bounds the granted premises on the east, so that the grantee in said deed may have access to that side of the granted lands, and that, when such street is extended and dedicated, it shall be done without charge to the said grantee above named. This instrument shall not be recorded, but, as between the parties, shall be treated as part of the said deed." The testimony is conflicting, the principal witnesses being the factors or agents of the respective parties who conducted the negotiations in the main. Mr. E. A. King testified, in effect, that he was agent for his father for the sale, disposition, and management of the property; that he dealt with Baird, and knew no one else in the transaction; that the negotiations

were in progress a month or such matter; that all the talk was that the 108 feet northerly from Salmon street should be a lot, and that the street in front of the property should be opened up to that point, and no further; that after they had come to an understanding a survey was made; that during the negotiations he gave Mr. Baird a map, which shows, by a white line across North Twenty-First street, if extended 108 feet northerly from West Salmon street, that the space thereby set off was intended to be a lot, not to be opened as a part of the street, and Baird so understood it; that during the negotiations they went upon the lot, and he was shown around it to within a few feet of the corner; that the locality was discussed as being a slightly one for Holbrook to build upon, and there was never any direct talk of extending the street over the lot; that a stock barn stood upon the land deeded to Holbrook, and a house partly upon it and partly upon the lot in dispute; that the west half of the lot belongs to his father, and the east half to himself and brother; that they came to an agreement a day or so before June 23d, and the terms as finally concluded were that King was to sell to Holbrook the property as designated upon the map, Holbrook to remove the barn and King the house, and the street was to be opened to within 108 feet of West Salmon street, the consideration being \$15,000; that subsequently Baird presented to him the written instrument, which he examined, and refused to sign; that witness then showed it to Judge Moreland, who told him it would do no harm to sign it, and that he had it in his possession a very short time prior thereto; that, after the agreement was executed and the transaction closed, Baird wanted an option to sell the lot in dispute, stating that he thought he could dispose of it to Holbrook, and, after some discussion, witness gave him a verbal option of 30 days to sell it for \$4,000, he to make his commission above that figure; that he afterwards came into the office, said he was working upon a sale, and thought he would make it go. The area of the lot is 60 by 108 feet. Witness further stated that he never agreed to open up the street to West Salmon street, and never would have signed the paper if he had known or understood that it was so stipulated; that during the negotiations Baird wanted half the street clear to Salmon street included in the deed, but the witness would not accede to it. On cross-examination he testified that he was to pay Baird a commission on the sale; that he insisted all the time that he would not open the street any further than to within 108 feet of West Salmon street, and Baird was insisting that it should be opened through; that he wanted a deed to half the street, as he termed it, and witness would not accede to that proposition; that Baird presented the written agreement to him after the trade was consummated, and thinks, but

is not sure, it was after all the money had been paid; that it was not handed to him the day before the deed was finally passed over to Baird; that he refused to sign it, because he did not think it needed any written agreement for the purpose of removing the barn and house and the fencing off the street; that, when he referred it to Judge Moreland, he (Moreland) did not understand the catch about the street, and misunderstood witness' explanation, and, when it was subsequently discussed, he told witness the agreement held him to open up the street through to Salmon street. Witness was then interrogated, and answered as follows: "Q. Isn't it a fact that you signed this, and then after you signed it Mr. Baird turned over to you the drafts and certificates of deposit for this land, and you gave him the deed? That is the fact, isn't it? A. I won't be absolutely sure about that. No, sir; it was all done about the same time, as I recollect it. Q. Who was present when you signed that instrument (Exhibit B)? A. Mr. Baird was there, my father, my brother N. A. King, and I think Judge Moreland, he was in the office; I don't know whether he was in our office or not, but he was close there." N. A. King, the brother, testified, in substance, that the final verbal agreement between Baird and his brother was as stated by the latter; that the written agreement was signed after the money had been paid for the land; that the money was paid and the deed delivered in the morning, and the agreement was signed about lunch time, or early in the afternoon; that after it was discovered there was an error in the instrument, and the matter had been called to the attention of Mr. Baird, he wanted a deed to one-half the lot; that at the point where North Twenty-First street, if extended, would intersect West Salmon street, there is a cut of seven or eight feet on the east side, and four or five on the west, in the grade, and that teams cannot now pass up North Twenty-First street. Judge Moreland testified, in substance, that E. A. King brought the paper into his office, and asked whether he should sign it, and he replied, "This paper will not hurt you to sign; they are to remove the barn, and you are to remove the house;" that his attention was not especially called to the condition as it respects the street; that, according to his recollection, Mr. King said nothing to him about the street at the time; that the signing occurred in the afternoon, just after he came into the office from his lunch, and that the trade had been made, the deed delivered, and the money paid; that in a few days afterwards he heard King give Baird a 30-day verbal option to sell the lot for \$4,000, clear of his commission. I. W. Baird, testified, in behalf of the defendant, that the trade was pending about five weeks; that he wanted a deed to half the lot on the street, or what was called Twenty-First street, to which they objected; that he then

wanted them to open up Twenty-First street, and they objected to that, saying it would put the whole into lots and blocks, and would make their taxes much heavier, and the trade about fell through with; that he talked of an option on the lot, for which he had a customer, tried to sell that, but they wanted such an awful price for it that he could not make a sale, and he let it drop; that subsequently King came back, and wanted to know if the man was alive yet, and, being informed that he was, he gave witness four or five hours to close up the deal; that it kept going along for a couple of weeks more, and witness finally presented a written proposition to King, which he read to his father, and his brother read it, then it was presented to Judge Moreland, who told King to sign it, which he did; that thereupon witness paid \$1,000, and, after the deed was delivered, he paid \$14,000 more, less his commission; that Mr. George H. Durham drew the instrument at his request, which he submitted to T. B. Wilcox before submitting it to King; that he obtained the thousand dollars from Durham, and Wilcox furnished it to him; that he presented the agreement right after lunch one day, and they kept it until after lunch the next day; that when it was signed King and his wife came down in the afternoon, and it was then he paid the balance of the money and obtained the deed; that he paid no part of the money before the agreement was signed, because he had no authority to do so; that he never came to any definite agreement with King until the paper was actually signed; that he agreed to put his statement in writing, and the one presented contained his final proposition; that the paper was drawn and submitted to Wilcox, and then to King, and they signed it the next day; that there was no mistake at all upon his part, and that he first received instructions from Mr. Durham regarding the purchase, and afterwards from Wilcox. On cross-examination, he testified that he obtained the thousand dollars first, then got the paper signed, showed it to Wilcox and Durham, when Durham gave him the balance of the money, which he delivered over to King, and procured the deed. T. B. Wilcox testified that he recollected about the time negotiations commenced for the purchase between Holbrook and King, and that he was the real purchaser of the property and furnished the money for the purpose, and thought he saw the paper before it was signed; that there had been quite an extended negotiation regarding different features of the property after they came to the matter of price, and that he positively refused to buy unless Twenty-First street was extended through to Salmon street; that the instrument (Exhibit B) correctly states the agreement as he understood it; that the paper or a copy was furnished him before any money was paid, and that it represents what the witness required as a condition to the pur-

chase. From this summary of the testimony, it will appear that the verbal agreement, as understood by E. A. King, is sufficiently explicit in its terms to enable the court to reform it, if it was assented to by Baird in behalf of Holbrook, and a mistake was made in reducing it to writing. No fraud is averred, and the simple inquiry is—First, what was the true agreement? And, second, is there couched in the terms of the written agreement a mutual mistake in manner and substance as alleged?

The chief actors in the negotiations differ radically as their testimony relates to both of these questions. Mr. King asserts that a complete verbal understanding and agreement was arrived at between him and Baird, which was that Twenty-First street should be opened up to within 108 feet of West Salmon street, and no further, but that there was a mistake made in reducing the same to writing, while Baird declares that no agreement or understanding was entered into until the paper was signed by the parties; that the negotiations had been proceeding without definite results until he presented the paper as his final offer, and that the acceptance thereof, evidenced by his signing it, was the consummation of the agreement; that none other existed prior thereto; and that it contained the true and final agreement of the parties. Notwithstanding Baird's positive declaration, it is urged that he is not stating the matter truly, and that he was in reality mistaken when he had the agreement reduced to writing, as it respects the opening of the extension of North Twenty-First street. Several reasons are assigned for this position, among which are the well-substantiated facts that only the west half of the lot in dispute was owned by A. N. King, while the east half belonged to his sons; that Baird subsequently took an option to sell the lot, and that the grade at the point is a difficult one to overcome for street purposes; that these, connected with the circumstance that he is positively contradicted by three witnesses touching the time of the execution of the agreement, considered with relation to the time when the deed was signed and the money paid, so discredit his testimony as to render it wholly unreliable. E. A. King is corroborated by his brother touching the specific terms of the verbal agreement, and that it was arrived at before the writing was presented and signed, and was not truly incorporated in the writing. Standing alone, Mr. Baird's testimony could not be considered faultless, and there are some contradictions and inconsistencies, when carefully read, that add weight to the criticism, but the fact conclusively appears that Baird was acting for Mr. Wilcox in making the purchase; that Wilcox probably saw the written agreement before it was signed,—at any rate, that he saw it before he paid over the money; and he testified that it correctly embodies the terms of his proposition, and the

only one upon which he would consent to make the purchase, or, in other words, that it truly represents what he required as a condition of the purchase. Mr. Wilcox's veracity is not questioned, and it is hardly possible to say that he was mistaken in the face of his positive declaration to the contrary. It may be conceded that King was mistaken touching the terms of the writing, and did not fully understand its contents when he signed it, but no such mistake is established as it relates to Baird or Wilcox, and, unless there has been a mutual mistake, the plaintiff cannot prevail. It is not very material whether the agreement was signed before the deed was executed and delivered and the money paid, or afterwards. One of its undisputed specifications is that it shall be treated as a part of the deed, and all the negotiations, as completed, must be considered as an entirety.

There is an element of negligence coupled with the affair, attributable to King, the agent, in failing to discover the plain letter of the agreement, which, is in no measure ambiguous or misleading, and in failing to inform his attorney, whose advice he sought, as to his real understanding touching the opening of North Twenty-First street. He had ample opportunity to, and did, examine the writing, and there is little excuse, if any, for overlooking the exact statement as contained therein. But the alleged mutuality of the mistake does not satisfactorily appear, and there can be no relief on that account alone. "It is not enough, in cases of this kind," says Mr. Chief Justice Spencer, "to show the sense and intention of one of the parties to the contract. It must be shown, incontrovertibly, that the sense and intention of the other party concurred in it. In other words, it must be proved that they both understood the contract, as it is alleged it ought to have been, and as in fact it was, but for the mistake. It would be the height of injustice to alter a contract, on the ground of mistake, where the mistake arises from misconception by one of the parties, in consequence of his imperfect explanation of his intentions. To make a contract, it is requisite that the minds of the contracting parties agree on the act to be done. If one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident there is no contract between them. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shown that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract." *Lyman v. Insurance Co.*, 17 Johns. 372. And such is the settled law as uniformly announced by this court. *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Hyland v. Hyland*, 19 Or. 51, 23 Pac.

811; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73; *Epstein v. Insurance Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 610. The decree of the court below will be affirmed, and it is so ordered.

(22 Utah, 447)

EUREKA HILL MIN. CO. v. CITY OF EUREKA.

(Supreme Court of Utah. Dec. 6, 1900.)

JUDGMENT OF COURT OF GENERAL JURISDICTION — PRESUMED VALID — BURDEN ON ONE WHO ATTACKS — DUTY OF COUNTY ASSESSORS — ASSESSMENT OF CITY PROPERTY — LEVY OF CITY TAX — ACTION TO RECOVER TAX — WHEN WILL NOT LIE — NET PROCEEDS OF MINES — PERSONALTY — WHEN TAXABLE.

1. The intendments of the law are that the judgments of courts of general jurisdiction are valid, and that he who attacks them must conclusively show their invalidity.

2. Under the authority of section 4, art. 13, Const., and sections 2504, 2566-2569, Rev. St. 1898, it is the duty of the county assessor of each county in which an incorporated city is situated to assess, in accordance with the provisions of section 2688, Rev. St. 1898, the taxable property in such city, and deliver a copy of that part of his assessment roll containing the assessment of such city property to the city auditor. Thereafter such assessment roll may be used by the city authorities, as provided in said section, in levying taxes for general municipal purposes; and when the acts of the assessor are in due form, and the tax regularly levied by the city authorities, and there is nothing on the face of the official proceedings to show that any officer acted illegally or superseded his authority, the acts of the assessor and city authorities are presumed to be valid until the contrary is shown.

3. The net proceeds of a mine are taxable at the place where the ores are taken to the surface through the main workings, and, being personal property, should be taxed as other personalty.

(Syllabus by the Court.)

Appeal from district court, Juab county; E. V. Higgins, Judge.

Action by the Eureka Hill Mining Company against the city of Eureka. Judgment for defendant, and plaintiff appeals. Affirmed.

Bennett, Harkness, Howat, Sutherland & Van Cott, for appellant. N. A. Robertson, for respondent.

BASKIN, J. This is an action in which the Eureka Hill Mining Company, a corporation, sought to recover from the city of Eureka, a municipal corporation, the sum of \$615.17, levied and collected by said city as a tax on the net annual proceeds of said company's mine, and paid by said company under protest. It appears from an agreed statement made by the parties, and from the findings of fact by the trial court, that the mining company during the years 1896 and 1897 owned five mining claims situated in the county of Juab, Utah, and worked the same as one mine, known as the Eureka Hill mine; that about 67 $\frac{1}{10}$ per cent. of the area of said mining claims lies within, and about

32 $\frac{1}{10}$ per cent. thereof lies outside of, the boundaries of said city; that the main shaft, the compressor, hoisting works, and ore veins of said mine are situated within the limits of said city; that a portion of the mill used by said company in operating said mine is within, and a part outside of, the city limits; that in that portion of the mill within the city the office of the mining company in said city is situated, but that the main office of said company is in Salt Lake City, and that city is designated in the articles of incorporation of said company as its principal place of business; that all of the ore extracted from said mine was raised through the main shaft, and mixed together at the hoisting works within the city of Eureka, and there sorted into two grades,—milling and shipping ore; that the shipping ores were from thence shipped to markets outside of the city and sold, and the milling ores were shipped to the company's mill, and there reduced to a marketable article, and thence shipped out of the city and sold; that of the ore so extracted and sold for the year ending June 1, 1897, about 45 per cent., in volume, came from ground lying within the city, and about 55 per cent. from ground lying without the city; that, in value, about 70 per cent. of the ore was extracted from ground lying within, and about 30 per cent. from ground lying without, the city limits; that the mining company kept no separate account of the net proceeds derived from ore extracted from the mine within the city, or of the net proceeds of ore extracted from the mine outside of the city, but kept one account only of the net proceeds derived from the whole of the ore extracted, shipped, and sold; that the mining company made and returned to the assessor of Juab county a statement showing the net proceeds of its mine for the year ending June 1, 1897, to be \$184,477; that said assessor in due time, during the year 1897, delivered to the city recorder of said city a copy of that portion of the county assessment roll containing the assessment of the property in said city, including the net proceeds of said company's mine so returned by the assessor; that the city regularly levied a tax of five mills on the dollar on the amount of the proceeds of the company's mine set out in the copy of that part of the county assessment roll so delivered by said assessor to the city auditor; that the tax levied on said net proceeds amounted to \$922.38, and of this sum the company paid to the city \$307.45, but denied the right of the city to collect the balance, \$614.92; that afterwards the city advertised the company's property for sale to satisfy said balance, and the company, to avoid a seizure and sale of its property, paid the same under protest. The city did not request, and the company did not make to the city, any return of either the amount of ore extracted within the city, or the net proceeds thereof, or any estimate of the same. Said levy was based solely on the

net proceeds of the company's mine as returned to the city auditor by the county assessor. In addition to the foregoing facts the trial court found the following facts: "That there is no method of ascertaining what proportion of such shipping ores and such milling ores originally came from within or without the city limits, and that all ores extracted from the mine were mixed at the said hoisting works after raising from the mine; that the books of plaintiff could have been so kept that the amount and proceeds of ores extracted from within the city limits would be capable of definite ascertainment, but were not so kept, nor was there any attempt on the part of the plaintiff to separate the ores taken from within and without the city limits, or the net proceeds derived therefrom." As a conclusion of law, the trial court found "that the net proceeds of plaintiff's mine within and without the city of Eureka are taxable at the place where they are taken to the surface through the main shaft of the plaintiff, which is within the limits of defendant city," and dismissed plaintiff's complaint and rendered a judgment for costs against the plaintiff.

Numerous assignments of error were made by the appellant, but the only one relied upon by its counsel in their brief is that the evidence is insufficient to support the judgment. The contention of appellant on this point is that the net annual proceeds of the mine, derived from ores extracted therefrom, outside of the boundaries of the city, were not subject to taxation by the city, and that the conclusion of law found from the facts by the court below is erroneous. Section 4, art. 13, Const., provides that "the annual proceeds of all mines and mining claims, shall be taxed as provided by law." The revenue act of 1896, in pursuance of that provision of the constitution, provides that "the net annual proceeds of all mines and mining claims shall be taxed as other property" (section 2504, Rev. St.), and that "every owner of mines and mining claims engaged in working the same, must, between the first and tenth of April, in each year, make a verified statement showing the net annual proceeds thereof and deliver the same to the assessor of the county in which the mine or mines are situated." Sections 2566-2569, Rev. St. From the requirement that such statement should be delivered to the assessor of the county in which the mine or mines are located, in connection with section 2088 of the Revised Statutes, which provides that "on or before the first Monday of June in each year the county assessor of each county in which there is situated any incorporated city or town, shall deliver to the clerk or recorder of each city and to the clerk or president of the board of trustees of each town, a statement showing the aggregate valuation of all the taxable property in such city or town; and shall deliver to the recorder of each city of the third class and to the clerk of each town a copy

of that part of the assessment roll containing the assessment of property in each such city or town, respectively, which shall be used as the basis for general municipal taxes therein until the next county assessment is made," it is evident that the legislature intended that the counties, cities, and towns within the limits of which mines are situated should respectively levy, collect, and appropriate to their respective use the tax on the net proceeds authorized by the revenue act. This being so, the jurisdictions in which such proceeds may be taxed are not the places where the ores are brought to the surface; for in some instances the ores may be brought to the surface through tunnels and shafts at points entirely outside of the jurisdiction, in which are situated all of the surface ground of mines, and the apexes of all the veins or deposits of ore embraced thereby and belonging to the same. The right to follow a vein or deposit of ore on its downward course, outside of the side lines of the surface boundaries, springs from and is incidental to the ownership of the apex and the surface ground covering the same. Therefore when the net proceeds of a mine are derived from veins or deposits of ore, the apexes of which and the surface ground of the mining claim are within the boundaries of a county, city, or town, we have no doubt that under the revenue act such proceeds are taxable therein, notwithstanding a portion or even all the ore may have been extracted from the mine beneath the surface on the dip, outside of the boundaries of the county, city, or town. The situs of such a mine, for the purposes of taxation, is not determined by the place at which the ores are brought to the surface, but by the place in which the apexes of the veins or deposits of ore, and the surface covering their apexes, are situated. The burden of showing the invalidity of that portion of tax sought to be recovered is upon the mining company. This, the city's counsel contend, has not been done. The record fails to show that any part of the ores from which the net annual proceeds of the mine were derived were extracted from any of its mining claims situated outside of the city limits. From aught that appears from the facts, in regard to which there is no contention, all of the ores may have been extracted from veins or deposits of ore, the apexes of which are wholly within mining claims belonging to the company, the surface boundary lines of which are wholly within the city limits. It is not shown by the facts that any of the ores were extracted on the strike of any vein or ore deposit outside of the city limits, but, from aught that appears, the extraction of ores outside of such limits may have been done beneath the surface, on the dip of a vein or deposit of ore having its apexes within the city limits. The acts of public officers, regularly performed within the scope of their authority, are presumed to be valid until the contrary is shown. In this case it was the

duty of the assessor, under section 2688, Rev. St., to, assess the taxable property in said city, and deliver a copy of that part of his assessment roll containing the assessment of the property in the city to the city auditor. This was done by the assessor in due form, and, upon the copy of the assessment roll so returned, the city authorities, as provided in said section, regularly levied the tax sought to be recovered. There is nothing on the face of their official proceedings showing that the officers acted illegally or superseded their authority. The intendments of law are that the judgments of courts of general jurisdiction are valid, and that he who attacks them must conclusively show their invalidity. The appellant has failed to make such showing in this case, and as the uncontradicted facts are before us, and fail to show the invalidity of the tax, the judgment should not be reversed.

Counsel did not cite any case in point on the main question in the case, nor have we been able to find any. The case of Gilchrist's Appeal, 109 Pa. St. 600, cited by appellant's counsel as in point, has no relevancy, as the facts in that case were different from those in this case. In that case the coal lands taxed were wholly outside of the boundaries of the city, and it does not appear that the owners of coal veins in the state of Pennsylvania are entitled to the lateral rights which the owners of mining claims in this state enjoy. The facts in this case show that it is probable that in some instances a very small portion of the surface ground of the apex of a vein or ore deposit of a mining claim may be in one taxation district, and the balance of the same on the course of the claim and vein or deposit in a different one. And in some instances the ores may be brought to the surface on both sides of the dividing lines of taxation districts, and some of these lines may cross the veins or deposits of ore at a right angle to their strike, and others may, upon the apexes of such veins or deposits, pass longitudinally over and through them. As the revenue act does not require the owners of mines in such instances to make statements of the proceeds of their mines derived from ores taken from different taxing districts, perplexing complications are liable to occur. We express no opinion as to how taxes should be levied in such instances, as the facts in this case do not present any such instance, but call attention to the matter simply to emphasize the necessity of amending the revenue act so as to meet such contingencies. It is ordered that the judgment of the lower court be affirmed, and that the appellant pay the costs.

BARTCH, C. J., and MINER, J. We concur in the affirmance of the judgment, but dissent from the holding contained in the opinion with reference to the place where the net proceeds of the mine are taxable. We agree with the trial court that the net proceeds of the appellant's mine, both within

and without the city of Eureka, are taxable at the place where the ores are taken to the surface through the main shaft of appellant's mine, which is within the limits of the respondent city. The net proceeds, being personal property, should be taxed in the city of Eureka, and as other personal property.

NOLAN v. BOARD OF COM'RS OF ELLIS COUNTY.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 1, 1901.)

APPEAL FROM JUSTICE—DISMISSAL.

Where transcript on appeal from justice fails to show any appeal, the appeal will be dismissed.

Error from district court, Ellis county; Lee Monroe, Judge.

Action by James Nolan against the board of county commissioners of Ellis county. Judgment for plaintiff in the justice court. Motion to dismiss appeal denied in district court. Judgment for defendant, and plaintiff brings error. Reversed.

James T. Nolan, in pro. per. David Rathbone, for defendant in error.

PER CURIAM. Upon the authority of the following decisions of the supreme court, the judgment in this case must be reversed, viz.: *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631; *Struber v. Rohlfis*, 36 Kan. 202, 12 Pac. 830; *McCarthy v. Holden*, 54 Kan. 214, 38 Pac. 261; *Shuster v. Overturf*, 42 Kan. 668, 22 Pac. 718. The plaintiff recovered judgment against the defendant. The defendant caused a transcript to be filed in the district court as upon appeal with the files in the case. The transcript was properly certified. It failed to show any appeal. The plaintiff moved to dismiss the appeal. The motion was denied. The district court proceeded with the trial, assuming to have jurisdiction of the case and of the parties, and rendered judgment for the defendant. The transcript controls. There was no appeal as shown by it. The district court was without jurisdiction. If the transcript does not speak the truth, and there was an appeal in fact, there is a remedy to correct the same by appropriate proceedings. The judgment is reversed, and the case remanded for further proceedings in accordance herewith.

(10 Kan. A. 331)

ZIMMERMAN et al. v. GINTHER.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 1, 1901.)

ADVERSE POSSESSION.

Where owners of adjacent lands have a resurvey of their dividing line made, readjust their fences, cultivation, and occupancy of their respective premises to the line thus established, and they and their grantees acquiesce in the correctness of the lines as established by such survey for more than 15 years, such occupancy

is sufficient to start and uphold the statute of limitations to the lands thus occupied.

(Syllabus by the Court.)

Error from district court, Russell county; Lee Monroe, Judge.

Petition of Elizabeth Zimmerman and others against L. J. Ginther for a survey of certain lands. From the survey Ginther appeals to the district court to set it aside, and Zimmerman and others bring error. Affirmed.

Sutton, Maher & Sutton, for plaintiffs in error. W. G. Eastland and J. C. Ruppenthal, for defendant in error.

McELROY, J. Zimmerman is the owner of the N. E. $\frac{1}{4}$, and Ginther is the owner of the N. W. $\frac{1}{4}$, of section 30, in township 12, of range 15 W. of the sixth P. M., in Russell county. At the instance of Zimmerman, one Russell, as county surveyor, made a survey and subdivision of the said section on the 25th day of April, A. D. 1898. This survey placed the half section line between Ginther and Zimmerman west of the line claimed by Ginther, and took from him a strip along the east line, as he contends. Ginther appealed from the Russell survey to the district court. The court sustained his contention, and set aside the survey. Thereupon Zimmerman, as plaintiff in error, presents the record to this court for review, and alleges error in the proceeding of the trial court.

The record in this case shows that one Bailey, as county surveyor, in February, 1880, re-established the lines and corners to the quarter section and subdivisions of this section. This survey was accepted by the owners and occupants of the N. $\frac{1}{2}$ of the section, from which date they recognized the Bailey survey, the corners and lines as established by him, as the true lines and the legal subdivisions of the section, entered into possession of their lands accordingly, and no question was ever made concerning the same until more than 15 years from that date. Ginther held possession of the N. W. $\frac{1}{4}$ of the section as established under a claim of ownership, and cultivated, harvested, and built his fences accordingly. He held the undisputed possession under claim of ownership for more than 15 years prior to the time of the Russell survey. It is contended that the Bailey survey was incorrect; that the same did not locate the true line between the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of such section; that in consequence of such mistake Ginther held possession of a strip which in reality belonged to the N. E. $\frac{1}{4}$ of the section. The trial court found that Ginther, and all the parties concerned, recognized the Bailey survey for more than 15 years; that during all the time Ginther held absolute, exclusive, notorious, open, adverse possession of such strip, and therefore was the owner. Counsel for plaintiff in error does not question the findings of fact, but contends that the conclusions of law are er-

roneous; that the possession of Ginther was not adverse. The defendant in error contends that the Bailey survey was made for the purpose of establishing the boundary lines, the subdivision lines, and corners; that the same was accepted by all the parties interested, and that such survey became final; that, in accordance therewith, Ginther took possession up to the line so found under claim of ownership, and that all parties had knowledge of such possession. It is further contended that this was adverse, open, notorious possession, and that all parties interested acquiesced in this survey, and in the lines and corners established thereby, for more than 15 years; that, therefore, Zimmerman is estopped from questioning the Bailey survey. Now, it appears that immediately after the survey by Bailey, Ginther took possession of the N. W. $\frac{1}{4}$ of the section up to the east boundary line as found and established by the survey; that he, under claim of ownership, fenced, occupied, and cultivated the same up to the line established. It thus appears that his possession was held for more than 15 years prior to the survey made by Russell; that his possession during all of that time was continuous, notorious, open, adverse, exclusive, uninterrupted, and visible, under a claim of ownership. The statute of limitations, as construed by our supreme court, is a statute of repose, and is looked upon with favor. We are of the opinion that all parties are bound by the Bailey survey. The plaintiff in error calls our attention to several authorities in support of his contention, all of which he claims have been approved by the supreme court in the case of *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443. From an examination of this case, however, we are constrained to the opinion that the authorities are against him. In *Winn v. Abeles*, supra, the court says: "Possession alone is not sufficient to confer title. The holding must be hostile and adverse as against the true owner. There must, in addition to actual possession, be an intention of the party in possession to claim the land as his own. The occupancy of Abeles was not taken under color or claim of title, nor was there any purpose to oust or dispossess Colyer. The undisputed facts show Abeles had no knowledge that this building extended beyond the boundary line of his lot until about the time that this controversy arose. He supposed his building rested entirely upon lot 9, and made no claim to any portion of the adjoining lot, and he is here now, asserting that he does not own nor claim the narrow strip of lot 10 upon which his wall had inadvertently been placed. Colyer was equally ignorant that the building of Abeles extended beyond the dividing line of the lots. No survey had been made, and it does not appear that there was any agreement that the line to which the wall extended should be taken as the true line. It will thus

be seen that there was no adverse possession. One of the essential requisites to obtaining title through the statute of limitations was wanting, viz. the intention of Abeles to claim that land exclusively and as his own. Mere occupation by inadvertence or mistake, without any intention to claim title, may not be a disseisin, as where a fence is erroneously erected not on the dividing line." In the case at bar there had been a survey. The parties took open, adverse, notorious, and exclusive possession of their lands according to the survey. They occupied the premises as owners. The possession was sufficient to start and uphold the statute of limitations. Judgment must be affirmed. All the judges concurring.

STOCKMAN v. WESTERN UNION TEL. CO.
(Court of Appeals of Kansas, Northern Department, W. D. Oct. 23, 1900.)

LIBEL—EVIDENCE.

The language of the telegram in this case was not libelous per se.

(Syllabus by the Court.)

Error from district court, Smith county; R. M. Pickler, Judge.

Action by Maggie Stockman against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. T. Reed and Mahin & Mahin, for plaintiff in error. Hayden & Hayden, for defendant in error.

WELLS, J. This action was brought in the district court of Smith county by Maggie Stockman, the plaintiff in error, against the Western Union Telegraph Company, a corporation, for damages alleged to have been sustained by the plaintiff by reason of the defendant having received at its office in Kensington, Kan., transmitted over its wires, and delivered to the plaintiff at Smith Center, Kan., a certain alleged libelous telegram. Said telegram, substituting a blank for the objectionable word, was as follows: "To Mrs. Maggie Stockman, Care Martha Noble, Smith Center, Kans.: Dont study — too hard. No witnesses will appear. Fritz Van Holstein." By substituting for the initial letter of the omitted word another letter having the same sound, the first syllable thereof would be a vulgar term sometimes used to designate the female sexual organs, and the word was completed by the terminal "ology." It appeared from the evidence offered by the plaintiff that the message was furnished the defendant for transmission and delivery to the plaintiff by her husband, with whom she then had a divorce suit pending; that the operator raised some question as to the meaning of the objectionable word, and was told by the sender, who was a stranger to him, that it meant "cunningness," and that it was "all right," and to "just send it."

At the close of the plaintiff's evidence the court sustained a demurrer to the evidence, and rendered judgment for the defendant.

The only vital question in this case is, were the words contained in the telegram libelous per se? If they were so, then the judgment was wrong; if not, the judgment was correct. The plaintiff in her petition claims that the telegram does, and was intended by the defendant to, charge that the said plaintiff was engaged in acts of sexual intercourse with others than her husband. Is this true? Assume that the misspelling of the first syllable would naturally be overlooked by any one seeing or hearing said message, and that it would be given the meaning said to be usually attributed to it, can the word be construed to mean what the plaintiff says it does? "Ology" is derived from a Greek word which meant a discourse or treatise, and in the English language it is used as the termination of the name of the science of the subject indicated by the prefix. Substitute this meaning for the word in question, and the telegram would read: "Don't study the science of the female sexual organs too hard. No witnesses will appear." This, surely, would not be libelous per se. The telegraph company had no right to assume that the words meant something not apparent on their face. The plaintiff's petition and evidence failed to charge the defendant with any further or other knowledge of the character of the communication than appeared upon its face. The judgment of the district court will be affirmed.

NOYES et al. v. PHIPPS et al.

(Court of Appeals of Kansas, Northern Department, W. D. Sept. 5, 1900.)

ORDER OF ATTACHMENT—CLAIM NOT DUE.

A probate judge has no authority to issue an order of attachment in an action pending in the district court upon a claim not due, and any levy of an order of attachment issued only by the probate judge is void.

(Syllabus by the Court.)

Error from district court, Norton county; A. C. T. Geiger, Judge.

Action by Edwin J. Phipps and Daniel W. Bailey against C. W. Noyes and others. From the judgment, defendants bring error. Reversed.

Thompson & Simmons, for plaintiffs in error. C. D. Jones, for defendants in error.

WELLS, J. There is but one question in this case: Is an order of attachment issued by the probate judge in an action pending in the district court upon a claim not due a valid order of attachment? This question must be answered in the negative. The

law expressly provides under what circumstances and in what manner orders of attachment must be issued. And while the statute gives the probate judge the authority, in the absence of the district judge, to order, in proper cases, that the attachment shall issue, it nowhere gives him the authority to issue such order himself. On the contrary, it directs that the attachment shall be issued by the clerk. There being no law authorizing the probate judge to issue an order of attachment, any levy under such order issued by him is void and of no effect. The judgment of the district court in this case must be reversed, and a new trial of the issues had in accordance with this decision.

HAFFAMIER v. HUND.

(Court of Appeals of Kansas, Northern Department, W. D. July 23, 1900.)

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE—PROOF—EXECUTION OF WRITTEN INSTRUMENT.

Code Civ. Proc. § 108, providing that the allegation of the execution of a note shall be deemed to be true unless its execution is denied under oath, does not dispense with proof of the execution of a note by decedent on the trial in the district court on the transcript, and without pleadings of an appeal from an order of the probate court, allowing the note as a claim against decedent's estate.

Error from district court, Ellis county; Lee Monroe, Judge.

Claim by Joseph Hund, administrator of the estate of Michael Hund, against Michael Haffamier, administrator of the estate of Valentine Sommereisen. From the judgment of the district court affirming an order of the probate court, allowing the claim, defendant brings error. Reversed.

A. D. Gilkeson, for plaintiff in error. Reeder & Reeder, for defendant in error.

PER CURIAM. The only question in this case is: In an appeal to the district court from an order of the probate court allowing a claim against the estate of a deceased person, where the case is tried on the appeal upon the transcript from the probate court without pleadings being filed, does a promissory note, purporting to have been given by the deceased in his lifetime, prove itself, the execution thereof not having been denied under oath, under the provisions of section 108 of the Code? This question has been squarely answered in the negative by our supreme court in *Neil v. Case*, 25 Kan. 355. Upon the authority of that decision, the judgment of the district court in this case is reversed, and said court directed to render judgment for the plaintiff in error herein.

SALINA MILL & ELEVATOR CO. v.
HOYNE.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 1, 1900.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
APPARENT DANGER—EVIDENCE—USUAL AP-
PLIANCES—MEASURE OF DAMAGES—IN-
STRUCTIONS—FINDINGS OF FACT.

1. Where defendant's servant at its mill directed plaintiff to drive his wagon under a chute, without apprising him that the same was so constructed that the bags of feed delivered into the wagon would come with sufficient force to knock plaintiff out of the wagon, and there was no danger apparent, it was not negligence on plaintiff's part to drive under, and remain in front of, the chute.

2. Where plaintiff, while receiving feed at defendant's mill, was injured by reason of the velocity with which the feed was delivered through the chute into his wagon, the action of the court, in refusing to permit the manager of defendant to testify whether such a chute was in general use by mills, was not erroneous, under the rule that an employer is only bound to furnish the usual appliances, plaintiff not being defendant's servant.

3. Where no juror of ordinary intelligence would have been misled by the mistaken use of the word "defendant" in place of "plaintiff" in an instruction, an assignment of error thereon was not well taken.

4. An assignment of error that the court, in an action for injuries, did not give the jury a rule of law by which damage should be measured, was not well taken, where the court limited the recovery to the value of time lost, physical pain, and personal injury; there being no certain standard or gauge by which to measure damages occasioned by pain.

5. Where plaintiff, while receiving feed at defendant's mill, was injured by delivery of the feed, through a chute, into his wagon, and the jury found that the fact that the plaintiff was in front of the chute was the proximate cause of his injury, and also that he was not negligent in being there, and that he might have avoided the injury by the exercise of ordinary prudence if he had been informed of the danger, it was proper not to direct a verdict for defendant on the ground that the findings were contrary to the general verdict in favor of plaintiff, since the logical deduction from the findings was that if plaintiff had not been exposed to danger he would not be hurt, that he was not at fault in being there, but that he was exposed to danger by the fault of the defendant.

Error from district court, Saline county;
R. F. Thompson, Judge.

Action by Michael Hoyne against the Salina Mill & Elevator Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The suit was to recover damages to the person, alleged to have been occasioned by the negligence of the mill company in putting sacks of feed from the mill through a chute into the plaintiff's wagon in such a manner as to be very dangerous to his person, without notifying the plaintiff of the risk of injury. The defendant mill company denied the allegations of the petition, and pleaded contributory negligence on the plaintiff's part. Defendant company assigns as error that the court overruled its demurrer to the plaintiff's evidence; that the court erroneously instructed the jury; that it erred

in sustaining objections to the defendant's evidence; in refusing to set aside certain findings of fact; in refusing to give judgment to the defendant for costs on the special findings, notwithstanding the general verdict for the plaintiff; and in denying a motion for a new trial.

Z. C. Milliken, for plaintiff in error. D. Ritchie, for defendant in error.

PER CURIAM. The first assignment of error is without merit. It is contended in its support that the evidence showed that the plaintiff put himself voluntarily in a position of danger, and negligently omitted to observe such signals of danger as were apparent, and that by reason thereof contributed directly to the mishap that caused the injury. The evidence does not support this contention. It does appear thereby that the defendant company's employé who delivered the feed to the plaintiff directed him to drive his wagon under the chute to receive the feed without apprising him that the chute was so constructed that the bags of feed, when they came down the chute, would come with sufficient velocity to knock the plaintiff out of his wagon; nor was there anything apparent to warn the plaintiff of this danger. Being directed to drive under the chute and receive his load, without intimation of danger, he might, without negligence being imputed to him by reason thereof, assume that it was safe to do so.

The court refused to permit the secretary and manager of the company to answer this question: "Do you know whether this kind of chute is in general use by millers?" This is the basis of the second assignment. In support of this contention, counsel cite several cases wherein employes sought to recover damages from employers for negligence in failing to furnish safe and suitable machinery, and in which the rule is stated to be that such appliances, and machinery are only required to be such as are in general use in like employments; that they are required to be of ordinary character, and reasonably safe; and that, if they are such as are ordinarily used in like employments, it follows, of necessity, that they are reasonably safe. The answer is, the plaintiff was not in the employ of the mill company. He was a stranger to it; was not called upon to use the machinery of the mill or know aught of its character. The mill company saw fit to use a contrivance so constructed as to endanger its patrons' lives and limbs, and in this case sent the plaintiff into the danger without warning. The rule of law contended for has no application to the facts.

The third assignment of error is based, first, on an apparent mistake. The word "defendant" was used instead of "plaintiff." The position of the word in the instruction, and its connection with the statement, were such as to show the mistake clearly. No ju-

ror of ordinary intelligence could have been misled. The other contention under this assignment is that by the ninth instruction given by the court no rule of law was stated by which the damage should be measured; that the jury were not thereby limited to compensatory damages. The court did limit the recovery to the value of the time lost. The other elements of damage thereby submitted to the jury were for physical pain and personal injury. There is no certain standard or gauge by which to measure the damage occasioned by pain, or what compensates one therefor. The same may be said with regard to the element of personal injury in this case as disclosed by the evidence. There was no allegation or proof of permanent injury. There was no ground for the assessment of any damages for personal injuries, save the pain, loss of time, temporary impairment of health, and expense in being healed. Hence to have said to the jury that the law only aims to compensate for the actual loss sustained would have added nothing to their enlightenment. The damage was assessed at \$182. It is evident that they were not misled by the instruction of the court or its failure to instruct. These elements of damage, not susceptible of being measured by any rule, must, of necessity, be left to the good sense of the jury.

By the fourth assignment plaintiff in error challenges the correctness of certain findings of fact. By the first and second of these the jury say the plaintiff did not unnecessarily expose himself to danger, and the plaintiff could not see the bags of feed as they came, a distance of 20 or 25 feet, before they reached him. There is evidence to sustain these findings. The other complaint is that, in specifying the amount of damages under the different elements submitted to it, the jury assess \$150 for injury to the general health of the plaintiff. The other item assessed \$32 for loss of time. It is argued that the first item is not within the issues joined and not sustained by proof. We are of an opinion to the contrary. The finding is sufficiently comprehensive to cover other elements of damage submitted to the jury covered by the issues and sustained by the evidence.

The fifth contention is that the defendant was entitled to judgment by the reason of the findings of fact, notwithstanding the general verdict, for the reason that the findings are to the effect that the plaintiff's negligence was the proximate cause of his injury. On the contrary, the jury say the plaintiff was not negligent. It is true by one finding they say that the fact that the plaintiff was in front of the chute was the proximate cause of his injury; by another, they say he was not negligent in being in front of the chute; and by another, they say that he might have avoided the injury by the exercise of ordinary prudence, if he had been informed of the danger. The logical deduction from the

findings is that, if the plaintiff had not been exposed to danger, he would not have been hurt; that he was not at fault in being there, but that he was exposed to danger by the fault of the defendant. The trial court was not concluded by the one finding in deciding upon the motion for judgment, but was bound to consider all findings, and their relations to, and bearing upon, each other. The motion for a new trial was predicated upon the contentions hereinbefore noticed, and was correctly denied. The judgment is affirmed.

STOUT et al. v. CROSBY.

(Court of Appeals of Kansas, Northern Department, W. D. July 21, 1900.)

~~BILLS AND NOTES—MORTGAGES—EXECUTION—~~
~~PROOF—WILLS—PROBATE—IMMATERIAL~~
~~VARIANCE—EVIDENCE.~~

1. Where an executrix sued on notes sold and indorsed to a testatrix, they were competent and material evidence, since they would show title by possession in connection with their assignment to the testator.

2. Under Gen. St. 1889, c. 22, § 26, providing that written instruments affecting real estate which are duly acknowledged or proved and certified may be read in evidence without further proof, a mortgage was properly admitted in evidence without proof of its execution.

3. Where a petition alleged a will and the granting of letters testamentary to have been made in one county, it was not error to admit in evidence proof of probate and issue of testamentary letters by authenticated transcript from the probate court of another county, since this was an immaterial variance.

Error from district court, Ellis county; Lee Monroe, Judge.

Action by Mary Crosby, executrix of the estate of Anna Crosby, deceased, against Elihu Stout and Harriet Stout. From a judgment for plaintiff, defendants bring error. Affirmed.

James T. Nolan and A. D. Gilkeson, for plaintiffs in error. David Rathbone, for defendant in error.

PER CURIAM. Action by defendant in error against plaintiffs in error to obtain judgment upon notes, and to foreclose a mortgage given to secure the same. The notes were made to Emma M. Judd. It was alleged that they were sold, indorsed, and delivered by her to Anna Crosby in her lifetime, and that the plaintiff is the duly-qualified executrix of the last will of said Anna, and as such owns the notes. The answer denies the allegations of the petition, except the execution of the notes. Upon the evidence of the plaintiff (the defendants offered none) the court found for the plaintiff, and gave her judgment and foreclosure as prayed.

The assignments of error are based upon technical objections wholly. The first is as to the admission in evidence of the notes and written indorsement thereon transferring title to the testatrix. An objection was made to the notes, only that they were im-

material to any issue formed. They were competent and material to show title by possession in connection with the assignment.

The next objection to the proceeding of the court upon the trial is that the mortgage was admitted in evidence without proof of its execution. In this there was no error. See section 26, c. 22, Gen. St. 1889; Wilkins v. Moore, 20 Kan. 538.

It is next contended that it was error to admit in evidence proof of probate of will and issuing of letters testamentary by authenticated transcript from the probate court of Grant county, Wis., because the petition alleged the county to be Essex. This was an immaterial variance, and amendment instanter of the petition could have been made, and should have been made, without prejudice to the defendant.

It is further said that the authentication of the record of the probate court of Wisconsin was not sufficient; that it should have conformed to the provisions of section 906, Rev. St. U. S. The record, being in court, pertaining to a court, was properly authenticated under the provisions of section 905.

We are of the opinion that the evidence is sufficient to identify the plaintiff as the holder of the notes and mortgage. The motion for a new trial was properly denied. Judgment affirmed.

STOUT et al. v. JUDD.

(Court of Appeals of Kansas, Northern Department, W. D. July 21, 1900.)

BILLS AND NOTES—MORTGAGES—PLEADINGS—FRAUD—COERCION—BURDEN OF PROOF.

1. In answer to a suit on a note and for foreclosure of a mortgage, defendants filed a general denial. They alleged want of consideration and fraud and coercion in procuring the note. The reply was a general denial, and that the note was given to settle and adjust various amounts due from defendants. Defendants' answer was not verified. *Held*, that defendants were not entitled to judgment on the pleadings, since the petition stated a cause of action, and the burden of proof was on defendants to establish their affirmative defenses.

2. Where an answer in a suit on a note alleged want of consideration, and that it was procured through fraud and coercion, the plaintiff was not required to negative the issues raised by the answer, in her evidence, to establish a prima facie case; the burden of proof thereof being on defendant.

3. Where a threat to institute foreclosure proceedings if defendants failed to renew their past-due paper was the sole ground of a charge of coercion and fraud, such question was properly taken from the jury, since this does not constitute fraud or duress in law.

4. A finding of the jury on conflicting evidence is conclusive on appeal.

Error from district court, Ellis county; Lee Monroe, Judge.

Action by Emma M. Judd against Elihu Stout and Harriet M. Stout. From a judgment for plaintiff, defendants bring error. Affirmed.

A. D. Gilkeson, for plaintiffs in error.
David Rathbone, for defendant in error.

PER CURIAM. This action was brought by Emma M. Judd against Elihu Stout and Harriet M. Stout for the recovery of \$247.25, with interest, alleged to be due upon a promissory note, and for the foreclosure of a real-estate mortgage. The defendants filed an answer: (1) General denial. (2) Alleged that the note was executed without consideration, and that the same was procured through fraud, dishonesty, oppression, and coercion of one Leroy Judd, the husband of plaintiff. The plaintiff filed a reply: (1) General denial. (2) Averred the purchase of various notes and mortgages against the defendants; that, in the settlement and adjustment of the amount due upon the various notes so purchased, the defendants executed the note sued upon. A trial was had before the court and jury, which resulted in a verdict and judgment for the plaintiff in the sum of \$261.80, with interest. The defendants, as plaintiffs in error, present the record to this court for review.

The first question presented in the argument of counsel for plaintiffs in error is that the court erred in refusing to render judgment for plaintiffs in error upon the pleadings. This contention is not tenable. The petition stated a cause of action. The answer of the defendant was not verified. Upon the pleadings the burden of proof was upon the defendants to establish their affirmative defenses set out in the answer. Without evidence being offered, the plaintiff was entitled upon the pleadings to judgment. Therefore the court committed no error in overruling defendants' motion for judgment upon the pleadings.

The second is that the court erred in overruling their demurrer to the evidence. This contention is likewise without merit. The plaintiff in the trial court was not required in the first instance to offer evidence upon the issues presented by the pleadings. The burden was upon the defendants.

It is further contended that the court erred in its instructions to the jury. The contention here is that the court erred in instructing the jury that there was no evidence offered by defendants sufficient to present to the consideration of the jury the question of failure of consideration and duress in the execution of the note. We think the court properly instructed the jury upon this question. The only evidence offered in support of this phase of the case was that of the defendants, who testified that the only duress was the threat of plaintiff to institute foreclosure proceedings in the event that defendants failed to renew their past-due paper. This does not constitute fraud or duress in law, and the question was properly taken from the consideration of the jury.

Argument is also presented upon the theory that the verdict of the jury was not sus-

tained by sufficient evidence. The total amount of the indebtedness, as recognized by all of the parties to this transaction, at the time the note under consideration was executed, was a little over \$2,000. The matter was compromised and adjusted at \$2,000. The parties all agree that this was the amount of indebtedness, according to the agreement and adjustment of the parties. The defendants executed one note at that time, as agreed, for \$2,000, with interest at 8 per cent. The note under consideration was also executed at the same time for the sum of \$200, with interest at 10 per cent. The plaintiff's contention was that the interest agreed to be paid upon the principal indebtedness was 10 per cent.; that the \$200 note was executed as and for 2 per cent. of the principal sum. The defendants, however, contend that the interest upon \$2,000 should be 8 per cent., and that therefore there was no consideration for the \$200 note. This question was fairly presented to the jury by the instructions of the court, and their finding thereon is conclusive upon this court. The testimony was conflicting, and it was properly within the province of the jury, upon this conflicting evidence, to find which contention was supported by the evidence. As to the other question, as to duress in the execution of the note, there was no competent evidence offered in support of this defense. The court properly instructed the jury, and their findings are supported by sufficient evidence. From what we have said it follows that the motion for a new trial was properly overruled. The judgment must be affirmed.

(131 Cal. 364)

STUMPF v. BOARD OF SUP'RS OF SAN LUIS OBISPO COUNTY. (L. A. 755.)

(Supreme Court of California. Jan. 14, 1901.)

HEALTH—SANITARY DISTRICTS—ELECTION—JURISDICTIONAL FACTS—EVIDENCE—HEARSAY—UNSWORN STATEMENTS—CERTIORARI—RETURN.

1. Where the return to a writ of certiorari to review the action of a board of county supervisors in creating a sanitary district shows no evidence of posting the order calling the required election, nor a recital in the proceedings that notice was posted, the election was void, and the subsequent declaration of the board that the district was duly organized was a nullity; and therefore all the orders, records, and proceedings of the board should be annulled.

2. Where the return to a writ of certiorari to review the action of the board of supervisors in creating a sanitary district did not show that any evidence was taken or heard as to whether the signatures to the petition for its establishment were genuine, or whether 25 of them were resident freeholders in the district, it was error on the hearing for the court to permit a witness who had signed the petition, and was present when it was presented to the board, to testify that the board questioned him as to the residence of the signers, and whether they were freeholders, since, as his statements before the board were not sworn to, they were mere hearsay when repeated before the court,

and did not prove the residence or signatures of the signers.

3. Where the board of supervisors, in determining whether 25 of the signers of a petition for the formation of a sanitary district were freeholders and residents in the district, and that their signatures were genuine, relied on the mere unsworn statement of one of the signers, instead of having the facts established according to rules of evidence required in the courts, the sufficiency of such evidence as proof may be reviewed on certiorari, since it was in proof of jurisdictional facts.

4. Where, on certiorari to review the action of the board of supervisors in creating a sanitary district, it appeared that the only evidence taken before the board as to the genuineness of the signatures of the signers of the petition for the creation of the district, and whether 25 of them were freeholders and residents thereof, was unsworn to and improper, it would be useless to require a further or amended return to show evidence of jurisdiction; and, no leave to make such return having been requested, the orders, records, and proceedings of the board will be annulled.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; E. R. Unangst, Judge.

This is a proceeding by J. W. Stumpf to review the action of the board of supervisors of San Luis Obispo county in the matter of the alleged creation of Templeton sanitary district, in said county. From the judgment Stumpf appeals. Proceedings annulled.

P. O. Chilstrom and S. M. Swinnerton, for appellant. A. E. Campbell (Venable & Goodchild, of counsel), for respondent.

HAYNES, C. The plaintiff based his application for the writ upon an affidavit, as required by section 1069 of the Code of Civil Procedure. The writ was issued and served, and a return thereto was made, setting out the petition for the formation of the district, which purported to be signed by 27 "residents and freeholders" of the district therein described. On November 7, 1898, the board made an order reciting that "a petition in due form having been received from residents and freeholders of the district hereinafter described," praying for the creation of a sanitary district, and ordering that an election be held on December 10th by the qualified electors residing within the district, the boundaries of which were stated in the order designating the place at which the election should be held, and the persons who should conduct the same, and further ordering "that a copy of said order be posted for four successive weeks prior to said election in three public places within the proposed district," and that it should be published for four successive weeks in the Templeton Advance. The return to the writ further shows that officers of the district were nominated, and an affidavit of the publication of said order calling an election was made and filed; that on January 4, 1899, the board canvassed the returns of the election, and found the whole number of votes cast to be, for a sanitary district, 59 votes, and against it 44 votes;

and that persons therein named had been elected, respectively, to the offices of sanitary assessor, and members of the sanitary board,—and declared that “a sanitary district, to be known and designated ‘Templeton Sanitary District,’ has been duly established,” with boundaries therein described. The return does not show that any evidence was taken or heard as to whether the signatures to the petition were genuine, nor whether 25 of them were each a resident freeholder within the boundaries of the proposed district; nor does the return show that the order calling an election was posted in three public places within said proposed district for four weeks, or at all, or that any evidence in regard thereto was heard. The defendant also filed an answer to the petition for the writ, denying the allegations of the petition. This was irregular. The return to the writ constitutes the answer, as well as evidence, and the case is heard thereon, unless upon motion an additional or amended return is made. Upon the hearing, however, Mr. Whicher, the clerk of the board of supervisors, was called by the plaintiff, and testified that no evidence was received by the board as to whether or not the signers of the petition were residents and freeholders within the district; that no witnesses were produced or examined before the board upon that question; that Mr. Smith, a member of the board, examined the names, and was satisfied with them. Mr. Fisher was called by the defendant, and testified that he was one of the petitioners; that he was present at the time the petition was presented to the board. He was then asked several questions by counsel for defendant, as to whether he was questioned by any member of the board as to the residence of the signers of the petition, and whether the petitioners were freeholders, and whether Supervisor Smith did not go over the names and question him in “regard to them.” These questions were each objected to by plaintiff upon the ground that it did not appear that the witness was sworn before the board, and that the questions were incompetent. Each objection was overruled, and the plaintiff excepted. The witness answered each question affirmatively, and further testified that Supervisor Smith looked over the petition and asked witness about the names,—if they were freeholders,—“and I said, ‘Yes. If you are not satisfied, you can go down and look at the records;’ and he said, ‘We will take it for granted.’”

No objection was made upon either side to the introduction of parol evidence, and the question of its admissibility need not now be considered; but, if its admissibility be conceded, the court erred in overruling plaintiff's objections above noted, for the reason that the unsworn statement of the witness made before the board of supervisors was incompetent, and its repetition before the court was mere hearsay, or the repetition of un-

sworn statements, and did not tend to prove that, as a matter of fact, the petitioners were each residents and freeholders within the proposed district, and that their signatures were genuine. The determination of these questions, upon which the jurisdiction of the board depended, required the exercise of judicial power; and, as the statute did not prescribe the character of the proof by which they should be determined, they must be established in accordance with the rules of evidence recognized by the courts and the common law. “An exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved. This exception arises out of the most important office and function of the writ,—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunal as to the sufficiency of the evidence to establish jurisdictional facts were not reviewable, the writ of certiorari would be of no avail as a remedy against an assumption of jurisdiction. And, for the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it will require a return to be made of the evidence upon which such facts are based.” 4 Enc. Pl. & Prac. p. 262. This court has said: “In all cases it is essential that there be proof of a sufficient petition. Inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. * * * Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet, if the jurisdictional facts do not appear of record, it must certify not only what is technically denominated the ‘record,’ but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of the tribunal may be involved.” *In re Madera Irr. Dist.* 92 Cal. 296, 333, 335, 28 Pac. 272, 675, 14 L. R. A. 755, citing *Blair v. Hamilton*, 32 Cal. 52; *People v. Board of Delegates of San Francisco Fire Dept.*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 300. The statute authorizing the formation of sanitary districts requires that the order or proclamation calling an election “shall be posted for four successive weeks prior to the election, in three public places within the proposed district, and shall be published,” etc. The return shows that proof of publication was made by affidavit of the publisher, in due form; but there is no evidence of posting, nor is there even a recital in the proceedings to the effect that such notice was posted. Without such posting the election was void, and the subsequent declaration of the board of supervisors to the effect that the Templeton sanitary district was duly organized is a nullity. As it is only the evidence that was heard by the board of supervisors upon questions essential to their jurisdiction that can be considered by the court in determining whether the

board acquired jurisdiction, it is obvious from the parol testimony hereinbefore recited that it would have been useless for the court to require an additional or amended return; and, no leave to make an amended return having been requested, we advise that the judgment and order appealed from be reversed, and that judgment be entered annulling all the orders, records, and proceedings of the board of supervisors in the matter of the alleged creation of Templeton sanitary district, in said county of San Luis Obispo.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and that judgment be entered annulling all the orders, records, and proceedings of the board of supervisors in the matter of Templeton sanitary district, and adjudging that said district has no legal existence.

(131 Cal. 356)

SAVINGS & LOAN SOC. v. OTTY AND
COUNTY OF SAN FRANCISCO.
(S. F. 1,462.)¹

(Supreme Court of California. Jan. 14, 1901.)

TAXATION—ASSESSMENT—DESCRIPTION OF
PROPERTY—BANKS—RECOVERY OF
TAXES PAID—INTEREST.

1. A sworn statement of taxable property returned by a taxpayer is not conclusive on the assessor, and he may assess property omitted therefrom without requiring the taxpayer to appear and testify in relation thereto.

2. The term "loans on stocks and bonds," used in describing an item of property assessed to a savings bank, sufficiently describes the property.

3. The fact that loans made by a bank are secured by property which is exempt from taxation does not render such loans untaxable.

4. A finding that a 20 per cent. increase in an assessment for taxation applies only to certain items of property assessed is warranted where the items raised can be ascertained by mathematical calculation.

5. Civ. Code, §§ 1915, 1917, allowing interest as damages between parties to an action, does not apply to the state or any of its political subdivisions; and a taxpayer entitled to recover illegal taxes paid to a county under protest, as provided by Pol. Code, § 3819, which makes no provision for the payment of interest, cannot recover interest thereon.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Savings & Loan Society against the city and county of San Francisco to recover taxes paid under protest. From a judgment allowing the recovery of a portion of such taxes, plaintiff appeals. Affirmed.

A. N. Brown, for appellant. H. T. Creswell and James L. Gallagher, for respondent.

CHIPMAN, C. Action to recover certain taxes which were paid under protest. In response to a demand made by the assessor of the city and county of San Francisco,

plaintiff, between the first Monday of March and the first Monday of July, 1896, returned a verified statement purporting to contain a complete list of all its property subject to taxation for that fiscal year. Without requesting a corrected statement requiring plaintiff to appear and testify in regard to the statement returned, the assessor, of his own motion, made an assessment upon the property described in the statement, as well as other property omitted therefrom. The added property was found by the court to have belonged to plaintiff on the first Monday of March of the year named, and this finding is not disputed. It appears also that on June 25th plaintiff received notice in writing from the assessor of the property assessed, including the added items and giving their valuations. Plaintiff did not appear before the county board of equalization, or request any reduction of the assessment or any alteration, or that the added property be omitted therefrom. In September the state board of equalization ordered the entire assessment roll of defendant to be raised 20 per cent., except certain property; and the auditor thereupon raised plaintiff's assessment accordingly, as will hereinafter appear. The trial court gave judgment for plaintiff for the taxes assessed upon "state and mining bonds" of which it appeared plaintiff owned none, and the amount of the tax assessed upon the 20 per cent. increase of the face value of the "county and school-district bonds." Plaintiff's suit was for the entire tax paid, excepting only the amount thereof which was assessed upon the property listed to the assessor by plaintiff. The appeal is from the judgment on bill of exceptions.

1. Plaintiff contends that, "until he shall have subpoenaed and examined the taxpayer who has furnished to him a sworn statement, the assessor can do nothing but accept the statement as true, and act upon it as a full and correct list of the taxable property of the one by whom or on whose behalf it has been made and returned." Plaintiff devotes the greater part of its opening brief to a discussion of this proposition, and the learned counsel for plaintiff has also furnished us with an elaborate discussion of the question in review of the decision rendered here, since the original briefs were filed, in *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 55 Pac. 685. The court is asked to re-examine the question there decided adversely to plaintiff's present contention: (1) Because its determination "was not essential to the disposition of that case"; and (2) because "the chief constitutional and statutory province of the statement [made by the taxpayer] has been overlooked." So far as we can see from the argument now made, the question was substantially the same in that case as in this, and the opinion then given shows that the proposition had careful attention, and we are not disposed to recede from the position there taken. We

¹ Rehearing denied February 14, 1901.

do not regard the assessment complained of as the arbitrary assessment which the assessor is authorized to make under section 3633 of the Political Code. It was an assessment under the general powers given the assessor and the duties imposed upon him by law,—Pol. Code, § 3628 et seq., and section 3801, which latter requires him to take an oath that he has made diligent inquiry and examination to ascertain all the property within the county subject to assessment, and that the same has been assessed on the assessment books. We are entirely satisfied with the reasoning in the case above cited, upon the authority of which we must hold against plaintiff's contention.

2. The assessment contained the following items of personal property:

Furniture	\$	5,000
Franchise		5,000
Money		40,300
Money on deposit in Bank of California		86,286
Loans on stocks and bonds		861,358
State and mining bonds		173,450
County and school-district bonds		349,327
Total		\$1,520,721

Of these items the statement furnished by plaintiff contained only the first four. The remaining three were added by the assessor, the assessment as to the others being the same as returned in the statement of plaintiff. It is now contended that the assessment as to the item "Loans on stocks and bonds" was void for uncertainty, and because upon untaxable property. The rule as to the degree of certainty required in describing personalty in assessments for taxation is this: that the property shall be so described that taxpayers may know for what they are to be taxed. City and County of San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264. Appellant makes a very ingenious argument—more ingenious than forcible—to show that the term "loans on stocks and bonds," according to Webster's definition of the word "loan," is without legal or actual significance, and, "as written, is not only not taxable property, but no property whatsoever." A "loan," it is shown by defendant, is (1) a lending; (2) that which is lent; (3) a permission to use; that ex vi termini a loan imports that the thing loaned has passed out of the possession and control of the lender into that of the borrower; that neither the "act of lending" nor the "permission to use" can be property; that the only thing that would be loaned on stocks and bonds would be money, and the fact that money has been lent would involve the fact that the money loaned (the loan) was not in the lender's possession, and could not be taxed to him; that, if the money can be found, it is to be assessed and taxed to the person who owns it, and cannot be assessed to two distinct persons. Subdivision 4, § 3650, of the Political Code provides that the assessor must list "all personal property,

showing the number, kind, amount and quantity; but a failure to enumerate in detail such personal property, does not invalidate the assessment." The statute indicates that the classes of personal property should be set down separately, while a statement of every article need not be. *People v. McCreery*, 34 Cal. 432. In that case an assessment reading, "Money," valuation "\$5,000"; "Money loaned," valuation "\$125,000,"—was held to sufficiently describe the property. The money loaned was assessed to the lender, which seems to meet appellant's suggestion that such a thing is impossible. If the term "loans" means money loaned, we need look no further for authority in holding the designation or classification in the present case to be sufficient. Appellant's corporate name implies that appellant is engaged in the business of receiving money as "savings," and lending out or making "loans" of these deposited "savings" in the interest of depositors. These loans, it must be presumed, are evidenced by some sort of obligations of the borrowers, executed in connection with the hypothecation of the stocks and bonds as security for the loans; and these evidences of indebtedness of the borrower to plaintiff necessarily become solvent credits or choses in action,—promissory notes or contracts of pledge,—and are taxable unless for some reason they are made nontaxable by the law or the constitution, as appellant urges they are. Upon the point now under discussion, we think plaintiff could not have been misled by or mistaken as to the meaning of the terms used in classifying the personal property in question. In commercial and banking usage the meaning of the expression "loans on stocks and bonds" is as well understood as the expression "money in bank." If a proposed borrower should approach plaintiff's counter and ask the cashier if the society "made loans on stocks and bonds," the cashier would at once understand what was meant.

3. But, conceding the terms used to be sufficiently definite, appellant contends that, it being admitted that all these shares of stock in corporations formed under the laws of this state are not subject to assessment or taxation, these notes or other evidences of indebtedness constitute "the contract or other obligation by which the credit [the lender's counterpart of the borrower's debt] is secured," within the meaning of article 13, § 4, of the constitution; that as such they were, "for the purposes of assessment and taxation, to be deemed and treated as an interest in the property affected thereby; that as the whole includes all its parts, and as the whole of the property affected by these notes and contracts of pledge was not taxable, it must follow that every part of that property and every interest in it was likewise not subject to taxation. The claim seems to be that the term "property," used in the section of the constitution referred to,

includes both real and personal property, and that, as plaintiff acquired an interest in the stocks by the loan, such interest can no more be taxed than can the property itself so held as security. We do not think it necessary to decide whether the term "property," as used in the constitution, includes personal property. Section 1 of article 13 includes "credits" within the meaning of the word "property," and provides that all property (except certain enumerated kinds) "shall be taxed in proportion to its value," etc. In the case of the mortgage of land the mortgage debt is taxed to the holder, and so would the debt be taxed to the holder if the security be some form of personal property not exempt. We cannot see any reason for holding that, because the security happens to be of some kind of property exempt by law, the debt secured thereby should also be exempt.

4. It is claimed that the money and solvent credits were illegally assessed, because raised above their face value by the state board of equalization. The court found that the increase was only upon the three items,—furniture, franchise, and county and school-district bonds. Appellant excepted to this finding as not supported by the evidence, and claims that it appears from the assessment book that the increase of valuation made by the auditor pursuant to the order of said board was upon all the personal property assessed to plaintiff. The assessment book showed the items and valuation as heretofore stated, amounting in the aggregate to \$1,520,721. If the 20 per cent. increase had applied to all the personal property, it would have amounted to \$304,724, whereas the actual increase was \$71,865, or exactly 20 per cent. of the three items mentioned by the court, lacking 40 cents. An attempt was made by defendant to show by the witness Herzer, chief deputy in the assessor's office, what items were raised, to which plaintiff objected on the ground that the roll speaks for itself, and cannot be interpreted by the opinion of witnesses. The trial court took the view that, if the items raised could be arrived at by mathematical calculation, the roll must be held to be sufficiently definite, although it fails to designate each item which the auditor took into account to reach his aggregate. The witness' testimony contributed nothing to the meaning of the roll. As to the county and school-district bonds, the trial court gave plaintiff judgment for the tax increase thereon, which it had paid, and plaintiff was only required to pay the 20 per cent. increase on the value of the furniture and the franchise. We see no reason for holding the assessment void on the ground alleged. If the increase of the roll could be ascertained by including any one or all the other items, or by including one or more of them, and including or excluding one or more of the items found by the court to be the ones raised, there might be some ground for

holding with appellant on the ground of uncertainty as to what property was burdened with the increase. But as there is no possible way to reach the amount of the increase, except by computing the 20 per centum on these three items, and as by so doing the result is readily ascertained, we conclude that the court was warranted in finding the fact as it did.

5. It is claimed that the court erred in not allowing interest from date of payment of the tax under protest; citing Civ. Code, §§ 1915, 1917; Perley, Interest, p. 135. The Code sections cited relate to interest as compensation or damage between parties to an action, and the language of the statute is general, and does not include the state or any of its political subdivisions. The state is not bound by general words of a statute which would operate to establish a right of action against it. *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646; *Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016. The action here is brought under a new section of the Political Code (3819), in which no provision is made for the payment of interest. St. 1895, p. 335.

The view we have taken of the questions presented by appellant makes it unnecessary to particularly notice the alleged errors of law at the trial. The judgment should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 350)

CARTER et al. v. BUTTE CREEK GOLD-MINING & POWER CO. et al. (Sac. 787.)
(Supreme Court of California. Jan. 11, 1901.)
APPEAL AND ERROR—UNDERTAKINGS—SUFFICIENCY—DISMISSAL.

Where an appeal bond recited that plaintiffs had appealed from a judgment, and also from an order denying a motion to set the same aside, in consideration of which, and of such appeal, the sureties undertook that appellants would pay all damages awarded against them on "the appeal," such undertaking was ambiguous, in that it did not show for which appeal it was given, and, not covering both appeals, it was fatally defective, and the appeals should be dismissed.

In bank. Appeal from superior court, Butte county.

Action by T. O. Carter and others against the Butte Creek Gold-Mining & Power Company and others. From a judgment for defendants, and from an order refusing to set aside said judgment, plaintiffs appeal. Appeals dismissed.

T. F. Batchelder, J. G. Severance, and E. L. Forster, for appellants. Park Henshaw, for respondents.

GAROUTTE, J. Respondents have moved to dismiss the appeals in this case. One of

the grounds relied upon to secure a dismissal is based upon the claim that the undertaking upon appeal is substantially defective. This undertaking recites that whereas the appellants have appealed to this court from the judgment entered in the action, and also from the order denying plaintiffs' motion to set aside the judgment, now, therefore, "in consideration of the premises and of such appeal," the sureties undertake that appellants will pay all damages awarded against them on "the appeal." The case of *Estate of Heydenfeldt*, 119 Cal. 346, 51 Pac. 543, is similar to the case at bar. There the appeal was taken from various orders, and the sureties undertook "that said appellant will pay all damages and costs which may be awarded against her on said appeal." In this case the undertaking uses the language "the appeal." In the *Heydenfeldt* Case this court said: "It has been established by a long line of decisions of this court that an undertaking on appeal, such as the one given in this case, is entirely invalid for any purpose. *People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815, and previous cases there cited; *Associates v. Wilkins*, 71 Cal. 626, 12 Pac. 799; *McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16; *Centerville & K. Irr. Ditch Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813. It is said in the *Centerville* Case, supra: "If the undertaking has no special reference to either matter appealed from, but is conditioned generally upon 'such appeal' (*People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815), or 'said appeals' (*McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16), all the appeals will be dismissed upon the ground that by reason of its ambiguity it cannot be determined for which appeal it was given." For the foregoing reasons, the appeals are dismissed.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

(131 Cal. 1)
THOMPSON et al. v. STAACKE et al. (S. F. 2,801.)

BANK OF CALIFORNIA v. SAME.
(Supreme Court of California. Jan. 17, 1901.)

In bank. Rehearing denied.

For opinion in department, see 63 Pac. 81.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order of the court denying a rehearing. If it is not true that "the moneys here involved are moneys expended under the subsequent orders," as stated in the opinion of the court, then this appeal cannot be properly disposed of without deciding the question whether the first order of allowance ceased to be operative on the filing of the inventory or when the estate became insolvent. I think it clear that at least \$47.50 has been allowed in this

account for support of family in excess of the total amount payable under the last two orders, and, unless this sum is covered by the maxim de minimis, the appellants were entitled to a decision of the question presented by their appeal. In my opinion, even so small a sum as \$47.50 is not within the rule de minimis, especially when it appears that the future proceedings in the settlement of this estate will be embarrassed by the question raised, but not decided, upon this appeal.

(131 Cal. 352)

PEOPLE v. ANDERSON. (Cr. 603.)

(Supreme Court of California. Jan. 12, 1901.)

MANSLAUGHTER—EVIDENCE—SUFFICIENCY.

The state contended that accused was guilty of manslaughter, in that, knowing that deceased had such an appetite for whisky that his death would result from an unrestrained use of it, gave it to him for the purpose of causing death, or so carelessly as to amount to criminal negligence. Deceased boarded at defendant's hotel, and on being taken ill was cared for by defendant. The physician instructed defendant to give a certain small quantity of whisky. Deceased was intoxicated when the physician first called, but he never saw deceased intoxicated thereafter. His stomach would not retain liquor. Defendant knew that deceased could not drink with safety. At one time during the illness a flask of whisky was in a drawer in deceased's room, but not where he could get it, and once when the physician asked for whisky accused took a flask from under the mattress, but did so with no attempt to conceal from whence it was taken. At the time deceased was too weak to get out of bed. Before the doctor was sent for, deceased drew a check for \$2,000 in favor of accused, which he immediately tried to cash, but deceased subsequently disclaimed knowledge of the check, and refused to provide for defendant in his will, as urged to do by defendant. *Held*, that the evidence was insufficient to sustain the verdict.

In bank. Appeal from superior court, Humboldt county.

Simon Anderson was convicted of manslaughter, and he appeals. Reversed.

S. M. Buck and J. F. Coonan, for appellant. Tiley L. Ford, Atty. Gen., for the People.

HARRISON, J. The appellant was charged with the crime of murder in the killing of Thomas Kehoe, and upon his trial therefor was convicted of manslaughter. He has appealed from the judgment entered thereon upon the ground that the verdict is not sustained by the evidence. The evidence established that Kehoe died from Bright's disease of the kidneys, superinduced by an excessive use of alcoholic drinks. It is claimed by the prosecution, in support of the verdict, that, with the knowledge that Kehoe had such a passion for whisky that his death would result from an unrestrained use of it, the defendant gave it to him to drink, or placed it within his reach, either for the express purpose of producing his death, or with such carelessness as to constitute a

criminal negligence which would make him responsible for his death. There was no direct testimony that the defendant ever gave any whisky to the deceased, except in accordance with the directions of the attending physician, or was in any way instrumental in allowing him to obtain any whisky; but it is claimed that the circumstances connected with his death and the relations shown to have existed between him and the defendant are sufficient to justify the verdict. The deceased had for a long time been addicted to excessive drinking, and for some time prior to his death was an inmate of the hotel kept by the defendant. In the early part of April, 1899, while at the defendant's hotel, he had an attack of delirium tremens, and was under medical treatment therefor for about a week. After his recovery from this he remained under medical treatment for other troubles for another week, during a portion of which time the defendant was his nurse; and after his recovery from this he went about the streets as usual. The record does not give any account of his condition or doings from this time until after the 15th of May, except that he continued to room at the hotel of the defendant, and was occasionally seen upon the streets. At some time between the 15th and 20th of May he had evidently yielded to his passion for drink, and as a result thereof was taken with some kind of sickness which confined him to his bed, and required the attendance of a nurse. In the early part of this sickness the defendant alone took care of him, but after the 20th of May, an employé, one Nilsen, who came into his service on that day, assisted him, and thereafter, while the deceased remained at the hotel, the defendant cared for him during the day and until midnight, and during the remainder of the night Nilsen, who seems to have been a night watchman, relieved him by himself looking into the room of the deceased at frequent intervals, and ministering to his wants. Kehoe remained in the hotel until May 25th, when he was removed to a hospital, where he died on May 28th. Dr. Ottmer, who had been the medical attendant of Kehoe during his sickness in April, was sent for by the defendant Monday afternoon, May 22d, and attended upon the deceased from that time until his death. He testified that he found Kehoe in bed, in a very weakened condition, and in an advanced stage of Bright's disease of the kidneys, from which he had been suffering prior to his first attendance upon him; and he gave instructions to the defendant to give him a tablespoonful of whisky every three hours. There is no evidence that from this time Kehoe was given or had any whisky, except in accordance with this instruction. Neither is there any evidence that the defendant was present at any time when Kehoe drank any whisky, or in any way contributed to his drinking before he was taken down with his last illness; and although Dr.

Ottmer says that Kehoe, when he saw him that evening, was as drunk as he could be, and must have drunk a great deal to have got into the condition he was in, it was not shown that the defendant was in any way connected therewith, or ever knew that he had been drinking, until he took to his bed as the result thereof. Dr. Ottmer says that after his first visit Kehoe was sober whenever he called, and that at the first visit he did not want any whisky, since he had had all that he wanted; that he was sober after that evening, because he could not keep any liquor on his stomach; that in his weak condition a very little would make him appear to be quite intoxicated.

It was shown by the prosecution that while Dr. Ottmer was attending Kehoe in April he advised him that, if he continued to drink as he had been drinking, it would kill him, and that the defendant was present when this advice was given; that during his sickness in May whisky was permitted to be in his room, and an opportunity afforded to Kehoe to get the same in the absence of his attendants; and it is urged that when the defendant assumed to nurse and care for him during his last attack it was an act of criminal negligence to permit any whisky to be placed within the reach of Kehoe, or so that he would have an opportunity to satisfy his craving for it. As a part of the evidence in support of this claim, it appears that when Nilsen first began to assist the defendant there was a pint flask of whisky in a drawer in Kehoe's room, but Nilsen states that it was where Kehoe could not get at it. It was also shown that a flask of whisky was at one time upon a stand, and that there was at another time a flask upon the bureau; but, as the defendant had been instructed to give Kehoe a tablespoonful of whisky every three hours, and as it appeared that Kehoe was too weak to get out of bed, the jury were not authorized to hold that it was criminal negligence to allow the flask to be in the room. On Monday evening, May 24th, an attorney went to Kehoe's room, together with Dr. Ottmer and a friend of Kehoe's, for the purpose of having him execute his will, and they were afterwards joined in the room by the defendant. Kehoe's weakness was so great that he could scarcely talk; and when the doctor asked for whisky, that he might give him a hypodermic injection of strychnine and whisky for the purpose of enabling him to answer the questions put to him, the defendant reached across the bed, and took a small flask of whisky, partly filled, from under the mattress at the side of the bed. It is urged from this fact that the jury were authorized to find that the whisky was placed there by defendant to enable Kehoe to get at it and drink it. Aside from what has before been said that there is no evidence that Kehoe did drink any of it, Dr. Ottmer also testified that, although it was within Kehoe's reach, if he had drunk

it he could not keep it down, as he would vomit even water. It must also be borne in mind that the defendant took the flask from the bed openly, in the presence of several persons; and it is hardly to be supposed that, if he had placed it there with any sinister motive, he would thus publicly have betrayed himself. Moreover, it is only a conjecture that the flask was placed there by the defendant.

Testimony was offered on the part of the prosecution that on Monday afternoon, before the defendant sent for Dr. Ottmer, Kehoe made a check in favor of the defendant for \$2,000, as a gift to him, and that the defendant had two persons affix their names as witnesses thereto; that immediately upon its receipt the defendant sought to have it cashed by the bank where he had been informed that Kehoe had money on deposit, but the bank, being suspicious, declined to pay it; that, on Wednesday evening, Kehoe, while his will was being prepared, disclaimed all knowledge of making the check, and, although urged by the defendant to make some provision for him in his will, refused to do so. These facts are urged as showing motive on the part of the defendant that he desired the death of Kehoe in order that he might obtain his money. If it be assumed that Kehoe made the check at the suggestion or request of the defendant, that fact has no tendency to show that the defendant gave him any whisky. A sufficient motive for obtaining the check would be found in a purpose to take a wicked advantage of the impaired condition of Kehoe's mind for mere purposes of greed, in the belief that his physical condition was such that he would never recover, or know of having made the check. We are clearly of the opinion that there was no evidence before the jury from which they were authorized to find that Kehoe came to his death by reason of any act of the defendant. The judgment is reversed, and a new trial ordered.

We concur: MCFARLAND, J.; TEMPLE, J.; VAN DYKE, J.

(131 Cal. 336)

McNAMARA v. OAKLAND BUILDING & LOAN ASS'N. (S. F. 1,365.)

(Supreme Court of California. Jan. 11, 1901.)

BUILDING AND LOAN ASSOCIATIONS—BY-LAWS—WITHDRAWAL OF MEMBERS—LOANS—PREMIUMS—MORTGAGES—FORECLOSURE—SET-OFF—ATTORNEY'S FEES.

1. The provisions of the act of March 31, 1891 (St. 1891, p. 252), amending Civ. Code, div. 1, pt. 4, tit. 16, governing building associations, do not apply to associations incorporated prior to the enactment of the amendatory act, unless they have elected to continue their existence thereunder, as provided by section 646, authorizing such election.

2. Under Civ. Code, § 644, giving building associations power to fix the terms on which members may withdraw, it is competent for an association to enact a by-law providing that

a borrowing member cannot withdraw before his loan is fully paid, except by the consent of the directors.

3. A clause in a mortgage given by a borrowing member of a building association, providing that, in case of foreclosure, the association shall have the option to apply on the mortgage note the cash surrender value or shares of stock pledged by the borrower, less all fines and penalties, and that thereupon the shares shall become the property of the association, gives the borrower no right to set off payments made on the stock against the amount due on the loan, nor does it compel the association to do so.

4. A borrowing member of a building association occupies the dual relation to the corporation of borrower and stockholder, each of which is distinct from the other.

5. Evidence that a borrowing member of a building association had a copy of its by-laws, providing that the premium on the loan should be deducted from the principal, and that he voluntarily paid interest on the mortgage note, which included the premium for six years, is sufficient to support a finding that he knew he was to pay such premium.

6. A borrowing member of a building association, who has consented to pay a premium on his loan as fixed by the board of directors, in violation of a by-law requiring the money to be loaned to the highest bidder, cannot complain of such violation where no fraud is shown, and all the applicants for loans were successful, and none of them suffered by the failure of the directors to invite public bids.

7. The early proceedings of a building association showed that its attorney, in a suit to foreclose a mortgage providing for the payment of attorney's fees, had been its regularly salaried attorney, as provided by a by-law prescribing the duties of corporation attorney, and authorizing the board of directors to fix his compensation, but there was no evidence that he occupied that position when the suit was brought, and it did not appear that he was then paid a salary by the association. *Held*, that the allowance of attorney's fees was not error.

8. Where the complaint, in a suit to foreclose a mortgage stipulating for the payment of reasonable attorney's fees, sets forth the provision in the mortgage, a finding that the mortgagor executed the mortgage is equivalent to a finding that he agreed to pay reasonable attorney's fees.

9. In a suit to foreclose a mortgage stipulating for the payment of a reasonable attorney's fee, it is unnecessary to aver that the fee claimed is reasonable.

10. In a suit to foreclose a mortgage given by a member of a building association, full equity is done by giving him credit on his loan for the present cash value of his shares, ascertained by a public sale thereof.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by J. N. McNamara against the Oakland Building & Loan Association. From a judgment for defendant and an order denying a new trial, plaintiff appeals. *Affirmed*.

R. Clark (W. H. Linforth, of counsel), for appellant. John Yule, for respondent.

CHIPMAN, C. Plaintiff's action is to cancel a mortgage given by plaintiff to defendant's assignor, the Oakland Building, Savings & Loan Association, upon certain real property in the mortgage described, and for the recovery of three fully paid up shares in said association, or their par value, to wit, \$300.

The complaint contains a copy of the mortgage, and the note for the payment of which it was security. Defendant answered December 30, 1896, and at the same time served and filed a cross complaint against plaintiff for judgment on the note, for the foreclosure and sale of the mortgaged premises, and for the sale of certain 15 shares of the capital stock of defendant's assignor, which had been pledged by the terms of the mortgage as further security. The court found as conclusions of law: That plaintiff was entitled to no relief; that there is due from plaintiff to defendant the principal sum of the note, to wit, \$1,200, and interest at 8 per cent. per annum from September 1, 1896, amounting to \$76; also attorney's fees, amounting to \$250, and to costs of suit; and that defendant is entitled to decree of foreclosure and sale of the land mortgaged and of the said shares. Judgment was accordingly entered, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Defendant and its assignor were incorporated under title 16, pt. 4, div. 1, of the Civil Code of this state, the latter about October 3, 1889, and the former about April 24, 1890. Neither of said corporations elected to continue its existence under section 646 of the Civil Code, as amended by the act of March 31, 1891 (St. 1891, p. 252). The court found the following facts: That in October, 1889, defendant's assignor loaned to plaintiff the sum of \$1,200, plaintiff executing to it his promissory note for that amount, payable to said corporation or order six years after date, bearing 8 per cent. interest, payable monthly in advance, to be compounded if not so paid, and, in case of default in paying any monthly interest, the payee was given the option to deem the principal to be due. The note recited that it was secured by mortgage of even date, and a pledge of 15 shares of the capital stock of the mortgagee series No. 1. Defendant's assignor, mortgagee, "at a meeting of its directors, September 5, 1889, fixed the premium on all loans which it should make to borrowers at 20 per cent. on amount of loan made," and fixed the rate of interest at 8 per cent. Before plaintiff executed said note he was informed of this premium charge, and that the amount thereof (\$240) would be included in the amount of the note given by him, and that interest would be charged on the whole amount. He received the sum of \$960 and no more, but gave his note for \$1,200. The mortgage was duly recorded October 16, 1889. Plaintiff paid to defendant's assignor, as provided in the mortgage, the sum of \$139.50, down to May 5, 1890, and no more, of which \$72 was paid for and applied to the interest on said note, and \$67.50 was paid and applied on account of the purchase price of said shares. Without the knowledge of plaintiff, defendant's assignor transferred to defendant the note and the security on May 5, 1890. De-

fendant had no knowledge of any agreements between its assignor and plaintiff, except as contained in the said written instruments, except that it was understood and agreed between plaintiff and defendant that if plaintiff should pay the interest as provided in the note, and should pay the monthly installments on said shares as provided in said mortgage, "then in that event, and as soon as and when the said fifteen shares of stock, with the installments paid in, and the interest and proportional profits of said shares of stock, should and would equal \$100 per share, said corporation would thereupon satisfy said mortgage, * * * and surrender to plaintiff three shares of said stock, * * * paid up." Beginning with the month of June, 1890, and to August, 1896, plaintiff paid to defendant, agreeably to the mortgage, the sum of \$1,162.50, and no more, of which the sum of \$600 was for interest on said note, and \$562.50 on account of the purchase price of said shares, and was full payment for interest and installments on said shares to and including August, 1896, but such payments were insufficient to mature said stock or make it of value of \$100 per share, or any value greater than \$70.20. No part of the principal of said note has been paid, and of the interest only to August 31, 1896, and no more. The monthly installments on said shares have been paid to include August, 1896, and no more. At the commencement of the action, defendant had no money in its possession belonging to plaintiff. Appellant contends that the evidence is insufficient to sustain the findings, specifying each separately. We will endeavor to deal with such as seem to present the salient features of appellant's contention.

1. Appellant claims that the debt was not due when the action was commenced. The note was dated October, 1889, and was payable six years after date, or October, 1895. The suit was commenced September 15, 1896, and the cross complaint was filed December 30, 1896. It is not disputed that on the face of the instrument the action to foreclose could be brought, but it is contended that by the provisions of the act of 1891, supra, it was prematurely brought. It is sufficient answer that neither defendant nor its assignor elected to continue its existence under section 646, Civ. Code. The provisions of the act of 1891 do not apply. It may be here observed, for it concerns the further examination of plaintiff's points, that we have nothing to guide us in determining the rights of the parties, except as we find it in the statute relating to these associations, and in the by-laws framed thereunder, and in the contracts entered into. Associations kindred in character to that of defendant and its grantor exist in many of the states of the Union, and also in England, where they had their origin. Although transplanted into this country in comparatively recent years, they have given rise to much litigation, and the

decisions on many questions are far from harmonious. Naturally, too, the decisions vary because of different statutory provisions under which the cases have been decided. Mr. Deering states that our Code provisions governing these associations are principally drawn from the act of May 20, 1861 (St. 1861, p. 567); and, as we have no previous decisions of this court on the subject, it appears to be necessary to give, at least, an outline of the statutory provisions under which defendant and its assignor were organized. They are found in sections 639 to 647, inclusive, of the Civil Code, as they stood prior to the amendments of March 31, 1891. The corporation may be organized with or without a capital stock, and may raise funds, in shares not exceeding \$200 each, payable in periodical installments. Section 639. It may borrow money to carry on its objects. Section 640. It may purchase real estate, and erect buildings for its members, and may make loans to its members for the purpose of aiding them to acquire and improve real estate. Section 641. It may insure the lives of its members and debtors. Section 642. It may purchase and hold real estate for purposes named. Section 643. Section 644 is the one most important in determining the questions before us. It provides that "the by-laws of such corporations must specify the amount of the periodical subscriptions or payments to be made by each member, the time and manner in which such payments are to be made; the fines and forfeiture for default; * * * the terms and conditions upon which loans may be made to its members and by them repaid to the corporation; the manner in which a person may become, and cease to be, a member; the conditions on which members may withdraw from the corporation, and the provisions for the payment to withdrawing members of the sums of money due to them, arising from subscriptions or payments, and the proportion of the profits such withdrawing member may receive on withdrawal." Section 645 requires the secretary, once each year, to prepare a full and explicit statement of the corporation affairs, and print the same in one or more newspapers, and circulate the statement among the members. Section 646 was repealed in 1874, as also was section 648. Section 647 provided for the consolidation of two or more such corporations, or the transfer of the engagements and the funds and property of one to another, but not to the prejudice of the right of any creditor of either corporation. It will be noticed that the provisions place but few restrictions upon the corporation. The legislative injunction of greatest importance to members is found in section 644, and that section, in effect and in terms, requires the corporation to outline and define its scheme in the by-laws. The act of 1891, *supra*, made many and important changes and additions to the law, apparently with some intelligent reference to the law in other states, and to

the better established systems for such associations. But with this later act we can have no concern, and much of the learning found in the decisions of the courts of other states, and many of the principles laid down elsewhere for the government of this class of corporations, are of but little value in the present case.

Plaintiff's action appears to have been brought upon the theory that at the end of six years, having made all his payments, he was entitled to have his mortgage canceled, and, as he had subscribed for 15 shares and borrowed only on 12 shares, he was entitled to have 3 shares returned to him fully paid. It is not improbable that representations were made that the series to which his shares belonged would mature in six years. The maturity of the mortgage debt points that way. But there is nothing in the evidence, and plaintiff offered no legal evidence, to show that there was any agreement that such would be the result. On the contrary, as we shall see, the by-laws plainly contemplated an uncertain period for the maturity of the stock.

2. Appellant contends that, if payment of the note could be enforced, he had the correlative right to offset his payments and his earnings, and that, if he is granted this right, it will appear from the evidence that the debt is paid. Appellant is mistaken as to the nature of the agreements into which he entered. He occupied the dual relation to the corporation of borrower and stockholder, each of which was distinct from the other. Under the scheme, he could not be a borrower without becoming a stockholder, but he could be a stockholder without being a borrower. The purposes of the corporation declared in its articles were to accumulate funds upon shares, not exceeding \$100 each, payable in one sum, or in periodical installments, and from fines, premiums, loans, and interest and other lawful sources, to borrow money, and to loan out funds of the corporation to members. A subscriber to the shares was required by article 2, § 2, of the by-laws to pay monthly installments of one dollar per share, "until each share of the series of stock upon which such monthly payments shall be made, together with the earnings of such shares, shall reach the value of \$100." (Amended as to borrowing members by allowing them the election to pay 50 cents per month instead of \$1.) If not a borrower, he could pay in full, if he preferred, and have his paid-up certificate. The scheme, however, was largely one for the loan of money to members, and was so contrived, at least in theory, that by payment of interest on the note, and by small monthly payments, a member could pay for his shares, and, if not otherwise in default, upon surrender of the shares, fully paid up, to the association, it operated to pay his loan. A member was entitled to borrow upon the security of his subscribed shares, and such

other security as was required, \$100 for each share. But the by-laws provided that the "mortgages, bonds, or other securities shall remain in force and on deposit as collateral security, until each member shall have received satisfaction in full for his or her claim of one hundred dollars per share, whereupon the mortgage or mortgages shall be canceled, and collateral bonds or other securities returned to said borrower or borrowers." As plaintiff subscribed for 15 shares, and only borrowed \$1,200, he would, if he had made all required payments, have been entitled to 3 shares fully paid up, and would also have been entitled to have the mortgage canceled. Provision was made for withdrawals, whereby a stockholder could withdraw and receive the amount of dues actually paid upon each share, with interest, after some deductions provided for; but no member could withdraw who had taken a loan until such loan was fully paid, unless by the consent of the directors. It was competent for the association to fix the terms on which members might withdraw, in the absence of statutory provisions. *End. Bldg. Ass'ns* (2d Ed.) § 31. The Code (section 644) gives the association the power to fix, by its by-laws, the terms on which a member may withdraw. I can find nothing in the by-laws, and nothing in the contracts entered into by plaintiff, warranting the claim that, notwithstanding he had defaulted in his payments on the mortgage, and also on his shares, he still had the right to offset his payments previously made against the amounts still due from him. The only clause in the mortgage bearing upon the point is one that, in case of foreclosure, gives to the mortgagee the option, without notice to the mortgagor, to apply on the mortgage note the cash surrender value of the shares, less all fines, penalties, etc., and thereupon the shares should become the property of the mortgagee. But this gives the mortgagor no right to make the offset, nor does it compel the mortgagee to do so. The mortgagor having ceased all payments, and by suit having sought to compel the cancellation of his mortgage, the mortgagee is within its rights in asking a foreclosure of the mortgage and a decree for the sale of the shares, and, presumably, they will bring their cash value, and plaintiff will have his credit therefor. That the relations of borrower and stockholder are separate and distinct, in associations such as defendant's assignor, seems to be well settled. *End. Bldg. Ass'ns* (2d Ed.) §§ 123, 477. And it is general law that payments on account of collaterals are not payments on account of the debt they secure. The pledging of shares as collateral security for the payment of the debt "is a recognition of the distinct standing of the member as a member and as a debtor." *Id.* § 477, and cases cited.

3. It is contended by plaintiff that the evidence does not support the finding that a pre-

mium on the loan was fixed at 20 per cent. or any other sum, and that there is no evidence that he agreed to pay a premium. He complains also that he was entitled to a loan of \$1,500, for which he applied, but received only \$960, and should be compelled to pay the latter sum, if any, and no more. It is true that plaintiff applied for \$1,500, and that the by-laws entitled him to a loan of \$100 on each share. It is true, also, that he received but \$960, for which he gave his note for \$1,200. The evidence is sufficient, we think, to support the finding that plaintiff knew he was to pay a premium. He had a copy of the by-laws, as all members had, and these by-laws provided that the premium bid should be deducted from the principal. He paid interest on the note and installments on the shares for several years, and must have known for what he was paying. The proceedings of the directors show that, at a meeting held September 5, 1889, when plaintiff's and other loans were allowed, the premium was fixed at 20 per cent. The note called for \$1,200, and included \$240 premium, leaving \$960 for the borrower. This was part of the plan for creating funds, in which plaintiff shared with other members, into which he entered with his eyes open. He testified that he would not have signed the note had he understood that he was to receive but \$960, and it appeared that the money was not in fact paid until after the note and mortgage were delivered. Still, plaintiff does not allege nor attempt to prove fraud, and he made so many payments voluntarily, after he must have known the full effect of his contracts, that his testimony that he would not have signed the note had he known the facts cannot avail him.

The proceedings of the corporation directors show that the loan was allowed to plaintiff for \$1,500. We cannot see that he can complain that the directors finally found that they could loan him but \$1,200. He certainly could not expect to receive \$1,500 on his note for \$1,200, and, if he had received \$1,200 in money, his note must have been for \$1,500, to include the premium. The by-laws required that the money should be "loaned out in open meeting to the highest bidder or bidders. The premium bid shall be deducted from the principal," etc. The premium in this case was not thus determined, but, as plaintiff consented to pay it as fixed by the directors, we do not see that he can complain of this violation of the by-laws. All the applicants for loans at that time were successful. No one of them suffered by the failure of the directors to invite public bids for the money. If the association suffered, the matter cannot be inquired into in this action. If, as we have said, the by-laws were not strictly pursued, the plaintiff cannot complain in this action. Indeed, as a member, having himself been a party to the violation and receiving the benefits thereof, he ought not to be heard to complain.

4. Appellant claims that it was error to allow attorney's fee, for the reason that the attorney of defendant was its regular salaried attorney; citing the by-laws, which prescribe the duties of the corporation attorney, and provide that he should receive such compensation as the directors should determine. Some of the early proceedings of the corporation defendant show that its attorney in this action was its regularly appointed attorney, but there is no evidence that he occupied that relation when this suit was brought, and, if there were any such evidence, it does not appear that he was paid a salary or other compensation by the corporation. The by-laws authorize such compensation to be made, but do not fix the amount. Plaintiff has not brought suit within the rule laid down in *Bank v. Treadwell*, 55 Cal. 379. The mortgage in terms provides, in case of foreclosure, the mortgagor shall pay reasonable attorney's fees, "and the payment of such costs and expenses and attorney's fees by the mortgagor is secured hereby." The cross complaint contains an averment setting forth the provisions of the mortgage, and alleging that the attorney's fees therein provided for were secured thereby, and the prayer asks for reasonable attorney's fees. There is no allegation that the sum claimed is reasonable, nor is there any finding of the fact, and therefore it is claimed defendant is not entitled to attorney's fees. It is found that plaintiff executed the mortgage, which is equivalent to a finding that he agreed to pay a reasonable attorney's fee for the mortgage so provided. The averment that the fee claimed was a reasonable amount is not necessary. *Carriere v. Minturn*, 5 Cal. 435. The attorney's fee was not the cause of action, but an incident to it. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144, affirming *Carriere v. Minturn*. See, also, *Brooks v. Forrington*, 117 Cal. 219, 48 Pac. 1073. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755, does not overrule or conflict with *Carriere v. Minturn*. As an averment was unnecessary, so also was a finding. The conclusion of law that defendant was entitled to recover attorney's fees rested upon the provisions of the mortgage, and the court could determine what amount would be reasonable without hearing any testimony thereon. *Insurance Co. v. Fisher*, 106 Cal. 234, 39 Pac. 758; *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796.

5. Appellant contends, also, that he was entitled to have an account taken, and all of the money paid by him credited on the debt, and a finding as to the duration of the association, and judgment against him for the amount he would have to pay at the winding up of his series; citing *End. Bldg. Ass'n's*, §§ 130, 134, 444, 445. It was proved by a witness, conceded by both sides to be an expert accountant and familiar with the workings of defendant and other like corpo-

rations, that plaintiff's shares had not matured September 15, 1896, when the action was brought, and that if the earnings continued to be what they had been in the past, i. e. what was termed $13\frac{5}{7}$ per cent. monthly compound, it would take $8\frac{1}{2}$ years from the time payments commenced for the shares to mature. But the witness said it could not be ascertained certainly in advance when the series would mature, for the obvious reason that the earnings were an unknown quantity for the future. We cannot see that there is anything in the plan upon which defendant and its assignor were operating that would permit a shareholder, who was a mortgagor, to default in payments of interest and principal of his note and installments on his shares, and still entitle him to claim the full benefit of all his previous payments whenever he chose to default. Nor can we see how an accounting could be taken of the unascertainable earnings of a going concern, the shares of which mature at no fixed period, so as to protect other shareholders. Nor can we see that any equitable principle would warrant our holding that defendant should pay back to plaintiff moneys which, by the terms of his agreement, were to be surrendered, upon his default, for the benefit of the other shareholders. We have already seen that he gets the present cash value of his shares by public sale, the proceeds to be credited on his notes. Whether the investment is a wise one to the borrower, who makes all required payments, we are unable to say, but it is clearly not so to one who cannot persist in his payments until the scheme closes, or until the series to which his shares belong has matured. We cannot find, however, either in the statute or in the by-laws, or in the contracts entered into, any authority for equity to interpose so as to aid the unfortunate borrower in the situation of plaintiff. Mr. Endlich says (section 149): "There is obviously a great difference between the case of a member who has fulfilled, faithfully, all the requirements of his undertakings with the building association,—of those which relate to the duties of membership generally, as well as those which pertain to his position as a borrower,—and that of a member who, after obtaining an advance, neglects both classes of obligations, and renders himself liable to compulsory proceedings on the part of the society, which the latter is bound to institute all the more rigorously, as the success of the whole scheme depends upon the performance of all his duties as a member. Whatever, therefore, may be the advantages allowed to members voluntarily repaying loans, these provisions have no application, and offer no immunities, to those who become defaulters, and are, upon that ground, sued by the association upon the covenants of their obligations. Having thus violated the rules of the society, they are not entitled to the benefits held out to those who keep them, nor are they within

the meaning of the statute designed to favor the conscientious borrowers." See the subject further treated at sections 480-482. We have seen that plaintiff will receive as a credit on his debt the value of his shares when sold, and, as these shares represent his interest in the association, he will thus receive all that he is entitled to as a defaulter, upon any principle of equity. This cash value was shown to be \$70.20 per share, or \$1,060.50 for 15 shares. In an elaborate and well-considered opinion, which Mr. Endlich regards "as definitely conclusive upon the controversy" (section 482), Paxson, J., in *Watkins v. Association*, 97 Pa. St. 514, holds that, in a suit brought against the borrower, the value of the defendant's stock, for the purpose of application to the extinguishment of his debt, is "just what the defendant has paid on account thereof. This was all * * * the law gave him the right to apply. The value of stock beyond this consisted mainly of profits, in which a defaulting borrower has no right to participate." The learned justice then proceeds to show why this must be so. We are not called upon to affirm or deny this doctrine, and I refer to it to show that full equity is done in giving plaintiff the benefit of the value of his shares by sale in the open market. He paid on account of his shares \$630 in all, as found by the court. It is possible that the shares will sell for much more than this sum, as their cash value was proven to be \$1,060.50 at the time the action was brought.

Appellant assigns numerous errors occurring at the trial, most of which, however, depend more or less upon propositions already noticed. Appellant offered the testimony of plaintiff to show that when he purchased the shares he was told by some one, acting for the corporation, that his stock would mature in seven years. Again, he was asked whether Col. McMullen (one of the directors) ever represented to him as to the time when the stock would mature or the loan be discharged. Again, he was asked how he understood that he was to pay the note and mortgage and other similar questions as to his understanding of the transaction and his motive in entering into the engagement and like matters. We have examined this series of questions with some care, and while some of them, perhaps, were admissible, although their exclusion did no harm, the information sought was properly excluded. Under the issues in the case, plaintiff could not vary the effect of his contracts by showing that he did not comprehend their full meaning. We advise that the judgment and order be affirmed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(6 Cal. Unrep. 631)

PEOPLE v. MENDENHALL. (Cr. 658.)¹

(Supreme Court of California. Jan. 15, 1901.)

ASSAULT WITH INTENT TO MURDER—MALICE—INSTRUCTIONS.

On prosecution for assault with intent to murder, an instruction that the malice necessary to make a killing murder might be either express or implied, though technically correct, was inapplicable and erroneous, as the intent must be proved in such prosecution, and implied malice may show no actual intent.

Department 2. Appeal from superior court, city and county of San Francisco; F. H. Dunne, Judge.

William P. Mendenhall was convicted of assault with intent to murder, and appeals. Reversed.

Leon E. Prescott, for appellant. Tiley L. Ford, Atty. Gen., for the People.

HENSHAW, J. The defendant was charged with and convicted of the crime of assault with intent to commit murder, and appeals from the judgment given against him. The court instructed the jury as follows: "Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no deliberate provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." It is insisted that this instruction, while pertinent and proper in a charge upon the crime of murder, is improper and erroneous where the offense is an assault with intent to commit murder; that the charge of murder may be established in the absence of proof of an intent to kill, but that the charge of attempt to commit murder cannot be established by proof merely of implied malice. In this we think the appellant's contention is sound, and that, in the crime charged, the court erred in instructing the jury as it did. In *People v. Mize*, 80 Cal. 41, 22 Pac. 80, there came under the attention of this court the following instruction: "They [the defendants] cannot be convicted of an assault to commit murder unless the evidence shows beyond a reasonable doubt that, had the prosecuting witness been killed, defendants would have been guilty of murder. If the evidence shows that, had Henry Coffey been killed, one of the defendants would have been guilty of murder, then that one should be convicted." This court held the instruction to be erroneous, laying down the unquestioned proposition that while, to constitute murder, the guilty person need not intend to take life, to constitute an assault with intent to murder, there must be proved the intent to take life, and though the wrongdoer's act is such as, were it successful, it would be murder, if in truth he did not mean

¹ Reversed in banc. See 67 Pac. 325, 135 Cal. 344.

to kill he is not guilty of an assault with intent to commit murder. 1 Bish. Cr. Law, § 270; 2 Bish. Cr. Law, § 741. In *People v. Wallace*, 101 Cal. 281, 35 Pac. 862, an instruction identical with the one in the case at bar was complained of, but it was there said that, conceding the instruction to be erroneous, the defendant could not have been injured by it, as he was acquitted of the offense to which it applied. In *People v. Burgle*, 123 Cal. 303, 55 Pac. 998, defendant complained because the court instructed the jury upon express malice alone, properly excluding from their consideration the definition of implied malice. It was said by this court that it is doubtful whether the language of section 188 of the Penal Code should be given to the jury at all in the case of assault with intent to commit murder, and that it was intimated in *People v. Wallace* that the section should not be given, because "implied malice is not equivalent to that actual intent which is essential to the crime of assault with intent to commit murder." Under our Code a conviction of murder may be sustained either where a deliberate intent is manifested to take away the life of a fellow man, or where no considerable provocation appears, or where the circumstances attending the killing show an abandoned and malignant heart. Where a deliberate intent appears, there is present the express malice of the law. In the latter class of cases the malice is implied,—the law presuming it from the circumstances of the case,—though in fact the actual and deliberate intent to kill may not have been present in the mind of the wrongdoer. Therefore it is only in cases of murder of the first class, where express malice and deliberate intent are shown, that, the attempt failing, the wrongdoer may be found guilty of an assault with intent to commit murder. In murders of the other category the specific crime here charged is not contained.

Appellant further complains of the following instruction: "It is incumbent upon the prosecution to prove the intent, and if it appear that the alleged assault was committed under such circumstances as would, had death ensued, have mitigated the offense from murder to manslaughter, such intent was not premeditated, and you cannot find the defendant guilty of the charge preferred against him." This instruction is legally correct, though it is by no means a full exposition of the law. It is certainly true that in a case where, if death had ensued, a conviction of manslaughter alone would have been justified, the defendant (death not having resulted) could not be convicted of an assault with intent to commit murder; but, upon the other hand, as has been pointed out, even if death had ensued under circumstances which would have made the crime murder, he still could not be properly convicted of the lesser charge (the victim surviving)

unless it were a murder committed with express malice.

The error in the instruction first above quoted was manifestly prejudicial. It cannot be said that the error was cured and rendered harmless by other instructions. The judgment is therefore reversed, and the cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 80)

KLUMPKE v. BAKER et al. (S. F. 1,640.)
(Supreme Court of California. Jan. 22, 1901.)

In bank. Motion for rehearing denied.
For opinion in department, see 63 Pac. 137.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. If an indiscriminate assessment of the real property of different persons can be upheld upon any ground, it seems clear to me that it cannot be defended under the provisions of the Code respecting mistakes in the names of owners. A mistake in the name of the owner of a lot otherwise correctly assessed puts no obstacle in the way of payment of the proper tax by the real owner. But, if my land is assessed together with the adjoining property of another person, I cannot pay my tax without paying his tax. If I pay the whole tax, there is no means by which I can be reimbursed for the excess. If I do not pay, I must lose my land.

(131 Cal. 30)

PEOPLE ex rel. SILVA v. LEEVE DIST.
NO. 6 OF SUTTER COUNTY
et al. (Sac. 687.)¹

(Supreme Court of California. Jan. 19, 1901.)

LEEVE DISTRICT—SPECIAL LAWS—VALIDITY.

1. A levee district was organized under Act March 25, 1868, providing a method for the organization of such districts, and, such act being declared void as to the method of such organization, the legislature, by Act March 30, 1872, and Act March 31, 1891, p. 235, recognized the existence of such district. *Held*, that such legislative recognition gave legal existence to such district.

2. Act March 31, 1801, providing a new form of government for a certain levee district, is not in violation of Const. art. 11, § 6, and article 12, § 1, declaring that neither municipal nor private corporations shall be created by special laws, since such levee districts are not corporations, but mere governmental functions having attributes of corporations.

In bank. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Quo warranto, on the relation of John F. Silva, against levee district No. 6 of Sutter county and others. From a decision affirming a judgment for defendants (63 Pac. 342), plaintiff appeals. Affirmed.

Atty. Gen. Ford, Hart & Aram, and Kirby S. Mahon, for appellant. W. H. Carlin and M. E. Sanborn, for respondents.

¹ Rehearing denied January 19, 1901.

HENSHAW, J. The opinion of the department heretofore filed herein is modified so as to read as follows: "This is a proceeding in quo warranto to test the legal existence of levee district No. 6. The other defendants are the officers of the district. The case was heard and determined upon an agreed statement of facts, which are the findings in the case. Upon these facts judgment was rendered for defendants, and plaintiff appeals. Levee district No. 6 was organized under the act of March 25, 1868 (St. 1867-68, p. 316). By virtue of that act levee district No. 1 was created, and there was provided a scheme for the organization and government of other levee districts which might thereafter be formed. But section 21 of the act, setting forth the method of organization for such districts, has been declared unconstitutional and void. *Moulton v. Parks*, 64 Cal. 183, 30 Pac. 613; *Brandenstein v. Hoke*, 101 Cal. 134, 35 Pac. 562. It follows, therefore, and is conceded, that the organization of levee district No. 6, effected under section 21 of the act of March 25, 1868, was irregular and void. Notwithstanding this fatal irregularity in its organization, the legislature made distinct recognition of the existence of the district by an act approved March 30, 1872 (St. 1871-72, p. 734); and again by acts approved March 31, 1891 (St. 1891, p. 235, and St. 1891, p. 237). The first of these acts of recognition was passed under the constitution of 1849, the latter two under the present constitution. That they are positive acts of recognition sufficient to invest the district with the functions and attributes which it had assumed to exercise under the law of 1868 may not be doubted, under the authority of *People v. Reclamation Dist. No. 108*, 53 Cal. 346, and *Reclamation Dist. v. Gray*, 95 Cal. 605, 30 Pac. 779, unless it can be said that the legislature itself was without power so to validate the existence of a levee district thus irregularly organized. This is the contention of appellant. But legislative action in such matters is only circumscribed by the express limitations of the constitution. It is not questioned but that in the first instance, by direct enactment, the legislature could have carved out levee district No. 6 precisely as it did in the case of levee district No. 1. Where the exercise of a particular power is limited by the constitution, the legislature must act in the mode prescribed. But where there is no such limitation, if the legislature shall prescribe a mode for its exercise, which is, perchance, illegal, it may, by subsequent ratification or recognition, validate the acts done under the irregular mode. To illustrate: The present constitution forbids the creation of corporations for municipal purposes, except by general law. A special law creating a special municipal corporation would be violative of this constitutional inhibition, and no subsequent act of ratification or recognition by the legislature could validate that which, in the first instance, it had no power to do. But un-

der the constitution of 1849 corporations for municipal purposes could be created by special law. If, then, the legislature, acting under that constitution, should so, by special law, create a municipal corporation, and for some reason the law lacked validity, the legislature, having the power thus to create the corporation, could, by ratification or recognition of its corporate existence, erect it into a valid municipality. If, then, levee district No. 6 be considered as a corporation (a matter inviting later attention), it was a corporation created for municipal purposes, and, notwithstanding this irregularity of its creation, the legislature could, as it did, give it a legal existence by its positive acts of recognition.

"But appellant still further contends that levee district No. 6 was a corporation for municipal purposes under the act of 1868 and the act of 1872 recognizing its existence; that a new and distinct organization was perfected for it under the act of March 31, 1891, passed under the present constitution; that the district elected to come under this act, and to exercise the corporate functions provided for by the act; that the act itself is void, and that, therefore, the district is improperly exercising corporate functions, from using which it should be restrained. Since levee district No. 6 was a legal entity before the passage of the act of March, 1891, if that act be itself void, it would not interfere with the legal existence of levee district No. 6, and the utmost which the court could do would be to require it to exercise the powers which it had theretofore enjoyed under the act of 1868 and the acts amendatory thereto, and restrain it from exercising any new rights or powers under the act of 1891. But, upon the other hand, respondent insists upon the validity of the act of 1891, and upon its right to exercise the powers conferred upon it by that act, and thus a further consideration of the question is demanded. Appellant's argument against the validity of the act of March 31, 1891, is that levee district No. 6 is a corporation for municipal purposes; that under the constitution corporations for municipal purposes shall not be created by special laws; and that the act of March 31, 1891, dealing, as it does, with levee district No. 6 alone, and providing a new form of government for it, is a special law. Section 1 of article 12 of the constitution, having reference to private corporations, provides that they may be formed under general laws, but shall not be created by a special act. Article 11, § 6, of the constitution declares that corporations for municipal purposes shall not be created by special laws. The act of 1891 is unquestionably a special law. If levee district No. 6 be a corporation, it is certainly not a private corporation, and must come under the designation of article 11, § 6,—'a corporation for municipal purposes.' And if it be a corporation for municipal purposes within the meaning of that article and sec-

tion, then indubitably, the act of March, 1891, forcing upon a levee district a new, distinct, and different organization, is special and inhibited legislation. But is levee district No. 6 a corporation for municipal purposes within the meaning of the constitution? Expressions will be found in the cases where such organizations have been designated 'corporations for municipal purposes,' or 'public corporations,' or 'corporations for public purposes'; but these were convenient phrases of designation and description, rather than judicial declarations as to the nature and character of these agencies. The question propounded is conclusively answered by *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016. It is there held that a reclamation district, conceding it to be a corporation, is not a corporation for municipal purposes, within the meaning of the constitution. But as such levee districts or reclamation districts are distinctly not private corporations, it must follow that, if they be corporations, they are corporations in a class by themselves, and the general powers of the legislature for their creation, organization, and control are in no wise limited by the constitution of the state. The judgment appealed from is therefore affirmed."

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 55)

SPIELBERGER v. THOMPSON. (Sac. 734.)
(Supreme Court of California. Jan. 21, 1901.)

In bank. Motion for rehearing denied.

For opinion in department, see 63 Pac. 132.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing, and from the judgment of affirmance. The statement of facts contained in the department opinion is based exclusively upon the findings of the superior court, but those findings are assailed as being contrary to the evidence; and, in my opinion, several of those which are most material to the conclusion of the court are wholly unsupported by any evidence contained in the record. The uncontroverted facts are that Philip Oppenheimer was trustee of an estate of about \$70,000. He was also one of the beneficiaries, and the remaining beneficiaries were his mother, his brother Emanuel, the payee of the note in controversy here, and his sister, the maker of the note, and the defendant herein. Emanuel had induced his mother to commence an action to vacate the trust upon the ground of fraud. He and his brother and sister were made defendants in that action, but he, by answer and cross bill, took sides with his mother in favor of dissolving the trust. His sister and his brother Philip answered, defending the action. The litigation having reached this stage, all parties became anxious to settle

the controversy, and Emanuel represented to his sister that nothing stood in the way of a dismissal of the action and cross action except the refusal of his mother's attorney to allow a dismissal until he should be paid or secured in the payment of his fee, amounting to \$1,500; and he agreed that if she would give him her note for that amount "he would pay said attorney his fee, and obtain a judgment dismissing the said action." Upon this representation, and in consideration of this promise, the note in controversy here was executed and delivered. It appears very clearly from all the evidence in the case that the representation was false, and that the promise was never performed in its true and proper sense. As to the representation, if there had been nothing in the way of a dismissal of the action except the objection of the plaintiff's attorney, that, so far from being a formidable obstacle, was no obstacle at all; for nothing could have been easier than to substitute another attorney (as was afterwards done), who would make the motion to dismiss. But it will appear that the obstacles to dismissal were of another character, and the fault lay at another door. It is shown clearly by all the testimony, including the explicit admission of Emanuel himself, that he never took the note to his mother's attorney, and never informed him that he had it. On the contrary, he kept it among his private papers for about a month, and then pledged it as collateral for money borrowed of Charles Helsen, which money he used in his private business. The first thing this defendant heard of the note after delivering it was when it was presented, with a demand of payment, by Helsen's agent. She did not pay it, and afterwards Emanuel redeemed it and pledged it again to C. W. Clarke to secure other advances. This is what he did with the note which he had promised to use for the payment of his mother's attorney. Nevertheless he claims that he, by his attorneys, promptly moved to dismiss the action. He asserts that he and they made numerous attempts to procure the dismissal. He does not testify—and there is no evidence of any sort—that his mother's attorney moved to dismiss the action, or that he or she ever consented to a dismissal. And the finding of the court goes no further than the evidence on this point. It does not appear in the case anywhere, or in any way, that the plaintiff in that action ever consented to a dismissal, unless her consent is inferred from the finding that "the dismissal was delayed through the acts and conduct of the attorney representing the defendant herein in that action." But clearly this finding does not necessarily imply the consent of the plaintiff at the time of Emanuel's numerous attempts, which he claims to have made shortly after receiving the note. The final settlement and dismissal of the action was not reached for five months after the delivery of the note, and not until after a trial of the action and a

decision in favor of the defendants on the merits; and then it was based upon further negotiations, and apparently upon new considerations, independent of the payment of \$1,500 to the plaintiff's attorney. Some delay in this final settlement may have been due to the acts of defendant's attorney,—as, for instance, his successful defense of the action,—and at the same time it may be true that plaintiff did not consent in the beginning to a dismissal.

But if this fatal objection to the finding is waived, and it should be held that, taking the findings altogether, they may be construed to mean that promptly after receiving the note Emanuel did not only move to dismiss his cross action, but also procured his mother's consent and that of her attorney to dismiss her action, the only result is to put Emanuel in other difficulties. He confesses that he did not pay his mother's attorney, did not inform him that he had the note to secure him, but used the note to raise money for his private business. If, under these circumstances, the attorney nevertheless consented to a dismissal of her action, it proves that the representation made by this defendant that he would not consent to a dismissal without payment or security for his fee was false, and the whole transaction a fraud.

But, aside from this, it was no performance of his contract for Emanuel to make motions and efforts to procure a dismissal of the actions. His contract was to procure a judgment of dismissal, and that without unreasonable delay. The findings of the court with respect to this matter are that Emanuel did pay the fee of his mother's attorney, that the action was finally dismissed, and that the delay in dismissing it was caused by the acts of the attorney representing the defendant. All these statements are literally true, but they are true with such qualifications as to render them wholly immaterial. The action was finally dismissed, but not for five months after the delivery of this note, which during all that time Emanuel had been using to raise money for his own purposes; and in the meantime the case had been tried, and a decision rendered by the superior court that the trust was valid, advantageous, and free from fraud. Can it be claimed that a dismissal of the action under these circumstances was a compliance with Emanuel's agreement to procure a judgment of dismissal? When this defendant gave her note to secure a dismissal of that action, the advantages that would have accrued to her by an immediate dismissal were that she would have been saved the trouble and expense of a trial, and would have secured herself from whatever risk of being defeated in the litigation she may have had reason to apprehend. It may also be reasonably sup-

posed that it was a motive of controlling weight with her to avoid the pain and scandal of a public trial of charges of fraud preferred by her mother against her brother. By his failure to dismiss the action before it had been tried and he had been defeated on the merits, Emanuel deprived his sister of every possible advantage she could have expected when she gave her note.

But it is said in the opinion of this court that the delay in the dismissal was largely occasioned by the defendant herself. The only support for this statement is in the finding of the superior court, above quoted, which, it will be observed, does not say that the delay was caused by any fault of the defendant, but by the acts and conduct of the attorney representing the defendant in that action. This, as above remarked, is true in a literal sense, but with a serious qualification. The same attorney represented this defendant and her brother Philip in the defense of that action, and it does appear by the testimony of Philip in this case that his attorney (who happened also to be his sister's attorney in defending that action) did in his behalf, and upon grounds peculiarly affecting his interest, oppose the motion of Emanuel to dismiss. There is not the slightest atom of evidence that he opposed the dismissal on behalf of the defendant, or at her instance, or for any benefit to her; and if he deemed that the interest of Philip, who was absent from the state, was opposed to a dismissal, it is not easy to see how the defendant could have prevented his opposition, or why she should be held responsible for it. Besides, the agreement of Emanuel to procure a judgment of dismissal bound him to obtain the consent of Philip, so far as his consent was essential, and to comply with whatever conditions Philip attached to his consent. There is no hint or suggestion in the findings or evidence that the defendant conspired with Philip to exact unreasonable conditions as the price of his consent, and to hold her responsible for his action is unjust and unwarranted.

Finally, with respect to the settlement of the case and the payment of plaintiff's attorney: The case was settled when there was nothing left to settle except the costs of a litigation which had been instigated (unjustly as it appears) by Emanuel, and which he should have paid. He did pay his mother's attorney, but the amount was only \$800, instead of the \$1,500 he represented to be necessary, so that by his recovery in this action (he is represented here by his assignee) he makes a handsome bonus out of his sister, and practically escapes the consequences of his fault by throwing the entire expense upon her. I think a more equitable result might have been attained without doing violence to any rule of law.

(181 Cal. 402)

MILLER & LUX v. BATZ, County Treasurer.
(L. A. 800.)(Supreme Court of California. Jan. 18, 1901.)
PUBLIC LANDS — SWAMP LANDS — COMPENSA-
TION FOR RECLAMATION — STATUTE
OF LIMITATIONS.

1. A mandamus proceeding against a county treasurer to compel the payment of a sum due for the reclamation of swamp lands was submitted on agreed facts which showed that the land was reclaimed by plaintiff's predecessor, but which failed to show an assignment of the claim to plaintiff, and the writ was denied because the purchase of the land did not amount to an assignment. Pol. Code, § 3477, requires such money to be paid to the original purchaser or his assignee. The judgment was affirmed on appeal, and a rehearing was granted on the representation that such question was not raised in the brief of either party, and the petition for rehearing stated that plaintiff was assignee of the person reclaiming the land. *Held*, that the cause would be reversed and remanded, with leave to plaintiff to amend his petition and present additional evidence.

2. Code Civ. Proc. § 338, requiring an action on a liability created by statute, other than a penalty or forfeiture, to be brought within three years, does not bar a proceeding to compel the payment of money due for the reclamation of swamp lands, since Pol. Code, § 3477, and the preceding sections requiring the payment of two dollars per acre to the purchaser of swamp lands when the reclamation is completed or so much money is expended therein, is a contract between the purchaser and the state, and is not a liability created by statute.

In bank. On rehearing. Reversed.

For opinion in department, see 61 Pac. 935.

HARRISON, J. The judgment appealed from was affirmed in department June 15, 1900 (61 Pac. 935), upon the authority of *Carpenter v. Savings Union* (Cal.) 61 Pac. 92. A rehearing was granted upon the representation that the question upon which the *Carpenter* Case was decided had not been presented by the plaintiff or by the defendant either at the trial in the court below, or in the briefs here upon the appeal. In view of this fact, and of the further fact that the plaintiff states in its petition for rehearing that the reclamation of all the lands in the district was made entirely by its immediate predecessors in interest, and not by the original purchasers of the lands, and that before the commencement of this action appellant's immediate predecessors in interest executed an assignment to it of the claim now involved, we have determined to remand the case, with leave to the plaintiff to amend its petition and submit additional evidence in support thereof, should it be so advised.

As the statute of limitations, which is pleaded as a defense, and has been argued upon this appeal, will doubtless arise upon the next trial, it is proper to consider the same. Counsel have discussed in their briefs the applicability of different statutes of limitation upon the plaintiff's cause of action, but as the defendant has pleaded only the statute prescribed in subdivision 1, § 338, Code Civ. Proc., it is only necessary to determine whether the action is barred by the

provision thus pleaded. That subdivision prescribes three years as the time within which an action may be commenced upon a liability created by statute, other than a penalty or forfeiture. The plaintiff's cause of action herein is not founded upon a liability created by statute, but is based upon a contract between him and the state, and is subject to only those provisions of the statute of limitations which are applicable to causes of action arising out of contractual relations. The state has, in effect, declared in section 3477 of the Political Code, and preceding sections, that the holders of certificates of purchase of swamp and overflowed lands may reclaim the same, either by themselves or through the agency of a reclamation district, and that whenever the works of reclamation are completed, or the sum of two dollars per acre has been expended in the work of reclamation, there shall be repaid to each purchaser or his assigns out of the swamp-land fund, after making certain deductions therefrom, his proportion of the amount which has been contributed to that fund. The purchasers are under no obligation to reclaim the land, but the state agrees that, if they do reclaim it, it will repay to them this amount of money. The obligation of the state to make this payment is not a liability created by statute, but arises from the acceptance by the purchasers of the offer made by the state, and the performance of the work which the state has prescribed as the condition upon which it will make the payment. This obligation in favor of the purchaser is of the same character and arises at the same time as does his right to receive a patent for the land. The fact that the obligation is evidenced by statute does not render the plaintiff's cause of action one "created" by statute. All contracts with the state have their authority in some statutory provision, but it is not to be assumed, in the absence of express provision to that effect, that the legislature intended to prescribe a different rule of limitations for actions against the state upon its contract from that for actions upon other contracts. The liability of the state to the plaintiff herein results from its agreement to repay the money, but it is not "created" by the statute, as is the liability upon a swamp-land assessment for reclamation purposes (*People v. Hulbert*, 71 Cal. 72, 12 Pac. 43), or the liability of a stockholder for his proportion of the corporate debts (*Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 37 Pac. 490), or the right to maintain an action for the recovery of taxes (*City of San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923). Such liabilities are "created" by statute, and exist only by express declaration of the statute. The distinction is clearly pointed out in *Higby v. Calaveras Co.*, 18 Cal. 176, where the court said in reference to the question then under consideration, and that it was governed by the statute which is here pleaded: "This duty is not cast by contract, but by the law;

and the same law provides the compensation, or, in other words, creates the liability upon the part of the county to pay the compensation." Although the action is against the respondent as treasurer of the county, it is for the purpose of recovering money which has been paid to the state, and which the state, for its own convenience, has deposited with the county, as one of its governmental agencies. The plaintiff's right to maintain the action against the respondent is measured by his right to maintain it against the state. See *Kings Co. v. Tulare Co.*, 119 Cal. 509, 51 Pac. 868. The nature of the cause of action, and not the form of the action, determines the applicability of the statute of limitations. *De Haven v. Bartholomew*, 57 Pa. St. 126; *Higby v. Calaveras Co.*, supra. The judgment is reversed, and the cause remanded, with leave to the plaintiff to amend its petition.

We concur: VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.

(131 Cal. 376)

FOERST v. KELSO. (S. F. 1,448.)¹

(Supreme Court of California. Jan. 15, 1901.)

DAMAGES—PLEADING—AMBIGUITY—
DEMURRER.

Where the complaint prayed damages for injuries occasioned to plaintiff's person and property, real and personal, but did not specify the particular amount of damages sustained as to each, a demurrer to the complaint for ambiguity and uncertainty was improperly overruled.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Minna Foerst against John Kelso. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Edwin L. Forster, for appellant. F. J. Castelhun, for respondent.

HENSHAW, J. The complaint in this action prayed damages for injuries occasioned to plaintiff's property and person by reason of blasting operations negligently conducted by the defendant. It charged that the blasts showered a rain of rocks upon plaintiff's house and premises, "killing chickens and breaking boards of house, stable, woodshed, chicken house, and fence"; that upon one occasion "two immense bowlders of rock were blown upon plaintiff's premises, one of which struck plaintiff's stable and passed through the roof, breaking rafters and boards, one of which struck and injured plaintiff's shoulder; that the other bowlder went crashing through the rear wall of the plaintiff's house, through a sink into the middle of plaintiff's kitchen, in the second story, breaking windows, dishes, etc."; "that said blasting also caused plaintiff to become sick, ill, and nervous, to such a degree that she

has ever since suffered, and still suffers, from the effects thereof"; "that by reason of the premises plaintiff has suffered damages in the sum of \$5,000." To this complaint defendant interposed special demurrers for ambiguity and uncertainty, charging that it could not be ascertained therefrom for what injuries the plaintiff asks damages, —whether for personal injuries received by plaintiff, or injuries to her real property, or for the killing of her chickens, or for the shaking or damages of the houses in the neighborhood. To this respondent makes answer that it sufficiently appears from the complaint that the damages are sought for injuries to plaintiff's health and to her real estate and to her personal property, and that therefore the demurrer was properly overruled. In this reliance is placed upon the case of *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; but, so far as the question here involved was concerned, it was there decided merely that while it was necessary for the pleader to point out the particulars in which she had sustained injuries, namely, the humiliation and injuries to her health, in order that evidence thereof might be given at the trial, it was not necessary that she should designate the particular amount of damage which she had sustained by reason of the indignity, distinguished from the amount sustained from the injury to her health. "These elements of damage," it is said "were not capable of computation, nor would evidence of such amount have been admissible. This amount was to be determined by the jury in the exercise of an intelligent discretion." In the present case the demurrant asks, in effect, that the plaintiff be required to set forth with exactness, as it was easily possible for her to do, the amount of damage which she claims to have sustained by reason of the injuries to her real and personal property; for defendant might be willing to concede a good cause of action in plaintiff for these amounts, while denying her any right of recovery for injuries to health. It is true that demurrers for ambiguity and uncertainty, when improperly overruled, should not always work a reversal of the judgment, and will not do so when it appears that the matters complained of by demurrer were so trifling as not to have affected any substantial right of the demurrant. *Alexander v. Mill Co.*, 104 Cal. 532, 38 Pac. 410. But it is also true that when the demurrer for ambiguity or uncertainty, improperly overruled, affects the substantial rights of a party, he is entitled to a reversal of the ruling. Such were the cases of *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119; and *Mallory v. Thomas*, 98 Cal. 647, 33 Pac. 757,—with which cases this is identical in principle. It follows, therefore, that the judgment must be reversed, with directions to the trial court to sustain the demurrer to

¹ Rehearing denied February 15, 1901.

the complaint, with leave to plaintiff to amend and make more certain.

We concur: TEMPLE, J.; MCFARLAND, J.

(131 Cal. 390)

BOSQUI v. SUTRO R. CO. et al. (S. F. 1,594.)
(Supreme Court of California. Jan. 16, 1901.)

CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—STREET RAILROADS—EVIDENCE—SUFFICIENCY—INSTRUCTION—QUESTION FOR JURY.

1. Whether experienced railroad men are more competent to testify as to the speed of an electric car, and therefore entitled to greater credence than ordinary passengers, whose testimony has been admitted unchallenged, is a question for the jury, and their finding on the testimony, if supported by real and substantial evidence, will not be disturbed on appeal.

2. Defendant's testimony, showing how the equipment of its electric road compared with the equipment of other roads, was properly excluded in an action by a passenger for personal injuries caused by the derailment of a car, when offered to show that defendant's cars could run over the track at a certain speed with safety.

3. The exclusion of defendant's testimony, showing at what rate of speed its electric cars could run with safety without derailment, was harmless, where defendant was permitted to show that the car on which plaintiff was a passenger could be run over the road at an excessive rate of speed without derailment.

4. An instruction to the effect that a carrier of passengers must exercise the care of a very cautious person, "surrounded by the same circumstances," is not objectionable as exacting a greater degree of care than can be reasonably exacted of a common carrier.

5. Whether the failure of a carrier of passengers to employ extremely cautious men is a breach of the carrier's duty to exercise the utmost care is *prima facie* a question for the court, and not for the jury, but the question whether such care has in fact been exercised is for the jury.

6. The rule that proof of the occurrence of an accident causing injuries to a passenger without fault on his part is proof of negligence on the part of the carrier applies to street-railroad companies operating cars by electricity or steam power.

7. An instruction stating a correct proposition of law, referring in no way to the evidence submitted, is not necessarily misleading.

Commissioner's decision. Department 2. Appeal from superior court, city and county of San Francisco; William B. Daingerfield, Judge.

Action by Benjamin A. Bosqui against the Sutro Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Smith & Murasky and McKinstry, Bradley & McKinstry, for appellants. C. H. Wilson, for respondent.

CHIPMAN, C. Action for personal injury. The trial was by a jury, and plaintiff had the verdict. Defendant appeals from the judgment and from an order denying its motion for a new trial. The injury was caused by one of defendant's cars leaving the rails

and colliding with another of its cars coming from an opposite direction.

1. It is contended by defendant that the evidence is insufficient to justify the verdict. Counsel argues the point upon the assumption either (1) that the judgment can be sustained only on the theory that defendant failed to overcome the presumption of negligence arising from proof of the accident; or (2) that evidence "real and substantial" (Driscoll v. Railway Co., 97 Cal. 553, 32 Pac. 591) was offered by plaintiff that the car was derailed because of its excessive speed; and defendant's counsel assume that plaintiff will not contend that the negligence of defendant was affirmatively shown in any way other than by proof as to the speed of the car. Plaintiff, however, contends, not only (1) that the car was being run at an excessive speed; but (2) that, with even ordinary care, the car could have been stopped after it left the rails, and before the collision; (3) that the incoming car should have been stopped before it collided with the car on which plaintiff was a passenger; (4) that the car was not derailed by gravel previously piled on the rails, as contended by defendant, but that any gravel found on them after the collision was thrown there by the car itself while running along the side of the rails; and (5) if it be true that some person, unknown to defendant, placed the obstruction on the tracks, still defendant was guilty of negligence in not stopping the car before the collision.

Defendant operates an electric street-railway line from the west terminus of the Sutter street car line to the Cliff House. Defendant's outgoing car 37 left its starting point going to the Cliff House at 8:35 o'clock p. m., April 9, 1897. On Richmond avenue, just beyond the crossing of Commonwealth avenue, and on a straight track, car 37 left the rails, and continued moving for a distance, variously stated as 70 to 100 feet, when it collided with defendant's incoming car 29. Plaintiff was riding on car 37, which was crowded with passengers, and received the injury complained of by reason of the collision. No question of plaintiff's contributory negligence arises, and the evidence is undisputed that the track was well constructed, and the appliances for operating the car in perfect order, and suitable for the purposes for which they were being used.

Upon the question of the speed of car 37 when it left the rails, it is conceded by defendant that the evidence is conflicting,—plaintiff's witnesses testifying to a speed of 15 to 25 miles an hour, and defendant's witnesses to a speed less than 8 miles an hour (the motorman put it at 7 miles),—but defendant claims that, its witnesses being experienced railroad men, "such testimony is entitled to more weight than that of ordinary railroad passengers." This view of the evidence seems not unreasonable, and, if the fact could be said to be one peculiarly within the knowledge of railroad men, should have

had weight with the jury; but we cannot say, as matter of law, that the jury should have disregarded the one and accepted the other class of evidence. Defendant cites the case of *Railroad Co. v. Huntley*, 38 Mich. 540, where it was held that "opinions of persons riding in cars, and not observing from the outside, should be excluded, unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable." We cannot agree with this statement, but, even if sound law, no objection was made to the testimony of plaintiff's witnesses upon this or any other ground. Their testimony went to the jury unchallenged. The question whether defendant's witnesses were more competent to testify to the point in issue than plaintiff's witnesses, and the reason for giving the greater credence to the opinions of defendant's witnesses, were considerations properly addressed to the jury, and with their conclusion, there being sufficient evidence to support it, we cannot interfere. But the unusual, if not a dangerous, speed of a street car on a straight track, unaccompanied by any other circumstance, is not negligence, and the court substantially so charged the jury. It was urged at the trial and is urged here that the evidence showed that gravel or loose macadam with which the street was paved had been piled on the rails by some person or persons unknown to defendant, and that the car was thrown from the track by this loose material, upon which the car came so suddenly that it was impossible for the motorman to check the speed, and prevent the car from running onto the obstruction. Plaintiff contended, and now urges, that the track was clear, and that this loose material, afterwards found packed upon the rails, was thrown there by the forward truck wheels as they passed along near the rails in the loose macadam, before swerving to the left towards the incoming car, and was run over by the rear truck wheels while still on the track, thus accounting for the crushed appearance of gravel on the rails after the accident. The motorman testified that he saw the obstruction when within 10 feet of it, and immediately set his brake; that the car ran over about 6 feet of the gravel on the track, and then left it, and collided with car 29 at a point about 70 feet distant; and that car 37 was running about 7 miles an hour when it struck the gravel. No other person saw any obstruction on the rails before the car went off, and there was evidence from which an inference might have been drawn that the gravel on the rails was pushed onto them by the car wheels after it left the rails. The motorman of car 29 testified that he saw car 37 jump the track when four lengths from his car, and he was traveling about 7 miles an hour up grade. The evidence was that both cars were so injured as to show that they came together with considerable force, so that, as testified by defendant's su-

perintendent, "the front of car 37 was broken in, the glass broken and the steps wrenched and broken, and the front poles or stanchions broken. The kingbolt was also bent. Car 29 was damaged in a similar manner."

These stanchions were $3\frac{1}{4} \times 2\frac{1}{4}$ inches dimensions, and by the concussion passengers in both cars were unseated, and several of them thrown off the cars. An experienced engineer, a builder and operator of electric roads, Mr. Leland, testified that a car weighing 12 tons, 35 feet long (these weighed 12 tons, and were 37 feet long), proceeding down a $5\frac{8}{10}$ per cent. grade (the grade at the point in question), at the speed of 23 miles an hour, could be stopped in 50 feet; at 20 miles an hour, in about 42 feet; at 7 or 8 miles an hour, in less than its own length. He further testified: "In cases of emergency, electric cars are stopped by throwing in the reverse current. It is called slugging the motors, and it causes the motors to act as generators of electricity, which causes the car first to stop, and then go backwards. It is a very simple operation, and, if the car at the time of the accident was proceeding motor off (as the motorman testified was the fact), could have been applied instantly. I have never known it to fail, and it should always be resorted to in cases of great peril or imminent danger. It stops the car very quickly." It is not pretended that defendant's motorman resorted to this expedient, or did more than apply the brake, which he testified, from what he said he afterwards learned, did not have any effect after the car left the track. It is quite probable that the motorman of car 29, coming up this grade, could have stopped his car in time to have avoided the collision, if Mr. Leland's testimony is to be believed, and it be true that car 37 was going no faster than 7 miles an hour when it left the track. He saw car 37 coming towards him, and off the track, 148 feet, or 4 car lengths, away, and at the speed he was traveling he could have stopped his car in less than its own length, and, whether car 37 went 70 feet or 100 feet, after it left the track, the two would not have come together. Motorman Knox, of car 29, also testified that he set his brakes and reversed his motors, and was "nearly stopped" when the collision happened. He testified further: "The other that was approaching me was not going over 7 miles an hour, and much less, I think, at the time it hit my car." Mr. Knox does not state how far his car traveled after he applied the brakes and reversed the motor, but it could not have been over 35 feet, according to Mr. Leland's testimony. This would show that car 37, after the brake was applied, while the car was on the track, and with the brake on afterwards, to more or less purpose, ran, with its trucks in loose macadam, over 100 feet, and was, when it collided with car 29, still going at considerable speed, judging from the effect upon the two cars. The inference drawn by the jury from this evidence must have been that when car

37 jumped the track it was going at a high rate of speed, as plaintiff's witnesses testified, and faster than the usual speed of defendant's cars, and much faster than the statutory limit of 8 miles an hour; and that, even though the car was derailed by means of the obstruction, the collision would not have occurred but for the excessive speed of car 37 at the time it left the track. Then, too, the jury may have believed Mr. Leland in stating that car 37 could have been stopped by the slugging process he described, but which the motorman failed to apply or account for not applying. The jury may also have believed from the testimony that Motorman Knox, of car 29, was negligent in not stopping his car in time to avoid the accident. It was certainly his duty to do so if reasonably within his power, and defendant would be equally liable for failure of duty on his part as for failure of duty on the part of Motorman Rogers, of car 37. The evidence was conflicting upon all these hypotheses, and, while we might differ with the jury as to where the preponderance of the evidence lay as to one or more of the theories upon which the jury must have determined the case, we are not at liberty to interpose our judgment for that of the jury where, as we think was true, there was some real and substantial evidence to support the verdict.

Defendant's counsel correctly state the general rule that the breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to plaintiff; and as stated by Shear, & R. Neg. § 26: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." This rule is sought to be applied on the assumption that the evidence shows beyond question that the proximate and only cause of the collision in the present case was due to the obstruction on the railway track. But the evidence is not all one way as to the fact, and, besides, it does not follow that the car would have left the track at all if the speed had been 7 or 8 miles an hour instead of more than twice that speed, as the jury were warranted from the evidence in believing it to have been. Furthermore, defendant's counsel ignore the evidence of a new cause for the collision arising after the car left the track. The nature of this evidence has already been suggested. For example, the excessive speed of car 37 may not only have caused it to leave the track when, at the usual speed, it would have safely passed over the gravel on the track (assuming that gravel was previously placed there), but, had the speed been 7 miles an hour instead of 15 or 20, the car would in all probability not have run 80 or 100 feet through the loose macadam, or, having done so, the two cars would have come together with little or no force.

2. Error is claimed in sustaining plaintiff's objection to the following question put to defendant's witness Superintendent Van Frank: "How did these rails used on this electric road compare with the rails used on other roads in town, both electric and cable?" In sustaining the objection, the court said: "You can go into probative matters as to how this road is built, if you want to show it is a safely built road and safely equipped." Counsel stated that their purpose was to show that on a road such as this, and with such cars as were there used, the cars could run over the track 30 miles an hour with safety. The court remarked: "I don't say you cannot prove that, but I don't think you can prove it in that way. You ask the witness now to compare the equipments of this road with equipments of other roads." We think the ruling was correct, and, besides, the record shows that counsel got what they wanted from the witness later on.

3. The same witness was asked the following question: "Now, at what rate of speed could those cars be run, if it were so desired, with absolute safety, so far as derailment was concerned?" The court sustained plaintiff's objection, and the ruling is claimed to be error. The court remarked that the objection was to the form only, and that counsel were entitled to some of the points suggested by the question, and counsel did immediately ask the witness whether a car such as No. 37 "could not be run over that road on a straightaway, barring curves, at a speed of thirty miles an hour, without derailment," and the witness answered that it could. Conceding error in the ruling, it was without injury.

4. Defendant asked certain instructions, marked "2" and "3," which the court gave, with modifications. The refusal to give the instructions as asked, and in giving them as modified, is assigned as error. The instructions involved were intended to guide the jury with reference to the duty of the motorman, and especially as to the degree of care required of him when suddenly confronted with an obstruction on the track whose presence there he could not reasonably have anticipated or foreseen. Defendant asked that the jury be told that defendant would not be liable if the motorman exercised such care as "would have governed an ordinarily prudent man in the same circumstances," etc. Again: That "the standard of care to be used by motormen * * * must be measured by the foresight and caution of the average prudent man standing in their shoes, and compelled to exercise care * * * in the same situation and surrounded by the same circumstances." The court defined the standard of care to be used by the motorman to be that of a "very cautious man standing in his shoes, and compelled to exercise care * * * in the same situation, and surrounded by the same circumstances." Again, the court said: "If he acted in the premises

with the same care as would be exercised under the same circumstances by an extremely cautious person," etc. It is conceded by defendant's counsel that carriers of passengers must exercise "great care, or the utmost care, or even the care of very cautious persons," and that an instruction so stating would not have been erroneous "without the additional reference to surrounding circumstances"; but it is urged that as given the instruction "exact[s] double-distilled care of the defendant common carrier." The objection is stated in another form as follows: "The reasonable and prudent man, in view of the circumstances which surrounded Rogers, the motorman of car 37, would exercise the utmost care, and this is all that can be reasonably exacted of the common carrier. The extremely cautious person, under such circumstances, would exercise extraordinary care, which the law does not require of a common carrier." And it is urged that "the effect of such a rule would be to make common carriers insurers of their passengers, since a jury might always find an accident could have been avoided if the motorman * * * had exercised, under all the circumstances of the case, * * * such care as a 'very cautious man,' or an 'extremely cautious person,' would have exercised." It is further urged that it was for the jury, and not for the court, to say whether a failure to employ extremely cautious men is a breach of the carrier's obligation to exercise the utmost care. It was said in *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, after citing certain cases decided by this court: "It thus appears to be settled law in this state that a proprietor of stagecoaches is liable for the slightest negligence in regard to the vehicle provided by him; that he is responsible to his passenger for the utmost care and diligence of extremely cautious persons." In speaking of the rule as applied to railroad companies, the court said: "The railroad company is bound for the utmost care and diligence of very cautious persons, and is responsible for any, even the slightest, neglect." Many cases are cited approvingly where such expressions are used as "extreme vigilance," "as far as human care and foresight can go," "greatest possible care," "is liable for the smallest negligence," "highest degree of care," and the like, as indicating the degree of care required. In *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324, the rule as to railroads was stated as follows: "The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them, while in the course of transportation, which might have been avoided by the exercise of such care." We cannot see that the instructions complained of intensified the rule by the use of any unwarranted adjectives. The use of the terms "very cautious person" and "extremely cautious person" finds ample justification in ad-

judicated cases of recognized authority, and the qualifying words, "under the same circumstances," seem to us rather favorable to defendant than otherwise, and, indeed, were used in the instruction asked by it. Negligence always is relative to the circumstances surrounding the case. *Franklin v. Road Co.*, 85 Cal. 63, 24 Pac. 723.

It was for the court to instruct the jury as to what constitutes negligence, and hence it was not error for the court to instruct as it did. It is not true that it was for the jury to say whether a failure to exercise the utmost care, or the care which an extremely cautious man would, under the circumstances, have exercised, would constitute negligence. This was the function of the court, while the jury was to say whether such care had in fact been exercised.

5. It is contended that the court erred in instructing the jury that "the proof of the occurrence of the accident without fault of the passenger is prima facie proof of negligence on the part of the company." The claim is that the rule is not applicable to street-railway companies; citing *Hastings v. Railroad Co.* (Sup.) 40 N. Y. Supp. 93, where the cars were drawn by horses. The rule, as the trial court gave it, has been applied in this state to stagecoaches (*Boyce v. Stage Co.*, 25 Cal. 460, and *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2); to elevators in buildings (*Treadwell v. Whittier*, supra); in the case of explosion in a dynamite factory (*Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 713), where the principle upon which the rule rests was clearly stated; in case of a steam railway while operating in the streets of a city (*McCurrie v. Southern Pac. Co.*, supra). There is no principle upon which an exception to the rule can be made in the case of street railways, especially where operated by electricity or steam power. The reason of the rule is equally applicable to electric cars operating in a city.

6. The court gave the following instruction: "If you find that there was an obstruction on the rails, the question arises, 'Would the accident have occurred if there had been no obstruction?' If you find that the accident would not have occurred without the obstruction, then, subject to what I have just told you, the obstruction was the proximate cause of the injuries to plaintiff, and he cannot recover from defendant, unless, on the whole case, it has been shown by competent evidence that defendant or its servants placed the obstruction on the rails, or unless the servants of defendant could, by the exercise of the care exercised by a very cautious person, have discovered the obstruction in time to have avoided the accident." There was no evidence whatever that defendant or its servants placed the obstruction on the rails, and it is contended that it was error to assume the possible existence of a state of facts which the jury had no right to find, there being no evidence of any such facts. In *Peo-*

ple v. Cochran, 61 Cal. 548, it was said: "If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury was misled by it to the prejudice of the defendant. Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant." If this latter statement be true, surely a correct proposition of law, under like circumstances, would not necessarily mislead the jury. In the present case there was not the slightest evidence or suspicion pointing to the defendant as having placed the obstruction on the rails, and we do not think the instruction assumes that any such evidence existed. We do not believe that the reference made to defendant in that connection could, in view of the evidence in the case, have made the slightest impression on the jury to defendant's prejudice. We advise that the judgment and order be affirmed.

We concur: SMITH, C.; HAYNES, C

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(25 Mont. 30)

CONKLIN v. CULLEN.

(Supreme Court of Montana. Jan. 30, 1901.)

APPEAL—DISMISSAL.

Under Sup. Ct. Rule 10, § 3, subd. "a," requiring the statement of a case on appeal to refer to the pages in the transcript, an appeal will be dismissed where the statement in appellant's brief does not indicate the pages in the transcript where the complaint, answers, findings, and judgment are to be found.

Appeal from district court, Lewis and Clarke county; Henry C. Smith, Judge.

Action by S. L. Conklin against W. E. Cullen. From a judgment in favor of defendant, plaintiff appeals. Appeal dismissed.

A. I. Loeb, for appellant. Cullen, Day & Cullen, for respondent.

BRANTLY, C. J. The respondent has moved for a dismissal of the appeal herein on the ground that the brief filed by appellant, besides being defective in other respects, fails to comply with the requirement of subdivision "a" of section 3 of rule 10 of this court, in that the abstract or statement of the case does not refer "to the page numbers in the transcript in such manner that the pleadings, evidence, orders, and judgment may be easily found." The motion must be sustained. The statement covers five printed pages, but there is nothing therein to indicate, even indirectly, where in the transcript the

complaint, answer, findings, and judgment, or any of them, may be found, though a reference to them is necessary to an examination of the merits of the appeal. This court is left to undertake the labor which counsel should have done, and to remedy the defects occasioned by his omissions. Appellant is thus convicted of a violation of the rule in question, and is subject to the penalty of having his appeal dismissed, which is accordingly done. *Smith v. Denniff*, 23 Mont. 65, 57 Pac. 557; *McCleary v. Crowley*, 22 Mont. 245, 56 Pac. 227; *Rehberg v. Greiser*, 24 Mont. —, 63 Pac. 41. This penalty is the more readily imposed because, though counsel for appellant has had ample opportunity since the motion was filed to remedy the defects complained of, he has not seen fit to do so. *Rehberg v. Greiser*, supra. Motion granted.

PIGOTT and MILBURN, JJ., concur.

(25 Mont. 31)

STATE ex rel. MOORE v. SECOND JUDICIAL DIST. COURT et al.

(Supreme Court of Montana. Jan. 30, 1901.)

COURTS—SUPERVISORY CONTROL—WRIT.

Under Const. art. 8, § 2, giving the supreme court a general supervisory control over all inferior courts, a writ of supervisory control will not be granted to command a district court to sustain a motion for judgment on the pleadings, since the party has a remedy if he should finally be defeated in the action.

Application for a writ of supervisory control by the state, on relation of Donald Moore, against the Second judicial district court for the county of Silverbow and William Clancy, judge. Dismissed.

J. E. Healy, for relator.

PIGOTT, J. The plaintiff applies for a writ of supervisory control. His application discloses that in an action between the present relator, or plaintiff, as plaintiff, and one James A. Murray, one James Cummings, and one T. J. McKenzie as defendants, the plaintiff moved the court in which the action is pending for a judgment on the pleadings; the pleadings consisting of the complaint and the separate answer of Murray, his codefendants having made default. The motion was denied. By the present application, the plaintiff seeks to obtain a writ of supervisory control, commanding the district court and its judge to sustain the motion, and render judgment in favor of the plaintiff and against Murray. The application must be denied, and the proceeding dismissed. The facts alleged in support of the application are insufficient to justify the issuance of the writ asked for. If the order of the district court overruling the motion for judgment on the pleadings be erroneous, and the plaintiff should be finally defeated in the action, the law prescribes the method whereby, at the proper time, the error may be corrected, and the

rights of the plaintiff protected. The matters stated in the application do not invoke the exercise by this court of the power of a "general supervisory control over all inferior courts," granted to it by section 2 of article 8 of the constitution. As giving countenance to the application, which the plaintiff asks be entertained under the authority conferred by section 2, *supra*, counsel cites *State v. First Judicial Dist. Court*, 24 Mont. —, 63 Pac. 395, and *Ore-Purchasing Co. v. Lindsay*, 24 Mont. —, 63 Pac. 715; but nothing that was said or decided in either case can reasonably be interpreted as suggesting that a writ of supervisory control ought to be issued under the circumstances here shown to exist. The application is plainly so devoid of even the semblance of merit that its further consideration is needless. The application is denied, and the proceeding is dismissed. Dismissed.

BRANTLY, C. J., and MILBURN, J., concur.

(10 Okl. 544)

RAGAINS v. GEISER MFG. CO.¹

(Supreme Court of Oklahoma. Sept. 6, 1900.)

APPEAL—EVIDENCE—REVIEW.

Evidence will not be reviewed on appeal unless the case-made or the bill of exceptions contains all of the evidence pertaining to the subject about which it is alleged that error has been committed; and when the case-made and the certificate of the trial judge contain statements to the effect that all of the evidence introduced upon the trial is contained therein, but the record itself shows upon its face that it does not, and that material written instruments and letters were omitted therefrom, the record is the best evidence, and will prevail over such statements.

(Syllabus by the Court.)

Appeal from district court, Kay county; before Justice Bayard T. Hainer.

Action by James G. Ragains against the Geiser Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Tetrick & Rose and Dale & Bierer, for appellant. Henderson, Webster & Gilmer, for appellee.

BURWELL, J. The above-named plaintiff in error commenced his action in replevin against the defendant in error, in the probate court of Kay county, to recover the possession of certain personal property seized by the Geiser Manufacturing Company for the purpose of foreclosing a chattel mortgage executed by Ragains to it to secure the payment of certain notes, in the total sum of \$800, which had been executed by Ragains to the Geiser Manufacturing Company in payment of a threshing separator. A trial was had in the probate court, which resulted in judgment in favor of the plaintiff, and from this judgment the defendant appealed, and

a trial de novo was had in the district court. After the plaintiff had introduced all of his evidence, the defendant filed his demurrer thereto, which was sustained by the court. Thereupon judgment was rendered for the defendant for costs, from which the plaintiff appealed.

We have carefully read the entire record in this case, and find that a considerable portion of the evidence introduced upon the trial has been omitted from the case-made. It was the duty of the appellant, when he appealed from the judgment of the trial court, if he desired to have this court review the evidence introduced upon the trial, and determine as to whether or not the demurrer to the evidence was properly sustained, to bring up all of the evidence introduced upon the trial, by case-made or bill of exceptions; and, inasmuch as he has failed to do this, he is not in a position to say that the trial court was not authorized to render the judgment entered in this case. A number of letters, etc., which were introduced in evidence, and which were very material to the issue, are wholly omitted from the record. Reference is made to them, but they are not attached to or copied into the case-made, and, as their introduction in evidence unmistakably appears from the record itself, the certificate of the trial judge to the effect that the case-made contains all of the evidence will not change or modify the rule. We will here say, however, that, under the evidence presented, we think the judgment of the trial court was correct, and it will not be presumed that the appellant omitted any evidence from the case-made that was particularly favorable to him. This court has heretofore announced the rule that a case will not be reviewed upon the evidence unless all of the evidence bearing upon the particular point sought to be reviewed is presented by the case-made or bill of exceptions. *Pappe v. Insurance Co.*, 8 Okl. 97, 56 Pac. 860, and cases therein cited. For the reasons herein stated, the judgment of the trial court is hereby affirmed at the costs of appellant. All of the justices concurring, except HAINER, J., who presided at the trial below, not sitting.

(10 Okl. 454)

SCHOWALTER et al. v. BEARD.¹

(Supreme Court of Oklahoma. Sept. 5, 1900.)

JOINT AND SEVERAL LIABILITY—JOINDER OF PARTIES.

When all the parties who enter into a promise receive some benefit from the consideration, whether past or present, the promise is presumed to be joint and several, and one or more may be sued thereon with or without uniting all in the same suit.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John C. Taraney.

¹ Rehearing denied January 2, 1901.

¹ Rehearing denied January 2, 1901.

Action by Jacob Beard against A. H. Schowalter and Martin Gerber. Judgment for plaintiff, and defendants appeal. Affirmed.

This was an action begun in the district court of Kingfisher county by Jacob Beard, plaintiff, against A. H. Schowalter and Martin Gerber, defendants. The amended petition upon which the case was tried states: That in April, 1893, the defendants, Schowalter and Gerber, and one Dave L. Hendrix were the owners and in possession of lot 18, block 75, Kingfisher city. That the legal title to the same was in said Hendrix. That the plaintiff, Beard, was the owner of lot 17, immediately south. That in April, 1893, the said Schowalter, Hendrix, and Gerber entered into a contract with plaintiff, Beard, in words and figures as follows, to wit:

"Know all men by these presents that we, Hendrix and Gerber and A. H. Schowalter, of the city of Kingfisher, Kingfisher county, Oklahoma Territory, are held and firmly bound unto Dr. Jacob Beard in the sum of five hundred dollars, good and lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, administrators, and assigns. Hendrix and Gerber, by Martin Gerber. A. H. Schowalter.

"The conditions of the foregoing obligation are as follows, viz.: Whereas, the said Dr. Jacob Beard has agreed to erect upon lots 16 and 17 in block 75 in North Kingfisher, O. T., a three-story brick building, not less than 50 by 60 feet in size, with the north wall extending one-half upon lot 18 of said block 75: Now, therefore, if the said Dr. Jacob Beard shall erect said building as above described within 90 days from April 1st, 1893, we, the said Hendrix and Gerber and A. H. Schowalter, agree to purchase of said Beard a one-half interest in said north wall, at the actual cost price thereof, as far up as the top of the second story of said building, and pay for the same in cash as soon as the said Dr. Jacob Beard shall have the same completed, and present us a good and sufficient deed for one-half interest in said wall as aforesaid; and, if the said Dr. Jacob Beard shall fail to erect said building as aforesaid, then the obligation to be null and void, otherwise to remain in full force and effect. Hendrix and Gerber, by Martin Gerber. A. H. Schowalter."

—The above contract was acknowledged by Gerber and Schowalter before a notary public, and thereafter said contract was extended by indorsement written thereon in words and figures as follows, to wit:

"Kingfisher, O. T., April 5th, 1893. We hereby agree that the time for the erection of the building by Dr. Jacob Beard, as described in the within contract and bond, be extended 40 days, or up to August 10th, 1893, and that said extension of time shall not annul our obligation as within set forth; such obligation being of mutual concern. A.

H. Schowalter. [Seal.] Attest: N. Campbell."

—That plaintiff erected said building in compliance with the terms of said agreement, and within 90 days from the 1st day of April, 1893, and tendered a deed to said Schowalter for one-half of said wall. And it concludes with a prayer for damages and general relief. To this petition the defendants filed a general denial and the statute of limitations. The case was called for trial November 18, 1898, and, before any evidence was introduced, defendants objected to the taking of any testimony, for the reason that the petition did not state facts sufficient to constitute a cause of action, and for the further reason that the bond sued on is a joint obligation, and all the obligors are not made parties defendant, which objection was overruled by the court, to which the defendants excepted. At the close of plaintiff's testimony the defendants filed a demurrer to the evidence, which was overruled by the court, to which the defendants excepted. The court rendered judgment for plaintiff and against defendants for \$416.81, to which the defendants excepted. Defendants filed a motion for a new trial, which was overruled by the court, to which the defendants excepted, and bring the case here for review.

W. W. Noffsinger and L. M. Lane, for appellants. F. P. Whistler and Bradley & Bradley, for appellee.

IRWIN, J. (after stating the facts). It is first contended by plaintiffs in error that defendant in error, who was plaintiff in the court below, is not suing to enforce a contract to purchase a one-half interest in the brick wall, but is suing for a penalty provided in the bond, and, this being true, he must allege and prove special damages by reason of the breach of the contract; and they cite authorities to sustain this petition. But we think the trouble with the position of plaintiffs in error is that they mistake the petition. We think it is plainly a petition seeking to recover under the contract for one-half the actual expenses of building the wall, and as such it would be only necessary to allege and prove the completion of the wall, the actual cost of the same, and the tender of the deed.

Another defense urged is that the obligation is joint, and that all the obligors should be made parties defendant. We think section 851, p. 219, St. Okl. 1893, settles this proposition, as all the obligors on this agreement were parties who received some benefit, and the statute above cited makes all such contracts presumably joint and several, and the proof shows that all these defendants were owners of, or parties interested in, lot 18, on which the wall was partly to be erected.

Another defense urged is that the partition wall was more than half on lot 18, and

consequently was not built strictly in accordance with the contract. But it is alleged that this was done by and with the consent of the defendants, and some evidence was introduced to sustain this claim; and, it seems to us, to make this defense available, the defendants should have alleged and proved that they were damaged in some way by this departure from the contract. This question was before the court, and we think the evidence tends to sustain his findings in this particular, and, this being true, his rulings will not be disturbed. We have examined the record, and, failing to find any error of the trial court, and believing that substantial justice has been done, the decision of the district court is affirmed. All of the justices concurring.

(38 Or. 490)

IN RE BOLANDER'S ESTATE.

(Supreme Court of Oregon. Feb. 4, 1901.)

PROBATE COURTS—JURISDICTION—ASSETS.

A county court exercising the jurisdiction of a probate court has no power to determine an issue of title between an administrator and a claimant of property inventoried by the administrator as an asset of his estate.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

In the matter of Bolander's estate. Petition by Louis Philip Bolander for an order on Andrew Saling, administrator, to show cause why he should not deliver to petitioner certain property inventoried as an asset of the estate. From a decree in favor of petitioner, the administrator appeals. Reversed.

In September, 1884, the Mutual Life Insurance Company of New York issued to Henry N. Bolander two paid-up policies of insurance on his life for \$2,040 and \$2,170, respectively, payable to his wife, Anna M. Bolander, if living at the time of his death, and, if not, to such of the children of her body as should be living at the time of her death. The wife died July 28, 1897, leaving eight children of her body surviving her, and Bolander died August 28, 1897. After the death of Mrs. Bolander, all the beneficiaries under the policies of insurance, at the request of the insured, signed an application to the insurance company to change the policies "to favor of Henry N. Bolander, the insured, his executors, administrators, or assigns, and to issue policies in accordance with said change." Seven of them signed the application prior to, and the other one 18 or 20 days after, the death of the insured; but it does not appear that it was presented to the insurance company, or that the desired change was in fact made, or new policies issued. On October 21, 1897, Andrew Saling was appointed administrator of the estate of Henry N. Bolander. Among the personal effects of the deceased were the two life insurance policies referred to, which were delivered to the administrator by the heirs of

Mrs. Bolander residing in Multnomah county, as a part of the assets of the estate, and which the administrator received and inventoried in good faith. Subsequently, after the conditions of the policies had been complied with, and legal proof of the death of Bolander made to the insurance company, three of the heirs confirmed in writing their previous request for a change in the beneficiaries, and directed the insurance company to pay the money due under the policies to the administrator. On the 29th of October, 1898, Louis Philip Bolander, one of the heirs, to whom all the others had assigned and transferred their interest, if any, under such policies, filed a petition in the county court, alleging that he is the owner of the policies referred to, and the sole beneficiary thereunder, and asking for an order upon the administrator to show cause why he should not correct his inventory by eliminating such policies therefrom, and why he should not deliver them to the petitioner. Citation having been issued, the administrator answered, setting up the facts, in substance, as before detailed, and further alleging that the application and request to the insurance company to change the beneficiaries named in the policies was intended for, and was in effect, an assignment of all their interest therein to Henry N. Bolander, and that such policies and the proceeds thereof were the property of his estate. The county court sustained a demurrer to the answer, and decreed that the petitioner was the owner and entitled to the possession of the policies, and that the estate had no right, title, or interest therein, and thereupon ordered the administrator to correct his inventory by eliminating the policies therefrom. On appeal to the circuit court, this decree was affirmed, and the administrator brings the cause here for review.

Milton W. Smith and John T. McKee, for appellant. Thos. G. Greene, for respondent.

BEAN, C. J. (after stating the facts). Two main questions are presented by this appeal: (1) Has the county court, exercising the jurisdiction pertaining to a court of probate, the power to require an executor or administrator, against his will, to eliminate from the inventory of an estate property listed by him, and which he insists belongs to the decedent, upon the petition of a claimant thereof, before the title is determined in some competent tribunal? (2) If so, upon the facts stated, are the policies in question the property of the estate?

The first question, in our opinion, must be answered in the negative. In *Gardner v. Gillihan*, 20 Or. 598, 27 Pac. 220, it was held that the probate court has no jurisdiction to try a question of title to property as between an administrator and a third person, but that such an adjudication, if necessary, must be had in a court of ordinary jurisdiction. This principle is decisive of the case at bar. However ingeniously it may be stated, the real

inquiry presented by the petition, and which the court was asked to decide, was whether the property in dispute belonged to the petitioner or the decedent, and this question can be determined only in a court organized and constituted for the purpose of trying questions of that character, and provided with the necessary machinery therefor. By section 1112 of the statute an executor or administrator is required to file an inventory of all the property of the deceased that shall come to his possession or knowledge, and by section 1100 it is made the duty of the county court, or judge thereof, to exercise a supervisory control over him, "to the end that he faithfully and diligently perform the duties of his trust according to law." Under these provisions the probate court may order an executor or administrator to file an inventory, and may remove him for want thereof. In *re Holladay's Estate*, 18 Or. 168, 22 Pac. 750; *Marks v. Coats* (Or.) 62 Pac. 488. In the exercise of this power the court may, perhaps, incidentally pass upon the question of title so far as to determine whether the administrator has been unfaithful to his trust in not inventorying property; but it has no power to strike from an inventory property listed by him, where, as in this case, there is a dispute between him and another as to the possession thereof. Such a controversy necessarily involves a pure question of title, which cannot be tried and determined by a probate court. 1 Woerner, *Adm'n*, § 151; Schouler, *Ex'rs*, § 236; In *re Haas' Estate*, 97 Cal. 232, 31 Pac. 893; *Homer's Appeal*, 35 Conn. 113; In *re King's Estate*, 15 Phila. 559. It is argued on behalf of the petitioner that, since the county court may require an administrator to file an inventory, it may compel him to file a proper one, and, if necessary, to eliminate therefrom property which does not belong to the estate, and that such an order is not an adjudication of title. But, to determine that the property should not be included in the inventory, the court must of necessity decide that it is not owned by the estate, and its adjudication, therefore, would clearly be one of title, which, as we have seen, is without the jurisdiction of such court. The chief object of an inventory and appraisal is to fix the value and amount of the estate for the purpose of an accounting, and, where an executor or administrator charges himself in his inventory with property as that of the decedent, such inventory, in our opinion, is conclusive upon the probate court, so far as the claims of third persons are concerned, at least until the contrary is made to appear by the judgment of another tribunal having jurisdiction to determine the question of ownership. It is no doubt true that, for the purpose of relieving himself from liability, an executor or administrator may be permitted by the county court to correct his inventory by showing that through a mistake he has charged himself with property not belonging to the decedent. Where an admin-

istrator, however, insists and maintains that the property listed by him was that of his decedent, the claimant must be remitted to another forum to test his alleged title to the property. Any other view would embarrass the probate courts with the trials of titles to property, which, under our system, should be had in courts of general jurisdiction and under the course of procedure there provided. It follows from these views that the decree of the court below must be reversed, and the cause remanded, with directions to dismiss the petition.

(37 Or. 544)

LAW GUARANTEE & TRUST SOC., Limited, OF LONDON, v. HOGUE et al.

(Supreme Court of Oregon. Feb. 4, 1901.)

On rehearing. Petition overruled.

For former opinion, see 62 Pac. 390.

WOLVERTON, C. J. By a supplemental petition for rehearing, filed since the original was denied, it is insisted that the holding of the court to the effect that a mere affirmative averment of defendants' want of knowledge or information sufficient to form a belief concerning a material matter alleged in the complaint is not a good denial, and presents no issue, is opposed to two former decisions of this court, namely, *Robbins v. Baker*, 2 Or. 52, and *Sherman v. Osborn*, 8 Or. 66. These cases are not referred to in the opinion, and, to the end that we may not be misunderstood, we have deemed it advisable to state our position more fully. For their answer, the defendants Hogue and wife "allege that they have no knowledge, nor information sufficient to form a belief, as to whether the plaintiff is a citizen or subject of any foreign state, or is duly or at all organized or existing under or by virtue of any law or laws of Great Britain, or otherwise, or at all," and "allege that they have no knowledge nor information sufficient to form a belief as to whether the Jarvis-Conklin Mortgage Trust Company is, or ever was, a corporation organized or existing under or by virtue of the laws of the state of Missouri, or otherwise, or at all." These are the allegations held to be insufficient to put the question of the incorporation of these two supposed corporations at issue. In *Robbins v. Baker*, *supra*, the court states the question under consideration as follows: "The answer in this case does not declare absolutely that the defendant has no knowledge of the matter controverted, but denies that he has sufficient knowledge to make up an opinion or form a belief;" and it was held that the form of expression used in the answer conveyed the same meaning as though the language of the statute had been followed. The form of the answer was neither discussed nor determined. In *Sherman v. Osborn*, *supra*, the denial was as follows: "But whether the defendant * * * was at the time

* * * a nonresident of the state of Oregon, plaintiff has no knowledge or information thereof sufficient to form a belief, and therefore denies said allegation," and the court held it sufficient, citing *Robbins v. Baker*, supra. It will be observed that this was an allegation that the plaintiff had no knowledge or information sufficient to form a belief as to whether, etc., followed by the clause, "and therefore denies" the same. In later cases it has been held that a denial of any knowledge or information sufficient to form a belief as to the existence of a particular fact is good under the Code. *Wilson v. Allen*, 11 Or. 154, 2 Pac. 91; *Colburn v. Barrett*, 21 Or. 27, 26 Pac. 1008. So that by prior decisions of this court two forms of expression may be used in constructing a denial. One follows the statute literally, being a denial of any knowledge or information, etc., and the other is by affirming a negative that he has no knowledge or information, etc., followed by the expression, "and therefore denies" the same. We are not aware that any other form of denial upon information or belief has the sanction of this court. It will be noted that in each of these forms there is a denial, which, although not a literal, is a substantial, compliance with the statute. The statute, which, according to text writers and the weight of authority, should be exactly followed, has prescribed the requisites of this species of denial; and, while the affirmation of the negative, followed by the expression "and therefore denies the same," has received the sanction of some courts, yet it must be conceded that a mere affirmative, without being accompanied by any form of denial, is by no means an exact compliance therewith, and, in our opinion, is not permissible. *Pom. Rem. (3d Ed.)* § 640; *Phil. Code Pl.* § 364; *The Holladay Case (C. C.)* 27 Fed. 830, 841; *Clafin v. Reese*, 54 Iowa, 344, 6 N. W. 729.

(131 Cal. 386)

FREMAN v. BARNUM. (S. F. 1,614.)

(Supreme Court of California. Jan. 16, 1901.)

JUDGMENT—RES ADJUDICATA—MATTERS LITIGATED—MATTERS NECESSARILY INVOLVED—SUBSEQUENT ACTION—STATUTES—DISTRICT ATTORNEYS—ASSISTANTS—CONSTITUTIONALITY.

1. Where, in a suit by an assistant district attorney against a county for salary for a certain month, the question whether an order of the county supervisors, terminating his office prior to such month, was valid, was litigated, the decision was conclusive of the question in a subsequent suit by the attorney for salary for other months.

2. While, in an action by an assistant district attorney against a county for salary for a certain month, the question as to the constitutionality of the statute authorizing his appointment was necessarily involved, and must have been determined, not having been actually litigated, the judgment in such action was not conclusive of the question in a subsequent suit by such attorney for salary for other months.

3. County Government Act 1893 (St. 1893, p. 359) § 25, subd. 36, declaring that the county board of supervisors shall have authority to authorize the district attorney to appoint an assistant district attorney, which office was thereby created, was not unconstitutional, since the assistant district attorney was but a deputy, and by section 61 of the same act the district attorney could appoint as many deputies as he saw fit, and, if not a deputy, the board had power to authorize the district attorney to fill the office when in their judgment the public interest required it.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Application by G. C. Freman against H. E. Barnum, as auditor of Fresno county, for a writ of mandate to compel defendant to issue a warrant in favor of plaintiff. From a judgment in favor of defendant, plaintiff appeals. Reversed.

L. L. Cory, for appellant. N. C. Caldwell, for respondent.

TEMPLE, J. This is an application for a writ of mandate to compel the defendant, who is auditor of Fresno county, to draw a warrant in favor of the petitioner for certain installments of salary alleged to be due him as assistant district attorney of said county. In the county government act of 1893 (St. 1893, p. 346), in section 25, it is provided as follows: "The boards of supervisors in their respective counties, have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * * Subd. 36. To authorize the district attorney to appoint an assistant district attorney, which office is hereby created," etc. Pursuant to this act, the supervisors of Fresno county, on the 19th day of November, 1895, duly authorized the district attorney to appoint such officer, and accordingly the appellant was appointed December 2, 1895, and immediately qualified, and has ever since continued to discharge the duties of the office. On the 16th of February, 1897, the board of supervisors of the county of Fresno made an order revoking and rescinding the order authorizing the district attorney to appoint an assistant. This action was brought to compel the payment of salary for the months of February, March, and April, 1898. In defense, the auditor contends that the statute giving the supervisors power to authorize the district attorney to make the appointment is void, and also that the rescinding of the order by the supervisors terminated the office. The last point above mentioned seems to possess merit, but, unfortunately, the auditor is in no condition to urge that defense. The plaintiff in his petition sets up, as an estoppel, a former judgment between the same parties in a proceeding to compel defendant to issue a warrant for salary which accrued in March, 1897. As a defense in that case, the auditor, who is also defendant in this, set up the order made February 13, 1897, re-

rescinding and revoking the said order made November 19, 1895, in pursuance of which the plaintiff was appointed. It is averred that the issue so raised was duly tried and determined by the court, and judgment rendered, in effect, holding that said attempt to rescind the order of November 19, 1895, was ineffectual, and did not deprive plaintiff of his right to be paid for his services. These allegations as to the former adjudication are not controverted in the answer.

The matter, then, was directly put in issue in the former action, and it was there duly tried and solemnly adjudged that, notwithstanding the rescinding order, plaintiff was entitled to his salary. The law upon this subject is stated by Justice Field in *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195. It was held that a judgment between the same parties is an estoppel in another suit upon a different cause of action as to points or questions actually litigated and determined. If the point or matter of fact has, by them or those to whom they are privy in estate, been once distinctly put in issue, and solemnly found against them, they are precluded from contending to the contrary.

But this estoppel in actions upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved, and defenses which might have been, but were not, made. This applies to the question as to the constitutionality of subdivision 36 of section 25 of the county government act of 1893. It is true that matter was necessarily involved, and must have been determined, before judgment could have been entered in the former suit. But it does not appear from the record that such question was raised and litigated. This being a different action upon a different cause of action, the defendant is not estopped from raising the objection. But that matter is easily determined. The assistant district attorney was but a deputy, and, by section 61 of the same act, the district attorney could appoint as many deputies as he saw fit. The statute only authorized the board to pay an additional assistant. That they may do this follows from the views expressed in *Tulare Co. v. May*, 118 Cal. 303, 50 Pac. 427.

If the plaintiff was not a deputy, but was filling an office created by the subdivision alluded to, the result would be the same. The board then had the power to authorize the district attorney to fill the office when, in their judgment, the public interest required it. In my judgment, the board could also cause the appointee to be discharged when, in their judgment, his services were no longer required (*Ford v. Board*, 81 Cal. 19, 22 Pac. 278), but defendant is precluded from making that defense. The judgment is reversed, and a new trial ordered.

We concur: **McFARLAND, J.**; **HENSHAW, J.**

(131 Cal. 379)

FIELD v. AUSTIN et al. (S. F. 2387.)
(Supreme Court of California. Jan. 15, 1901.)
SALES—ACTION FOR PRICE—FINDINGS—SUFFICIENCY—DEFENSE—EVIDENCE.

1. In an action by a seller against a purchaser to recover on purchase-money notes, findings should be made on the issue of fraud raised by an answer setting up the defense of failure of consideration and fraudulent representations by the seller in making the sale, and showing that the purchaser has been damaged by the fraud, though the answer fails to allege a rescission, or offer to rescind, on the part of the defendant.

2. The seller's fraudulent representations in making the sale may be given in evidence as a defense to his action against the purchaser on purchase-money notes, and will be an answer to the whole demand, or to such extent thereof as the proof may justify, where the purchaser pleads failure of consideration and fraud as a defense.

3. Where a written contract recites an aggregate sum as the consideration for the transfer of several items of property, the actual consideration for each item may be shown by parol, and when that is done the transaction will stand as though it was so recited in the contract.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; **M. H. Hyland, Judge.**

Action by **Arthur G. Field** against **Paul P. Austin** and another. From a judgment for plaintiff, defendants appeal. Reversed.

John E. Richards, John G. Jury, and J. H. Campbell, for appellants. **H. C. Moore, N. Bowden, and Jackson Hatch**, for respondent.

SMITH, C. The plaintiff recovered judgment in the court below for the sum of \$13,310, with interest and attorney's fee, alleged to be due on seven promissory notes made to the plaintiff by the defendants. The complaint is in the ordinary form. The defense was fraud in the procurement of the contract. The questions involved relate exclusively to the sufficiency of the findings. The answer of the defendant **Potts**—besides denying that the notes were given for valuable consideration, and alleging that they were wholly without consideration—"avers (1) that each of said notes was given for a part of the purchase price of certain shares of the **Western Granite & Marble Company**, a corporation, (2) all of which shares were then, and have ever since continued to be, and now are, entirely worthless and valueless; * * * (3) that each of said notes was procured by and through the false and fraudulent representations of the plaintiff, to wit, that said stock was of the value of \$50 per share, or more, and that a dividend of ten per cent. on that valuation had already been earned, and would be paid on or about May 1, 1893, all of which the plaintiff knew to be false, and without any foundation in fact; that no dividend has ever been paid on said stock since the making of said notes." The answer of the defendant **Austin** is to the same effect, but the fraud is alleged in more detail, and

additional circumstances are mentioned; as, e. g. that the plaintiff controlled the officers of the corporation, and caused them to make false and misleading statements and reports, etc. It will be sufficient, however, to consider only so much of his answer as corresponds to that of his co-defendant. The findings of the court, so far as material, are that the notes sued upon were made in pursuance of a written contract of even date, by the terms of which the plaintiff agreed to sell, and thereby did sell, certain office furniture and other property, specifically described, used in the plaintiff's business "of brokerage, insurance, and real estate," together with the business, and also 650 shares of the capital stock of the Western Granite & Marble Company, for the sum of \$45,750, to be paid \$10,000 in cash, \$25,000 by the joint notes of defendants, and \$10,000 by the several notes of each for \$5,000; "and that there was not then, nor had there been prior to that time, any confidential relation existing between them, and said Field did not at any time prior to the consummation of said contract or thereafter do or perform any act or thing tending to conceal from the defendants the value or standing of the properties for the purchase of which they were negotiating from him, nor did he in any way prevent, or attempt to prevent, any or either of them from making fair and full investigation on their account into the values of the several properties mentioned, * * * and that in fact the several properties so sold and transferred did possess an actual value, and were not valueless"; and, finally,—as in fact appeared from the absence of allegations on the point in the answers,—"that there had been no rescission or offer to rescind."

1. The above findings, it is quite clear, do not respond to the issues as to fraud made by the allegations of the answers, and the case therefore stands without findings as to these issues. Nor, as appears from the opinion of the court inserted in the bill of exceptions, was it designed to find on them. The theory of the court, as there expressed, is that the answers, owing to the failure to allege a rescission, or offer to rescind, or to allege damages, *eo nomine*, could not be regarded as cross complaints to rescind, or for damages for fraud or deceit; and hence that "the only defense set up to these notes is a want of consideration," or, as elsewhere expressed, "a total failure of consideration." But the facts alleged in the answers show that the defendants were damaged, and also the extent of the damage; and upon proof of those facts and of the fraud alleged they would have been entitled to recoup against the notes either to the whole amount of the notes, if the stock was entirely valueless, or to such less extent as the proofs might justify. The law on this point is well settled. Nor would the case be altered even had it been found that the stock given as the consideration of the notes had some value. This

would affect only the extent of the relief. "There are three methods by which, in cases like the present, a party defrauded may obtain relief: (1) Cancellation or rescission, etc. * * * (2) Affirmative relief by an action to recover compensation for the injury sustained by the fraud of the defendant, where no cancellation is necessary as * * * the basis of such recovery. (3) Defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability." *Toby v. Railroad Co.*, 98 Cal. 498, 33 Pac. 553. And in the last case "it is permissible for the defendant to recoup to a partial extent, or to defeat the action to the entire extent of the note, for fraud in the obtaining of the note or in its consideration [even] where it is admitted that the party who gave the note retained the goods, and made no offer to return them." *Bell v. Sheridan*, 21 D. C. 374. Or, in other words, "in cases like the present fraud may be given in evidence as a defense, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the true, as well as a salutary, rule, and well calculated to do final and complete justice between the parties most expeditiously and least expensively." *Beecker v. Vrooman*, 13 Johns. 302. And to same effect, *Groff v. Hansel*, 33 Md. 163; *Apple-garth v. Robertson*, 65 Md. 493, 4 Atl. 896; *Withers v. Greene*, 9 How. 230, 13 L. Ed. 109; *Whitney v. Alaire*, 4 Denio, 556.

2. The findings also fail to respond to the allegations of the answers as to the consideration. The allegations are: (1) That the consideration of the notes was the stock; (2) that this was entirely without value. On these points the court simply finds the terms of the contract, and that "the several properties so sold and transferred by the said Field did possess an actual value, and were not valueless." But this refers not specifically to the stock,—which, according to the allegations of the answer, constituted exclusively the consideration of the notes,—but, generally, to all the property sold, and would be equally true whether the stock be or be not of any value. It is true that in the written contract an aggregate sum is mentioned as the consideration for the transfer of the property generally, and that, as the court says, "no valuation was thereby placed upon any of the items composing the consideration"; and, consequently, that *prima facie* the contract was entire. But it was competent for the defendant to show by parol testimony what the consideration in fact was; that is to say, that the consideration of the notes was the stock, and the consideration for the other property the \$10,000 paid in cash. Code Civ. Proc. § 1962, subd. 2; Civ. Code, §§ 1614, 1615; 1 Greenl. Ev. §§ 284, 285, 304; *Hendrick v. Crowley*, 31 Cal. 476; *Stufflebeem v. Arnold*, 57 Cal. 11. On the proof of this fact the transaction would stand

precisely as though it were so recited in the contract, and the case would thus come under the general principle of construction applying to such cases, which is that a sale "of different articles at different prices is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless the transaction is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such a failure been anticipated." *Norris v. Harris*, 15 Cal. 256. Or, as more tersely expressed: "Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule [applying to cases where there is a sale of several articles for one consideration. Civ. Code, § 1608], because, in effect, there is a separate contract for each separate article." *Miner v. Bradley*, 22 Pick. 459, citing *Johnson v. Johnson*, 3 Bos. & P. 162. Nor does it make any difference whether the facts are recited in the written contract, or proved by evidence aliunde,—as was held in the latter case, where the aggregate consideration only was recited, and proof was allowed that part of it corresponded to one of the properties sold, and the balance to the other. See, also, *Mayfield v. Wadsley*, 3 Barn. & C. 361; *Jackson v. Shawl*, 29 Cal. 272; *Treadwell v. Davis*, 34 Cal. 601. In the present case it appeared from the evidence of both parties that in negotiating the sale the property other than the stock was estimated to be of the value of \$10,000,—which was paid in cash,—and the stock itself at \$55 a share, making in the aggregate the amount of the notes; and there was other evidence tending to show that the consideration of the notes consisted wholly and exclusively of the stock. The defendants were, therefore, entitled to a finding on this point, and, in connection therewith, to a finding on their allegation that the stock was of no value, and on findings in their favor on these points would have been entitled to rescind without returning the stock (*Gifford v. Carvill*, 29 Cal. 593; *Canal Co. v. Roach*, 78 Cal. 554, 21 Pac. 304; *Gamble v. Tripp*, 99 Cal. 226; 33 Pac. 851; *Vineyard Co. v. Tuohy*, 107 Cal. 254, 40 Pac. 386); or, to state the point more simply, would have been entitled to judgment on the ground that there was a total failure of consideration for the notes. The findings are, therefore, insufficient, even on the theory adopted by the court that the sole issue was "whether there was a total failure of consideration"; for it was competent for the defendants to prove their allegations that the consideration of the notes was the stock, and that this was of no value,

and the court failed to find on either of these issues. We advise that the judgment and order be reversed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(131 Cal. 385)

FINDLAY v. POTTS et al. (S. F. 2,388.)
(Supreme Court of California. June 26, 1900.)

PROMISSORY NOTES—NEGOTIABILITY.

Under Civ. Code, §§ 3087, 3093, providing that a negotiable instrument is a written promise or request to pay a certain sum of money in conformity with title 15, c. 1, art. 1, defining a negotiable note, a note with a stipulation for an attorney's fee in case of suit is not negotiable.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Action by James W. Findlay against Fred S. Potts and another. From a judgment for plaintiff, defendants appeal. Reversed.

John E. Richards, John G. Jury, and J. H. Campbell, for appellants. H. C. Moore, N. Bowden, and Jackson Hatch, for respondent.

SMITH, C. This action was brought by plaintiff, as assignee of Field, to recover \$10,000 alleged to be due on four promissory notes executed in pursuance of the contract involved in *Field v. Austin* (S. F. 2,387; just decided) 63 Pac. 692, and belonging to the same series as the notes sued on in that case. The notes all contain stipulations for attorney's fees in case of suit, and are, therefore, nonnegotiable. *Bank v. Babcock*, 94 Cal. 93, 29 Pac. 415; *Same v. Falkenhan*, 94 Cal. 141, 29 Pac. 866; *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224; *Chase v. Whitmore*, 68 Cal. 548, 9 Pac. 942; Civ. Code, §§ 3087, 3093. Otherwise the case is similar to *Field v. Austin*, and on the authority of that case the judgment and order denying a new trial should be reversed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

(7 Idaho, 357)

FIRST NAT. BANK OF POCATELLO v. O. BUNTING & CO., BANKERS.

(Supreme Court of Idaho. Dec. 13, 1900.)

APPEAL—MOTION TO DISMISS—RECEIVER—APPLICATION TO SELL PROPERTY—JURISDICTION OF JUDGE.

1. Under the provisions of subdivision 1, § 4807, Rev. St., and section 9, art. 5, Const., an appeal may be taken from an order or judgment confirming a receiver's sale.

2. Under the statutes of this state the judge at chambers may grant the application of a receiver to sell property.

3. *Held*, under the evidence in this case, that the judgment confirming the receiver's sale must be affirmed.

Quarles, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Bingham county; J. C. Rich, Judge.

In the matter of the insolvency of C. Bunting & Co., Bankers. From a confirmation of the sale of certain assets of the insolvent, the First National Bank of Pocatello appeals. Affirmed.

Thomas F. Terrell and Hawley & Puckett, for appellant. Dietrich, Chalmers & Stevens and D. W. Standrod, for respondent.

SULLIVAN, J. This is an appeal from an order or judgment of the district court confirming a receiver's sale of 55 shares of the capital stock of the First National Bank of Pocatello, Idaho. The following among other facts appear from the record: The respondent C. E. Thum is the duly appointed, qualified, and acting receiver of C. Bunting & Co., Bankers, and has been such receiver for more than three years last past. That said Bunting & Co. is insolvent and unable to pay its liabilities. That 55 shares of the par value of \$100 each, of the capital stock of the said First National Bank of Pocatello came into the hands of said receiver as a part of the assets of said Bunting & Co., Bankers. That said Bunting & Co. at the time of its failure was the owner of 150 other shares of the capital stock of said First National Bank of Pocatello, and had, prior to said failure and to the appointment of said Thum as receiver, pledged said 150 shares to the Omaha National Bank, of Omaha, Neb., as security for the payment of a debt of about \$35,000 owing by said Bunting & Co. to said Omaha bank. And said last-mentioned bank held said 150 shares as such security until February 17, 1900, and all of said shares were of the par value of \$100 each. On the 12th day of February, 1900, said receiver made an application to the district judge for an order to sell said 55 shares of stock either at public or private sale, provided he could obtain therefor not less than \$125 per share. The judge, upon reading and filing said application, made the following order, to wit: "It is ordered that the petitioner, C. E. Thum, as such receiver, be, and he is hereby, authorized, empowered, and directed to offer said stock for sale, at public or private sale, to the highest and best bidder for cash, at such time and place and in such manner as he may deem most advantageous, and that he sell the same upon receiving therefor the sum of \$125 per share or upward in cash. Such sale to be reported to the judge of said court for confirmation. Dated February 13, 1900." Under said order the receiver caused to be posted in three public places in Blackfoot, Bingham county, three notices of the sale of said 55 shares of stock at public auction at the front

door of the court house in the town of Blackfoot, said county, on the 17th day of February, 1900, at the hour of 2 o'clock p. m., subject to the confirmation of said court. At said time and place said receiver offered for sale each certificate of said stock separately, and received no bid therefor, and thereupon offered said 55 shares, or the whole amount thereof, in one parcel; and the highest and best bid which he received therefor was that of D. W. Standrod & Co., of \$6,875, that being \$125 per share. He thereupon sold the same to said Standrod & Co., subject to the confirmation of said sale by the court. Thereupon the receiver made a report of said sale to the court, and notice was given of the time and place of hearing said return, which was at the court house in the town of St. Anthony, Fremont county, Idaho, on the 1st day of March, 1900, at 2 o'clock p. m. of said day. It was thereafter stipulated by Thomas F. Terrell, Esq., attorney for plaintiff, and the attorney for the receiver, that said hearing should be had at the court room in Blackfoot on the 12th day of March, 1900, at the hour of 10 o'clock a. m. On the 3d day of March, 1900, the appellant, the First National Bank of Pocatello, by its cashier, William A. Anthes, filed a demurrer to said report of sale made by the receiver, which is as follows: "Comes now the plaintiff, being a creditor of said defendant corporation, and, desiring to see the stock mentioned in the order of the judge of said district court, made and dated on the 13th day of February, 1900, in the above-entitled cause, bring the best obtainable price, objects to the confirmation and approval of said sale of stock made on the 17th day of February, 1900, for the reason and upon the grounds following, to wit: (1) That the judge of said district court, at chambers, had no power to make or issue an order for the sale of said stock, or to make the order so made on the 13th day of February, 1900. (2) That the order of sale so made on said day is insufficient in form and substance to authorize such sale, or upon which title in a purchaser can be predicated. (3) That the judge of said court, at chambers, has no power to make or enter an order or judgment of confirmation of such sale, and is without jurisdiction so to do, no such power being conferred by law. (4) That no sufficient notice of the time and place for the sale of such stock was given before the sale thereof, nor was notice thereof given for a sufficient time before such sale. (5) That no sufficient notice of the time and place for the hearing of the confirmation of such sale has been given, as will appear from the notice served, and evidence of service thereon." On March 12, 1900, the appellant filed its written objections to the confirmation of said sale, the main points of which are set forth in the above-quoted demurrer, and further alleged that said receiver had promised said W. A. Anthes that he would notify him of the time and place of the sale of said stock,

and that he failed to do so. It is also alleged that said stock is worth more than \$125 per share, and that it would sell at an advance of from \$345 to \$1,000 more than the gross sum realized at said sale. It is also alleged that in order to show the good faith of said opposition the appellant had obtained a bid of \$7,220 from one Silas F. King for said 55 shares, which bid was accompanied with a certificate of deposit payable to the said attorney of appellant, which certificate was to be indorsed by said attorney to a custodian to be named by the court. On the day set for the hearing of the said report of sale, Thomas F. Terrell, Esq., appeared for the appellant, and Messrs. Dietrich, Chalmers & Stevens for the receiver. Said matter was heard in open court, and C. E. Thum, receiver, W. A. Anthes, George F. Gagon, and D. W. Standrod were sworn, examined, and cross-examined as witnesses in said matter, and documentary evidence introduced, and the cause submitted to the court without argument. Thereafter, on the 21st day of March, 1900, the court filed its findings of fact and conclusions of law, and judgment was entered confirming said sale.

By the 1st finding of fact the court finds that all of the statements and averments in the receiver's report of sale and petition for confirmation are true, and that all of the material averments and allegations of plaintiff's objections and opposition are untrue. The 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th findings of fact made by the court are as follows: "(2) That on the 15th day of February, 1897, the defendant, C. Bunting & Co., Bankers, a corporation, being then and there insolvent and unable to meet its obligations as they matured, C. E. Thum was duly appointed receiver thereof, in the above-entitled court and cause, and thereupon, forthwith, duly qualified and entered upon the discharge of his duties as such receiver; that, among other things, there were then and there, of the assets of said C. Bunting & Co., Bankers, a corporation (hereinafter designated as the defendant bank), fifty-five (55) shares of the capital stock of the First National Bank of Pocatello, Idaho, a corporation (hereinafter designated as the plaintiff bank), said shares being represented and evidenced by certificates thereof numbered 52, 54, 59, 60, 61, and 62, which said shares and certificates then and there came into the custody of said C. E. Thum, as such receiver, who, as a part of the duties of his said office, then and there took the possession, custody, and control thereof, and thereafter retained the same at all times; that on the said 15th day of February, 1897, at Blackfoot, Idaho, said defendant bank was also the owner of 150 other shares of the capital stock of said plaintiff bank, which said last-mentioned shares were then pledged to the Omaha National Bank, at Omaha, Nebraska, as collateral security for the payment of debt of some \$35,080, owing by said defendant bank to said

Omaha National Bank, and was held by said pledgee as such security until the month of February, 1900, all of which shares were and are of the par value of \$100. (3) That at all times subsequent to the said 15th day of February, 1897, until the sale hereinafter found, said Thum, as such receiver, made diligent effort to find a purchaser or purchasers and to obtain an offer or offers for the above-described 55 shares and 150 shares of stock, but notwithstanding such diligent search, effort, and inquiry, said receiver was never at any time during said three years' time able to obtain a bid or offer of any kind for said stock, and did not in fact receive any bid or offer whatever for said shares of stock until about the 10th day of February, 1900, when by his personal effort and negotiations he had caused the said one hundred and fifty shares of stock to be offered for sale at pledgee's sale by the holder thereof at not less than \$125 per share; that by reason and on account of said negotiations on the part of said receiver, and not otherwise, he, the said receiver, obtained an offer for said 55 shares of stock, of \$125 per share, provided and on condition only that the same should be offered for sale and sold at the same time and place with the 150 shares pledged and offered for sale at pledgee's sale as aforesaid, so that said 205 shares might be procured as one single investment, which said offer was made by D. W. Standrod & Co., Bankers, of Blackfoot, Idaho, and no other offer whatever was up to that time made by or received from any other person or corporation for said fifty-five shares of stock; that, had it not been for the personal efforts and negotiations aforesaid on the part of said receiver in pooling said stock, he would have received no bid or offer whatever for said fifty-five shares of stock, for the reason that three years' experience showed that no person desired to invest in so small a block of said stock. (4) That on the 12th day of February, 1900, at Blackfoot, Idaho, the said 150 shares were advertised for sale at pledgee's sale to be had at Blackfoot, Idaho, aforesaid, on the 17th day of February, 1900, at two o'clock p. m. of that day, and said receiver, having received the offer mentioned in finding 3 above, forthwith applied to the judge of said court for authority to offer said 55 shares for sale at the same time and place with said pledged stock, and to sell the same at not less than \$125 per share; that on the 13th day of February, 1900, by the judge of said court said petition was granted and allowed, and an order duly made and entered herein, upon said petition, authorizing, empowering, and directing said receiver to offer said fifty-five shares of stock for sale, at public or private sale, to the highest bidder for cash, at such time and place and in such manner as he might deem most advantageous, and to sell the same upon receiving therefor the sum of \$125 per share, or upward, in cash, such sale to be

reported to the judge of said court for final action; that immediately upon the receipt of such order, on February 13, 1900, said receiver advertised said fifty-five shares of stock for sale on the 17th day of February, 1900, at two o'clock p. m. of that day, at the front door of the court house in Blackfoot, Idaho, by posting notices thereof in three of the most public places in and about Blackfoot aforesaid. (5) That pursuant to said order and notices, and at the time and place therein specified, viz. the 17th day of February, 1900, at two o'clock p. m. of that day, at the front door of the court house in Blackfoot, Bingham county, Idaho, said receiver offered for sale to the highest and best bidder for cash the said fifty-five shares of stock, at public auction; that a number of persons were there present, and several bids were then and there made for said shares of stock, the highest and best bid made or received being the sum of \$6,875 by D. W. Standrod & Co., Bankers. (6) That pursuant to said order of sale, and on the 23d day of February, 1900, said receiver duly reported said sale to the judge of said court, alleging that the sum bid as aforesaid was a fair and adequate price for said stock, and commensurate with the value thereof, and recommending that said bid be accepted, such sale confirmed, and said stock transferred in due form to the purchaser; that the plaintiff, by its counsel, then and there made and presented its objections and opposition in writing to the confirmation of said sale and the approval of said report thereof, whereupon such proceedings were had that a hearing upon the issues so raised was set for Monday, the 12th day of March, 1900, the same being a day of the regular spring term of said court, at Blackfoot, Bingham county, Idaho, and the same was then and there heard by and before the court as aforesaid. (7) That at said sale each of said certificates was first offered separately, and, no bid being received therefor, all said certificates were offered in one parcel, and the aforesaid bid received therefor; that the same was and is a fair and adequate price for said stock, and said sum of \$6,875 was and is commensurate with the value of said stock, and that said stock could not be sold for a higher or better sum or price than that received at said sale; that said sale was regularly made and fairly conducted; that sufficient notice of the time and place of said sale was theretofore given for a sufficient time before said sale; that ample notice of the time and place for the hearing of said report of sale, for confirmation thereof, was duly given to all parties interested, and a full and complete hearing was in fact had upon all the issues involved, all interested parties being present and participating therein. (8) That said receiver did not at any time promise or undertake to specially notify plaintiff or its cashier, Mr. Wm. A. Anthes, or any other person, of any proposed sale of said stock, but only to no-

tify the public generally, and in accordance with the order of the court or the judge thereof, and that it was and is not competent for plaintiff to become a purchaser of said stock; that said receiver gave to plaintiff and said Anthes the same notice of said sale which was given to any other person and the general public, and the allegation that he gave only such notice as would not secure bids or bidders against D. W. Standrod & Co., and failed in that respect to perform his duties as such receiver, or to fairly make and conduct said sale, is not true; that the allegation that said stock then was and now is worth more than \$125 per share is not true. (9) That in connection with such opposition the plaintiff caused a bid of \$7,220, being an advance of \$345 over the highest bid at said sale, to be made and tendered in the name of Silas F. King, and said bid was accompanied with a sufficient tender of \$7,220 in open court, and to the court or any one it might name, to be held as an offer or bid for said fifty-five shares of stock in the event of a resale thereof, but said bid or offer was not made in good faith, but on behalf of one J. A. Murray, for the purpose of gaining some advantage, the exact nature of which does not appear; that, so far as appears from the evidence herein, the said Silas F. King is a fictitious person or name. (10) That at said hearing in open court the said D. W. Standrod & Co., Bankers, made the following offer, viz.: That if plaintiff or said bidder would keep good the said bid of \$7,220, and pay the same to said receiver, for said fifty-five shares, and also repay to them, said D. W. Standrod & Co., Bankers, the amount which they had paid for said 150 shares at pledgee's sale as aforesaid, with interest thereon at seven per cent. per annum from the 17th day of February, 1900, they would then and there relinquish their claim to said fifty-five shares, and would transfer and turn over to the person making such payment the said 150 shares. But said offer was then and there refused and rejected. (11) That at the time of said sale, there was due upon said pledge of 150 shares, from the defendant herein, about \$22,885, evidenced by two certain promissory notes of said defendant; that said 150 shares were sold and purchased at such pledgee's sale by D. W. Standrod & Co., Bankers, for the sum of \$18,750, and thereupon, by reason of the negotiations aforesaid on the part of said C. E. Thum, receiver, the said notes were fully satisfied, discharged, and surrendered to said receiver, and said transaction resulted in a saving of upwards of \$4,000 to the estate of the insolvent bank; that said offer and bid of D. W. Standrod & Co. was conditioned upon the right and opportunity to purchase the whole of said 205 shares of stock, and, were said fifty-five shares of stock sold to said King or Murray, the court finds that it was and is wholly impracticable that said 150 shares of stock would have sold or would

now sell for any amount to exceed \$110 per share; that it is for the best interest of all parties concerned that the said bid of D. W. Standrod & Co., Bankers, of \$6,875, be accepted, and the sale thereon to them confirmed by the court, and the said stock transferred accordingly."

Conclusions of law were drawn from said findings of fact, and judgment was entered against said appellant and in favor of the receiver, confirming said sale. The appeal is from said judgment. Counsel for respondent moved to dismiss this appeal on the ground that no appeal lies from an order or judgment of a court confirming a sale made by a receiver; that what is denominated in the transcript as a judgment is in legal effect only an order, and appeals from orders are not in harmony with the policy of the law of receivership; and that if a lower court exceeded its jurisdiction the remedy is by writ of review. The judgment or order appealed from made a final disposition of more than \$6,000 worth of the assets of the insolvent bank of Bunting & Co., and, we think, comes clearly within the provisions of section 9 of article 5 of the constitution of this state, which provides that "the supreme court shall have jurisdiction to review upon appeal any decision of the district courts or the judges thereof." The decision complained of, we think, is such an effectual and final disposition of a large amount of the assets of said insolvent estate, as to come clearly within the provisions of said section of the constitution, and that an appeal is the proper proceeding whereby to review said judgment of confirmation. Subdivision 1 of section 4807, Rev. St., among other things, provides that an appeal may be taken to the supreme court from a final judgment in a special proceeding. The statute in regard to the appointment of receivers and the care of insolvent estates is placed under the chapter concerning provisional remedies, and an order or judgment made in regard to an insolvent estate which concludes the rights of the parties is appealable, under the provisions of said section 4807, Rev. St. See section 198, High, Rec.

Ten errors are specified and relied upon for a reversal of this case. The first three go to the jurisdiction of the judge in making the order for the sale of said stock at chambers, overruling appellant's demurrer to the report of the receiver, and in making findings of fact, conclusions of law, and entering judgment therein. The record shows that the order for the sale of said 55 shares of stock was made by the judge at chambers, and counsel for appellant contends that the judge has no such power conferred on him by the statute. Upon a most careful examination of our statutes in regard to receivers, we are of the opinion that a judge at chambers has the power to order the sale of property in the hands of its receiver, with instructions to the receiver to report the sale to the

court for confirmation. The record shows that the receiver reported the sale to the court, with his doings in said matter, and the court, after hearing much evidence, confirmed said sale. If it was error for the judge at chambers to order said sale, which we think it was not, the judgment of the court confirming the same cured said matter, as the ordering of a sale is only preliminary and incidental to the confirmation of such sale.

The other errors assigned refer to the admission and rejection of certain evidence, the sufficiency of the evidence to justify the confirmation of said sale, and the jurisdiction to render the judgment appealed from. We have carefully examined the action of the court in its rulings on the admission and rejection of certain evidence, and find no prejudicial error therein, and also find that the evidence is sufficient to justify the judgment confirming the sale of said shares of stock. The evidence shows that the receiver acted in the utmost good faith in the sale of said stock, and for the best interest of the insolvent estate of C. Bunting & Co. and its creditors. It also shows that the Omaha National Bank held 150 shares of the capital stock of said First National Bank of Pocatello, which had been pledged to it, prior to the failure of C. Bunting & Co., to secure the payment of about \$33,000 owing by Bunting & Co. to said Omaha Bank; that said indebtedness had been reduced to \$22,900 at the time of the sale of said 55 shares of stock. It further appears that one A. T. Ryan controlled 60 shares of the capital stock of said Pocatello Bank, that, with the 55 shares in the hands of the receiver and the 150 shares pledged to the Omaha Bank, constituted a majority of the capital stock of said Pocatello Bank, or 265 shares out of a total of 500 shares. The receiver testified that ever since his appointment he had been trying to sell said 265 shares in one block; that said 265 shares would sell for a better price as a whole than if sold in separate lots, for the reason it would give to the purchaser the control of the bank. It is further shown that a sufficient number of shares to control a corporation would, as a rule, be of greater value than a minority of such stock. The receiver testified: That immediately preceding his application to sell said 55 shares of stock the Omaha Bank had assigned said 150 shares held by it as collateral, but said shares were still held as collateral. The Omaha Bank and Mr. Ryan had agreed to keep their stock until such time as it could be sold with the said 55 shares in one block. That he (the receiver) had not been able to sell the same while so grouped, for the reason that the Omaha Bank would not allow the 150 shares held by it to be sold unless sufficient could be realized therefor to pay its full claim against the insolvent bank. That just before making application for said order to sell said 55 shares of stock he was offered \$125 per

share for the same, provided said 150 shares would be sold at the same time for \$125 per share. That he had never received any other bid at any price for said 55 shares. The testimony of the receiver also shows that he has made constant and diligent effort to sell said stock since his appointment as receiver. After receiving said bid he wrote to the president of the Omaha Bank, informing him of said offer, and the stock and notes for which payment the stock was held as collateral were duly assigned to Mr. Ryan, and arrangements made with said Ryan to have said stock sold. Thereupon the receiver procured the order of the judge for the sale of said 55 shares of stock, and advertised the same for sale at the time and place that the 150 shares were to be sold. That said 205 shares were at said time and place sold to D. W. Standrod & Co., and the promissory notes of C. Bunting & Co., which said 150 shares were pledged to pay, were delivered up to the receiver, and are in his possession. At the time of said sale there was due on said notes about \$22,800, which would leave about \$4,000 due on said notes over and above what said 150 shares of stock brought at \$125 per share. That \$4,000 has been canceled by a surrender of said notes to the receiver. The record shows that D. W. Standrod & Co.'s offer of \$125 per share for said 55 shares of stock was upon the condition that they get the 150 shares above referred to on the same terms, and by the sale of the last-mentioned stock a debt amounting to \$4,000 more than \$125 per share against said estate was paid or canceled. The court had a right to and did take into consideration this whole transaction, and under the facts it would be most unjust to rescind the sale of the 55 shares of stock, and thus compel Standrod & Co. to retain the 150 shares, when their dealings with the receiver show that they would not have made any bid for the 55 shares had it not been agreed and understood that the 150 shares should be sold to them at the same time for the same price. The receiver by the sale of said 150 shares realized \$4,000 more than \$125 per share therefor to said insolvent estate, and the appellant, by his offer of \$7,220 for said 55 shares of stock, offers the small sum of \$345 more than what was paid therefor by D. W. Standrod & Co. If the parties to this transaction could all be placed in the condition that they occupied before said sale, and it was a question with the court whether the 55 shares be sold for \$7,220, or that the 205 shares be sold as they were sold, and both propositions presented to the court for his approval and confirmation, there would be no question as to which would be for the best interests of the insolvent estate, as it would be much more benefited by the sale of the 205 shares at \$125 per share than by the sale of 55 shares for the sum of \$7,220, or \$345 more than it was sold for. The court finds, and we think correctly, "that said 150 shares of stock would not have sold

or would not now sell for any amount to exceed \$110 per share." And thus, by making the sale of said 150 shares in connection with the 55 shares, said 150 shares brought \$15 per share, or \$2,250, more than said shares would have brought separately. The receiver and creditors alike were interested in getting as large a sum as possible for said 205 shares of stock, and the evidence shows that a much larger sum was realized from the sale as made than could possibly have been realized by selling the 55 shares separate and apart from the 150 shares. The record shows that this is a contest between rival stockholders of the Pocatello Bank, and that the receiver has received a much larger sum for said stock than he could have possibly received had he sold said 55 shares separate and apart from the 150 shares. The court finds, and we think correctly, that the bid put in in the name of Silas F. King was not made in good faith, but was made on behalf of J. A. Murray for the purpose of gaining some advantage, and that, so far as appears from the evidence, said King is a fictitious person. While it is true the First National Bank of Pocatello is named as the plaintiff in this action, it is clear to our minds that it is only the nominal plaintiff, the real plaintiff being the person who put in the bid in the name of Silas F. King, and that this contest is for the ownership of the 55 shares of stock, and not for the purpose of protecting and promoting the interest of the creditors of the insolvent bank, for whom the receiver has acted fairly in this matter. Strict construction, technicalities, and hair-splitting grammatical analysis ought not to be permitted to control under the facts of this case, when they lead to injustice, but the interests of the creditors of the insolvent bank should be kept steadily in view. The wish and desire of a would-be purchaser of a small part of the assets in the hands of the receiver should not be held to be paramount to all else. We are commanded by the provisions of the fourth section of the Revised Statutes to liberally construe our statutes, and all proceedings under them, with a view to effect their objects and to promote justice. We are of the opinion that the court below by its decision and judgment in confirming said sale has effected the aim and object of our law in regard to receivers in those particulars, and has done justice to all concerned in this case. The order or judgment confirming said sale must be affirmed, and it is so ordered. Costs of this appeal are awarded to the respondent.

HUSTON, C. J., concurs.

QUARLES, J. (dissenting). I am unable to concur in the opinion of my associates in this case. The law, as I understand it, has some respect and consideration for the rights of all parties to an action. When application is made by a receiver to sell property, or to confirm a sale that has been made, all

parties interested are entitled to notice. The rule is thus stated in 17 Enc. Pl. & Prac. p. 833: "All parties interested should receive notice of the application for and of the motion to confirm a sale of property in the hands of a receiver." See cases cited in note to the text above quoted. Sales of property by receivers should be made, conducted, and confirmed according to the laws applicable to judicial sales generally. See 17 Am. & Eng. Enc. Law (2d Ed.) p. 832. These rules are just, protect all parties to be affected by the sale, and should be observed. Upon what process of reasoning or upon what principle sales by receivers should be exempted from these rules, or why the sale in question, made by the receiver in this case, should be made an exception to these general rules, I am unable to understand. The sale of the 55 shares of stock in the First National Bank of Pocatello, held by C. Bunting & Co. at the time of the appointment of C. Thum receiver, and which then passed into the possession of said receiver, was had under an order made by the district judge, at chambers, on an ex parte application made by the receiver, and upon three days' notice posted in the town of Blackfoot, where the said sale was made. The receiver in his report says that he "caused to be posted in three of the most public places in said Bingham county three notices of the sale of said property in due form, advertising said stock for sale," etc. The order for the sale was made on the 13th day of February, 1900, and was filed on February 14, 1900. While testifying as a witness, C. E. Thum, the receiver, among other things, testified: "After the order of sale for said stock had been made, I posted three notices, all in the town of Blackfoot, Idaho,—one in front of the court house, one on the bulletin board at the post office, and one on the bulletin board of the county treasurer's office. I gave no other notice whatever." The receiver was in doubt whether the order reached him on the 13th or 14th of February, but I think the only proper conclusion, from his evidence, and from all the evidence in the case, is that the order of sale reached him on the 14th of February, and that on the same day he posted the three notices in the town of Blackfoot, fixing February 17, 1900, at 2 o'clock p. m., as the time for sale, and at that time the sale was made. It thus appears, undisputably, from the record before us, that the sale in question was made upon three days' written notice posted in three places in the town of Blackfoot, no other notice being given. More than that, the plaintiff in this action, a creditor of C. Bunting & Co., the insolvent corporation for which the receiver was appointed, was not given notice of the application of the receiver for the order to sell these 55 shares of stock in the plaintiff bank. Nor did said plaintiff have any notice, actual or constructive, of the proceedings to sell said stock, or of the said

sale. Said plaintiff was entitled to notice of the application to sell said stock. The defendant was not notified of the application for the said order to sell, nor of the application for confirmation of the sale. Without considering the power of the judge, at chambers, to make the order directing the sale, which I am inclined to think that he has, I am of the opinion that said order was void because given without notice. And I am of the opinion that it is void for another reason,—that it directed the sale to be made by either public or private sale. We have no statute that I know of which authorizes a receiver, sheriff, or other officer to sell at any judicial sale without notice, or on three days' notice, or authorizing such sale to be made privately. All judicial sales made under authority of law in this state require notice. All sales under execution, foreclosure of mortgage, foreclosure of pledge, or in partition, where a sale is required, must be upon not less than 20 days in case of sale of realty, and in case of personalty, perishable property alone excepted, must be upon not less than 5 nor more than 10 days' notice. See sections 3393, 3423, 4482, and 4583, Rev. St., and Act Feb. 14, 1899 (Acts 1899, pp. 241, 242). The property sold was not perishable property, within the meaning of our statutes requiring notice of sale. On the other hand, the evidence in the record before us shows that the said shares of stock in question were growing and increasing in value, owing to the policy of the plaintiff bank in retaining its surplus annual earnings, instead of paying same out in dividends among its stockholders. There could be, under said circumstances, no great hurry for said sale, and at least no such indecent haste as would prevent the usual statutory notice required in this state in case of judicial sales of personal property. A receiver's sale is a judicial sale, and should be, and is required by law to be, made upon notice as other judicial sales are made. The plaintiff, to protect its own interests, and to realize as much as possible upon the debt owing to it by the insolvent banking corporation of C. Bunting & Co., commenced this action, and obtained the appointment of a receiver to take charge of the assets of said insolvent bank. It was entitled, both as a creditor and as the plaintiff, an actual party to the action, to notice of every important step to be taken in the action which affected its rights or the assets of the insolvent banking corporation.

There is evidence in the record showing that the cashier of the plaintiff bank made inquiries as to when said shares of stock would be sold, and that the receiver knew that he desired to know when said shares would be sold, yet no notice is given the plaintiff or its said cashier. It further appears that one of the officers and stockholders in said plaintiff bank, who apparently, from the evidence, is ambitious to control

a majority of the stock of said banking corporation, was given notice by telephone by the receiver, and who was thereby enabled to, and did, buy in said stock through another banking concern. It is attempted to justify said sale upon the theory that purchaser bought on the same day, in an entirely different transaction, at pledgee's sale, 150 other shares in the First National Bank of Pocatello (the plaintiff here), pledged by C. Bunting & Co. to the Omaha National Bank, and that the estate of C. Bunting & Co. has been benefited by that transaction. But the two transactions are entirely distinct. The 150 shares held by the Omaha National Bank never were in custody of the district court, and never came to the hands of the receiver. Neither that sale nor those shares were connected with the sale complained of here. The order of sale did not mention said 150 shares of pledged stock. The report of sale did not mention them. The petition for the order of sale did not mention them. The objections filed by the plaintiff to the confirmation of the sale did not mention them. The petition of the receiver for the order of sale, the order of sale, report of sale, and the plaintiff's written directions to the order of sale in fact constitute the pleadings in this proceeding, and make up the only issues to be tried by the court. But the court wandered outside these issues, and heard much irrelevant evidence, and the findings of fact are nearly all without the issues and irrelevant. The evidence that was admitted to show that the purchaser wanted the 150 shares, with the 55 shares sold by the receiver, and his motives for wanting them, were irrelevant to the issues before the court in this proceeding. The only questions before the court were whether the sale had been properly ordered, and made for a fair price, and whether it should be confirmed. The evidence shows that, the order of sale having been made without notice either to the plaintiff or the defendant, and without at least five days' notice given as required by law, it should have been set aside, and a new sale, upon sufficient notice, ordered made. By voluntarily appearing and objecting to the confirmation of the sale, it may be said, the plaintiff waived notice of application for confirmation of the sale. Yet under no rule of practice nor upon any sound principle can it be urged, in my opinion, that the plaintiff by such appearance waived the giving of notice to it of the application for the order of sale in the first instance. The record shows that a resale will result in a higher price, that an advance of \$345 over the price for which the purchaser bid it in is guaranteed, and that it will in all probability bring as much as \$1,000 more than the amount for which it was formerly sold. Much of the irrelevant and incompetent evidence that was admitted by the lower court on the hearing of the application to confirm

the sale in question shows an unseemly scramble between two of the stockholders and officers of the plaintiff corporation bank to obtain a majority of the stock therein, so as to control its business; that one of these officers and stockholders was favored by the receiver, and was thereby enabled to purchase the 55 shares of stock at a less price than he would have been able to do if he had not been so favored. Officers of the court should not be permitted to engage in such conduct. Judicial proceedings should be conducted with fairness to everybody. I cannot assent to a rule or decision which sanctions the sale of the assets, or any of them, by a receiver upon a private sale, or sale made publicly after three days' notice, in an action commenced by a creditor to wind up the affairs of an insolvent corporation, without any notice to the plaintiff creditor or to the insolvent defendant of the application for the sale, or of the sale itself. If the law requires not less than five nor more than ten days' notice of such sale, as I think it does, less than five days' notice is no notice at all. This court held in *Cummings v. Steele*, 59 Pac. 15, that an order appointing a receiver, made on ex parte application, without notice to the defendant, who had appeared in the action, was made without jurisdiction and void. The rule of practice there stated applies with full force here. Without notice to either plaintiff or defendant, or any one interested, an order is made directing the sale of over \$6,000 of the assets of the insolvent corporation, the defendant in the action. That order, in my opinion, is coram non jure. And under that order a sale is made upon three days' notice posted in the town of Blackfoot, without actual knowledge having been brought home to the parties to the action, either plaintiff or defendant, and that sale is confirmed against the objections of the plaintiff, who objected upon the ground that no notice was given it, in the face of a showing that the property can be sold at an advanced price if a resale is ordered. I am compelled to dissent. The rule followed here simply authorizes courts into whose possession property of insolvent corporations may come to dispose of that property without the knowledge of either party to the suit or any party interested. It violates all established rules of procedure in this jurisdiction, by denying to parties in interest the right of hearing. That hearing to which they were entitled was upon the application for the order to sell. If that notice had been given in this case, the said shares of stock would have sold for more than they did sell for, as parties who own stock in and are officers of the Pocatello National Bank desired to buy said stock, but were prevented by lack of notice from bidding at said sale. Said order confirming the sale should be reversed, and this proceeding remanded to the district court, with instruc-

tions to set aside the said sale, and to order a resale after first giving public notice of not less than five nor more than ten days.

Petition on Rehearing.

(Feb. 8, 1901.)

SULLIVAN, J. After a careful examination of the petition for a rehearing in this matter, we find no reason why a rehearing should be granted, as the petition contains no points that were not fully considered on the hearing of this case. A rehearing is denied.

STOCKSLAGER, J., concurs.

QUARLES, J. I gave to this case careful consideration in all of its phases upon the original hearing, and since the application for rehearing was made I have again carefully considered it, and am unable to come to any different conclusion from that announced in the dissenting opinion heretofore announced by me, for which reason I think that a rehearing should be granted herein.

(10 Okl. 469)

BERTWELL v. HAINES.¹

(Supreme Court of Oklahoma. Sept. 5, 1900.)

THE TERM "MONTH" DEFINED—INTERIOR DEPARTMENT—FINDINGS OF FACT—HOMESTEAD APPLICATION—CONTEST—RESULTING TRUST.

1. The term "month," when used in a statute, unless otherwise provided, means a calendar month, and not a period of 30 days, or a lunar month.

2. Findings of fact made by the secretary of the interior will be treated as conclusive by courts in the absence of the record, or a copy thereof, from which such facts purport to have been found.

3. Where one claiming a right to a tract of government land by reason of prior settlement files in the proper land office, within three months after the date of his settlement, an application to enter the land, accompanied by an uncorroborated affidavit of contest, alleging in proper form that he is a prior settler on such tract under the rules of the department of the interior, it is the duty of the register and receiver to order a hearing between the entryman and the contestant to determine the rights of priority between them. The object of the rule of the department of the interior, to the effect that all contests shall be corroborated, was promulgated for the purpose of showing the bona fides of such contestant, and such corroboration is not necessary to confer jurisdiction upon such officers to hear such cause. Their jurisdiction is acquired by the issuance and service of notice of contest.

4. Where a court of equity can say that the findings of fact made by the secretary of the interior in a contest case are reasonably supported by the evidence introduced by the opposing parties on the hearing of such contest, and that the facts found support his conclusions of laws, it will decline to entertain a bill by the losing party to declare a resulting trust, when such bill discloses the above state of facts, because it fails to state a cause of action, and a demurrer thereto on that ground should be sustained.

(Syllabus by the Court.)

¹ Rehearing denied January 3, 1901.

Appeal from district court, Kingfisher county; before Justice John C. Tarsney.

Action by Fremont Bertwell against William R. Haines. Judgment for defendant. Plaintiff appeals. Affirmed.

W. A. Taylor and Dille & Blake, for appellant. W. W. Noffsinger, Geo. B. Robberts, and J. C. Robberts, for appellee.

BURWELL, J. This is an action to declare a resulting trust. The record discloses that the plaintiff on July 22, 1889, filed a homestead entry for the N. E. $\frac{1}{4}$ section 12, township 19 N., range 6 W., in Kingfisher county; that the appellee, Haines, on July 22, 1889, filed an application to contest the entry of Bertwell, on the ground of prior settlement, claimed to have been made on April 22, 1889, and at the same time filed an application to enter the land, but the contest affidavit was not corroborated until August 6, 1889. A trial was had upon due notice, and as a result thereof Bertwell's entry was canceled, and Haines awarded the land on the ground that he was a prior settler. Haines then made entry, and subsequently, upon final proof, secured the patent. After patent, plaintiff commenced this action in the district court of Kingfisher county. The defendant demurred to plaintiff's petition, and the court, after sustaining the demurrer, entered judgment for defendant for costs, from which judgment plaintiff appealed.

1. It is first contended by the plaintiff that, conceding settlement to have been made by Haines on April 22, 1889, he lost all rights (if any he had) under such settlement by not filing either an application to enter or a duly corroborated affidavit of contest against the entry of plaintiff in the land office within three months from the date of his alleged settlement. The statute providing the time in which a settler must assert his claim in writing in the land office uses the expression, "within three months," and there can be no doubt, under the authorities, in the absence of an express statute to the contrary, that the word "month" means a calendar month, and not a lunar month, nor does it mean a period of 30 days. Therefore any papers filed in the land office by Haines on July 22, 1889, were filed within three months after April 22, 1889. *Hunt v. Wickliffe*, 2 Pet. 201, 7 L. Ed. 397; *Tied. Com. Paper*, § 316.

2. But it is contended in the brief of appellant that the appellee did not file an application to enter within the three months immediately following April 22, 1889, under the rule just stated. The original application, or a copy thereof, filed by Haines for the tract in controversy, is not attached to, and made a part of, the petition; that record is not before us. But the land department found as a fact that this application was filed on July 22, 1889, and, in the absence of the records of the department of the interior, or copies of them, bearing upon this par-

ticular matter, we must conclude that the finding of the department is correct.

3. Now, what was the effect of the contest filed by Haines against Bertwell's entry, in view of the fact that it was not corroborated by any one until the 6th of August, 1889, or 15 days after the expiration of the 3 months after settlement? Did he, by reason of this fact, lose his right to have the question of priority determined between him and Bertwell? We think not. It has been held by a long line of decisions in the interior department that it is not necessary to file a formal affidavit of contest where one claims by reason of prior settlement, and makes this appear to the department by affidavit. When this is done, it is the duty of the department to order a hearing to determine who was the first settler. *James v. Nolan*, 5 Land Dec. Dep. Int. 526; *In re Forward*, 8 Land Dec. Dep. Int. 528; *Willis v. Parker*, Id. 623; *Baxter v. Crilly*, 12 Land Dec. Dep. Int. 684; *Austin v. Thomas*, 6 Land Dec. Dep. Int. 330; *Todd v. Tait*, 15 Land Dec. Dep. Int. 379; *Smith v. Edelman*, 4 Land Dec. Dep. Int. 168; *In re Austian*, 18 Land Dec. Dep. Int. 23; *In re Johnson*, 3 Land Dec. Dep. Int. 456. And again, the department has held that, in case of prior settlement, it is not necessary to file a formal application for entry of a tract already covered by entry, but that a contest affidavit which alleges prior settlement, and shows the qualifications of the contestant to make entry, filed within three months after settlement, is sufficient. *Huntsbarger v. Eickman*, 16 Land Dec. Dep. Int. 270; *Rumbley v. Causey*, Id. 266. And corroboration of the affidavit neither confers nor defeats jurisdiction of the department to hear and determine the matter at issue in any contest case. Jurisdiction is acquired by the issuance and service of notice upon the contestant or adverse claimant, and, while it is a rule of the department of the interior that contest affidavits shall be corroborated, this rule is enforced, as repeatedly announced in the land office decisions, for the purpose of satisfying the department of the good faith of the party contesting. *Shugren v. Dillman*, 19 Land Dec. Dep. Int. 453; *Irwin v. Hayden*, 27 Land Dec. Dep. Int. 555. If the register and receiver should decide to entertain a contest affidavit that is not corroborated, and order a hearing thereon upon due notice, they have jurisdiction so to do, and, if not reversed on appeal in the land department, the courts will not say that the hearing was wrong. Whenever the officers of the interior department order a hearing, their decision as to whether or not such hearing shall be had is final, because the department has the right, on its own motion, to order a hearing at any time to investigate the legality of an entry or the bona fides of the entryman. Therefore the fact that the affidavit of contest was not corroborated within three months from the date of settlement is immaterial. Then,

at any rate, the contest affidavit is in the nature of a pleading, which can, in the absence of an intervening right, in the discretion of the officers, be amended at any time before trial on the issue raised by the amendment.

4. The next and last question is, were the acts of settlement by Haines sufficient to initiate a right to the land, and, if so, did he fail to follow up his settlement as required by law? On this point the secretary finds as follows: "I find the facts to be substantially as set out in the decision now appealed from. Haines' settlement on April 22, 1889, his continued presence in a tent on the land during the four or five days next following, his opening a spring or a well, making a site for a house by four stakes upon which he wrote his name and date of settlement, the plowing of a small piece of ground, and other acts of residence and improvement during that time, are clearly shown. At the expiration of that time he left, he alleged, to bring his family from Kingman, Kan., to their new home on said tract. He did not return with his family until about July 19 or 20, 1889. Upon going to Kingfisher to make his entry, on the 20th or 21st of that month, he found the tract covered by Bertwell's entry. His only recourse then was to initiate a contest, which he did, as hereinbefore stated. He alleges, and the testimony shows, that his delay in returning to the tract from Kansas was due to his own and his wife's sickness, and to serious injuries received by the team which he had purchased to convey there his family and household goods. I am convinced by the evidence before me that Haines established his residence upon the land in April, 1889, and that he has not since changed it, nor formed and carried into effect any intention to abandon his claim. Himself and family have lived upon the land ever since his return, in July, 1889. Upon such return he at once commenced, and soon thereafter finished, his dwelling thereon, and a wire fence around the entire tract. He has since cultivated the land and made other improvements. Bertwell had notice of Haines' prior settlement before he made his entry, not only through Haines' improvements, but from friends of the latter, who informed him that Haines was very proud of his claim, and would surely contest for his right thereto. Haines' absence from the land between April and July was excusable, under the circumstances of the case."

The above findings of fact, in our opinion, are reasonably deducible from the evidence, notwithstanding the fact that the copy of the evidence taken on the hearing in the land office, which is attached to and made a part of the petition in this case, only contains the evidence offered by Bertwell, and that offered by Haines in rebuttal, and omits entirely the evidence offered by Haines in chief, and therefore we must apply the law to these facts as found. We know of no rule as to the exact amount of improvements which are necessary

to be made before one can claim prior settlement. Each case must be decided upon its own merits, taking into consideration the opportunity and ability of the settler to make improvements upon his claim under existing circumstances. If the improvements are such as may be seen by other claimants, and are followed up within a reasonable time, and in a way that unmistakably shows the good faith of the settler, his rights should be protected. Haines having initiated his right to the land by settlement, and followed it up by moving his family upon it at the earliest possible moment the health of himself and family and other conditions would permit, and by making valuable improvements upon the land, and residing thereon and cultivating the same until final proof, we feel that, under all of the circumstances, the greater equities are with him. Bertwell knew of Haines' settlement before he filed; but, even if he had not, his entry was made subject to the prior settler's rights; and it has been held by the supreme court of the United States in *Bohall v. Dilla*, 114 U. S. 51, 5 Sup. Ct. 782, 29 L. Ed. 61, that "the settler may be excused for temporary absence caused by well-founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service," and other authorities could be cited to the same effect. The petition, taking all of the facts as disclosed by it into consideration, fails to state a cause of action, and a court of equity would not be warranted in taking the legal title away from Haines and giving it to Bertwell. Therefore the demurrer was properly sustained. For the reasons stated, the judgment of the trial court is hereby affirmed, at the costs of the appellant. All of the justices concurring, except BURFORD, C. J., not sitting, and McATEE, J., not present.

(10 Okl. 400)

McKENNON v. McKENNON.¹

(Supreme Court of Oklahoma. Sept. 4, 1900.)

ALIMONY PENDENTE LITE—REVIEW.

1. By section 4548, St. Okl. 1893, after a petition has been filed in an action for divorce and alimony or for alimony alone, the court, or a judge thereof in vacation, may make an order for the support of the wife during the pendency of the suit, and in doing so the court exercises discretionary powers; but it is not an arbitrary, but a legal, discretion, which is reviewable on appeal.

2. The order of the court making allowance for alimony pendente lite will not be disturbed in this court, unless the record shows an abuse of discretion.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice John H. Burford.

Action by Annie McKennon against T. F. McKennon. From an order allowing the plaintiff temporary alimony defendant appeals. Affirmed.

Cotteral & Horner and George Buckner, for plaintiff in error. H. R. Thurston, for defendant in error.

IRWIN, J. The first question presented by the record in this case is the motion of defendant in error to dismiss the appeal, for the reason that the order of the trial court requiring the defendant in the court below to pay alimony pendente lite was not a final order, or such an order as could be brought by appeal to this court, and as authority for this position citing the case of *Earls v. Earls*, 26 Kan. 178. And while we entertain the highest regard for the ability and legal acumen of the distinguished judge who wrote the opinion in that case, and reluctant as we are to run counter to his opinions, we are constrained in this case to dissent from the doctrine laid down in that case. We agree with the learned judge that this is an order preparatory to the trial, and that it has spent its force before any of the merits of the case can be heard; but at the same time it seems to us that this is an order which makes a final disposition of the questions litigated therein, and one which defendant can have no relief from, however oppressive or unjust it may be, unless an appeal is allowed; and the fact that the defendant can have the matter reviewed on appeal after a final decision is rendered in the case does not relieve him from the hardship, as long before a final hearing is reached his property may, and probably would, be sold on execution, the proceeds turned over to plaintiff, and expended by her, and be beyond the powers of the court to return to him, or, worse yet, he may have been imprisoned for contempt of court in disobeying this order of the court. This would certainly seem like locking the stable after the horse was stolen. Under our law, the title to real or personal property, and the right to exercise dominion and control over it, as well as the right to life and liberty, are subjects too sacred to be made to depend upon the arbitrary exercise of discretion by any one man, however just or learned he may be. It is repugnant to our sense of justice, that rights and privileges as important as these, involving liberty or property, should be taken from any man, without giving him a hearing before the highest tribunal of the law. It is apparent that this order involves not only the right of property, but the question of personal liberty, and makes both depend upon the wise exercise of a sound discretion of the trial judge. While we believe the question of allowing alimony pendente lite is one addressed to the sound discretion of the trial court, we think it is the exercise, not of an arbitrary, but of a legal, discretion, which justice, logic, and sound reason would dictate should be subject to review on appeal. Being a matter of discretion with the trial court, this court should not disturb the decision unless it ap-

¹ Rehearing denied January 3, 1901.

appears from the record that there has been a palpable abuse of this discretion, but, when there is such abuse, it should be corrected on appeal, and we think that the decision in the case of *Earls v. Earls*, above cited, is not only in conflict with sound reason, but at variance with the great weight of authorities on this subject. In *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, it is said: "An order allowing temporary alimony and counsel fees is such a final order as may be appealed from under the Code." In the case of *Sharon v. Sharon* (Cal.) 7 Pac. 456, the California supreme court arrive at a conclusion that a judgment or decree for alimony pendente lite was a final judgment or decree. The court in that case says: "A final judgment is not necessarily the last order in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from the final judgment in an action." It will be noticed that what is said of the Code of California will apply to the Code of Oklahoma. The California supreme court says, if it is in the nature of a final judgment and is final upon the question adjudicated in it, the same is appealable. This doctrine is sustained by the supreme courts of Kentucky and Arkansas in the cases of *Lochnane v. Lochnane*, 78 Ky. 468, and *Hecht v. Hecht*, 28 Ark. 92. These were cases on appeal from orders allowing alimony and counsel fees pending proceedings in divorce. The appeals were sustained by the supreme court in both cases. In *Hecht v. Hecht* the court says: "The order or judgment of the court is not, strictly speaking, an interlocutory one. While it may be true that a petition for alimony and attorney's fee could not be brought as a separate and independent suit, yet it is also true that such an application and order for an allowance pendente lite, especially such a one as is made in this case, is, so far as it affects the rights of this appellant, in its consequences wholly independent of his suit for divorce. This is a definitive judgment, from which the appellant can have no relief by the final decree, even though it should appear that injustice had been done him. By due process on the execution, the money will have been collected and paid over to the parties in whose favor it is awarded, and its recovery will have passed beyond the powers of the court. It is true the allowance of alimony and other necessary costs is discretionary with the court trying the case, and will be interfered with by this court only upon the clearest proof that there has been a palpable abuse of that discretion. Yet, when there has been such abuse which affects the substantial rights of a party, we are of the opinion that he can have redress by appeal to this court." And they there cite, in support of this doctrine, *Tucker v. Yell*, 25 Ark. 420. In the case of *State v. Seddon*, 93 Mo. 524, 6 S. W. 344, which was a case of mandamus

to compel the allowance of an appeal, the court, in discussing the question of the delay and inconvenience that might be occasioned by allowing an appeal in cases of an allowance for alimony pendente lite, says: "At all events, that a law may work inconvenience or hardship to a party litigant in a particular case is no reason for withdrawing from another a legal right, and perhaps it is as well in the main that the road to divorce should not be altogether a path-way strewn with roses." In the case of *Gruhl v. Gruhl*, 123 Ind. 87, 23 N. E. 1101, the doctrine is announced that an appeal may be taken from an order allowing alimony pendente lite and attorney's fees. *Traylor v. Richardson*, 2 Ind. App. 452, 28 N. E. 205: "Allowance pending action in divorce: An appeal will lie directly from an order making an allowance to attorneys for services rendered to a wife in an action for divorce, without awaiting the final judgment in such action." In *Lewis v. Lewis*, 20 Mo. App. 546, the court says: "The power of the court to order and enforce the allowance for alimony pendente lite, although an adjunct to the action of divorce, is an independent proceeding, standing upon its own merits, and in no way dependent upon the merits of the issue in the divorce suit, or in any way affected by the final decree upon the merits. It grows ex necessitate rei out of the relations between the parties to the controversy. The order making such allowance in this case was a final and definite order, disposing of the merits of that proceeding in the circuit court, and the relator was entitled to make his appeal." In the case of *Blair v. Blair*, 74 Iowa, 314, 37 N. W. 386, the court, by Judge Robinson, says: "If the relief granted by the district court be regarded as an order merely, we think an appeal may be taken from it. It is, however, in the form of a judgment, and, while it is designed to provide for the temporary needs of the plaintiff, it is permanent in form, providing for the payment of fixed amounts on specified dates, and authorizing execution for their collection. It may therefore be regarded as a judgment final for the amounts therein named. The motion to dismiss the appeal is overruled." In the case of *Blake v. Blake*, 80 Ill. 524, there was an appeal from an order of the trial court allowing alimony pendente lite. A motion was made to dismiss the appeal on the ground that the decree appealed from is interlocutory, and not final, being an exactly parallel case with the case at bar. In that case, Chief Justice Scott, speaking for the full court, says: "The question raised is one that has never been passed on by this court, but, upon first impressions, we are of opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or,

If payment was willfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other, the decree could be enforced, and if defendant has property it could, in some way consistently with the practice in courts of chancery, be subjected to its payment. Such decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and, if no appeal lies, this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be. It is no answer to this position to say defendant can have this decree against him reviewed on appeal or error after final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted, and years elapse before any final decision could be reached. In the meantime, he has been imprisoned for disobedience to the decree, or his property, under process of law, been subject to the payment of the sum decreed. Nor does the fact that an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted. On the theory alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, the only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitor's fees could be determined in the appellate court. On the contrary, if an appeal should be denied it might subject defendant to very great hardships in many cases, as the sequel will show. It is apprehended there can be no decree against a party, that will work a deprivation of his property or liberty, from which no appeal or writ of error will lie. Such is the decree against defendant. Under it he may be deprived of his liberty, or his property subject to levy and sale." And further the court says: "But this court has always assumed jurisdiction to review the action of the court below in the allowance either as to alimony or solicitor's fees, and its right to do so has not been questioned." And then they cite with approval *Blake v. Blake*, 70 Ill. 618. *Foss v. Foss*, 100 Ill. 576: "Alimony. The allowance of alimony to the wife for her support pending a suit for divorce, and to enable her to maintain or defend the suit, under the statute, as at common law, in discretionary; but this discretion is a judicial, and not an arbitrary, one, and is subject to review upon appeal or error." An order allowing alimony pendente lite held appealable direct to the supreme court. *Williams v. Williams*, 29 Wis. 517. Hence we think the motion to dismiss the appeal should be overruled.

The next question is, was this such an abuse of discretion by the trial court as

would warrant a reversal of the order allowing alimony pendente lite? In our opinion, the order allowing alimony pendente lite and suit money was an order entirely independent of the merits of the original action for divorce, and did not depend to any extent upon the final decision of the merits of the case. We are aware that in many of the states it has been held that alimony pendente lite and solicitor's fees could not be allowed by the court until after the return day of the process of summons, and only upon notice to the opposite party. But we think a different rule prevails in this territory, on account of the peculiar wording of our statute on the subject, under "Procedure, Civil," art. 28, entitled "Divorce and Alimony." Section 4548 of the Statutes of Oklahoma of 1893 contains this provision: "After a petition has been filed in an action for divorce and alimony, or for alimony alone, the court, or judge thereof in vacation, may make and enforce by attachment such order * * * for support of the wife during the pendency of the action as may be right and proper; and may also make such order relative to the expenses of the suit as will insure to the wife an efficient preparation of her case." Thus, it will be seen that the right of the court to make the order only depends upon the filing of a petition, and does not depend upon the truth or falsity of it. This order is made for the very purpose of trying the issues raised by the pleadings, to wit, did a common-law marriage exist between the parties? The court was under no legal obligation to investigate this question in advance of this order. Nor was it the intention of the law that he should do so. If the petition on its face made such a showing as entitled the plaintiff to a divorce or alimony, then, under the provision of the statute, the court had the undoubted right to make this order for alimony and suit money, and, if the order was right when it was made, the plaintiff's failure to sustain the allegations of her petition could not in any way render the action of the court erroneous. In the case of *Traylor v. Richardson*, above cited in 2 Ind. App. 452, 28 N. E. 205, it is said: "Where, pending an action for divorce, the court makes an order that the defendant pay to the wife's attorneys a certain sum within a given time, to enable her to prepare her case for trial, the fact that subsequent to the order the wife voluntarily dismisses the action, and returns to her husband, is no defense to an action on the order, where the defendant has taken no steps to have the order rescinded or modified." In the case of *Gruhl v. Gruhl*, 123 Ind. 88, 23 N. E. 1101, in speaking of this kind of an order, the court says: "But the question whether or not the charges were true or imaginary was a question for the final hearing, and did not enter into the determination of the preliminary motion, and hence the court could not consider it in advance of its time. The court

could determine no question relating to the merits of the controversy except on the final trial, when ample opportunity would be afforded to examine and cross-examine witnesses." We have examined this record very closely, and we are unable to see that this allowance was exorbitant or unreasonable, or that there has been an abuse of discretion which requires our interference. Hence the judgment of the district court will be affirmed. All the justices concurring, except BURFORD, C. J., who, having tried the cause below, took no part in this decision, and McATEE, J., not sitting.

(16 Colo. App. 35)

FAIRBANKS et al. v. KENT et al.

(Court of Appeals of Colorado. Jan. 14, 1901.)

CONVERSION — IDENTITY — VALUE — ATTACHMENT — REPLEVIN — JUDGMENT — DEMAND.

1. In an action for conversion of certain stoves, the person who prepared the bill of sale by which the stoves were conveyed to plaintiff, and who was present when the stoves were delivered thereunder, and who rented the building in which they were stored, testified that the stoves were taken from the possession of the seller, and placed in this building, and locked up, and that subsequently a constable and defendant's attorney went there, and broke the door, and took the stoves out under a writ of attachment against the seller, and that they were the stoves involved in the present action. *Held* that, in the absence of proof to the contrary, the testimony was sufficient to identify the property as that converted.

2. In an action for conversion of stoves at V., testimony as to their value at D., by giving the wholesale price in D., and adding the freight between D. and V., was competent to establish their value; it being shown that, according to the course of trade, this would be the value of the property at V. at the time and place of the conversion, the stoves being new, and sold and shipped from D.

3. A judgment, in attachment against the debtor, cannot operate as an estoppel in an action by a third person against the attaching creditor for conversion of the goods attached.

4. A judgment of dismissal in replevin of goods under attachment cannot operate as an estoppel against a subsequent suit for conversion for the same goods.

5. Attaching creditors having levied on goods conveyed by the debtor in good faith to a third person, the latter could sue in conversion therefor without a demand.

6. A judgment sustaining an attachment has no bearing on the question whether the levy was wrongful as to third persons, and hence as to the necessity of a demand therefor before suit by the latter.

Appeal from district court, Arapahoe county.

Action by E. H. Kent and another, doing business under the firm name and style of Kent & Stuchfield, against Fairbanks, Morse & Co. From a judgment for plaintiffs, defendants appeal. Affirmed.

Charles H. Dyett, for appellants. Thomas & Thomas, for appellees.

BISSELL, P. J. Kent & Stuchfield brought this suit against Fairbanks, Morse & Co. to recover for the conversion of a lot

of stoves. The case was tried to the court without a jury, and the court found for the plaintiffs, and they had judgment for \$125.80, wherefrom Fairbanks, Morse & Co. prosecute this appeal. The history of the case, briefly, is this: One Hudlow was in business in Victor, and had bought hardware from Kent & Stuchfield, who were carrying on this business in Denver. Some stoves were purchased, and those in controversy were among the number. Hudlow probably became embarrassed, and for that or some other unexplained reason undertook to settle his account with Kent & Stuchfield by reselling and turning the stoves over to them. The bill of sale from Hudlow to Kent & Stuchfield was duly prepared and executed, and its terms and conditions were carried out by delivery by Hudlow to their agent in Victor. The stoves were taken to contiguous premises in a room which had been rented for the purpose, and there stored and locked up. After this transaction was completed, and without any preliminary talk about its regularity, Fairbanks, Morse & Co. brought an attachment suit against Hudlow, and in executing the writ proceeded to break down the door and seize the stoves and sell them. Immediately thereafter, Kent & Stuchfield brought a replevin suit, in which the attachment plaintiffs gave a redelivery bond, and the property never repassed into Kent & Stuchfield's possession. This replevin suit thus begun was ultimately dismissed before trial, and consequently cuts no figure in the case, except as showing that the property passed into the possession of the appellant. The appellant's suit, of course, proceeded to judgment against Hudlow, and the attachment was sustained. In the present suit the bill of sale was set out in the complaint, the inventory of the goods stated, the seizure and conversion of the goods laid, and there was a prayer for the conversion.

When the trial came on the bill of sale was produced, and properly proven, to show Kent & Stuchfield's title. Subsequently a witness was offered, who prepared the bill of sale, and had it executed, who was present at the time the stoves were delivered thereunder, and who rented the store, and he gave evidence that the stoves were taken out and put into this independent room, and locked up, and that subsequently the constable and the attorney for the defendants went there, and broke the door down and took the stoves out, and that they were the stoves involved in the replevin suit and in the present action. One of the firm of Kent & Stuchfield substantially identified the stoves, which were known by names as well as by numbers, although they seem to have been described in the trade one way and in the bill of sale in another. The appellants complain that there was no sufficient identification of the goods. It is impossible to agree with them, because the allegations of the complaint, coupled with the testimony of the witness respecting the exe-

cution of the bill of sale, the delivery of the stoves thereunder, their storage, and ultimate seizure, was enough, in the absence of any proof to the contrary, to prove the identity, and entitle the plaintiffs, their other evidence being sufficient, to recover.

The appellants likewise complain that there was no evidence of value, or, if there was, that it was given by parties who were not competent to testify. They insist, of course, the rule is that the value of goods converted is their value at the time and place of conversion. We concede it, but we find enough in the record from which this proof can be extracted, so that, without any proof to the contrary, we would be without the right to reverse the case. One of the firm of Kent & Stuchfield testified as to the value of this stuff, giving the wholesale price in Denver, and adding the freight between Denver and Victor. According to the course of trade, as testified to by him, this would be the value of the stoves in Victor at the time and place of the conversion. The stoves were new, had been sold and shipped there, and we do not discover any such deficiency of proof of value as warrants us to disturb the judgment.

We see nothing in the proposition suggested by the appellants respecting the estoppel by the judgments rendered by the justice of the peace. So far as concerns the judgment in favor of Fairbanks, Morse & Co., it is simply a judgment against Hudlow, showing that he was indebted to that firm, and that he had done those things which entitled them to an attachment. Whatever may be the effect of that judgment as between Fairbanks, Morse & Co. and Hudlow, it in no manner affects the appellees here, nor did the production of the record of that judgment in any wise bear on the question of their right to recover. The other judgment was simply a judgment of dismissal, and it did not and does not have any bearing on the subsequent suit brought for conversion. The parties had a right, if they saw fit, to abandon their replevin suit, and bring an action in trover; if they could prove the facts which would otherwise maintain the action. The only force that we can see to it is that the delivery bond supports the plaintiffs' case, and tends to show that they got the goods, and, never having returned them, of course converted them.

The only other proposition presented respects the necessity for a demand. Whatever may be the rule in case the original taking is rightful, the evidence in this case shows that possession was acquired by Fairbanks, Morse & Co. wrongfully as against the appellees, and under those circumstances they could bring suit without a demand, and, otherwise proving their case, could recover the value of the property. The rendition of a judgment in favor of Fairbanks, Morse & Co. against Hudlow, and the order sustaining the attachment, has no bearing on this proposi-

tion. That is a matter between the parties to that suit, and it in no manner determines or affects the character of the property acquired as against the appellees here, and the cause of action which was occasioned thereby. We have spent more time in examining the case than perhaps its importance justifies, and, having disposed of all the essential propositions presented by counsel for plaintiffs, we conclude with the affirmance of the judgment. Affirmed.

(16 Colo. App. 22)

HIWASSEE GOLD-MIN. CO. v. HOTCHKISS MOUNTAIN MINING & REDUCTION CO.

(Court of Appeals of Colorado. Jan. 14, 1901.)
NEW TRIAL—CONDITIONS PRECEDENT—COSTS—PAYMENT.

Suits by two mining companies against each other to determine conflicting claims were consolidated, and after entry the judgment in favor of defendant was corrected to include attorney's fees and expense of adverse, according to a stipulation between the parties before trial that, if defendant recovered, those sums should be included in the judgment. Code, § 272, provides that the unsuccessful party in a suit for possession of realty may pay the costs recovered thereby, and on application the court shall vacate the judgment and grant a new trial. Held that, plaintiff having paid the costs of both actions as taxed, it was error to deny its motion for a vacation of the judgment and a new trial because it had not paid the attorney's fee and expense of adverse, since, being made part of the judgment proper, their payment was not necessary to make compliance with the statute complete.

Appeal from district court, Hinsdale county.

Action by the Hiwassee Gold-Mining Company against the Hotchkiss Mountain Mining & Reduction Company to determine conflicting mining claims. From an order denying a motion for a new trial, plaintiff appeals. Reversed.

Charles D. Hayt and Riddell & Starkweather, for appellant. S. D. Crump and G. D. Bardwell, for appellee.

THOMSON, J. The Hiwassee Gold-Mining Company made application in the United States land office at Gunnison for a United States patent to the Palmer lode mining claim, and the Hotchkiss Mountain Mining & Reduction Company made application in the same land office for a United States patent to the Ilma lode mining claim. The surface boundaries of the two claims were in conflict, and each claimant duly adversed the application of the other. Within the legal time, each adverse claimant brought suit upon its adverse in the same court to determine its right to the territory in dispute. There were, therefore, upon the docket of the court, two cases involving the same subject-matter, in one of which the Hiwassee Company was plaintiff and the Hotchkiss Company defendant, and in the other of which the Hotchkiss Company was plaintiff

and the Hiwassee Company defendant. Issues having been joined in both cases, it was ordered that they be consolidated and tried together. The result of the trial was a verdict in favor of the Hotchkiss Mountain Mining & Reduction Company. Judgment was entered on the verdict. After its entry, the Hotchkiss Company moved that it be corrected so as to include an attorney's fee of \$50 and the expense of adverse, amounting to \$110, for the reason that before trial it had been stipulated by counsel of the respective parties that, in case the Hotchkiss Company should prevail, those sums should be allowed to it, and included in the judgment. Affidavits accompanied the motion, and the court, upon the hearing, found that a stipulation had been made as alleged, except that the amount to be allowed as expense of adverse was \$40, instead of \$110, and ordered those amounts to be included in the judgment, and made part of it. The judgment was amended accordingly.

Code, § 272, provides that, whenever judgment shall be rendered against either party in a suit for the possession of realty, it shall be lawful for the party against whom judgment is rendered at any time before the first day of the succeeding term to pay all costs recovered thereby, and upon application of such party, such costs having been paid, the court shall vacate the judgment, and grant a new trial of the cause. The Hiwassee Company, within the time limited, moved the court to set aside the judgment and grant a new trial, alleging that it had paid the costs of the suits. The court found that all the costs in both cases had been paid by it except the \$50 allowed for attorney's fees and the \$40 allowed as expense of adverse, but that these had not been paid, and thereupon denied the motion. The Hiwassee Company is here by appeal from the judgment. It is possible that the Hotchkiss Mountain Mining & Reduction Company, by reason of its having been plaintiff in one of the adverse suits, and victor in both, would, by the terms of section 423 of the General Statutes, have had a right to the taxation of those sums as costs. If these had been so taxed, their payment, together with the payment of the other costs, by the losing party would have been a condition precedent to the granting of a new trial. But the attorney's fee and the expense of adverse were not taxed as costs. They were included in the judgment proper, as being in the nature of damages, and it was not by virtue of the statute that their recovery was adjudged. The sole ground of their allowance was the stipulation of the parties. All that is required of the losing party in ejectment in order to a new trial is the payment of the costs which have been taxed. When he has paid those, his right is complete, and it is error to deny it. No part of the judgment proper need be paid; nothing but the costs. The court found that the appellant had paid all the costs except

the \$50 and the \$40. But those sums were not costs, so that, upon the court's finding, there was a full compliance with the Code provision, and a new trial should have been ordered. The judgment will be reversed. Reversed.

(16 Colo. App. 39)

KLUG v. MCPHEE.

(Court of Appeals of Colorado. Jan. 14, 1901.)

PERJURY—JUSTIFICATION OF SURETY—MALICIOUS PROSECUTION—APPEAL.

1. A memorandum, below the justification in an appeal bond, stating the surety's financial condition, is for the advice of the clerk, and, even if false, does not amount to perjury, since the statute regulating appeals makes no provision for justification.

2. The statute authorizing indorsement of the name of the prosecuting witness on an indictment for a crime committed against the property or person of an individual does not apply to the crime of perjury; and the fact that defendant's name was indorsed on an indictment for perjury does not connect him with the prosecution, making him liable as for malicious prosecution, since he might have been summoned in invitum.

3. In a suit for malicious prosecution the connection of defendant with the prosecution is a fact which must be established.

Appeal from district court, Arapahoe county.

Action by John P. Klug against Charles D. McPhee. From a judgment for defendant, plaintiff appeals. Affirmed.

Daniel Sayer, Clay B. Whitford, and H. A. Lindsley, for appellant. Hartzell & Steele, for appellee.

BISSELL, P. J. The difficulty of this case, and the consideration given to it, cannot be measured by the brevity of this opinion. It is our inclination, as it is probably the inclination of all courts, to afford a party who has been subjected without cause to a criminal prosecution an opportunity to recover damages for the wrong. I make this statement in the face of what I believe to be the law and the necessity which exists in all republican governments to afford the citizen a reasonable opportunity to bring to justice all offenders against the general law. Under our system it is the right of every good citizen to complain to the grand jury when he believes crime has been committed, and in doing this he must be measurably and reasonably protected against suits for malicious prosecution. Notwithstanding all this, a very careful examination of this record does not enable us to reverse the judgment and afford the plaintiff a chance to properly try his case.

In 1896 there was a suit between McPhee and other parties in the district court, which resulted in a judgment and the taking of an appeal to this tribunal. An undertaking was given for its prosecution. This was the origin of the difficulty. Klug, the appellant, was offered as a surety. He signed the undertaking and justified before the clerk, whereby he swore that he was worth the

sum mentioned in the undertaking, and above his just debts and liabilities, in property not exempt from execution. Thereunder the justification there was a memorandum, signed by him, reciting that he owned 2,500 acres of land in Weld county, 500 without incumbrance, improved, and of the value of \$20,000; 500 head of horses; and 500 head of cattle. The prosecution against Klug was apparently based, although we are not fully advised about it by this record, upon the untruthfulness of this justification. In other words, the parties in whose favor the appeal bond ran, so he contends, investigated the matter, and found the memorandum, as they claimed, to be untrue, and thereupon made a complaint before the grand jury against him, and he was indicted for the crime of perjury. On the trial of that indictment he was immediately acquitted, and thereupon brought this suit against McPhee for damages for what he alleged was a malicious prosecution.

There are a good many questions presented on this appeal which have basis, and about which the trial court undoubtedly committed errors, as we look at the record. We do not, however, expect to go through the record and discuss them, nor pay any attention whatever to various points urged by counsel for appellant, because the whole matter is determined by another consideration, which entirely disposes of the case and relieves us of the necessity to consider them. No matter how many errors may have been committed by the court in the progress of the trial, if the plaintiff failed to prove a fact fundamental and essential to the maintenance of his suit, he cannot have the case reversed because of them. There seems to have been a misconception respecting the memorandum signed by Klug underneath the justification. That memorandum was no part or parcel of the justification, and, whether true or false, did not render Klug liable either to a prosecution in a criminal proceeding or to a civil suit, unless on some basis of misrepresentation which is not exhibited. Under our statute, parties have the right to appeal. The only limitation is that they must give an undertaking in double the amount of the judgment, with sureties to be approved by the clerk. The statute regulating appeals makes no provision for justification, but simply requires the clerk to satisfy himself as to the sufficiency of the bondsmen. There is, however, a general statute respecting undertakings, requiring the person taking them to use diligence in ascertaining the responsibility of the sureties, and requiring him to cause the sureties to make an affidavit that he or they are worth the sum specified in the undertaking, over and above their just debts and liabilities. The clerk complied with that statute, and Klug signed the undertaking and made the proper affidavit. The memorandum below is simply a memorandum for the advice and advantage of the clerk, and to

show that that officer had taken due precaution to make inquiries. If the memorandum itself is not a part of the justification, whether true or false, it would not subject the surety to any prosecution for perjury. Neither is it a part of the affidavit, nor was it made as such. On the trial of the present suit there seems to have been an attempt on the part of the court, as well as on the part of counsel for the appellee, to confine the proof to a support of this memorandum, and to an attempt to show its truthfulness. In this respect both the court and counsel were in error, because that was not the gravamen of the suit; nor did it make any difference, for the purposes of this action, whether or not Klug could uphold and show the absolute truthfulness of that memorandum. To maintain the present case, all Klug had to do was to show that his justification was true; that he was worth \$20,000 over and above all his just debts and liabilities; and then show that the prosecution was without probable cause, with or without direct proof of malice, as the case might be, and that the prosecution was instigated by McPhee without the justification which the law requires him to show as a defense. This erroneous theory regarding the case occasioned, as we have already suggested, the commission of a good many errors. A good deal of proof was rejected which ought to have been admitted, and a good many questions excluded which should have been answered; but, regardless of those matters, the plaintiff failed to prove one fundamental fact, and, failing in this respect, he cannot complain because of these incidental errors, nor ask the reversal of the case. It has been several times decided, both by the supreme court and this, that the plaintiff is bound to make proof or offer proof of the fundamental facts essential to maintain his cause of action, and, failing in this, he cannot successfully assign error on some ruling of the court excluding other proof which might, this being done, be rendered admissible. In other words, having offered testimony which the court has refused, he cannot rest on that proposition, though it shows error, and, failing to make or offer the proof necessary to the suit, rest, have the judgment go against him, and then appeal. The failure of the plaintiff's proof was with respect to McPhee's connection with the prosecution. The plaintiff did not show that McPhee instituted the prosecution, that he fathered it, that he caused it to be commenced, or that without him the indictment would not have been found. It is quite true, McPhee appeared on the back of the indictment as the prosecuting witness. This, however, is no proof of his connection with it, because that simply shows that he is the person whose rights have been perhaps affected, and perhaps the one who furnished the principal proof on which the prosecution rests. It in no manner shows that he went before the

grand jury voluntarily, and gave the evidence and started the prosecution. He may have been called there by subpoena issued by the prosecuting officer or by the grand jury itself, who may by some one else have been advised of the commission of the alleged crime. It is quite true, there is a statute which provides for the indorsement of the name of the prosecuting witness on an indictment for a crime committed against the property or person of an individual, and which under some circumstances will subject the prosecuting witness to the payment of costs. This, however, is not that sort of a case. This prosecution was not instituted because of injury to the personal property of McPhee; but it was instituted to punish a crime against the statutory law regarding perjury, which is not a crime against the person or property to which the statute would be applicable. This disposes of that contention and the effect of the indorsement, and, as has been said by a writer on the subject, there must be some evidence of the identity of the defendant, and that he was a prosecutor in proceedings which are charged to be malicious. Newell, Mal. Pros. c. 13, p. 451, § 3. It is quite evident this must be the law, regardless of authority; and wherever one would seek to recover damages for malicious prosecution in a case where an indictment has been found, and the accused tried and acquitted, he must produce evidence connecting the person charged with the institution of the proceedings. It is very different in cases of an indictment against a person for the violation of a general law, and the case of an indictment against a person for the commission of a crime against some individual, or for a wrong done against the property of some individual, and also in a case where the prosecution is initiated by a complaint filed before a justice of the peace, or some other peace officer, based on an affidavit signed by one who complains. At all events, in the present suit we are unable, although we have read the abstract and supplemental abstract with great care, to find therein any evidence which is sufficient to so connect Mr. McPhee with the prosecution as, under any circumstances or any condition of the proof, to render him liable in damages for the wrong which was apparently done Mr. Klug. This being true, the judgment of nonsuit which was entered in the court below on this proof was manifestly right, and it must necessarily be affirmed. Affirmed.

(16 Colo. App. 44)

PAUL v. ROOKS.

(Court of Appeals of Colorado. Jan. 14, 1901.)

JUSTICES OF THE PEACE — JURISDICTION — GENERAL APPEARANCE — WAIVER OF DEFECTS — ATTACHMENT — SUMMONS — RETURN — APPEAL — EFFECT AS APPEARANCE — CERTIORARI.

1. Where, in an action commenced before a justice of the peace by attachment, the sum-

mons made returnable in 13 days was not served on defendant, but on return day the case was continued for 12 days at his request, made by letter, defendant's motion to quash the summons and dismiss the action because Laws 1897, p. 113, § 2, requires that in attachment cases, on the return day of the summons, which shall not be more than 10 days from the issuance thereof, the justice shall continue the hearing for 20 days, was properly denied, since, as such statute was intended for the benefit of creditors of defendant other than plaintiff, failure to comply with it could not prejudice defendant.

2. Where, in an action commenced before a justice of the peace by attachment, the summons, made returnable in 13 days, was not served on defendant, but on the return day the case was adjourned at defendant's request by letter, he thereby waived any defect in the summons or in its service, since such application was a general appearance.

3. Motion by defendant on the adjourned day to dismiss the attachment was a general appearance, though he stated in the motion that he appeared specially for that purpose only, since he would have no right to make such motion unless he were in court.

4. Defendant, by appealing from the judgment of the justice, gave jurisdiction of the person, and waived all defects in the service of process.

5. Under Code, § 297, providing that a writ of certiorari may be granted where an inferior tribunal exceeds its jurisdiction and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy, the mere fact that an appeal lies to a final judgment is not conclusive against the right to a writ of certiorari.

Appeal from Jefferson county court.

Action by John W. Paul against F. M. Rooks. From an order dismissing the cause on appeal from a judgment in plaintiff's favor, he appeals. Reversed.

Fillius & Davis, for appellant. S. A. Osborn, for appellee.

WILSON, J. This action was commenced by plaintiff, Paul, before a justice of the peace, by attachment. Summons was issued and made returnable in 13 days. There was no service upon the defendant. Upon the return day, at the request of the defendant by letter, the case was continued for 12 days. The garnishee appeared and made answer to the garnishment process. At the expiration of the time for which the cause was continued, the defendant, appearing specially by attorney, moved the court, in writing, to quash the summons because it was made returnable in 13 days from the date of its issuance, instead of not more than 10 nor less than 5 days, as required by law. At the same time the defendant, by his attorney, also claiming to appear specially, filed a motion to dismiss the attachment, assigning various reasons therefor. Both motions were overruled, and thereupon, after hearing the testimony of plaintiff, judgment was rendered in his favor. The defendant, by his attorney, then asked that no execution issue for 10 days, until he could take the case up by appeal, which was done within such time. In the county court, defendant, by his attor-

ney, moved the court to dismiss the action on the ground that the judgment of the justice court, as appeared from the transcript and the papers in the case, was absolutely void for the lack of jurisdiction by the justice. This motion was sustained, and the cause dismissed.

The motion of defendant in the justice court to quash the summons and dismiss the action was based upon an amendment to the law regulating attachments before justices of the peace, adopted in 1897, which required, substantially, that in all such cases, upon the return day of the summons, "which shall not be less than five nor more than ten days from the issuing thereof," the justice shall continue the hearing for 20 days, etc. Laws 1897, p. 113, § 2. The contention is that the requirements of this section were violated in both instances; the summons having been made returnable in 13 days, and the cause having been continued for only 12 days after the return day. It is obvious from the mere reading of the section that it was intended solely for the benefit and protection of creditors of the defendant other than the plaintiff, if there should be any. It was to give them an opportunity to come in and prorate with the plaintiff. They alone would have a right to complain of a failure to proceed in accordance with the provisions of the section, and none are here complaining. The defendant would have no right to object, because his rights were not prejudiced by such failure. Even, however, if he did have the right to object at any time, he lost such right by his subsequent acts. There is no question about the justice having jurisdiction of the subject-matter. The only dispute is as to the jurisdiction of the person. It is too well settled in this state to require discussion or reference to authorities that any kind of general appearance by a defendant in a justice court is a waiver of any defect in the summons or in its service. If the defendant had appeared in person before the justice on the return day of the service, and asked for a continuance, this would, unquestionably, have been a general appearance. We see no reason why such an application by him in writing should not have the same effect. Even if this were not true, when he appeared specially for the purpose of assailing the summons he also filed a motion to dismiss the attachment. This was, in effect, a general appearance, because he would have no right to make such motion unless he were in court, and this result was not obviated by his stating in the motion that he appeared specially for that purpose only. Its effect was that of a general appearance, whatever he might have seen fit to call it.

When defendant appeared in the county court and moved to dismiss the action, he did not restrict his appearance to a special one, nor did he state in the motion the ground upon which he claimed the judgment of the justice court to have been void. If it

was because of lack of jurisdiction of the person by the justice, the general appearance for this motion might itself have cured this defect and given the county court full jurisdiction; the defendant failing to rely upon the motion which he had made in the justice court. In addition to this, after judgment was rendered by the justice the defendant appeared before him and requested and secured a stay of execution for 10 days. If any one of these acts was not sufficient in itself to waive any defects in the summons or in its service, or in the proceedings by the justice, it would certainly seem that all concurring should be sufficient to accomplish that end. However this may be, the disputed questions are effectually set at rest by the fact that the defendant took an appeal from the judgment of the justice. *Deltz v. City of Central*, 1 Colo. 330; *Wyatt v. Freeman*, 4 Colo. 15; *Charles v. Amos*, 10 Colo. 277, 15 Pac. 417; *Railroad Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542. In the last-cited case the court said: "The taking of an appeal from the judgment of a justice of the peace gives jurisdiction of the person, and is a waiver of all defects in the service of process, or even the want of process." The case of *Otero Co. v. Hoffmire*, 9 Colo. App. 528, 49 Pac. 375, cited by defendant, is not in point. That case involved, and the decision was based upon, the total want of jurisdiction by the justice of the subject-matter. A change of venue had been granted, and the justice, in express violation of the statute, instead of sending the case to the nearest justice,—one who resided in the same town with him,—had sent it to a justice residing 10 miles distant. Defendants promptly entered a special appearance and moved to dismiss on the ground that the justice was without jurisdiction. This motion was overruled, and the defendants took no further steps in their defense. There was no act of defendants, either before the justice who rendered the judgment, or in the county court to which an appeal was taken, upon which could be based a claim that the defendants had entered a general appearance or waived any rights. The want of jurisdiction to which the court was referring in that case, and upon which it based its decision, was of the subject-matter, not of the person only. We do not feel called upon to suggest what remedy defendant could have had, other than by appeal, but will say that his construction of Code, § 297, is not in accord with the decision of the supreme court. *People v. Lake Co. Dist. Ct.*, 26 Colo. 396, 58 Pac. 604, 46 L. R. A. 850. It has been there held that the mere fact that an appeal lies to a final judgment is not conclusive against the right to issue a writ of certiorari. "Notwithstanding that fact, it may be granted, if in the judgment of the court the remedy of the appeal is not plain, speedy, and adequate." For the reasons stated, the judgment will be reversed. Reversed.

(7 Ariz. 211)

BILLUPS v. UTAH CANAL ENLARGEMENT & EXTENSION CO.

(Supreme Court of Arizona. Jan. 28, 1901.)

WATERS—CANAL—NEGLIGENCE—BREAKING OF BANK—FLOODING LANDS—COMPLAINT—ANSWER—ISSUES—SCOPE OF ISSUES—EVIDENCE—INSTRUCTIONS—COSTS.

1. Where, on appeal, the evidence is not incorporated in the record, assignments of error which involve a consideration of facts cannot be considered.

2. A complaint alleged that, because of the negligence of defendant in the operation of a canal, plaintiff's land was flooded. The answer denied the allegations, and the jury were instructed that if cattle of plaintiff went on the canal, and caused the break, or if any agency of plaintiff caused the break, they should find for defendant. *Held* that, on appeal, the evidence not being in the record, the instruction would not be deemed erroneous as instructing the jury, if plaintiff was guilty of contributory negligence, to find for defendant, when contributory negligence was not in issue, since, under the answer, any fact that tended to disprove negligence on the part of defendant would have justified the instruction.

3. A complaint alleged that, by reason of the negligence of defendant in the operation of a canal, plaintiff's land was flooded. The answer denied the allegations, and the jury were instructed that if the flooding was a benefit to the land equal to, or greater than, the damage, they should find for defendant. *Held* that, since the answer put in issue the fact as to whether any damages had been sustained, if there was any evidence that the lands were benefited by the irrigation the instruction was proper.

4. Where, on appeal, the rules of the trial court relative to the per diem of the court reporter were not brought up, but the record disclosed that the court's attention was directed to an item in the cost bill for compensation of the court reporter, and that the court denied a motion to have the item stricken out, it would be presumed that the item was proper.

Appeal from district court, Maricopa county; before Justice Webster Street.

Action by W. M. Billups against the Utah Canal Enlargement & Extension Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. J. Daggs, for appellant. Baker & Bennett, for appellee.

DOAN, J. The appellant, as plaintiff, brought an action in the district court of Maricopa county against the appellee, as defendant, to recover damage for the injury caused to plaintiff's (appellant's) land, crops, and stock by the breaking of the canal owned and operated by the appellee, and the consequent flooding of the plaintiff's premises. The complaint alleged that "the defendant, while operating and carrying water in the said canal, grossly neglected to keep the banks of said canal in proper repair to carry water therein, and did manage said canal and water therein in such a grossly careless and negligent manner that on December 10, 1898, the water carried in said canal by defendant, at a point where said canal crosses plaintiff's land, overflowed, washed down and destroyed the bank, and flowed out and inundated and overflowed the

land of the plaintiff, to his great damage"; and, for a second cause of action, that "the defendant company, after the said canal had broken its banks and flooded plaintiff's property, on December 10th, failed and refused to place the said banks of said canal in proper repair; and while said banks were in such insufficient and poor repair, and while the defendant well knew the bank or break in said ditch was improperly and poorly and imperfectly constructed, and insufficient to hold the water usually carried therein, the defendant, on December 18, 1898, turned water in said ditch in such a grossly careless and negligent manner that the gap where the bank of said canal had previously broken on plaintiff's land again gave way and broke, and the lands of plaintiff were again overflowed, inundated, and damaged." The defendant demurred to the complaint, and entered a general denial of each and every allegation in said complaint, and each cause of action therein contained. The case was tried to a jury, and the jury, after having been instructed by the court, brought in a verdict in favor of the defendant; whereupon the court rendered judgment against the plaintiff for costs, including in said costs an item of \$50 for stenographer's fees. The motion to retax costs by deducting from the defendant's cost bill the said item of \$50 was denied. From the judgment in the case and the order denying the motion for a new trial the plaintiff appeals, and assigns as error—First, the refusal of the court to give six several instructions requested by plaintiff; second, the giving of two instructions for the defendant which were excepted to by plaintiff; and, third, the allowance in the judgment of the item of \$50 paid by defendant to the court reporter for his per diem for taking notes of the testimony in the trial, and the refusal of the court to strike the same from the defendant's cost bill on motion.

The appellant has not incorporated in the record any of the evidence in the case, but has simply said that the plaintiff submitted evidence, both oral and written, to sustain the issues on his part, and the defendant submitted evidence, both oral and written, to sustain the issues on its part. The record shows that 11 witnesses testified on one side, and 16 on the other, and that the examination of the witnesses occupied four days.

On the question presented in the first assignment, the courts have held, without exception, in considering the refusal of a trial court to give instructions requested by an appellant, that, unless the testimony upon which the instructions are predicated is before the appellate court, it is impossible to say whether or not the lower court erred in the refusal, and the court will therefore not review errors claimed to have been committed which involve a consideration of the facts as they may have been disclosed by the evidence. *Ah Twine Gooslin v. Letson* (Kan.

Sup.) 49 Pac. 157; *Harris v. Barnhart* (Cal.) 32 Pac. 589. The well-settled rule of the courts in this respect is very happily stated in *Frost v. Creamery Co.* (Cal.) 36 Pac. 929. The court in that case said: "Defendant appeals from the judgment, and brings up the judgment roll and a bill of exceptions, which merely show the instructions given and refused, and the exceptions thereto. Nothing else appears. A reversal is asked solely upon alleged errors in giving and refusing instructions. In such a case a judgment will rarely be reversed. All intendments are in favor of sustaining it. It does not appear what evidence was or was not introduced, and we cannot tell upon what theory the case was tried. Under these circumstances, the alleged error of the court below, in refusing certain instructions asked by appellant, cannot be considered as a ground for reversal. *Nelson v. Lemmon*, 10 Cal. 49; *White v. Abernathy*, 3 Cal. 420; *Carpenter v. Ewing*, 76 Cal. 487, 18 Pac. 432, and cases there cited. The same may be said of instructions given, unless they 'would have been erroneous under any conceivable state of facts.' *Carpenter v. Ewing*, supra."

It is next claimed that two instructions given were erroneous. Appellant says: "The court erred in giving instruction No. 6 for defendant, for the reason that this instruction tells the jury that, if they believe from the evidence that the plaintiff was guilty of contributory negligence, they must find for the defendant, when there was no issue of contributory negligence made by the pleading, and contributory negligence, having not been pleaded by defendant, could not be proved under a general denial, and this instruction is not responsive to the issues or pleadings." The instruction, as given, reads: "If the jury believe from the evidence that the horses and cattle under control of the plaintiff, and being pastured upon his premises, went upon the defendant's ditch, and tramped down the borders, and caused the break, whereby plaintiff's premises were flooded and damaged, or if you believe from the evidence that the break was caused by the direct agency of the plaintiff in any way, whereby his premises were flooded and damaged, he cannot recover in this case, and you should find for the defendant." Contributory negligence is not mentioned in the instruction, nor is it necessarily contemplated. Contributory negligence, when pleaded and proven, generally presupposes negligence on the part of the defendant, and is presented in the way of confession and avoidance; but in this case the negligence charged in the complaint is denied in the answer, and there is no averment on the part of the defendant that the plaintiff was guilty of contributory negligence.

The complaint alleged that the plaintiff was damaged "by reason of the grossly careless and negligent manner of the management of the said ditch, and the grossly care-

less and negligent manner of carrying water therein." The answer denied each and every allegation in the complaint. Under that answer, any fact, or state of facts, that tended to disprove negligence on the part of the defendant, could be put in evidence. Any evidence tending to show that the break was caused by the direct act or agency of the plaintiff, in taking out water for irrigation or for other purposes, or that after the first break was mended the plaintiff turned into the pasture where it had occurred a large band of cattle or horses, that tramped down the fresh earth where the bank was repaired, and that these or other possible acts were not known by the company, and were of such nature, or committed under such circumstances, as not to import negligence on the part of the defendant in not being aware of them or anticipating their results, would have been competent under the pleadings, and would have fully justified the instruction.

The next assignment alleges that "the court erred in giving instruction No. 7 for defendant, over objection of plaintiff, * * * because it is not responsive to the pleadings or the issues in the case." The instruction reads: "If the jury believe from the evidence that the flooding of the plaintiff's land by reason of the break in defendant's canal was a benefit to said land or to the plaintiff, and that such benefit was equal to, or greater than, the damage, if any, thereby sustained by plaintiff, your verdict should be for the defendant." The denial in the answer put in issue not only the alleged negligence of the defendant in causing the damage (if any) alleged in the complaint, but also put in issue the fact of the damages having been sustained. The instruction as given was most certainly responsive to the issue. If there was any evidence that the lands and crops were benefited by the irrigation, rather than, or more than, damaged, that evidence would render the instruction perfectly proper, and, as it can be readily conceived that such evidence may have been offered, the instruction in question comes under the rule above cited.

It is next urged by the appellant that the court erred in allowing the judgment for the item of \$50 paid by defendant to the court reporter, and refusing, on motion, to relax the cost bill by striking the said item therefrom. Our statutes provide (Rev. St. par. 895): "The successful party to a suit shall recover of his adversary, all the costs expended or incurred therein, except where it is or may be otherwise provided by law." Paragraph 896: "On all motions the court may give or refuse costs at its discretion, except where it is otherwise provided by law." Paragraph 902: "The court may for good cause, to be stated on the record, adjudge the costs otherwise than as provided in the preceding sections of this act." Paragraph 912: "The party in whose favor judg-

ment is rendered, and who claims his costs, shall deliver to the clerk of the court a memorandum of the items of the costs to which he is entitled. He may include in the costs all the necessary disbursements in the action or proceeding, including the fees of officers allowed. * * * From these provisions it will appear that the determination and disposition of the costs in any given case are largely in the discretion of the trial court.

Counsel for the appellee contend on this subject that "the charge is for the regular per diem allowed by the rules of the court." The rules of the trial court relative to the per diem of the court reporter, from which we could determine this fact, have not been brought up; but the record discloses that the court's attention was directed to this item in the cost bill, and that the court denied a motion to have the item stricken out. Upon the presumption that exists in favor of the regularity of the procedure of courts of general jurisdiction, we must, in the absence of any showing to the contrary, presume that in the allowance of the item aforesaid, and denying the motion to retax and strike out the same, the court was acting in accordance with its rules, and therefore its action will not be disturbed by this court. No other errors having been assigned, and none appearing in the record, the judgment of the district court is affirmed.

DAVIS and SLOAN, JJ., concur.

(25 Mont. 24)

MONTANA ORE-PURCHASING CO. et al. v. LINDSAY, Judge.

(Supreme Court of Montana. Jan. 28, 1901.)
BILL OF EXCEPTIONS—COMPELLING JUDGE TO SIGN AFTER TERM OF OFFICE—MANDAMUS—JUDICIAL DUTY.

1. Under Code Civ. Proc. § 1158, providing that a judge "may" sign a bill of exceptions after he ceases to be judge, he may be compelled to do so.

2. Mandamus will not lie to compel a judge to amend a bill of exceptions by incorporating therein particular matters; this being the exercise of a judicial, and not a ministerial, duty.

3. An application to compel a judge to amend a bill of exceptions is insufficient. Plaintiff must allege and show, not only that the matters set out in the amendment are material, but also that there is no evidence, other than that contained in the settled bill and the proposed amendment, which is necessary to illustrate or explain the exceptions.

Peremptory mandamus by the Montana Ore-Purchasing Company and others against John Lindsay, as judge of the Second judicial district court of the state of Montana. Motion to quash alternative writ granted, and demurrer to application for peremptory writ sustained.

McHatton & Cotter, for plaintiffs. Forbis & Evans, for defendant.

PIGOTT, J. Mandamus. The object of this proceeding is to obtain a peremptory

writ commanding John Lindsay, Esq., late one of the judges of the district court of Silverbow county, to amend a bill of exceptions settled and signed by him while judge. For the purposes of the present motion and demurrer, the allegations of the affidavit filed in support of the application must be taken as true. Succinctly stated, the facts are these: In an action between the Boston & Montana Consolidated Copper & Silver Mining Company and the relators or plaintiffs herein, which was pending in the court over which Judge Lindsay presided, an order was made refusing to grant a temporary injunction prayed for by the plaintiff therein. To a proposed bill of exceptions tendered by the plaintiff in that action, the relators herein (in whose favor the order denying an injunction had been made) offered an amendment, truly setting out certain material evidence received at the hearing, but which was omitted from the bill as proposed. Upon the presentation of the proposed bill and amendment for settlement, Judge Lindsay admitted that the matters recited in the amendment as having been introduced in evidence had been received at the hearing, but nevertheless refused to allow it or permit it to be inserted in the bill, saying that he did not care to do so. He settled and signed the bill, the matter sought to be incorporated by the amendment offered nowhere appearing therein. An alternative writ of mandate was issued on the 4th day of January, 1901, and on the following day was served. Judge Lindsay's term of office expired with the 6th day of January, 1901, and he is no longer judge. He moves the quashal of the alternative writ, and demurs to the application.

1. Counsel for the defendant insist that he cannot be compelled to act with reference to a bill of exceptions after his term of office as judge has expired. Whatever doubt may exist with respect to the question when tested by the rule of the common law, it is quite evident that in this state the statute makes it the duty of the person who as judge tried the cause or rendered the decision to settle and sign a bill of exceptions after, as well as before, he ceases to be judge. Among the provisions of section 1158 of the Code of Civil Procedure is the following: "A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer." The duty to settle and sign, when duly requested to do so, a bill which will preserve all the evidence and proceedings, whether in favor of or against either party, necessary to explain the exceptions, is imposed upon him, though he has ceased to be judge. The authority to settle and sign a bill of exceptions which he might have settled and signed while he was judge continues to exist, and the correlative duty attends and inheres in him until performed. It is argued that, since the respondent is no longer the judge, he now holds no office, trust, or station, where-

fore there is no duty enjoined upon him which can be said to result therefrom; and it is contended that, while the part of section 1158 which has been quoted permits a judge to settle and sign a bill after he ceases to be such officer, it does not enjoin such settlement and signing upon him as a duty. The cases of *Leach v. Aitken*, 91 Cal. 484, 28 Pac. 777, and *State v. Allyn*, 7 Wash. 285, 34 Pac. 914, fully support the position of the defendant. We shall not follow them, however, for they seem to be based upon a misconception of the force of the word "may" in the statute quoted. This word is sometimes permissive only; sometimes it is imperative. Legislative intent determines whether it is directory or mandatory. According to its natural and usual signification, the word "may" is enabling and permissive only, and so it must be interpreted where no right of or benefit to the public, nor right of persons other than the one upon whom the permission is conferred, depends upon giving to it the obligatory meaning; but the word is interpreted to mean "shall" or "must" whenever the rights of the public or of third persons depend upon the exercise of the power or performance of the duty to which it refers. In those cases where the public or persons possess the right to require that the power conferred by the word "may" be exercised, the word is imperative and mandatory, being the equivalent of "shall" or "must." *Blake v. Railroad Co.*, 39 N. H. 435; *Tarver v. Commissioners*, 17 Ala. 527; *Reg. v. Adamson*, 1 Q. B. Div. 201; *Suth. St. Const.* § 462, p. 597; *End. Interp. St.* § 306 et seq. And see *Bank v. Neill*, 13 Mont. 377, 34 Pac. 180, and *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80. The provision authorizing judges to settle and sign bills of exceptions after they cease to be judges continues them in an office or station for the purpose indicated. The provision was enacted for the benefit of third persons and to preserve their rights. Every defeated litigant has under the law the right to have settled and signed, in the due and orderly course of procedure, his bill of exceptions, and each litigant who prevails has likewise the right to demand that the bill containing the exceptions of his adversary shall embrace every matter essential to the fair presentation of the exceptions relied upon by the defeated party. If the writ of mandate lies at the instance of the prevailing party to compel the judge who is still in office to correct or amend a bill already signed by him, it lies also to compel the judge who tried the cause to correct or amend the bill after he has ceased to hold the office. This brings us to the next question.

2. Does mandamus lie upon application of the prevailing party to compel the judge to correct or amend a bill of exceptions tendered by his adversary? We observe, in passing, that section 1157 of the Code of Civil Procedure has no application to any question arising in this proceeding; nor is section 1158 relevant to the question now un-

der consideration. While, in the proper case, the writ of mandate may be issued to compel a judge to settle and sign a bill seasonably served and duly presented, the writ will not be issued to compel him to incorporate into the bill particular matters. The questions of what occurred at the trial and what evidence or proceedings are necessary to explain or illustrate the exceptions are judicial in their nature, and are to be finally determined, at least in so far as the remedy by mandamus is concerned, by the judge or officer whose duty it is to settle the bill. It is his duty in settling the bill or the statement on motion for a new trial to strike out of it all redundant and useless matter, and to make it truly represent the case, notwithstanding the assent of the parties to the incorporation of such redundant and useless matter or of any inaccurate statement. This common-law duty is recognized and declared in sections 1153 and 1173 of the Code of Civil Procedure. The writ of mandate may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It lies to coerce into activity, but not to direct the making of, a particular decision or ruling upon a question involving the exercise of discretion or judgment. The duty which the writ may compel to be performed must be ministerial. *State v. Smith*, 23 Mont. 329, 58 Pac. 867. The performance here sought to be enforced is of a judicial duty. *Raleigh v. District Court*, 24 Mont. —, 61 Pac. 991, is not inconsistent with the views expressed in this proceeding. Mandamus is not the remedy. We do not decide whether, upon the proper showing, the issuance of a writ of supervisory control would be warranted under the provisions of section 8 of article 8 of the constitution of Montana, as interpreted in *State v. District Court*, 24 Mont. —, 63 Pac. 395. In the present proceeding an alternative writ of mandate was issued upon an application therefor, and the writ of mandate will not be diverted from its functions, and made to serve the office of a supervisory control writ. Such is the ruling announced in the case last cited, and now affirmed. The motion to quash will be granted.

3. The defendant contends, also, that the application for the writ is further insufficient, because it does not state that the proposed amendment, when read with the bill, recites all proceedings had upon the hearing which are material to the matter contained in the proposed amendment. The bill which the plaintiffs seek to have corrected was settled and certified. It imports verity. Presumptively, the judge in settling the bill included therein everything that it should contain. To rebut this presumption (if in some appropriate proceeding it be rebuttable), it is essential that the plaintiffs allege and show, not only that the matters set out in the proposed amendment are material, but also that there was no evidence or proceed-

ing, other than that contained in the settled bill and the proposed amendment, which is necessary to illustrate or explain the exceptions. The demurrer also must be sustained. The motion to quash the alternative writ of mandate is granted, the demurrer to the application is sustained, and the proceeding is dismissed. Let judgment be entered accordingly. Dismissed.

BRANTLY, C. J., and MILBURN, J., concur.

(25 Mont. 33)

STATE ex rel. KELLY v. SECOND JUDICIAL DIST. COURT et al.

(Supreme Court of Montana. Jan. 30, 1901.)
EXECUTORS AND ADMINISTRATORS—ATTORNEYS—COURTS—ATTORNEY'S FEES
—APPEAL—RECORD.

1. Where an administrator refuses to pay an attorney for the estate, and does not agree to abide by a finding of the court as to the amount due the attorney, the district court has no authority, on objections to the administrator's final account by the attorney, to order the administrator to pay a certain amount of the estate funds to the attorney, since the employment and payment of counsel is a personal matter between the administrator and the attorney.

2. Where a writ of review is taken to an order of the district court, which afterwards amends the order, and the original order and the amendment are both in the record, the several orders may be considered together.

Writ of review on the relation of Mary Ellen Kelly against the Second judicial district court of the state of Montana, in and for the county of Silverbow, and the Honorable John Lindsay, judge, to review an order in probate. Order annulled.

L. P. Forestell, for relatrix. A. Laist, for respondent.

MILBURN, J. This cause comes before the court upon a writ of review issued upon the petition of the relatrix. The facts seem to be these: Relatrix is the widow and heir at law and a legatee of the testate, and guardian of Hala Claire Kelly, a minor heir. As administratrix with will annexed, she filed a certain account in the district court, and due notice of the hearing thereof was given by posting. Thompson Campbell filed certain objections to the allowance and settlement of the account, alleging that there was due him the sum of \$2,700, balance for attorney's fees for services rendered by him as counsel for the administratrix, which sum said administratrix had failed and refused to pay. Citation was prayed for and issued, requiring the relatrix, individually and as administratrix, and as guardian of the minor heir, to appear and show cause why an order of the court should not be made, directing her to pay the said sum of \$2,700. The citation was only served by copy delivered to Messrs. Donlan & Forestell, described in said citation as "her attorneys." Lewis P.

Forestell, as attorney, made a special appearance for the said administratrix, and as such only, and moved to dismiss and strike from the files the said petition of said Thompson Campbell for attorney's fees, and his objections to the settlement of said account. This motion was denied, and exception taken by the relatrix. No appearance was made in any wise for the heirs, legatees, or any of them, or for said guardian. No further part in said matter was taken by said administratrix, by attorney or otherwise. Immediately following said denial of said motion the court, on June 2, 1900, took testimony in support of said petition, and after considering said evidence it made the following order: "It is ordered, adjudged, and decreed that the motion of said Mary Ellen Kelly, administratrix as aforesaid, to strike from the files herein the said objections and petition of said Thompson Campbell, be, and the same is hereby, overruled; that said Thompson Campbell be allowed out of the funds of said estate of J. F. Kelly, deceased, for services rendered as attorney for the administratrix thereof and for the benefit of said estate, the sum of five thousand (\$5,000) dollars, a reasonable fee therefor, and that the same be taxed and allowed as costs of administration, and that he be paid forthwith said sum of five thousand (\$5,000) dollars, less two thousand three hundred (\$2,300) dollars heretofore paid, leaving a balance of two thousand seven hundred (\$2,700) dollars; that said Mary Ellen Kelly, administratrix as aforesaid, amend said final account by including among the unpaid costs of administration of said estate an item of two thousand seven hundred (\$2,700) dollars due Thompson Campbell; and that she, said Mary Ellen Kelly, administratrix as aforesaid, pay to said Thompson Campbell forthwith, out of the funds of said estate of John F. Kelly, deceased, the sum of two thousand seven hundred (\$2,700) dollars." The writ of review was issued June 12, and served upon respondent June 14, 1900. Return was made June 22, 1900. On July 9, 1900, this court ordered a further return to be made to show an order of June 2, 1900, which order for further return was served on respondent on July 9, 1900. On July 14, 1900, respondent made a further return showing a minute entry and order of June 2, 1900, as follows: "On the 2d day of June, A. D. 1900, an entry was made upon the minutes of said district court in said matter of the estate of J. F. Kelly, deceased, of which the following is a true and correct copy: 'This day, petition of Thompson Campbell, an attorney at law, petitioning that the court, before settling the account of the administratrix herein, allow said Campbell an attorney fee in the sum of five thousand dollars, coming on to be heard, together with the motion to quash said petition, the said motion is by the court overruled, and, after hearing testimony in support of said

petition and considering the same, the said administratrix is by the court ordered to pay out of the funds of said estate in her possession to said Thompson Campbell the sum of five thousand dollars, less such sum as has heretofore been paid by said administratrix to him; the said sum of five thousand dollars being by the court considered a reasonable compensation for the services performed by said Campbell as attorney herein.' " The return also showed a minute entry of July 13, 1900, as follows: "It appearing to the court that the journal entry in the above entitled matter, to be found in Journal Q, at page 417, is inaccurate and incomplete, it is ordered that the same be amended by substitution for the whole thereof of the words and figures following, to wit: 'This day, the final account of Mary Ellen Kelly, administratrix of the estate of John F. Kelly, deceased, together with the objections thereto of Thompson Campbell, and his petition for counsel fees, and the motion of said administratrix to strike said petition and objections from the files, were heard. After argument upon said motion the same was by the court denied, to which said ruling said Mary Ellen Kelly, as such administratrix, by her counsel duly excepted. Whereupon witnesses were examined in support of said petition and objections, in which said examination the said administratrix took no part; and at the conclusion of the testimony, and the account being submitted, it is ordered that said final account be settled upon being amended by including among the unpaid costs of administration of said estate an item of two thousand seven hundred (\$2,700) dollars due said administratrix for said Thompson Campbell's attorney fee, and that she be allowed out of the funds of said estate of J. F. Kelly, deceased, for services rendered by said Thompson Campbell for said administratrix and for the benefit of said estate, the sum of five thousand (\$5,000) dollars,—a reasonable fee therefor,—less two thousand three hundred (\$2,300) dollars heretofore paid, leaving a balance of two thousand seven hundred (\$2,700) dollars as aforesaid.' "

The relatrix, in her brief, submits 12 reasons why the order of the district court should be annulled. The principal points relied upon are the want of jurisdiction in the district court, or the judge thereof, to order the payment by the administratrix of a demand made by an attorney for services alleged to be rendered to the administratrix at her request in the matter of the settlement of the affairs of an estate; that a contract for such services is a private matter between the administratrix and her attorney, to be settled between them, and, if any amount be paid by such administratrix, it may be by her reported in her account of administration for allowance to her. Counsel for relatrix further relies upon the allegation that no contract was made by and between the administratrix and her said attorney as to

the amount to be paid for his alleged services, and that no agreement was made to the effect that he should receive such an amount as the court might fix. This case has been submitted to this court upon the theory that it is a proper case for a writ of review, and has been so treated by counsel for all parties; and we so consider it, without passing upon the question, not raised, whether or not appeal will lie from the order as amended. The language of the order as amended July 13, 1900, is not as clear as it might be; but we interpret it to mean that the district court on June 2, 1900, found \$2,700 due to said Thompson Campbell, and ordered the administratrix to amend her final account, and to divert said sum of money from the funds of the estate and hold it for the use of said Campbell, although there is no positive direction to pay it over to him. We consider the order void for the reason that the employment of counsel for the administratrix, and payment for the services of such counsel, was a matter of personal and private agreement between her and counsel, to be reported to the court as any other expense in course of administration, for the allowance or disallowance of the court. If the administratrix refused, as she did, to pay the said sum, or any sum, for counsel fees, and had not contracted with the counsel to abide by any finding of the court as to the amount, if any, to be paid counsel, then the court had no power to in any wise order her to include any sum of money in her accounts as due to such counsel, or to segregate and set apart any sum from the funds of the estate for the use of counsel, and to amend her final account by including such allowance in it. Sections 2771, 2774, Code Civ. Proc.; 1 Woerner, Adm'n (2d Ed.) § 152; 2 Woerner, Adm'n (2d Ed.) § 356; In re Ogler's Estate, 101 Cal. 385, 35 Pac. 901; In re Bullock's Estate (Cal.) 17 Pac. 541.

Without passing upon the propriety or impropriety of the court's having made further records in the matter after service of the writ of review upon it, we are of the opinion that, the whole record being before us without objection on the part of the respondent, we may properly consider the several orders together; the last one, of July 13, 1900, to be considered as the only one now affecting the relatrix. The district court's power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute. *State v. Second Judicial Dist. Ct.*, 24 Mont. 1, 60 Pac. 489; *State v. Second Judicial Dist. Ct.*, 18 Mont. 481, 46 Pac. 259; In re Higgins' Estate, 15 Mont. 474, 39 Pac. 508. There is no power in the district court, or judge thereof, to make the order directing amendment of the final account as aforesaid. Therefore the said order of June 2, 1900, as amended July 13, 1900, is hereby annulled at the costs of the defendant.

BRANTLY, C. J., and PIGOTT, J., concur.

(25 Mont. 14)

MURRAY et al. v. MONTANA LUMBER & MFG. CO.

(Supreme Court of Montana. Jan. 28, 1901.)

PUBLIC LANDS—PATENTS—TRUSTS—EJECTMENT—DEFENSES—EVIDENCE—ADMISSIBILITY—APPEAL—ASSIGNMENT OF ERROR.

1. A brief filed while Sup. Ct. Rules 1896, rule 5, § 3, subd. 2 (44 Pac. vii., 16 Mont. 594), requiring the full substance of evidence claimed to be wrongfully admitted or rejected to be quoted in the brief, was in force, which fails to quote evidence so objected to, will not present such questions for review, though the rule was subsequently repealed.

2. Where a brief filed while Sup. Ct. Rules 1896, rule 5, § 3, subd. 2 (44 Pac. vii., 16 Mont. 594), was in force, does not quote the evidence alleged to have been wrongfully admitted or rejected, but so far complies with the present rules by referring to the transcript as to enable the court to examine the question without additional labor, it will be considered on appeal.

3. Where assignments of error are not referred to in the argument, they will not be considered on appeal.

4. Where plaintiff brings ejectment to recover a mining claim, and the defendant offers evidence of a superior claim, and that plaintiff wrongfully obtained the patent thereto, and holds the property in trust for defendant, it is not error to refuse to strike out such evidence for insufficiency, but the proper method is to move to direct a verdict.

5. Where ejectment is brought to recover a mining claim which has been patented to the plaintiff, the defendant may show as a defense thereto that he had purchased a prior claim thereto, and was entitled to a patent therefor, but that his vendor afterwards wrongfully conveyed the same property to a third person, who relinquished the claim to the government, which enabled plaintiff to obtain title to the property.

6. Where defendant in ejectment for a mining claim patented to plaintiff claims under a prior claim purchased from one who received a certificate of purchase therefor, he may show that plaintiff's patent was wrongfully procured, though his vendor did not resist the issuance thereof.

7. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter cannot complain of the refusal of the court to strike out such evidence.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Ejectment by James A. Murray and others against the Montana Lumber & Manufacturing Company. From a judgment in favor of the defendant, and from an order denying a new trial, the plaintiffs appeal. Affirmed.

Action in ejectment to recover possession of a portion of the Railroad lode mining claim, situate in Silverbow county, and designated as mineral entry No. 1,594. The complaint is in the ordinary form, alleging title and right of possession in plaintiffs, and ouster by defendant. The answer denies title and right of possession in plaintiffs, admits that defendant is in possession, and then proceeds, by way of equitable counterclaim, to allege facts upon which defendant demands a decree declaring the plaintiffs are trustees of the legal title for its benefit, and requiring them to convey the same to it by suitable conveyance. To the counterclaim repli-

cation is made denying many of the allegations made therein, admitting others, and averring that defendant should not be heard to set up any claim to the title, because no adverse claim had been made by defendant during the period of publication under Murray's application for patent; and upon the issues thus raised a trial was had to a jury, which rendered a general verdict for plaintiffs, with special findings as to the facts stated in the counterclaim. Thereupon the court, on motion of defendant, rejected the general verdict and certain of the special findings, approved the others, and entered judgment thereon in favor of the defendant for the relief demanded. The facts set forth by defendant and found by the jury may be stated substantially as follows: On June 24, 1880, one John Noyes and his wife, Elmira, under a location made on October 27, 1879, applied to the United States for a patent to the Placer mining claim through the United States land office at Helena, and thereafter such proceedings were had in pursuance of this application that on February 26, 1886, they paid the purchase price to the government, and received a certificate of purchase. This claim was designated as mineral application No. 787 and mineral entry No. 1,347. On January 30th Noyes and wife conveyed the whole of the claim to James W. Forbis. On November 28, 1888, the same grantors, in conjunction with one Upton and his wife, again executed a deed to the same property to the said Forbis; and on May 4, 1889, the said Forbis and his wife conveyed the portion thereof in controversy herein to the defendant, which thereupon entered into possession. These various conveyances were properly acknowledged and recorded with the county clerk of Silverbow county. On August 1, 1887, the plaintiff Murray applied to the United States land department for a patent to the Railroad lode mining claim under a location thereof made on October 29, 1881. The application proceeded to entry, but, pending the approval of the entry by the commissioner of the general land office, and on June 16, 1888, it was discovered by that officer that there was a conflict between the Placer claim and the Railroad lode claim; and, it appearing that the latter had been located after the patent for the former had been applied for, it was ordered that the entry of the latter be held for cancellation to the extent of 7.18 acres, the area of the conflict. So the matter stood until August 21, 1889, when the commissioner of the general land office ordered a hearing in the land office at Helena as to the merits of the conflict. The proof upon this hearing was taken, but before the controversy was decided there was filed in the land office at Helena a paper, dated September 2, 1890, purporting to be a relinquishment to the United States of the conflicting area by one George H. Casey and one Charles S. Warren and wife, together with an abstract of the title showing the

conveyances from Noyes and wife to James W. Forbis, heretofore mentioned, and one from James W. Forbis and wife, dated July 8, 1890, to said Warren and Casey. These papers were transmitted to the department at Washington. Thereupon such proceedings were had in the general land office that on January 24, 1891, the Railroad claim was passed to patent, including the area in conflict between it and the Placer claim; the patent being issued on March 20, 1891. On June 28, 1894, Murray conveyed an undivided fourth interest in the claim to his co-plaintiff, and it is now held by them in common. The evidence further showed that the portion of the Railroad lode claim in controversy here was included in the area in conflict between this claim and the Placer claim. There was no proof tending to show that Noyes and wife or the defendant adversed the claim of Murray in the land office at Helena pending his application for patent. The plaintiffs have appealed from the judgment and an order denying them a new trial.

John W. Cotter and Frank W. Haskins, for appellants. F. T. McBride and E. W. Harwood, for respondent.

BRANTLY, C. J. (after stating the facts).

1. The brief of appellants was filed while the rules of this court promulgated in 1896 were still in force. Five errors are assigned therein. Three of these assignments are predicated upon rulings upon the admission and rejection of certain evidence. The first and second of them we cannot consider, for the reason that they neither set out the substance of the evidence upon which the rulings were made, as required by rule 5, § 3, subd. 2 (16 Mont. 594, 44 Pac. vii.), nor refer to the pages and marginal numbers in that portion of the transcript containing the evidence, as required by the rules now in force (rule 10, § 3, subd. "b"; 57 Pac. vii.). The third assignment, while not meeting the requirements of the old rule, so far complies with the present rule, by references to the transcript, as to enable us to examine the questions raised by it without additional labor. We shall, therefore, waive the defect, which would otherwise be fatal, and treat the brief as if filed under the rule now in force. The remaining two assignments are not referred to in the part of the brief devoted to the argument. We therefore assume that counsel for appellants considered them without merit.

2. At the trial, plaintiffs rested the case upon the Murray patent, the conveyance from Murray to his co-plaintiff, and evidence of the rental value of the property during its occupation by defendant subsequent to the date of the patent. Thereupon defendant offered evidence of the other facts set forth in the statement. Objection was interposed to all of it on the ground that it was incompetent, immaterial, and irrelevant. When defend-

ant rested, plaintiffs moved the court to strike it all from the record on the same grounds as those stated in the objection. The specific objection urged was that there was an absence of other evidence showing that an adverse claim or suit had been instituted by Noyes and wife, or defendant, against Murray's application for a patent; that at the time Murray entered the Railroad claim he had actual notice of the condition of the title to the Placer claim, and that the Home Investment & Realty Company took its interest with notice; and, therefore, that the facts shown by defendant tended in no way to establish a trust in plaintiffs in its favor. Error is assigned upon the action of the court in overruling the objection and motion. The objection to this evidence goes to its sufficiency, rather than to any legal ground for its exclusion from consideration; for it is assumed that, if the evidence which plaintiffs asserted was wanting had been introduced by defendant, it would have been entitled to the relief sought in its counterclaim. And this is undoubtedly a correct assumption, for whenever one person wrongfully obtains title to land which in equity and good conscience belongs to another, whether it be done in good faith or not, he is properly chargeable as trustee for the benefit of such other person. The principle applies to proceedings by which patent is obtained from the United States, as well as to dealings between private individuals; and the courts have readily exercised their equitable powers to control and limit the operation of the patent as between adverse claimants whenever it has been made to appear that by a mistaken application of the law to the facts of the case by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by a fraud upon the rights of one who is entitled to it. *Meyendorf v. Frohner*, 3 Mont. 322; *Hermocilla v. Hubbell*, 89 Cal. 5, 26 Pac. 611; *Mining Co. v. Tinney* (Nev.) 35 Pac. 89; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152; *Lindsey v. Hawes*, 2 Black, 554, 17 L. Ed. 265; *Cornelius v. Kessel*, 123 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; and cases cited in *Power v. Sla*, 24 Mont. —, 61 Pac. 468. The party claiming to be the rightful owner must show, of course, that he stood in such a relation to the government at the time the patent was issued that he was entitled to demand it; but, when this has been made to appear, the mere fact that the patent has been issued to another in no way impairs his right to be declared the owner. The evidence sought to be excluded by the objection was clearly admissible as tending to show that the defendant was entitled to the relief demanded. That it fell short (if such were the fact) of establishing all the facts necessary to justify the trial court in granting this relief is no reason why it should have been excluded in the first place, or

stricken from the record at the close of defendant's case. From the point of view of plaintiffs, the proper method of attaining the end sought by the objection and motion, viz. the exclusion from consideration by the court and jury of the evidence introduced by the defendant on the ground that it was insufficient because of its failure in the particular mentioned, would have been, we think, to request the court to direct a verdict for the plaintiffs upon the main issue, and to submit to the jury the question of damages only. However this may be from any view, the rulings were correct. It was not necessary for the defendant to show that Noyes and wife, or defendant, had prosecuted successfully adverse proceedings against Murray's application for patent. Noyes and wife had already gone through all the regular proceedings to obtain a patent, and had received a certificate of purchase. This was evidence that they had complied with all the conditions prescribed by law, and that they had acquired a vested interest in the land embraced in the Placer claim. The public faith was thus pledged to them, as well as their grantees, and thereafter the officers of the land department had no right to convey to any one else, so long as the certificate was outstanding. *Lindl. Mines*, § 771; *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86. The lands covered by the certificate immediately upon its issuance became segregated from the mass of public lands, and were not subject to entry by any one else. The right to the patent thus became vested in Noyes and wife, and thereafter the title stood as if the patent had already issued. The mere delay in its issuance did not subject them, or their grantees, to additional burdens, or expose them to assaults of third parties. *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925; also authorities last cited. Neither their rights nor those of the grantees were affected by proceedings in the land department, in which it appears they took no part. Conceding, for the sake of argument, that, in the absence of evidence showing that Murray had notice of the rights of Noyes and wife at the time his patent to the Railroad lode claim was issued, his title to the portion embraced in the conflict would be as good as against the claim of defendant, the rulings of the court below were correct. Under the facts as shown by the evidence it cannot be urged that he had no notice of the existence of defendant's rights. The plaintiff Murray took part in the proceedings had under the order of the commissioner of August 21, 1889. He therefore had personal knowledge of Noyes' title. Furthermore, the records of Silverbow county showed that Noyes and wife had parted with their rights to defendant. He resorted to these records for the evidence upon which he relied to obtain his patent. The abstract obtained from these

63 P.—46

records and presented to the land department was intended to show that the Casey and Warren relinquishment of the Noyes title—without which he could not obtain a patent—was authorized. Having relied upon what was disclosed by the records touching the condition of the Noyes title, he was bound by whatever they disclosed, and must be presumed to have had notice of their contents. Though he claims under the patent, he virtually occupies the position of a junior grantee of the Noyes title, for the patent would not have issued but for the fact that the commissioner of the land department was led to believe that this title was properly reconveyed to the United States under the alleged relinquishment by Casey and Warren. Conceding, again, that the Home Investment & Realty Company's title is superior to that of the defendant, in the absence of actual notice of defendant's equities at the time it took from Murray it stands in no position to complain of the rulings in question. No question was raised here as to the sufficiency of the evidence, or a want of evidence, to sustain the findings, nor that the findings do not support the judgment. So far as a consideration of this feature of the case is concerned, this plaintiff can obtain no relief. And, even though the evidence objected to should properly have been excluded or stricken out at the instance of this plaintiff, the ruling of the court below was nevertheless correct. The purpose of the objection and motion was to exclude it altogether from the consideration of the court and jury. To have done this would have been error, for, as we have seen, Murray had no right to complain and the exclusion of the evidence would have prejudiced defendant's rights as against him. The objection and motion were too broad. Let the judgment and order appealed from be affirmed. Affirmed.

PIGOTT, J., concurs. MILBURN, J., not sitting.

(131 Cal. 455)

HEDGE et al. v. WILLIAMS. (Sac. 724.)¹
(Supreme Court of California. Jan. 30, 1901.)
MASTER AND SERVANT—INJURY TO SERVANT
—INDEPENDENT CONTRACTOR—MASTER'S
LIABILITY—APPEAL.

1. Defendant's farm superintendent, who was also a member of a hardware firm, directed an employé of the firm to go to the farm, and repair a leak in a distillate tank, one of the appliances of the farm. By reason of the negligence of such employé in lowering a light into the tank an explosion occurred, by which plaintiff's decedent, a farm servant of defendant, was killed. *Held*, that under Civ. Code, § 2009, defining a "servant" as one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such services remains entirely under the control and direction of the latter, that the hardware firm, notwithstanding defendant's superintendent's connection therewith, was an independent contractor, and not defendant's servant, and, the firm having entire control of the employé by whose negligence the accident

¹ Rehearing denied March 1, 1901.

occurred, such employé was not defendant's servant, so as to render him liable for the result of his act.

2. Where there is no substantial conflict in the evidence on an issue as to whether a servant was the servant of defendant or an independent contractor, a finding that he was defendant's servant is not binding on the appellate court, which, on appeal, must decide such issue as a matter of law, under the facts.

Department 1. Appeal from superior court, Tulare county; W. B. Wallace, Judge.

Action by Etta Hedge and others against J. H. Williams. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

J. F. Boller and Bradley & Farnsworth, for appellant. Roth & McFadzean, J. E. Shuey, and Chas. G. Lamberson, for respondents.

GAROUTTE, J. This action was brought by the surviving wife and minor children for damages occasioned by the death of Joseph A. Hedge, the husband and father. Defendant appeals from the judgment and order denying his motion for a new trial.

The material facts in the case are as follows: Defendant was the owner of a large fruit farm near the town of Porterville. One A. H. Schultz was the superintendent of defendant in the management of the farm. A large tank, used to store distillate, was located upon the premises. Schultz discovered that the tank was leaking, and directed that the distillate be withdrawn therefrom, which was done, with the exception of possibly an inch in depth at the bottom of the tank. Schultz was also a member of the firm of Schultz & Wilson, dealers in hardware, tinware, plumbing, etc., in the town of Porterville. One Fontaine was in the employ of Schultz & Wilson, directly in charge of that portion of the business, including the repairing of tanks, etc., and had made this particular tank some years in the past. Schultz instructed Fontaine to repair the leak in the tank, and took him, with his implements of labor, to the place where the tank was located. The deceased, Hedge, was the servant of defendant, and was engaged in fixing a casing surrounding the tank. Upon the arrival of Fontaine at the tank, he climbed upon it, called for a lighted lantern and a string, opened the manhole, let down the lantern within, and immediately a disastrous explosion occurred. Hedge, Schultz, and Fontaine were all seriously injured. Hedge died; the others recovered. It will be seen from the foregoing statement that the facts are neither many nor complicated; yet the dual capacity in which Schultz was acting—his Jekyll and Hyde character, as it were—adds an additional element of interest to the case.

It is claimed by appellant that Fontaine stood in the position of an independent contractor; in other words, that Schultz & Wilson stood as independent contractors in re-

pairing the tank, and that Fontaine was their servant. It is next claimed that, if Fontaine was not the servant of Schultz & Wilson, he was the servant of defendant, and, Hedge being his fellow-servant, Fontaine's negligence could not form the basis of a recovery by Hedge's relatives. Of course, this contention is sound, unless defendant was guilty of negligence in selecting Fontaine to do the work. We return to the first proposition urged. Did Fontaine stand in the position of an independent contractor? If he did, then the defendant is not liable; for independent contractors alone must bear the damage occasioned by their negligence.

After viewing this evidence from every side, we are brought to the conclusion that Fontaine, in repairing this tank, was not the servant of defendant, and that his negligence in causing the explosion was not the negligence of defendant. First let us eliminate Schultz from the case in his dual capacity, and deal with him alone as a member of the firm of Schultz & Wilson. Then we have defendant personally going to the firm of Schultz & Wilson, and requesting that a man be sent out to repair the leaking tank. Defendant may go one step further, and request that Fontaine be sent out to repair the tank. Assuredly, Fontaine, under these circumstances, would be the servant of Schultz & Wilson, and not the servant of defendant. For nine years Fontaine had been in the employ of Schultz & Wilson, and as their employé he went with his tools to repair the tank. The firm had the power to discharge him at any moment, even at the very moment when the soldering iron was hot in his hand, and the solder ready to be applied. He was paid by the firm for his labor. Defendant could hold the firm liable if his work was negligently done. Looking at the case from this angle, Fontaine was not the servant of defendant. As the servant of Schultz & Wilson, he stood in the position of an independent contractor; and the facts fit the case of *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329, where the owner of a building employed a plumber to repair the water pipes, and this plumber was held to be an independent contractor.

Again, let us eliminate Schultz from the case in his character as a dealer in hardware, etc. Then we have him as the superintendent of defendant, requesting the firm of Wilson & Co. to repair this tank; or we may go one step further, and say he requested the firm to send out their man Fontaine to repair the tank. Under these circumstances, Fontaine still would be the servant of Wilson & Co., and to no degree the servant of defendant. In the early English case cited in *Bennett v. Truebody*, supra, where a butcher hired a drover to drive a bullock, the drover was held to be an independent contractor, and not the servant of the butcher. Coleridge, J., said: "The thing done is the driving. The owner makes the

contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation of master and servant, therefore, does not exist between them." It can hardly be claimed that the firm of Wilson & Co. were the servants of the defendant in repairing the tank; yet, if they were not defendant's servants, then their employé, Fontaine, certainly was not.

It seems to follow from the foregoing assumptions that, in the eyes of the law, the dual capacity in which Schultz was acting in no way affects the merits of this litigation. As to the law, the case would be the same if he were alone a member of the hardware firm, or alone the superintendent of the defendant. Schultz's dual capacity in no way changes the contractual relations between these various parties. Indeed, in no aspect of the case were there any contractual relations existing between the defendant and Fontaine as to the repairing of the tank. Defendant could not discharge him from the work. Only Schultz & Wilson could do so. Defendant was not paying him for his labor, for Schultz & Wilson were paying him. There being no contractual relation between Fontaine and defendant, it is impossible in law that Fontaine should be the servant of defendant.

Section 2009 of the Civil Code provides: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Schultz & Wilson were not the servants of defendant, tested by this section. Defendant could not be termed their master, for they were doing this work in the pursuit of an independent calling; and, this being so, they were independent contractors, and Fontaine was their servant. See *Shear. & R. Neg.* § 81. *Adam & Kibbe* employed *McGearey* to take down a flagstaff from their building. In an action for damages brought by a third party for injuries received in taking down the flagstaff, it was held that *McGearey* was an independent contractor, and alone liable. *Ahern v. McGearey*, 79 Cal. 44, 21 Pac. 540. That case is similar in principle to the case at bar. See, also, *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017. Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fontaine was acting in repairing the tank. This contention could only be sound if there was a substantial conflict in the evidence. But here, as to this particular branch of the case, there is no conflict in the evidence. And upon a state of facts of that character it becomes the duty of the appellate court to decide, as matter of law, what the facts prove.

The declarations of Hedge, the deceased, made to third parties after the accident, form no part of the *res gestæ*, and should

not have been admitted against these plaintiffs. The case being remanded, it becomes unnecessary to consider the legal soundness of the instructions given to the jury upon the point. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

(131 Cal. 452)

In re DEVINCENZI'S ESTATE. (S. F. 2,208.)¹

FIGONI v. DEVINCENZI.

(Supreme Court of California. Jan. 29, 1901.)

ADMINISTRATOR—SALE OF REALTY—ORDERS—
APPEAL—JURISDICTION OF AP-
PELLATE COURT.

Where an appeal was taken from an order annulling an administrator's sale of realty before the same had been entered of record, the appellate court acquired no jurisdiction, and hence an order entered by the superior court at the direction of the supreme court confirming such sale was void, since the first order of the superior court still stood, and the court acquired no jurisdiction to enter the second.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by Antonio Devincenzi, as administrator of the estate of Giovanni Devincenzi, deceased, for a confirmation of a sale of real estate. From an order confirming the sale Luigi Figoni appeals. Reversed.

Sullivan & Sullivan, for appellant. James A. Devoto and Devoto, Richardson & Long, for respondent.

HARRISON, J. The respondent made a sale of certain real estate of the above-named decedent under an order of the superior court authorizing him thereto, and thereafter made his return to the court setting forth that he had sold the same to the appellant herein. At the hearing upon this return the appellant filed objections to a confirmation of the sale, and the court made an order vacating and setting aside said sale, and declaring the same to be null and void. This order was dated July 8, 1896, and was filed with the clerk of the court July 10th, and entered at length in the minutes of the court July 27th. On July 10th the administrator served upon the appellant his notice of appeal from said order, and the same, together with an undertaking on appeal, was filed with the clerk within five days thereafter. Upon the hearing of the appeal in this court the order was reversed (119 Cal. 498, 51 Pac. 845), and the remittitur thereon was filed in the superior court, and entered in its minutes, February 2, 1898. Thereafter the administrator applied to the superior court for an order confirming the sale to the appellant, and, after notice thereof and hearing upon the same, the court made an order confirming said sale. From this order the present appeal has been taken.

At the date when the appeal from the order vacating the sale was taken, that order

¹ Rehearing denied February 26, 1901.

had not been entered of record. The appeal therefrom was, therefore, premature, and gave to this court no jurisdiction to entertain the same. In *re* Pearsons' Estate, 119 Cal. 27, 50 Pac. 929; In *re* Scott's Estate, 124 Cal. 671, 57 Pac. 654. Being without jurisdiction over the subject-matter of the appeal, the direction of this court for a reversal of the order of July 27, 1896, was unauthorized, and the order was not vacated by such direction, but remained in as full force as if no appeal therefrom had been attempted. When, therefore, in 1898, the administrator asked for a confirmation of the sale, the superior court was confronted with a valid order by which that sale had been annulled, and was without jurisdiction to grant the application. *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52, involved the validity of a judgment of the supreme court affirming a judgment of the superior court where the appeal was taken before the judgment had been entered. A formal judgment in favor of the plaintiff in the case of *Brady v. Page*, bearing date March 19, 1878, had been signed by the judge of the court, and findings and an order for judgment filed March 21, 1878. Judgment was not entered, however, until January 7, 1882. In November, 1878, the defendant appealed from said judgment to this court, and the judgment was affirmed. 5 Pac. 103. It was held that this court acquired no jurisdiction of the appeal, the court saying: "Until the judgment is entered, such court retains complete jurisdiction of the case, of which it cannot be divested by any unauthorized appeal to this court. If the attention of this court had been called to the fact that it had before it an appeal from a judgment which had never been entered, and which was still within the control of the lower court, the appeal would have been dismissed; but, whether this was done or not, the appeal was ineffectual, and this court was in fact without jurisdiction to entertain it. The appeal was futile, and the case remained in the lower court undisturbed." Under the principles of the foregoing cases it must be held that the superior court was without jurisdiction to make the order confirming the sale to the appellant. The order is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 125)

STEWART v. CALIFORNIA IMP. CO. (S. F. 1,544.)

(Supreme Court of California. Jan. 26, 1901.)

On petition for rehearing. Denied.
For former opinion, see 63 Pac. 177.

PER CURIAM. In the petition for rehearing, on the part of the defendants, it is suggested that, the attention of the court having been particularly directed to a consideration of the question as to who was the master employer of the engineer,—whether the

city of Oakland or the California Improvement Company,—the real question, to wit, whether the engineer was liable at all, has been overlooked. The liability of the engineer is a necessary postulate to the discussion or inquiry in reference to who was his employer or master. If the damages resulted without any negligence on the part of the engineer, it would be altogether immaterial who employed him, or who was responsible for his acts. The court therefore could not and did not overlook that question. But, as the argument of the respective counsel was directed mostly to the controversy as to who employed the engineer, or was responsible for his acts, necessarily the opinion is mostly devoted to the consideration of that question. The court below finds that the injury to the plaintiff was caused by the negligence of the defendant, the engineer, Conger, without any fault or negligence on the part of the plaintiff, and that at the time the relation of master and servant existed between the California Improvement Company and said defendant Conger. These findings are supported by the evidence. Rehearing denied.

(131 Cal. 481)

FLINN et al. v. MOWRY. (S. F. 1,604.)¹

(Supreme Court of California. Jan. 29, 1901.)

CONTRACTS—RESCISSION—ABANDONMENT—SEPARATE INSTRUMENTS—PUBLIC WORK—STREET PAVING—CONSENT OF PUBLIC AUTHORITIES—NECESSITY—PRIVATE CONTRACT—PLEADING—AMENDMENT—INSTALLMENTS—MATURITY—FINDINGS—EVIDENCE—NEW TRIAL—SEPARATE ISSUES—DENIAL IN PART—FAILURE TO APPEAL—EFFECT.

1. Where plaintiffs, desiring to obtain a contract for street paving, prepared a contract which was presented to defendant, a property owner, and, after negotiations between plaintiffs, defendant, and her agent, she directed the agent to sign the contract, which he did, but at that time only one other property owner had signed the same, and, it being a private contract, it was necessary that the owners of a majority of the frontage should sign the same in order to obtain a permit for doing the work, the contract was inchoate at the time of signing, and only became binding after the signatures of other property owners had been procured.

2. Where a contractor, in order to obtain defendant's signature to a street improvement contract, gave her a receipt for the difference between the price stated in the contract and the price agreed, the contract providing that the balance should be paid in installments, the contract and receipt, being executed at the same time, were parts of the same contract, and should be construed together.

3. Where, in an action on a street improvement contract, a paragraph of the complaint alleged that the amount due from defendant was payable in installments,—\$200 60 days after the completion of the work, and \$200 each month thereafter,—and proof had been given of such provision, the fact that plaintiffs, after both parties had rested, struck out that paragraph of the complaint by leave of court, did not preclude defendant from availing herself of these provisions by amending her answer to allege such provision, there being no occasion for her alleging it in her original answer, it having been alleged in the complaint.

4. Where a contract for street improvement provided that a balance should be paid, \$200 60 days after completion of the contract, and \$200

¹ For modification of judgment, see 63 Pac. 1004.

each month thereafter until the amount due should be paid, and contained no stipulation that, if the owner failed to pay any installment on demand, the contractor should have the right to recover the whole amount, failure of such owner to pay an installment would not entitle the contractor to a recovery of the contract price before the last installment had matured.

5. Where a street improvement contract required the owner to pay for the same in installments, the first installment to become due 60 days after completion of the work, the contractor, after having fully performed, was not entitled to rescind or abandon the contract as to the provisions for payment on the owner's failure to pay a single installment when due, and sue for the recovery of the entire price.

6. Where, in an action to recover the contract price of a street improvement payable in installments, the only objection by defendant to payment was that plaintiffs had not done the work in accordance with the terms of the agreement, such objection was not equivalent to a refusal to pay for the improvement so as to support a finding that, when the first installment became due, defendant refused to pay any sum, and has ever since refused to pay for the work.

7. Where, in an action on a street-paving contract, the complaint contained a claim for constructing a rock sidewalk in front of defendant's premises, and defendant made no denial of the allegation with reference to the sidewalk, and judgment was rendered declaring a lien for the amount due for the sidewalk alone, personal judgment only being rendered for the paving, and on motion a new trial was granted with reference to the paving, but denied in all other respects, and no appeal was taken from that part of the decree with reference to the sidewalk, defendant was not entitled to deny the making of the sidewalk contract for the first time in an amended answer filed on the retrial of the demand for paving.

8. Street Improvement Act, § 7, subd. 10, which declares that owners of land may perform the "grading" on the street in front of their property "after obtaining permission from the council to do so," applies only to the grading of streets, and hence no permit was required from the board of supervisors to authorize abutting owners to contract for the private "paving" of a street.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by one Flinn and another against Ellen M. Mowry. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Modified.

R. Percy Wright, for appellant. J. C. Bates and D. H. Whittemore, for respondents.

HARRISON, J. The plaintiffs entered into a contract with defendant to do certain work upon Laguna street, in San Francisco, in front of her property, and brought the present action to recover, after its completion, the amount agreed to be paid by her, and to have the same decreed a lien upon her property. The court rendered its decision in favor of the plaintiffs, giving them a lien upon one parcel of the plaintiffs' land for a portion of their claim, and a personal judgment against the defendant for the remainder. A new trial was denied, and the defendant has appealed.

Negotiations had been had between the parties with reference to paving the street,

and a proposal therefor had been presented to the appellant on behalf of the plaintiffs, and a formal contract for that purpose, bearing date April 10th, was afterwards prepared by them, and submitted to her. By the terms of this contract she was to pay 24 cents per square yard for paving, but in the proposal originally made to her the plaintiffs had offered to do the same at the rate of 20 cents per square yard. Before the execution of this contract, viz. April 14th, the plaintiffs visited the appellant at her house, and while there the terms of the agreement were discussed,—Mr. Alpers, who appears to have acted in behalf of the appellant, and as her adviser, being also present,—and at that interview an instrument was prepared by the plaintiff Flinn, which purported to be a receipt from the appellant for the difference between 24 cents per square yard, as named in the contract, and 20 cents therefor, as had been agreed upon between them, and which also contained the following: "The balance of (\$1,305.59) thirteen hundred five and ⁵⁹/₁₀₀ dollars to be paid in installments of two hundred dollars per month, the first payment to become due four months from date of completion, and each subsequent payment to mature within thirty days next succeeding, all without interest." After this agreement had been signed by the plaintiffs, the appellant expressed herself satisfied, and directed Mr. Alpers to sign the contract, which he thereupon did, as follows: "E. M. Mowry, per C. Alpers." At this time only one property owner had signed the contract, and, it being a private contract, it was necessary that the owners of a majority of the frontage should sign it, in order to obtain a permit for doing the work. The contract was, therefore, inchoate, and was left with Mr. Alpers, who afterwards procured other property owners to sign it, and returned it to the plaintiffs. This evidence was sufficient to justify the court in finding that the defendant entered into the agreement with the plaintiffs set forth in the complaint.

1. The two instruments thus prepared and signed by the respective parties constituted the agreement between them in reference to the work to be done by the plaintiffs and the payment therefor by the defendant. They were parts of one transaction, related to the same matter, were signed at the same time, and are to be taken together, with the same effect as if the terms of both had been incorporated in one document, and signed by both parties (Civ. Code, § 1642), and are to be construed, so far as practicable, so as to give effect to every part of each instrument (Id. § 1641). The provision in the instrument first prepared, wherein the appellant agreed to make the payment "upon the completion of the work," and the provision in the instrument of April 14th, wherein the plaintiffs agreed that the payment should be made in monthly installments of \$200 each, are easily reconciled by considering that this change in the time of payment was agreed

upon after the instrument of April 10th had been prepared, and submitted to the appellant. The instrument of April 14th, being signed by the plaintiffs, is, under section 1634, Civ. Code, to be interpreted most strongly against them. Its terms are equivalent to an express agreement that the plaintiffs should not be entitled to payment, and would not demand it, except in monthly installments of \$200 each. That this was the understanding of the plaintiffs is shown by their complaint as originally filed, and upon which they presented their case to the court, wherein, after alleging as one of the terms of the instrument of April 10th, that each of the owners of property fronting on the street agreed to pay for the work "upon the completion thereof," they allege, in paragraph 8, "that at the time of entering into said agreement it was further modified as to said defendant, E. M. Mowry, so that the amount due from her thereunder should be paid as follows: \$200 to be paid 60 days after completion of said contract, and \$200 each month thereafter until the amount due thereunder should be fully paid"; and also by the fact that, after they had completed the work, they demanded from the appellant only the first installment of \$200. After both parties had rested, the plaintiffs, by leave of the court, amended their complaint by striking out the above paragraph 8, but the defendant was not thereby precluded from availing herself of the modification therein alleged. Inasmuch as this modification was originally alleged in the complaint, there was no occasion for setting it up in her answer, and, as it had been introduced in evidence, she had a right to avail herself of its provisions, after the complaint was thus amended, by amending her answer so that the allegations might conform to the proofs.

The contention of the respondents, that the failure of the appellant to pay this installment when it was demanded gave them a right to a recovery of the whole amount of the contract price, cannot be maintained. No stipulation of this nature is contained in the agreement, and such right did not arise from a mere failure of the appellant to make the payment. Certain cases have been cited by them in support of this contention, wherein it has been held that in contracts for the sale or manufacture of goods to be delivered in installments, and paid for at each delivery, a failure on the part of the buyer to make a payment may be under such circumstances as will justify the seller to consider the contract as repudiated, and to release him from further performance. It is also the rule that, where a continuing or executory contract has not been fully performed on either side, the repudiation of the contract by one party, or his refusal of further performance, will justify the other party in treating the contract as at an end, and give to him a right of action for damages for its breach. See *Hale v. Trout*, 35 Cal. 228. The rule

in these cases has, however, no application to a contract for labor which has been fully performed on one side, and there remains only payment therefor. There can be no rescission or abandonment of a contract by a party who has fully performed his part of it. The obligation of the other party is measured by the terms of his agreement to the same extent as in any other contract. If this obligation is for the payment of money, and by his agreement such payment is to be made in installments, a failure to pay the first installment will no more give a right of action to recover them all than in the case of an ordinary promissory note which is made payable in periodical installments, and in which there is no provision for the maturity of the whole amount upon the failure to pay one of the installments. The agreement in the present case is specific and unambiguous that the defendant should make the payment for the work done by the plaintiffs in monthly installments of \$200 each, and the finding of the court that the plaintiffs gave to the defendant "an option to pay the money due for said work in monthly installments of \$200" is not sustained by the evidence. Neither does the evidence sustain the further finding that "when said first installment became due defendant refused to pay any sum at all, and has ever since refused to pay anything for said work." The complaint merely alleges that she had not paid the sums due upon the contract. The only evidence tending to support any finding of nonpayment was that the plaintiffs had demanded payment of the first installment. The only objection that is shown to have been made by the defendant to the performance of her part of the contract was her claim that the plaintiffs had not done the work in accordance with the terms of their agreement. This is not the equivalent of a "refusal" to pay any sum at all. As only one of these installments had matured at the commencement of the present action, the court erred in deciding that the plaintiffs were entitled to judgment for the full amount of the contract price.

2. In addition to the claim upon the contract for paving the street, the complaint set forth a claim for constructing a bituminous rock sidewalk on the street in front of a portion of the appellant's land. Defendant filed her answer January 16, 1895, but did not deny the allegations in reference to this sidewalk. The case was tried upon these pleadings April 13, 1896, at which time the court found in favor of the plaintiffs, and that they were entitled to a lien for the amount due for laying this sidewalk, amounting to \$241, and also to a personal judgment against the appellant for the amount due upon the contract for paving the street. Upon motion of the defendant for a new trial the court set aside that portion of its decision upon the contract for paving, ordered a new trial as to the issue thereon, and denied the motion for a new trial in all other respects.

Another trial was had upon this issue in November, 1897, and the court again made its decision thereon in favor of the plaintiffs. After both parties had rested at this trial, the plaintiffs, by leave of the court, amended their complaint by striking out the above-named paragraph 8, and the defendant afterwards filed an amended answer, in which she denied that she had made any contract for laying the sidewalk. The findings herein recite the proceedings had upon the former trial, including the former decision in reference to the claim for laying the sidewalk. The appellant, in her statement on motion for a new trial, specified as one of the grounds for setting aside the decision that this finding in reference to the sidewalk is not sustained by the evidence. It was not necessary that the evidence in reference to this claim should be incorporated in the statement. No issue thereon was presented by the answer on which the cause had been originally tried, and the decision made thereon became a part of the records of the court, which it could adopt and include in its final decision. The order for a new trial excluded this portion of its decision from any further consideration, and by failing to appeal therefrom, or otherwise to seek to have the order modified, it became final as to the defendant, and was not affected by her afterwards filing an answer in which the allegation was denied. The right of the court to limit its order for a new trial to a portion of the issues in the case is well established. *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437.

3. It is urged by the appellant that the court erred in excluding certain questions tending to show that the street was closed by the plaintiffs while performing their work thereon, and that in the performance of their contract they dug up and disturbed the street. These questions are claimed to have been proper for the purpose of showing that, inasmuch as the plaintiffs did not obtain permission from the board of supervisors to do the work, the contract therefor was illegal, and could not be the basis of a recovery. *City and County of San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396, is relied upon in support of this contention. That case, however, was decided upon the provision in subdivision 10 of section 7 of the street improvement act, which declares that the owners of land may perform the "grading" upon the street in front of their property "after obtaining permission from the council to do so." The contract in the present case is for other work than grading, and this provision of the section has no application. A contract is not to be held unlawful unless it is either contrary to some express provision of the law or to its policy. Civ. Code, § 1667. This restriction on property owners from doing work upon the street in front of their property is limited to grading, and the provision in a subsequent portion of the section that "whenever any owner or owners of any lots or lands fronting on any street shall have

heretofore done or shall hereafter do any work (except grading) on such street in front of any block at his or their expense," the work so done shall be excepted from any order for improving the street, implies the right of the owner to do such work, and to contract therefor, without obtaining such permission. Under their general supervision of the streets of the city the board of supervisors have adopted an ordinance forbidding any one from digging up or disturbing a street without the permission of the superintendent of streets; but, as permission from the superintendent was obtained in the present case, the questions which were excluded by the court were immaterial. That portion of the judgment decreeing a lien against the lands of the defendant in the sum of \$238.76, and directing a sale of said lands in satisfaction thereof, is affirmed. The judgment against the defendant for the sum of \$1,146, with interest thereon, for the paving and curbing of Laguna street, is reversed, and a new trial is ordered of the issues upon which the said personal judgment was given. The order denying a new trial, so far as it applies to the issues upon which the judgment was rendered for laying the sidewalk, and decreeing a lien thereof, is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 437)

CONWAY v. SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA et al.
(S. F. 1,535, 1,536.)¹

(Supreme Court of California. Jan. 25, 1901.)
MUTUAL BENEFIT INSURANCE—BY-LAWS—ASSIGNMENT OF POLICY—FINDINGS.

1. By-laws of a benefit insurance association form a part of the contract of insurance, and the association may require a substantial compliance with a by-law in regard to changing the beneficiary, or refuse to pay the benefit secured.

2. A beneficiary who has formally joined in a written assignment of a benefit certificate to secure an obligation of the assured is estopped from denying the sufficiency of the transfer.

3. Civ. Code, § 2911, provides that a lien is extinguished by lapse of the time within which an action can be brought in the principal obligation. *Held*, in an action on a life policy which has been assigned as collateral to secure a claim against the assured, where the issue was whether the claim was barred by limitations, that the failure to find on that issue was reversible error.

Department 2. Appeal from superior court, city and county of San Francisco; J. O. B. Hebbard, Judge.

Action by Thomas J. Conway against the Supreme Council Catholic Knights of America and others. From a judgment for all other defendants, and an order denying a new trial, the plaintiff and the defendant supreme council appeal. Reversed.

Black & Leaming and Wm. Caldwell, for appellants. D. R. Gale and John T. Campbell, for respondents.

¹ Rehearing denied February 19, 1901.

HENSHAW, J. In 1889 the defendant the Supreme Council of the Catholic Knights of America, a beneficial order incorporated under the laws of Kentucky, issued its benefit certificate to one John M. Conway, by which, upon the death of John M. Conway at a time when he was in good standing in the order, there should be paid to his nephew, Thomas J. Conway, the sum of \$2,000. The defendants Noonan, Shay, and Menihan became sureties for John M. Conway in the sum of \$1,600, and to protect and secure them an assignment and transfer was made to them of the policy. The assignment declared that the transfer was made as security, and it was executed by both the assured and his nephew, Thomas J. Conway. In June, 1893, the defendant sureties were compelled to pay \$1,600, the amount for which they were holden upon their undertaking. In August, 1893, John M. Conway died in the state of California, of which he had been a resident for some years. This action was begun by the nephew, Thomas, against the benevolent order to recover the amount of the policy. The sureties were called in and made parties defendant. They asserted a right to the moneys due on account of the policy by virtue of the foregoing facts, or at least to sufficient to reimburse them for their outlay. After trial, judgment passed for the defendant sureties, and the plaintiff and the Supreme Council of the Catholic Knights appeal from this judgment and from the order denying them a new trial.

The by-laws of the Catholic Knights provide a specific mode in compliance with which the beneficiary named in the certificate may be changed. It has uniformly been held in organizations such as this that the by-laws form a part of the contract, and that the association may require a compliance with them, or refuse to pay. *McLaughlin v. McLaughlin*, 104 Cal. 177, 37 Pac. 865; *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887; *Hass v. Association*, 118 Cal. 9, 49 Pac. 1056. In this instance there was no substantial compliance with the requirements of the by-laws, and it must therefore be held that, were these sureties merely seeking to enforce their demand against the order, the latter would be justified in law in its refusal to pay. But the actual situation here presented is somewhat different. All the parties in interest are before the court, and equity may be done. As between the original beneficiary and the Catholic Knights there is no dispute but that the nephew would be entitled to the money. He has a well-founded and strict legal claim to a recovery, but the equities of the defendant sureties are not to be overlooked. Having regard to them, it is clear that the plaintiff, who had formally joined in the written assignment upon the security of which the defendants Noonan and others paid out a large sum of money, would be compelled to reimburse them to the extent

of their outlay, with interest, and would be entitled to receive for his own benefit only the difference between the \$2,000 and that amount. In other words, there would be raised against him a clear estoppel in pais to deny the sufficiency and validity of the transfer. But another consideration enters into the matter. Both Conway and the Catholic Knights answered the pleadings of the defendant sureties, urging "that the claim and obligation so set up by said Noonan, Shay, and Menihan against said John M. Conway, deceased, is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of California, and the assignment of said benefit certificate made as collateral for said indebtedness has lapsed and is barred by said section, and has fallen and become of no force and effect whatever." The findings of the court are merely that the sureties were compelled to pay and did pay in June, 1893, and that John M. Conway died in August, 1893. By section 2911 of the Civil Code it is provided that a lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. There is no doubt but that the principal obligation in this case was barred, under the provision of the section of the Code of Civil Procedure pleaded, unless it had been reduced to judgment, or in some other equally effective form had been kept alive and enforceable. The court has failed to find upon this vital question, and the judgment and order must therefore be reversed, and the cause remanded. It is so ordered.

We concur: TEMPLE, J.; MCFARLAND, J.

(121 Cal. 430)

HABISHAW et al. v. STANDARD QUICK-SILVER CO. (S. F. 1,459.)

(Supreme Court of California. Jan. 25, 1901.)

INJURY TO MINER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

An experienced miner, who had worked in a mine for a year and a half, was injured by a piece of rock falling on him, owing to insufficient lagging. He was provided with lights, by which he could see for a distance from 15 feet to 30 feet, and had worked in that part of the mine for a day and a half. There was testimony of a fellow workman that an examination of the condition of the lagging was made by deceased just before he commenced his work, on the day on which he was injured, but such witness was successfully impeached by showing that he had declared that he had knowledge which would entitle plaintiffs to win their case, but would not give it unless paid therefor. *Held*, that there was a conflict of evidence requiring the question of contributory negligence or assumption of risk to go to the jury.

Department 2. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by Bertram J. Habishaw and others against the Standard Quicksilver Company. From a judgment in favor of plaintiffs, and

from an order denying a new trial, defendant appeals. Affirmed.

C. W. Cross, for appellant. W. T. Baggett, Dan Jones, and T. J. Sheridan, for respondents.

HENSHAW, J. Plaintiffs, who are the surviving wife and children of Thomas Habishaw, deceased, sued the defendant to recover damages for the death of Thomas Habishaw, the husband and father, alleging that he was killed in defendant's mine through the negligence of the defendant and its servants and employes. The negligence pleaded consisted of the failure by the defendant to provide a flooring or lagging over Habishaw's head, so as to prevent rock or other material, which might become loosened in the operations of the mine, from falling upon him. For the want of such flooring or lagging, a rock of large size fell a distance of about 12 feet, and in its fall struck Habishaw, and caused his death. The verdict of the jury was for plaintiff, and from the judgment which followed, and from the order denying its motion for a new trial, defendant appeals.

The contention of appellant is that the deceased, an experienced miner, was either guilty of contributory negligence in working where and as he did, knowing of the absence of lagging or flooring, or that in so working, with knowledge of the conditions and situation of the mine, the risks he ran became known to him, that he assumed them, and that, therefore, the defendant is not liable. Appellant urges that Mr. Habishaw being provided with lights by which he could plainly see for a distance of from 15 to 30 feet, and being an experienced underground miner (who had worked in that particular mine about a year and a half), as such experienced miner he would know whether or not such lagging or flooring was necessary or proper for his protection from injury; and that, having worked in that particular place for a day and a half immediately preceding the injury, by the ordinary use of his senses under such circumstances he must have known, or should have known, that there was no covering or flooring or lagging at a distance of about one foot over his head (the seventh floor), or at a distance of about seven or eight feet over his head (the eighth floor), covering the set immediately over where he was working; and that, knowing such facts and the probable results, it was contributory negligence on his part to continue to work in that place without such flooring or lagging, if the same was reasonably necessary for his protection from injury. It is insisted by the appellant that the evidence upon these matters is uncontradicted, and that the question becomes, therefore, one of law. By the respondent it is asserted that upon the question of contributory negligence there is a conflict in evidence, and that in any event, conceding the facts to be undisputed, it is not a case

in which as a matter of law the court can say that the deceased was guilty of contributory negligence, but is a case in which the question is properly referable to the jury.

We think this latter position is sound. The deceased had worked in the mine for a year and a half, and in this particular portion of the mine where the accident occurred for a day and a half. It is conceded to have been the duty of the timber men at the mine to have provided for the security of the miners by timbering and flooring or lagging. That with the light which the deceased carried he could have seen for a distance of from 15 to 30 feet, and should, therefore, have known whether or not the proper lagging was in place; whether or not the place had been properly lagged before the accident, and the lagging had been removed or destroyed by blasting; whether or not Habishaw knew that it had been properly lagged in the first instance, and was guilty of contributory negligence in going to work at the time of the accident without again verifying his knowledge,—were all matters not so plainly pointing to contributory negligence as to justify the withdrawal of their consideration from the jury. The testimony of the witness Farmer, a fellow workman with the deceased at the time of his death, to the effect that an examination of the condition of the lagging was made by Habishaw just before he commenced work upon the fatal day, may well have been disbelieved by the jury, in view of the fact that Farmer was successfully impeached by a showing that he had declared that he had knowledge which would entitle plaintiffs to win their case, but would not give it unless paid therefor.

The case is one of those where the question of contributory negligence, or the question of the assumption of known risks, was proper for submission to the jury, whose verdict in this regard is final. *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. 710; *Magee v. Railroad Co.*, 78 Cal. 436, 21 Pac. 114; *Martin v. Railroad Co.*, 94 Cal. 331, 20 Pac. 645; *Davies v. Steamship Co.*, 89 Cal. 286, 26 Pac. 827; *Smith v. Steamship Co.*, 99 Cal. 467, 34 Pac. 84; *Davis v. Power Co.*, 107 Cal. 563, 40 Pac. 950; *Goggin v. D. M. Osborne & Co.*, 115 Cal. 437, 47 Pac. 248. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 433)

In re SMITH'S ESTATE. (S. F. 2,295.)

(Supreme Court of California. Jan. 25, 1901.)
DESCENT AND DISTRIBUTION—KINDRED OF
THE HALF BLOOD—RIGHTS OF
INHERITANCE.

By Civ. Code, § 1394, "kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such an-

cestor must be excluded from such inheritance." *Held*, that in the excepted case thereunder the kindred of the half blood were not absolutely excluded from inheriting, but merely postponed to those of the whole blood, and that the provision had no application between kindred in different degrees.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the estate of Francis D. Smith, deceased. Appeal from a decree of distribution. Reversed.

Rodgers, Paterson & Slack, for appellants. J. N. Young, for respondent.

SMITH, C. This is an appeal from a decree of distribution. The deceased, who died intestate, inherited the property distributed from her father. She left, surviving her, her husband, and two half-sisters on the mother's side, the appellants. The whole of the property was distributed by the decree to the respondent, and the appellants excluded. The case turns upon the construction of the provisions of the Civil Code governing successions, and especially of those of sections 1386 (2) and 1394. By the former provision it is especially provided, in the case here presented, that the husband shall take one half of the estate, and the sisters the other half; but it is contended that by the latter section the sisters are excluded, as not being of the blood of the ancestor from whom the defendant derived the estate; and it was so held by the court. But I do not think this contention can be sustained. The section in question consists of two clauses connected by the conjunction "unless," which, as said by Lord Mansfield (*Wilson v. Smith*, 3 Burrows, 1556), "means the same as 'except,' and hence implies merely an exception to the first clause." *Stand. Dict.*; *Cent. Dict.*; *Ryan v. Andrews*, 21 Mich. 234, 235; *In re Kirkendall's Estate*, 43 Wis. 173-175, 177, et seq.; *Rowley v. Stray*, 32 Mich. 75, 76. The last clause can, therefore, apply only to the class described in the first, or, in other words, to the class from which it constitutes an exception, which is kindred "in the same degree." Hence it can have no application to the relations between different classes as determined by degree of kindred or otherwise (as, e. g., between half brothers or sisters and remote collateral kin), or between grandparents and uncles or aunts,—as in *Ryan v. Andrews* and in *Re Kirkendall's Estate*, supra. The effect of the provision is, therefore, simply to subdivide each of the classes as determined by degree of relationship into two classes, namely, those of the full and those of the half blood, and in each class to postpone the latter to the former. Its effect, therefore, is precisely that of the Missouri statute cited in 61 Am. Dec. 664, or of the Indiana statute cited in *Robertson v. Burrell*, 40 Ind. 336. Hence the provision has no application as between kindred in different degrees, but

the relative claims of these are determined exclusively by the provisions of section 1386 of the Civil Code, where the term "brothers and sisters," and other terms denoting kindred of various degrees, are used in their proper sense, and "according to the approved usage of the language" (*Id.* § 13) must be held to include those of the half as well as of the whole blood. *Rowley v. Stray*, supra, and cases cited page 75. The two sections, therefore (1386, 1394), in no wise conflict, but together prescribe a system not only complete and harmonious, but also equitable, and in accordance with the general sentiments of mankind, on which in fact, and not on the obsolete feudal reasons on which the common-law doctrine of inheritance of real estate was based, our law of succession is based. This construction is supported by the cases cited above, in which substantially similar enactments were construed; and also by the case of *Robertson v. Burrell*, 40 Ind. 336, where the statute construed is different, but the principle of the decision is the same. In that case there was an old statute (cited supra) identical in effect with ours, which had been superseded by a new statute couched in less definite terms; and it was held that it would be unreasonable, the statute admitting of a different construction, to construe it as postponing the kindred of the half blood "until after there was a failure of all kindred of the intestate who have the blood of the ancestor from the estate descended, however remote in degree,"—a principle equally applicable here. There are two cases that seem to conflict with these views, viz. *Perkins v. Simonds*, 28 Wis. 90, and *Kelly's Heirs v. McGuire*, 15 Ark. 555. But the former is expressly limited, and in effect overruled, in *Re Kirkendall's Estate*, 43 Wis. 175. And again in *Shuman v. Shuman*, 80 Wis. 476, 50 N. W. 670, it was held that the provision construed did not apply to personal property, which was also in effect to overrule the decision; for neither in the laws of Michigan nor in our own is there room for such a distinction. It may be added that the attention of the court was not drawn to the grammatical construction of the question. Hence the court assumed that "the words of the section are general," not noticing the fact that the first clause refers only to the class specified, and that the latter could not have a more extensive application. The same remark applies to the Kansas case. The true rule is stated by Judge Cooley in *Rowley v. Stray*, supra, as follows: "Ours is but the expression of a general policy which has always characterized our legislation, * * * and which, * * * in most respects, has put the half blood on a footing of equality with the whole blood in the law of descents. * * * A discrimination against the half blood is the exception, and is not to be extended beyond the obvious intent. And nothing seems plainer to us than that under this statute the half blood are only excluded

when there are others in the same statutory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate. This was the view taken by us when *Ryan v. Andrews*, 21 Mich. 229, was before us, and further reflection has confirmed us in it." It follows that the appellants are entitled to their shares of the estate as prescribed in section 1386, subd. 2. The order appealed from should be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

(131 Cal. 115)

MURPHY v. FARMERS' & MERCHANTS' BANK OF LOS ANGELES. (L. A. 754.)

(Supreme Court of California. Jan. 25, 1901.)

Supplemental opinion. For former opinion, see 63 Pac. 368.

PER CURIAM. Upon further consideration we think that the part of the opinion hereinbefore rendered which refers to the right of respondent to an accounting in this present action should be omitted, and that the question as to such right is not now properly before us, and should be left for further consideration if ever presented, and that the judgment should be modified accordingly. It is therefore ordered that all of the last paragraph of said opinion following the sentence, "Our opinion is that the court erred in deciding that plaintiff owns an undivided interest in the land," be, and the same is hereby, stricken out. It is further ordered that the judgment hereinbefore entered be, and the same is hereby, modified so as to read as follows: "For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed."

(131 Cal. 426)

In re **GRANT'S ESTATE.** (S. F. 2,334.)¹

(Supreme Court of California. Jan. 24, 1901.)

ADMINISTRATOR'S ACCOUNTING—ALLOWANCE—EFFECT—RES JUDICATA—FAILURE TO APPEAL.

Under Code Civ. Proc. § 963, subd. 3, authorizing an appeal from an order settling an administrator's account, and section 1637, declaring that the settlement of the account by the court or on appeal is conclusive against all persons interested in the estate, it was error for the court, on the hearing of an administrator's third annual account, to set aside the order settling the second annual account, where the same had been made after the proper notice to all parties, and after consideration by the court, and no appeal taken therefrom, since the statute applies to an annual accounting as well as to a final accounting.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

From an order settling his third annual account, and from an order directing him to pay a certain claim, the executor of the estate of Mary C. Grant, deceased, appeals. Reversed.

Sullivan & Sullivan, for appellant. Moses G. Cobb, for respondent.

McFARLAND, J. The transcript presents two appeals by the executor,—one from an order entered March 23, 1899, settling his third annual account, and the other from an order entered at the same time directing him to pay the claim against the estate of Peter A. Kearney, amounting, with interest, to \$613. The main question involved in the appeal first above mentioned is whether the court erred in disregarding a former order made November 24, 1897, settling appellant's second account, and in expressly setting aside said former order and resettling the former account, and disallowing nearly all the items of credit therein which had been allowed and settled by the former order. The facts necessary to be stated are these: Appellant filed his first account as executor in December, 1894, with a report of his administration, the account showing that he had on hand \$102.47; and after due notice of the hearing on February 6, 1895, the court on that day made an order settling and allowing the account as presented. On June 15, 1897, he filed his second account, in which, beginning with the \$102.47 balance on hand as per the first account, a great many items of receipts and expenditures are set forth. The items of expenditures consisted mainly of interest on a mortgage on the real property of the estate, taxes and insurance on the same, repairs on the buildings on the property, which was rented, necessary to keep the same in proper condition, water rates, etc. The account showed total receipts, \$1,022.47, and total expenditures, \$737.62, leaving a balance on hand of \$284.85. An order of court was duly made setting the hearing of this account for the 28th of June, 1897, at 10 o'clock a. m., at the court room of the court, and notifying all persons interested in the estate "then and there to appear and show cause, if any they have, why the said account should not be settled and allowed." Thereafter, on August 3, 1897, the court made an order in which it was declared that proof had been made to the satisfaction of the court "that notice of said settlement had been given as required by chapter 10, tit. 11, pt. 3, of the Code of Civil Procedure, and as ordered by the court," and, further, that "it appearing that said account is true and correct, and is supported by proper vouchers, it is ordered that said account be, and the same is hereby, settled and allowed as presented and filed." On December 30, 1898, the executor filed his third account,—the one from the order settling which this appeal is taken. This account begins with the \$284.85 on hand at

¹ Rehearing denied February 19, 1901.

the settlement of the previous account, and sets forth various items of expenditures, mainly of the character of the expenditures set forth in the second account; and it shows a balance in the hands of the executor of \$373.30. To the settlement of this account Dr. Peter A. Kearney, a creditor of the estate, whose claim had been allowed, filed objections, in which he attacked the second account which had been allowed as aforesaid, and averred that the second account was settled without proper showing or filing of vouchers; that certain payments which appear by the second account to have been made were in fact not made; that certain expenditures set forth in said second account do not truly represent expenditures actually made by the executor; that vouchers were taken for services rendered and materials furnished for repairs on the property for more than the amounts which the executor actually paid; that, even if said expenditures were made, they had become necessary through the negligence of the executor, etc. Due notice was given according to law of the settlement of this third account, and it came on regularly to be heard on the 14th day of February, 1899. Certain evidence was taken, and the court made the order settling said third account, from which order this appeal is taken. In this order the court recites that the executor had been negligent in not selling the real property of the estate under an order which had been made authorizing him to do so, and that therefore all the disbursements which he had made for interest on the mortgage, repairs, insurance taxes, etc., since October 5, 1895, and which had been allowed in the second account which had been settled as hereinbefore stated, should be disallowed, and that "the former order of November 24, 1897, settling the said executor's annual account, is hereby set aside on that account, and the said second account is hereby now settled and allowed, showing a balance in the hands of the said executor on the 15th day of June, 1897 * * * amounting to \$711.42, which said sum of \$711.42 is to be added in said executor's third account to the sum of \$475, rents with which he charges himself as having been received, making a total credit to the estate in the hands of the said executor on the 30th day of December, 1898, when said third account was rendered, of \$1,186.42, instead of \$789.85; and the disbursements charged as made in said third account are allowed to the amount of \$37.50, and no more, leaving a balance in the hands of said executor on the 30th day of December, 1898, when said third account was rendered, of \$1,148.92." At the same time the order was made, without notice, directing the payment of the claim of said Kearney.

An order "settling an account of an executor or administrator" is appealable (subdivision 3, § 963, Code Civ. Proc.); and it is

clear that, when proper notice has been given, it is conclusive as to all items contained in it, except as against persons laboring under some legal disability. It is so expressly provided in section 1637, and has been so declared in numerous cases. *In re Stott's Estate*, 52 Cal. 403; *Reynolds v. Brumagin*, 54 Cal. 254; *In re Coutts' Estate*, 87 Cal. 480, 25 Pac. 685; *Tobelman v. Hildebrandt*, 72 Cal. 313, 14 Pac. 20; *In re Coutts' Estate*, 100 Cal. 400, 34 Pac. 865; *In re Marshall's Estate*, 118 Cal. 381, 50 Pac. 540; *In re Fernandez's Estate*, 119 Cal. 579, 51 Pac. 851. In this respect there is no difference between a final account—that is, one made with a view to the immediate distribution of the estate—and any other account. The Code makes no distinction between them as to their appealability, or as to the conclusiveness of orders settling them, except that section 1634 provides that if the account be for a final settlement, accompanied by a petition for distribution, the notice must state those facts, and must be for at least 10 days. In some of the cases above cited the account dealt with was a final account; but in the two cases, *In re Coutts' Estate*, 87 Cal., 25 Pac., and 100 Cal., 34 Pac., in *Re Marshall's Estate*, and in *Re Fernandez's Estate*, the court was dealing with accounts rendered and settled prior to the final settlement. In the *Fernandez Case* the court said, "The settlement of the said annual accounts, not having been appealed from, is conclusive." (It is to be noticed that courts have fallen into the habit of calling accounts filed prior to the account on final settlement "annual" accounts, although the Code does not use that word.) Therefore in the case at bar the court erred in disregarding the order settling the second account, in setting the same aside, and in reopening and determining matters against appellant which had been conclusively adjudicated in his favor in the former order. And as the order settling the third account, from which the appeal is taken, is based mainly on matters that had been formerly adjudicated, it must be reversed. In the second appeal from the order directing the payment of Kearney's claim, that order is attacked upon various grounds; but, as it is based on the order settling the third account, which was erroneous for the reason above stated, the two orders must fall together. Both the orders appealed from are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

(131 Cal. 421)

WHEELER v. BULL. (S. F. 1,261.)

(Supreme Court of California. Jan. 23, 1901.)

NOTES—PAYMENT—DELIVERY—REQUEST OF MAKER—EVIDENCE.

1. A note in form the individual note of the president of a corporation was in fact the obligation of the corporation, and executed for its benefit. A firm thereafter agreed with the corporation to pay the note at maturity, and,

if necessary, to advance the amount "for the purpose of paying the same." On the maturity of the note a member of the firm told the corporation's president that, if he would sign an agreement relating to the reimbursement of the firm, they would "pay off the note as agreed," and he signed it. W. indorsed the firm's note to D. to borrow the money to take up the corporation's note. W. and the above member of the firm went to the bank holding the note for collection, and the former paid the amount to the bank, whereupon the note was stamped "Paid," without objection, and retained by W. The president of the corporation received a note from the member of the firm stating, "The note is paid." W. afterwards sued on the note. *Held*, that the trial court's finding that the note had never been paid was contrary to the evidence.

2. The fact that a note paid by a third party was not turned over to the maker did not affect the extinguishment of the obligation thereon, since such party had a right to retain it as evidence of a claim for reimbursement.

3. A firm agreed to take up a corporation's note. In reply to questions from W. and a member of the firm, the president of the corporation showed the sources from which returns were expected in a few days, and said the corporation would reimburse whatever would be advanced for taking up the note when such returns came in. W. borrowed money from D. with the firm's note indorsed by him as security, and paid the corporation's note with it. *Held*, that the evidence did not sustain the finding that W. took up the corporation's note at the special instance of the president, so as to authorize a recovery against him.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Judson Wheeler against Franklin P. Bull. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

A. W. Crandall, for appellant. J. C. Bates, for respondent.

HARRISON, J. The appellant executed his promissory note, June 21, 1889, for the sum of \$3,750, payable 90 days after date, to the order of Frank C. De Long. De Long placed the note with the First National Bank of San Francisco for collection, and on the day of its maturity the plaintiff paid to the bank the sum of \$3,825, the amount then due thereon, with accrued interest, and thereupon the bank marked the note "Paid," and delivered it to him. The present action is brought to recover from the defendant the amount of the note, with interest thereon according to its terms, the plaintiff alleging that he had made the payment and taken the note out of the bank at the request of the defendant; and upon his representation that it was an obligation of the corporation Home & Land Company, of which he was president, and had guaranteed its repayment. The defendant, in his answer, denied these allegations, and alleged that the note had been paid and discharged. The court found that the plaintiff took up the note at its maturity at the special instance and request of the defendant, paying therefor to the bank, who was its holder, its face value, with ac-

crued interest, and at that time received the note from the bank, and had ever since been the holder and owner thereof; that the note had never been paid, and that the whole amount thereof was due from the defendant to the plaintiff. Judgment was thereupon rendered in favor of the plaintiff for the amount of the note, and the defendant's motion for a new trial was afterwards denied. The present appeal is from the order denying a new trial.

The question upon which the rights of the parties depend is whether the transaction between the plaintiff and the bank constituted a purchase and transfer of the note, whereby its vitality was preserved, or whether it was a payment, by which the obligation of the note was extinguished. No importance is to be attached to the fact that the transaction is in some parts of the record called "taking up" the note, rather than a payment. The effect of the transaction is to be determined by the circumstances under which it took place, and not by the term which the parties may have given it. The maker of a note is frequently said, to take it up when he pays it. It sufficiently appears from the evidence that, although the note is in form the individual note of the appellant, it was in fact an obligation of the corporation Home & Farm Company, of which he was the president, and that it was executed for its benefit and account. After its execution, and prior to its maturity, this corporation had entered into an agreement with the firm of D. J. Wheeler & Co., by which that firm was employed to make sales of its lands, and in which it agreed to pay this note at its maturity if a sufficient amount therefor should at that time have been received from the sales of the land; and the firm of D. J. Wheeler & Co. agreed therein that, if the funds received by the corporation were not sufficient therefor, they would advance the amount to the corporation "for the purpose of paying the same," and the corporation agreed that the amount so advanced should be returned as soon as the money received from the sales would permit. When the note matured, the sales of the land had not yielded enough to enable the corporation to pay its amount, and on that day, at the request of Mr. Koscialowski, one of the members of the firm of D. J. Wheeler & Co., the plaintiff accompanied him to the office of the corporation in reference to taking up the note. Upon arriving there a conversation thereon was had with the appellant, in which, in reply to questions from them, he showed the sources from which returns from sales were expected within a few days, and told them that upon their receipt the corporation would reimburse whatever should be advanced for taking up the note according to its agreement with the firm. The plaintiff at first refused to have anything to do with the transaction, and left the office. Very soon after, Koscialowski returned, and presented an agreement

in the form of a letter addressed to D. J. Wheeler & Co., and said to Mr. Bull that, if he would sign that agreement, "they would get the money, and pay off this note, as they had agreed." The agreement, in addition to other matters, stated: "As to the amount of \$3,825 advanced by you, it will be returned to you out of the amount due from De Voto on the 1st of October, 1880." Bull thereupon signed the agreement in the name of the corporation, and as its president. Thereafter the plaintiff and Koscialowski went together to the bank, where the note had been placed for collection, for the purpose of taking it up, and the plaintiff paid the amount to the bank, upon which the clerk stamped the word "Paid" upon the face of the note, and it was taken away by the plaintiff. The money which the plaintiff paid to the bank had been obtained by him that afternoon from Maurice Dore upon the promissory note of D. J. Wheeler & Co., indorsed by himself. Koscialowski thereupon sent a note to Bull stating, "The note is paid." Upon these facts it must be held that the finding of the court that the note has never been paid by any one is not only not sustained by the evidence, but is contrary thereto. The firm of D. J. Wheeler & Co. had agreed that at the maturity of the note they would advance the money "for the purpose of paying the same," and they sought the aid of the plaintiff in order that they might carry out this agreement. They gave their note to Maurice Dore that they might obtain the money for this purpose, and for the purpose of securing Dore thereon the plaintiff indorsed their note. Koscialowski went with the plaintiff to the bank for the purpose of taking up the note, as his firm had agreed. The bank simply held the note for collection, and had no authority to deal with it, except to receive its amount in payment. Nothing was said at the bank by either party indicating that the transaction was other than a payment, and upon the receipt of the money the bank stamped the note "Paid" without any objection, and handed it to the plaintiff. This was a full performance of the obligation on behalf of D. J. Wheeler & Co., whose duty it was to pay the note, and was accepted by the bank, and the obligation was, therefore, extinguished. Civ. Code, § 1475; *Moran v. Abbey*, 63 Cal. 56; *Lancey v. Clark*, 64 N. Y. 209; *Burr v. Smith*, 21 Barb. 262. This extinguishment of the obligation of the note is not affected by the fact that the note was not surrendered to the maker. It was proper for the plaintiff to retain it until the corporation should comply with its agreement for reimbursement, as evidence in support of a claim therefor.

Neither does the evidence sustain the finding that the plaintiff took up the note at the special instance and request of Bull. It does not appear that Bull ever made any request of the plaintiff to take up the note, or to furnish the money therefor, or made any statement to him other than in accordance

with the agreement that had been made with the firm of D. J. Wheeler & Co. His statement that the corporation would soon be in funds with which to reimburse the advance that might be made for taking up the note was only the expression of an opinion, and the facts upon which his opinion was based were exhibited at the time, and it was given in reply to interrogatories put to him. The plaintiff had full knowledge of the contract between the firm and the corporation, and acted at the instance of the firm for the purpose of enabling it to carry out the terms of that agreement. The statements of Bull were with reference to a reimbursement of the advance that might be made on behalf of the firm under that agreement, but, whether the money should be advanced directly by the firm, or by another at its instance, did not change the obligation of the corporation to reimburse the firm in accordance with the terms of its agreement. The order denying a new trial should be reversed.

We concur: TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 447)

FENNELL v. DRINKHOUSE (ELLIOTT, Intervener. S. F. 2,441).

(Supreme Court of California. Jan. 29, 1901.)

EXECUTORS AND ADMINISTRATORS—PROBATE COURT—JURISDICTION—HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE—LIMITATION OF ACTIONS.

1. Code Civ. Proc. § 1723, provides that if a woman dies owning community property, which passes on her death to her surviving husband, any person interested in the title thereto may file in the probate side of the superior court a verified petition, which court shall determine the issue and make a decree, and a verified copy of which may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded. *Held*, that this section relates to real estate only, and does not give to the probate department of the superior court, in which the settlement of a wife's estate is pending, exclusive jurisdiction to determine a surviving husband's claim to money deposited by her in a bank during their marriage as community property.

2. Where a wife died leaving money in a bank, which was deposited after her marriage, and the administrator of her estate, who has taken possession of the money, is sued by her surviving husband to recover the money as community property, the presumption is that the money was community property, and the burden is on defendant to show the contrary; hence, there being no question as to the identity of the fund, plaintiff is not required to identify any specific part of it as community funds.

3. Where a wife died leaving money in a bank, which was deposited after her marriage, part of which was the proceeds of the sale of her separate real estate, the presumption that the balance was community property is not rebutted by evidence that the husband did little work and did not earn it, since the deposit was nevertheless community property, though it consisted wholly of the earnings of the wife while living with her husband.

4. The statute of limitations does not commence to run against the claim of a husband

that money in the possession of his wife was community property until the death of the wife, as the possession of community property by the wife is the possession of the husband.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. R. Webb, Judge.

Action by William Fennell against John A. Drinkhouse, special administrator of the estate of Winifred Fennell, deceased, and Maria Teresa Elliott, special administratrix appointed to succeed defendant, intervener. From a judgment for plaintiff, and from an order denying a new trial, intervener appeals. Affirmed.

George F. Shelton, for appellant. Emil Pohl and A. Ruef, for respondent.

HAYNES, C. Winifred Fennell, deceased, was the wife of the plaintiff, William Fennell. She died in the city and county of San Francisco, November 28, 1899, leaving estate therein, and the defendant Drinkhouse was duly appointed special administrator of her estate. On February 15, 1900, as such special administrator, he took possession of the sum of \$4,223.57 then on deposit with the Hibernia Savings & Loan Society in the name of Winifred Chapple (by which name the deceased was sometimes known), and this action was brought by the plaintiff against said Drinkhouse to recover said money, claiming that it was acquired by the plaintiff and said Winifred after their marriage, and that it was community property, to which he was entitled. After the appointment of defendant Drinkhouse as special administrator, a will executed by said deceased in her lifetime was found and probated, and Maria Teresa Elliott was duly appointed and qualified as executrix; but, said William Fennell having taken an appeal from the order probating said will, her letters were revoked, and she was appointed special administratrix of said estate, succeeding defendant Drinkhouse, and as such she filed a complaint in intervention in this action, claiming that the whole of said moneys were the separate property of said Winifred in her lifetime, and belonged to her estate, and that she, as special administratrix, was entitled to the possession of the whole thereof. The plaintiff answered said complaint in intervention, the cause was tried by the court, and findings were for the plaintiff, to the effect that he was entitled to \$1,815.77 (part of said sum of \$4,223.57) and costs, and that the intervener was entitled to the remainder of the fund, less disbursements made by defendant Drinkhouse as special administrator, and judgment was entered accordingly. This appeal is by the intervener from the judgment, and from an order denying her motion for a new trial.

Appellant formulates three propositions upon which a reversal is claimed, and states that the various assignments of error range themselves under one or the other of them. These grounds will be noticed in their order:

1. "That plaintiff has mistaken his forum and his remedy." It is contended that the department of the superior court in which the settlement of the estate of Winifred Fennell was pending alone had jurisdiction of the subject-matter of this litigation, under section 1723 of the Code of Civil Procedure, and that the remedy therein provided is exclusive. Said section has no application. It appears to relate to real estate alone. There would seem to be no reason for recording in the recorder's office a certified copy of a decree determining whether the money here in controversy belonged to the plaintiff or to the estate. Nor, under the facts of this case, is it a proper subject of litigation in the probate department of the superior court. If the money in question was, in fact, community property in the possession of Mrs. Fennell at the time of her death, it is no part of her estate. It is still in the hands of the special administrator; but that fact does not create a debt against the estate in favor of the plaintiff, for which he must present his claim and take chances as to the solvency of the estate. If the community property in question were horses or cattle, there can be no doubt that plaintiff could recover possession of them in an action of claim and delivery, and it is equally clear that he could not in such cases have that remedy in the probate proceedings concerning Mrs. Fennell's estate.

2. Appellant further contends that "plaintiff cannot recover in this action because he failed to identify the specific fund for which he sues." Counsel, I think, shows quite conclusively that "this cannot be treated as a suit on a claim against the deceased," not only because no claim against the estate was presented, but because it is not a suit against the estate, but is an action against John A. Drinkhouse "for money had and received, to and for plaintiff's use and benefit, in the said sum of \$4,223.57." There is no question about the identity of the fund received and held by defendant Drinkhouse. The only questions are: Is it community property, or, if part only is community property, how much? Appellant contends that the evidence is insufficient to justify the finding that any part of the money deposited in the bank by the wife was community property. All the money found in the bank and received by the special administrator was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption, therefore, was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant. This presumption can be overcome "only by evidence of a clear, certain, and convincing character establishing the contrary, and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof, the presumption as to the community character was absolute and conclusive." In re Boody's Estate, 113 Cal.

682, 686, 45 Pac. 858, and cases there cited. There was evidence tending to show that a portion of the money deposited by Mrs. Fennell in the Hibernia Savings & Loan Society was the proceeds of the sale of some real estate which was her separate property, and it also appeared that certain rents thereof entered into the account; but beyond that the evidence was confused and conflicting, and wholly insufficient to overcome the presumption that it was community property. Evidence that the husband did little work, and therefore did not earn the remainder of the money after deducting the proceeds of the real estate, was inconclusive, if not immaterial, since, if the deposit consisted wholly of the earnings of the wife while living with her husband, it was nevertheless community property.

3. It is further insisted that "the right of plaintiff to claim the money as community property is barred by the statute of limitations." The possession of community property by the wife is the possession of the husband. The right of the survivor does not depend upon the custody or possession of the community property prior to the death of the deceased spouse. No other questions are discussed. I advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(131 Cal. 469)

In re CAMP'S ESTATE. (Sac. 701.)

CAMP v. THOMAS.

(Supreme Court of California. Jan. 30, 1901.)
ADOPTION OF CHILD—COLLATERAL ATTACK.

Under Civ. Code, § 227, designating the judge of the superior court as a tribunal to determine application for adoption of a minor child, the determination by such judge that the child sought to be adopted had been abandoned by its parents was a jurisdictional fact to be determined by the judge on the evidence, and the recital in his order of adoption that it had been so abandoned cannot be collaterally attacked in an application for administration on the death of the party seeking to adopt him.

Department 1. Appeal from superior court, Kings county; J. W. Mahon, Judge.

In the matter of the estate of George W. Camp. From an order appointing W. M. Thomas, public administrator, administrator of the estate, W. H. Camp appeals. Affirmed.

Dixon L. Phillips, for appellant. Rowen Irwin and Hudson & Pryor, for respondent.

HARRISON, J. Applications for letters of administration upon the estate of the above-named decedent were presented to the superior court of Kings county by the public administrator of that county, the respondent herein, and also by the appellant, a brother

of the deceased. Upon the hearing thereon the court made an order appointing the respondent as such administrator, and directing letters of administration to issue to him. The brother has appealed.

The deceased died intestate, leaving several brothers and sisters and a surviving widow and two adopted children, who at the hearing of the petition were aged, respectively, about 11 and 8 years. The widow died shortly before the petitions were presented. At the hearing the proceedings taken in the lifetime of the decedent for the adoption of the children, including the order of the judge sanctioning their adoption, and declaring that they should thereafter be regarded and treated as the children of the decedent and his wife, were read in evidence. In reply thereto the appellant offered to introduce evidence showing that at the time the proceedings were had the children had not in fact been abandoned by their parents. The court excluded this evidence, and the appellant urges that in this ruling the court erred. While the proceedings for the adoption of a minor child do not constitute judicial proceedings, and the order of the judge therein is not the judgment of a court, yet under section 227, Civ. Code, the judge of the superior court has been designated as a tribunal for that purpose, and in the performance of his duties thereunder exercises judicial functions. It is a well-settled rule that when the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order. Wells, Jur. § 61; Brittain v. Kinnauld, 1 Brod. & B. 432; Evansville, I. & C. S. L. R. Co. v. City of Evansville, 15 Ind. 421; Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320; In re Grove Street, 61 Cal. 438; Levee Dist. v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085. Whether the children had been abandoned by their parents was a jurisdictional fact to be determined by the judge, upon the evidence presented to him, before he was authorized to entertain the petition for their adoption; and the recital in his order that it appeared to his satisfaction that they had been abandoned by their parents was a determination of this fact which cannot be questioned in a collateral attack upon the order. Otherwise, the existence of this fact and the status of the children would be always uncertain, since the evidence might not be the same at all investigations, and might be regarded with different effect by different tribunals, and the adoption be held by one court to have been valid, while another court would hold it to have been of no avail. Whether the parents of the child in a direct proceeding against the adopting person for the recovery of the persons of the children would be bound by this determination of the

¹ Rehearing denied March 1, 1901.

judge is not involved herein. It is very clear that, if an action had been brought against the decedent in his lifetime for necessities supplied for the support of the children, he would not have been permitted to show in his defense that at the time of the proceedings for their adoption the parents had not in fact abandoned them. He would have been estopped by his recital of their abandonment in his petition. Inasmuch as the rights of the appellant herein are derived solely through and under the decedent, he can have no greater right to question the validity of the order than would the decedent. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

CARLOW et al. v. FOWLER et al.
(Supreme Court of Kansas. Feb. 9, 1901.)

SUPREME COURT—JURISDICTION.

Where, in an action to recover on a debt and foreclose a mortgage, several persons claiming mortgages and tax liens were made defendants, and the aggregated claims of plaintiff and defendants amounted to more than \$2,000, but the largest single amount was only about \$1,200, an appeal will not lie to the supreme court under the act organizing the court of appeals, and excluding from the supreme court jurisdiction of controversies involving less than \$2,000.

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by W. R. Carlow and others against Edwin Fowler and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

L. B. & J. M. Kellogg, for plaintiffs in error. Miller, Buchan & Morris, for defendants in error.

PER CURIAM. This was an action brought to recover upon a debt, and to foreclose a mortgage upon real estate. Several persons claiming mortgages and tax liens upon the same property were made defendants. The litigated questions related to the running of the statute of limitations against the plaintiffs' cause of action, and to the validity of a tax sale and deed, constituting the title upon which the mortgages of some of the defendants rest. No one litigated claim or lien amounted to \$2,000. Aggregated, those of the plaintiffs and defendants amounted to more than that sum, but the largest single amount in dispute was only \$1,220, and all the others together amounted to about \$1,000. The case was brought to us during the existence of the act providing for the organization and regulating the jurisdiction of the court of appeals. That act excluded controversies involving less than \$2,000 from our jurisdiction. No single party to this case had a controversy with any other party to it involving \$2,000. The case is therefore dismissed.

63 P.—47

STATE v. RICE.

(Supreme Court of Kansas. Feb. 9, 1901.)

LARCENY—EVIDENCE.

Where property stolen belonged to one S., but ownership was alleged in one B., and the evidence showed that the latter had charge of it as the servant of S., and had no other interest in it, a conviction for larceny from B. cannot be sustained.

Appeal from district court, Ottawa county; R. F. Thompson, Judge.

Walter Rice was convicted of grand larceny, and appeals. Reversed.

R. R. Rees, for appellant. A. A. Godard, Atty. Gen., and F. D. Boyce, Co. Atty., for the State.

PER CURIAM. This is an appeal from a judgment of conviction of grand larceny. The property stolen belonged to one J. W. L. Slavens, but ownership of it was alleged in one George F. Bingham. The latter had the charge and control of the property for Slavens, the owner, but an examination of the testimony convinces us that his custody of it was in the capacity of a servant of the owner; that he had no character of interest in it or control over it, except to keep it for the owner, and under his direction and command. He had no interest in it as bailee or otherwise, and could not have maintained an action for injury to it. Under these circumstances, a conviction of the appellant for a larceny from Bingham cannot be rightfully had. It was distinctly so ruled in the recent case of State v. Beaty (Kan. Sup.) 62 Pac. 658. None of the other assignments of error are well taken. The judgment of the court below will be reversed, and subsequent proceedings had in the case in accordance with this opinion.

CARR v. STAFFORD.

(Supreme Court of Kansas. Feb. 9, 1901.)

SCHOOL ELECTION—CONTEST—EVIDENCE—PRESUMPTIONS.

1. Where at a contest over a school election 50 persons voted, and 26 of them testified that they voted for a certain person, it was for the jury, in a contest thereon, to decide between the voters and the tellers who counted the ballots.

2. In a school-election contest, it is not necessary for plaintiff to establish by explicit testimony that persons voting for him were legally qualified to vote.

3. Where it is shown that certain persons voted at a regularly called election, their right to do so will be presumed.

Error from district court, Chautauqua county; C. W. Shinn, Judge.

Action by E. E. Stafford against J. N. Carr. Judgment for plaintiff, and defendant brings error. Affirmed.

Fitzpatrick & Shukers, for plaintiff in error. J. D. McBrian and W. H. Sproul, for defendant in error.

PER CURIAM. The second and third instructions given by the court to the jury, of which the plaintiff in error complains, merely informed the jury what the issues were in the case, as contained in the pleadings. No propositions of law were stated in either of them. The seventh instruction, to the effect that fraud is never presumed, but must be proven, etc., was favorable to the defendant below. The testimony offered by defendant below to establish the good character of the witness Garrett was properly rejected. *Simpson v. Westenerger*, 28 Kan. 540.

There was no dispute at the trial that 50 persons voted at the school meeting. No objection was made at the meeting to the reception of the 50 ballots cast, and no question was then raised as to the right of any person present and voting to do so. Twenty-six of the persons present and voting at the meeting testified that they voted for Stafford. It was for the jury to decide between the voters and the tellers who took up and counted the ballots. It was not necessary for plaintiff below to establish by explicit testimony that the persons voting for him were legally qualified to vote. A vote is presumed to be legal until the contrary is shown. *Moss v. Patterson*, 40 Kan. 720, 20 Pac. 454. While a contestant for an office must show that he is qualified to hold the office (*Watt v. Jones*, 60 Kan. 201, 56 Pac. 16), yet, when it is shown that certain persons voted at a regularly called election, their right to do so will be presumed. The party disputing their right to vote must make proof showing their disqualifications. The judgment of the court below will be affirmed. All the justices concurring.

MILES v. LACKEY.

(Supreme Court of Kansas. Feb. 9, 1901.)

PARTIES IN ERROR—DISMISSAL.

Where, in a creditors' bill to set aside alleged fraudulent conveyance of realty, the grantee alone appears, and judgment is rendered for the defendants, proceedings in error in which the grantee alone is made defendant in error will be dismissed.

Error from district court, Cowley county; W. T. McBride, Judge.

Action by Henry Miles, trustee, against M. D. Lackey and others. Judgment for defendant Lackey, and plaintiff brings error. Dismissed.

Pollock & Lafferty and Jackson & Love, for plaintiff in error. Madden & Buckman, for defendant in error.

PER CURIAM. The action in the court below was in the nature of a creditors' bill to subject to the payment of a judgment real estate fraudulently conveyed by Calvin Dean, the judgment debtor, and wife, to M. D. Lackey. Dean and wife were parties in the district court, but were in default, and no express mention of any adjudication of their

rights is made in the journal entry of final judgment. There was, however, a judgment "that said plaintiff [Henry Miles, trustee] take nothing by reason of his supposed cause of action herein." We think all the rights of the defendants below, Dean and wife, have been settled. The validity of the conveyance has been finally adjudicated as to them. They are not made parties to the proceedings in error in this court, but M. D. Lackey alone is made defendant in error. The motion to dismiss must be sustained under the authority of *Kellam v. Manspeaker* (Kan. Sup.) 58 Pac. 990, and *Pratt v. Fairfield*, 56 Kan. 144, 42 Pac. 350. The proceedings in error will be dismissed. All the justices concurring, except POLLOCK, J., who did not participate, having been of counsel.

(62 Kan. 457)

MAXWELL et al. v. CHURCH, Superintendent of Insurance.

(Supreme Court of Kansas. Feb. 9, 1901.)

INSURANCE AGENT—REVOCATION OF LICENSE.

1. The license of an authorized resident insurance agent cannot be revoked by the superintendent of insurance for the reason that he divided commissions with a nonresident agent who placed with the Kansas agent insurance on property situated in this state.

2. The provisions of chapter 161 of the Laws of 1889, and sections 18 and 23 of chapter 93 of the Laws of 1871, construed and applied.

(Syllabus by the Court.)

Application by Mark Maxwell and others for a writ of mandamus to M. V. Church, superintendent of insurance. Granted.

This is an application for a writ of mandamus to require the superintendent of insurance to issue licenses to plaintiffs, authorizing them to act as agents for insurance companies admitted to transact business in this state, and to compel the revocation by said superintendent of an order heretofore made by him denying the right of plaintiffs to represent such companies. The offending acts charged by the superintendent of insurance against plaintiffs as such agents are stated in his return as follows: "Plaintiffs on or about November 3, 1900, at Kansas City, Kan., for and on account of one Sam L. Casey, an insurance agent of Kansas City, Mo., and a nonresident of the state of Kansas, acting through one Harry Rankin, also an insurance agent of Kansas City, Mo., and a nonresident of the state of Kansas, and with the intention and for the purpose of dividing the commission with said Casey or Rankin, or both of them, did write and issue policy No. 1,657,398 in the British America Assurance Company, for \$1,500, premium \$11.25, on the property of Ruddy Brothers, located in Kansas City, Kansas, and also one policy No. 274,579, for \$1,000, in the National Assurance Company, on said property, premium \$7.50, both at the solicitation of and in collusion with said Sam L. Casey and Harry Rankin, but for whom and for whose solicita-

tion and collusion said policies would not have been issued by said plaintiffs. Said conduct on the part of the plaintiffs was in direct violation of the rules and orders of the insurance department of this state, and in violation of section 18 of chapter 93 of the Session Laws of 1871 of this state, and of section 23 of said chapter 93, and of section 1 of chapter 161 of the Session Laws of 1889, and of section 2 of said chapter 161." The nonresident agency law which defendant alleges has been violated by the plaintiffs reads: "The superintendent of insurance is prohibited from issuing a license or authority to write policies of fire insurance, or to solicit and obtain and transact fire insurance business, to any person, agent, firm or corporation unless such person, agent, firm or corporation is a legal resident of the state of Kansas at the time such authority is issued. And whenever any person, agent, firm or corporation so authorized to issue policies of fire insurance and solicit and transact fire insurance business shall remove from the state of Kansas, the authority issued to such person, agent, firm or corporation shall be revoked, and the same shall be null and void." Laws 1889, c. 161, § 1. "Any fire insurance company authorized to do business by the superintendent of insurance is hereby prohibited from authorizing or allowing any person, agent, firm or corporation who is a non-resident of the state of Kansas from issuing or causing to be issued any policy or policies of insurance on property located in the state of Kansas." Laws 1889, c. 161, § 2. "That whenever the superintendent of insurance shall have or receive notice or information that any fire insurance company authorized to do business in the state of Kansas has authorized or permitted any person, agent, firm, or corporation, non-resident of the state of Kansas, to procure or issue policies of insurance on property in the state of Kansas, the superintendent shall immediately investigate or cause to be investigated the business done by any such fire insurance company so authorized to do business in the state of Kansas, whether it has permitted or allowed its fire insurance policy or policies to be obtained and issued on property located in the state of Kansas by any agent, person, firm, or corporation, non-resident of the state of Kansas; and if any insurance company has violated any of the above provisions, such fire insurance company shall have its license or authority to do business in the state of Kansas revoked by the superintendent of insurance, and such fire insurance company shall be prohibited from doing any insurance business, or receiving authority from the superintendent of insurance to do any insurance business in the state of Kansas, for one year from the date of the revocation of such authority; and the superintendent of insurance shall cause a notice thereof to be published in any paper of general circulation published in the city of Topeka, and after the

publication of such notice it shall be unlawful for any person, agent, firm or corporation of such insurance company to procure any new applications for insurance, or to issue any new policies." Laws 1889, c. 161, § 3. The plaintiffs have demurred to the return of the superintendent to the alternative writ.

L. C. Boyle, J. D. McCue, and A. F. Williams, for plaintiffs. A. A. Godard, Atty. Gen., and J. S. West, Asst. Atty. Gen., for defendant.

SMITH, J. (after stating the facts). Section 1 of the nonresident agency law (set out in the statement) prohibits the superintendent of insurance from issuing a license to a nonresident agent, and provides that when a resident agent removes from the state the authority theretofore given shall be revoked. An order made by the superintendent under this section operates directly against the agent himself. Section 2 of the act prohibits any fire insurance company from authorizing or allowing any person, agent, firm, or corporation, being a nonresident of this state, from issuing or causing to be issued any policy of insurance on property located in Kansas. The prohibition of this section applies to the offending insurance companies, and not to their agents. The same may be said of section 3. The authority of the superintendent under said section is confined to a revocation of the license of the insurance company in case it has permitted any person or agent, a nonresident of this state, to procure or issue policies of insurance on property in Kansas. It will be seen that, except in the first section of the law, no power over the licenses of agents is given to the superintendent of insurance. It is clear that the acts of the superintendent of insurance were not justified under chapter 161 of the Laws of 1889.

In the return the defendant avers, also, that plaintiffs have violated sections 18 and 23 of chapter 93 of the Laws of 1871. This act is entitled "An act to establish an insurance department in the state of Kansas, and to regulate the companies doing business therein." Section 18 reads: "Sec. 18. It shall be unlawful for any person, company or corporation in this state, either to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the superintendent of insurance in conformity to the provisions of this act; and any person violating the provisions of this section shall be liable to a penalty of five hundred dollars for each offense, to be collected as other penalties under this act." This section could be better understood if it followed the succeeding section (19). We think it should be read as a part of or as

supplemental to section 19, and in that connection its penalties are visited on agents of foreign insurance companies doing business in Kansas without due authority from the companies they claim to represent, and unless licensed as agents by the superintendent of insurance. Section 23 of the same act provides: "Sec. 23. The provisions of this act shall apply to individuals and partners, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance. It shall be unlawful for any company, corporation or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, without first having complied with all the provisions of this act. And any corporation, company or association, violating the provisions of this section, and any individual, company, association or corporation aiding in any manner, either as agent or otherwise, in such violation, shall be liable to a penalty of five hundred dollars, to be collected as other penalties under this act." It is apparent that the purpose of section 23 is to prohibit the business of insurance being carried on by any company without having first received a license so to do from the superintendent of insurance. It has no application to companies that are licensed and have complied with all the provisions of the statute. We find no provision of law which justifies the defendant in revoking the licenses of plaintiffs for the reasons given in the return of the superintendent of insurance to the alternative writ. A peremptory writ of mandamus will be allowed. All the justices concurring.

(62 Kan. 492)

BIGGS v. CONSOLIDATED BARB-WIRE CO.

(Supreme Court of Kansas. Feb. 9, 1901.)

NEGLECT—UNPROTECTED MACHINERY—INJURY TO CHILD.

Where a boy was killed by his clothes catching in an unprotected shaft, exposed in a place where children were accustomed to play, whether the boy should have seen the projecting setscrew which caught his clothing, and have appreciated the danger, and whether the machinery was dangerous, and known to be such, because the place was frequented by children, and whether defendants were negligent in leaving it uncovered and unprotected, were questions for the jury.

Error from district court, Douglas county; S. A. Riggs, Judge.

Action by W. P. Biggs, administrator, against the Consolidated Barb-Wire Company. Judgment for defendant, and plaintiff brings error. Reversed.

R. E. Melvin, for plaintiff in error. W. W. Nevison, for defendant in error.

PER CURIAM. This is the second coming of this case. When it was here before we held that the petition stated a cause of action, and the case was remanded for trial. *Biggs v. Wire Co.*, 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 635. At the trial testimony was offered by the plaintiff which we think tended to sustain the averments of the petition, but the court sustained a demurrer to the evidence and took the case from the jury. The testimony, although not full and satisfactory in some respects, tended to show that the place where the boy was killed was attractive to children, and that children actually did frequent it with the knowledge of defendants, and that the uncovered and unprotected shaft and appliance by which the boy was killed was dangerous. There was testimony, too, that the setscrew on the shaft, which caught the boy's clothing, only projected about two inches, and could not easily be seen when the shaft was in motion; that the velocity of the shaft at the time the boy was caught was from 80 to 90 revolutions per minute, and when revolving at that rate it appeared to some like a band around the shaft. It therefore appears that the case is substantially in the same condition that it was when it was here before. It was then held that the question of whether the boy was of sufficient intelligence, natural capacity, foresight, and judgment to be guilty of contributory negligence was for the determination of the jury; and the same may be said with respect to whether the boy could and should have seen the projecting setscrew, and have appreciated the danger of going near to the same. Whether the place was dangerous, and known to be such, because it was attractive to, and known to be frequented by, children, and whether the defendants were guilty of negligence in leaving it uncovered and unprotected, were also jury questions. There appears to have been testimony tending to sustain the material averments of the petition, and, applying the views expressed when the case was here before, we must hold that error was committed in taking the case from the jury. The judgment will be reversed, and the cause remanded for another trial.

(62 Kan. 482)

BIGGER v. RYKER, County Treasurer, et al.

(Supreme Court of Kansas. Feb. 9, 1901.)

TAX SALES—CONSTITUTIONAL LAW.

Chapter 162 of the Laws of 1891, being "An act regulating the sale of real estate for delinquent taxes in such counties as shall adopt the provisions of this act," does not conflict with the constitutional principle that no man's property can be taken from him without his consent, except by due process of law, nor with any other constitutional limitation.

(Syllabus by the Court.)

Application by L. A. Bigger for a writ of mandamus against C. A. Ryker, county

treasurer, and others. Judgment for defendants.

Vandever & Martin, for plaintiff. Carr W. Taylor, Co. Atty., and J. U. Brown, for defendants.

JOHNSTON, J. By this proceeding the plaintiff challenges the constitutionality of chapter 162 of the Laws of 1891, "An act regulating the sale of real estate for delinquent taxes in such counties as shall adopt the provisions of this act." The provisions of that act were duly adopted by the county commissioners of Reno county, after which the taxes charged upon some of the lands in the county of Reno became delinquent. The county treasurer advertised that these lands would be sold for taxes on September 4, 1900, at the court house, and on that day plaintiff was present and proposed to buy the lands so advertised; but the county treasurer informed him that all the delinquent real estate would be bid off in the name of the county, under the authority of the statute and resolution above mentioned. The plaintiff proposed and made bids upon each and every of the tracts and parcels of land, and offered to purchase the north half of each of said tracts and parcels, and to pay therefor the full amount of all taxes, penalties, costs, and charges, etc., against the entire tracts and parcels of land. At the same time he tendered a sufficient sum of money to make good his offer; but the offer, as well as the tender of money, was refused by the county treasurer, and the property mentioned was all bid off in the name of the county, in the manner provided for in the statute referred to. To compel an acceptance of his bid and tender, the plaintiff has brought this proceeding in mandamus. He attacks the validity of the statute because it excludes all bidders other than the county, and thereby prevents competition, and also because it provides for a sale to the county of the entire property taxed, when a smaller portion of it might sell for enough at a competitive sale to realize all taxes, penalties, and costs due thereon. These objections appear to be more of an attack upon the policy of the act than upon the validity of the powers to be exercised under it. The sovereign power of taxation belongs exclusively to the legislature. It has discretion and power to determine what property shall be subject to taxation, the rules upon which taxes shall be levied, and the means which shall be taken to secure an enforcement of the payment of the same. Its discretion is uncontrolled and its power is omnipotent, except as they may be limited by constitutional provisions. The principle of uniformity of taxation is required by our constitution, but no claim is made that the act in question trenches upon that principle or violates any express constitutional provision. The plain-

tiff insists that, while there is no specific inhibition in the constitution, the means provided in the act for enforcing the collection of taxes are contrary to the universal practice and to the general principles of equity and justice, and, further, that they are not due process of law. At the argument it seemed to some of us that the taking of the whole of a tract of land for the taxes and charges against it, when a smaller portion might be sufficient to pay them, was a harsh and objectionable method; but reflection convinces us that whether a part or the whole shall be appropriated in satisfaction of the tax lien is a matter of legislative discretion, and one which is not the subject of review by the courts. To insure the prompt payment of taxes, penalties are imposed by the legislature; and, if they are equal and uniform in their application, their validity is unquestioned, and very heavy penalties have been sustained. The harsher method of forfeiture for the nonpayment of taxes and noncompliance with the tax laws is frequently employed, and such statutes are generally held to be valid. If a forfeiture may be constitutionally enforced, no reason is seen why the provisions authorizing the treasurer to bid off the tract taxed for the county should not be sustained. The fact that we have had competitive bidding, and a sale of the smallest quantity which any purchaser will take and pay the taxes and charges against the land, makes the means complained of seem unnecessarily severe to some, but mere harshness and severity of methods do not violate any right secured by the constitution. It is probably true, as stated, that the usual methods of enforcing the collection of delinquent taxes upon lands in this country are by a public competitive sale for a quantity of land requisite to pay the amount due, but, as heretofore stated, this is matter of policy to be settled by the legislature, and a mere departure from usual methods does not necessarily conflict with the constitution. It may be that experience has shown that a sale of a portion of the land did not always insure the promptest and fullest payment of taxes; and it may be that new methods were necessary to insure the collection of the public revenues, and the discharge of expenses incurred in carrying on the public business. There is no cause for the landowner to complain of the method, as he is permitted to redeem the land at any time within three years from the date of the sale for an amount equal to the cost of redemption at the time of redemption. After that time the county commissioners dispose of the land in accordance with the general provisions of the law. The proposed purchaser, who has invested nothing, and who is informed by the statute itself that the county treasurer shall not accept bids or offers from any persons except the owner, his heirs, executors, administrators, and assigns, or a mortgagee of

the real estate, has little cause to complain. A statute requiring a sale for the smallest quantity of the land that will discharge the tax lien is mandatory upon an officer, and must be strictly pursued; but, the legislature having provided for a sale of the whole of it, the officer cannot disregard its provisions. Our attention has been called to *Martin v. Snowden*, 18 Grat. 145, as an authority against the validity of such a statute; and language is employed in the decision which gives countenance to the contention of the plaintiff, but the judge writing the majority opinion expressly states that he did not think it necessary to decide the question.

The claim that it is not due process of law cannot be sustained. Summary proceedings for the collection of delinquent taxes do not conflict with the principle that no man's property can be taken from him without his consent except by due process of law. Here the landowner has had notice of the assessment, and an opportunity to secure the correction of any errors made in levying the taxes against the land, and there are abundant remedies if a sale is not made in accordance with the statutory provisions. The constitution does not prescribe how land shall be sold, and a statutory provision providing a means of sale is within the power of the legislature, and not in conflict with the principle named, or with other constitutional restrictions. *Pritchard v. Madren*, 24 Kan. 486; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Desty, Tax'n*, 749.

The plaintiff also attacks the validity of other statutes which make provision for the disposition of lands purchased by the county under the provisions of chapter 162 of the Laws of 1891. This, however, is not a matter of concern to the plaintiff. Assuming that he had a right to purchase, he sought to compel the county treasurer to accept his bid and tender; but, the statute authorizing a purchase by the county alone having been held valid, his bid and tender were properly refused, and he has no standing to institute a judicial inquiry as to what shall be done by the county three years hence as to the sale or disposition of the lands purchased, or as to the disposition of the proceeds of such sale. Whether they shall be disposed of under existing statutes, or one to be enacted in the future, is a matter of legislative discretion, and not of any concern to the plaintiff. The motion to quash the alternative writ will be sustained, and judgment will go in favor of the defendants. All the justices concurring.

(62 Kan. 469)

STATE v. GILLESPIE.

(Supreme Court of Kansas. Feb. 9, 1901.)

LARCENY—EVIDENCE—DECLARATIONS OF ACCUSED—POSSESSION OF STOLEN GOODS.

1. The declarations of a person found in the possession of stolen goods as to how he came

by them, made by him at once upon their being discovered in his keeping, are of the res gestæ, because they are parts of the fact of either rightful or wrongful possession, and may be given in evidence upon a trial for the larceny of the goods, even though self-serving in character.

2. The mere possession of goods recently stolen upon the occasion of a burglary, alone and of itself, is not, as matter of law, evidence tending to show the possessor guilty of the larceny; nor is such possession, in connection with other circumstances, sufficient, as matter of law, to raise a presumption of guilt of either larceny or burglary; but such possession, in order to constitute evidence tending to show guilt of the larceny, or to be sufficient, in connection with other criminalizing circumstances, to raise a presumption of guilt of the burglary, must be unaccompanied by any reasonable explanation by the accused, or arising out of the evidence in the case, as to how he came by the goods.

(Syllabus by the Court.)

Appeal from district court, Harvey county; M. P. Simpson, Judge.

Taylor Gillespie was convicted of larceny, and appeals. Reversed.

Branine & Branine, for appellant. A. A. Godard, Atty. Gen., and John J. Hildreth, Co. Atty., for the State.

DOSTER, C. J. This is an appeal from a judgment of conviction of the offenses of burglary and larceny, concurrently committed. The store of one C. J. Gram, in Halstead, Harvey county, was broken into in the nighttime, and some articles of fruit and confectionery stolen. Suspicion of the crime fell upon the appellant, Taylor Gillespie, a boy aged about 17, who, with two sisters, resided on the outskirts of the town. A few mornings after the commission of the burglary, Gram, the store proprietor, and one Philbrick, a constable, called at the appellant's house to search for the stolen property. After an explanation by these men of the object of their visit, the boy left, and remained away about an hour, during which time some of the goods in question were found in the house. When he returned and learned that the goods had been found, he explained that one Ike Thompson had brought them to him and left them in his keeping, or, rather, to state the fact more accurately, he testified in his defense on the trial that Thompson had brought them to his house and left them in his charge; and he offered to testify, and likewise to prove by Gram and Philbrick, that he so stated to them immediately on his return to his house, and on being informed of the discovery there of the goods. This offered evidence of the explanation given by him was rejected by the court, and its rejection has been assigned as error. We are quite well assured that it was error. The general rule is that declarations made by a party concomitantly with the performance of an act by him, and of a nature to explain and characterize it, constitute a part of the act itself. The act and the accompanying declaration together

constitute the *res gestæ*, and both are admissible in evidence. This rule is too familiar to require the citation of authorities in order to the understanding or enforcement of it. It may be remarked, however, by way of illustration of its application to particular cases, that it is not limited to instances of self-dis-serving declarations, but extends as well to declarations self-serving in character. "It makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of or against the party making it. If the act was one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as when the tendency is to show the criminality of the act, and it may be given in evidence by the defendant as well as by the state." *Hamilton v. State*, 36 Ind. 230. In further illustration of the rule it may be also remarked that it is not limited to declarations accompanying the performance of acts by a party, but applies as well to declarations explanatory of existing facts with which a party stands in immediate personal relation. Declarations *res gestæ* are not merely declarations accompanying acts performed, but they are also declarations concomitant with present facts. The test of their admissibility is instinctiveness of utterance. If they appear to be the spontaneous, unpremeditated speech of the party in immediate causal relation to the thing in question, they are admissible, whether that thing be an act concurrently performed or a fact concurrently existing, or whether it be inculpatory or exculpatory in character or import. Declarations of this kind explanatory of the possession of stolen property fall entirely within the rule, and their admissibility has been fully authorized by the courts and text writers. Mr. Bishop, in his *Criminal Procedure* (volume 2, § 746), says: "The discovery of the stolen goods in the possession of the defendant being a fact in the case, the doctrine of the *res gestæ* teaches that what he said in connection with this fact—that is, with the discovery—may in general be admitted in evidence on either side, especially where at the time of such discovery he is directly or by implication charged with the theft. For example, his explanation of how he came by the goods, and the like, may be testified to as well in his behalf as against him. And if such explanation appears to the jury reasonable, and it is not shown by the prosecutor to be false, its weight in the scale for him will be very considerable; but if it appears unreasonable, and especially if it is shown to be false, it will bear against him heavily." Some of the cases most clearly in point are *People v. Dowling*, 84 N. Y. 478; *Henderson v. State*, 70 Ala. 23; *Mitchell v. Territory*, 7 Okl. 527, 54 Pac. 782. It is not improbable that the court below ruled against the introduction of the offered testimony because the explanation made by the defendant was not

given upon the instant of the first imputation against him of guilty possession of the goods. Some of the testimony might furnish a justification for this view, but other parts of it do not. It was not so stated by the court as the ground of the ruling made. It was not pressed upon us by the counsel for the state, but was only casually suggested by them, and therefore we have not critically examined all of the evidence to see whether such may not have been the reason for the court's decision. In fact, it would seem difficult to determine the relation, in point of time and other circumstances, between an accused person's knowledge of a criminating fact and his explanation of it, when the privilege was denied him of stating what his explanation was, and the time he made it, with relation to his knowledge of the exculpatory circumstance.

Upon the subject of the presumption arising from the possession of recently stolen property the court instructed as follows: "The possession of recently stolen goods taken on the occasion of a burglary is evidence tending to show the guilt of the possessor, and may, when taken in connection with other criminating circumstances, raise a presumption of guilt sufficient to warrant a conviction of both burglary and larceny." In *State v. Powell*, 61 Kan. 81, 58 Pac. 988, the question of the presumption arising from the possession of recently stolen goods taken on the occasion of a burglary was given consideration. In that case the court below had instructed that the unexplained possession of recently stolen property was *prima facie* evidence of the guilt of the larceny, and when burglary was charged in connection with the larceny, and the larceny could not have been effected without the commission of the burglary, the possession of the stolen property was also *prima facie* evidence of the burglary. This instruction was held to be erroneous because of the failure to include "other criminating circumstances" than the possession of the stolen property as necessary to raise the presumption of guilt of burglary. As to the conditions under which a presumption of guilt of burglary as well as larceny arises, the instruction of the court in this case omitted the statement of one of the essential facts justifying the presumption. That was the lack of explanation of the defendant's possession of the property. The court instructed that possession of recently stolen property taken on the occasion of a burglary was evidence tending to show the guilt of the possessor, and that, of course, meant his guilt of both burglary and larceny, because they were both charged in the information, and were both the subjects of investigation; and the court also instructed that such possession, in connection with other criminating circumstances, might be sufficient to raise a presumption of guilt of both burglary and larceny. Now, the unexplained possession of property recently stolen from a burglarized

house may be evidence tending to show guilt of both offenses; but it cannot be that the mere possession of recently stolen property is, as matter of law, evidence tending to show the possessor to be guilty of the larceny, because, if such be the case, it might tend so strongly to show guilt as to alone justify conviction. Nor do we think that, as matter of law, the mere possession of goods recently stolen on the occasion of a burglary may be sufficient, even in connection with other criminating circumstances, to raise a presumption of guilt of the burglary. The difference in strength and cogency between evidence tending to show guilt and evidence sufficient to raise a presumption of guilt is not great enough, if it exists at all, to justify the drawing of distinctions between the rules applicable to the two states of moral conviction they generate. As just remarked, evidence tending to show guilt may tend so strongly to show it as to raise a presumption of guilt; and a presumption of guilt, if not rebutted, is sufficient to convict of guilt. It is the unexplained possession of recently stolen goods that tends to show guilt or raises a presumption of guilt of the larceny, and it is the unexplained possession of recently stolen goods on the occasion of a burglary that tends to show guilt or raises a presumption of guilt of the burglary. In the case of *State v. Powell*, supra, the instruction held to be erroneous was not criticised because lack of explanation by the possessor of the stolen goods was not included among the conditions giving rise to the presumption of guilt. In fact, in that case lack of explanation was distinctly included among the elements of the presumption, so far as the larceny was concerned. In that case the instruction was held to be erroneous because the court had ruled that the possession of property recently stolen on the occasion of a burglary was sufficient, without other criminating circumstances, to raise the presumption of guilt of the burglary. The instruction might have been criticised because of its failure to include lack of explanation as one of the necessary additional criminating circumstances, but the question in the case was not what particular circumstances should accompany the possession of the goods in order to raise the presumption, but it was whether mere possession, without any other circumstance, was sufficient; hence it did not become necessary to consider lack of explanation by the possessor of the goods as a condition giving rise to the presumption. However, it is quite apparent that the opinion in that case proceeded upon the assumption that the law required lack of explanation of the possession of stolen goods taken from a burglarized house to constitute an element necessary to show guilt or to raise a presumption of guilt of both offenses, because, among other things, it was remarked, "It has been frequently held in this state that such possession, unexplained, is prima facie evidence of

larceny;" and again, "We do not feel warranted in still further extending the presumption that the evidence is of itself sufficient, if unexplained, to warrant a conviction for burglary." We think the rule stated by us obtains generally in the other states. In *Orr v. State*, 107 Ala. 35, 18 South. 142, the court says: "Whenever there is evidence tending to explain the possession, it is error to charge the jury that recent possession of stolen property is prima facie evidence of guilt, without the qualification 'unexplained.' The words 'may be' should be used in the place of the word 'is.' It is the 'unexplained' recent possession of stolen property that authorizes the inference of guilt. Whether the explanation offered is credible or satisfactory is a question for the jury." See, to same effect, *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Robb v. State*, 35 Neb. 235, 53 N. W. 134.

Other claims of error are made, but we do not consider them well founded; but for the errors above pointed out the judgment of the court below is reversed, and a new trial ordered. All the justices concurring.

(62 Kan. 431)

FIRST NAT. BANK OF HUTCHINSON v. WILLIAMS.

(Supreme Court of Kansas. Feb. 9, 1901.)
COMPENSATORY DAMAGES—EXPENSES OF LITIGATION—FRAUD.

1. Attorney's fees and expenses incurred in good faith by a bank in saving itself from loss occasioned by the fraud of a party who obtained from it a draft, and then caused the same to be cashed, may be recovered in an action against the wrongdoer.

2. The damages recoverable in the case mentioned are compensatory in their nature, and not exemplary.

3. The case of *Winstead v. Hulme*, 4 Pac. 904, 32 Kan. 568, distinguished.

(Syllabus by the Court.)

Error from district court, Reno county; M. P. Simpson, Judge.

Action by the First National Bank of Hutchinson against L. T. Williams. Judgment for defendant, and plaintiff brings error. Reversed.

W. M. Whitelaw and F. S. Whitelaw, for plaintiff in error. Geo. A. Vandever and F. L. Martin, for defendant in error.

SMITH, J. Plaintiff in error based its action in the court below against the defendant, Williams, on the following facts, which, stated briefly, are: Defendant, for the purpose of wronging, cheating, and defrauding the First National Bank, made and delivered to it a check drawn on the Citizens' Bank of Hutchinson in the amount of \$2,800, and bought of and received from plaintiff in error a draft on New York for said sum, payable to his own order. To carry out his fraudulent purpose, defendant represented that he had on deposit in the Citizens' Bank a sum equal to the amount of his check. The check was worthless. Discovering this

fact, plaintiff below, by telegraph, stopped payment of the New York draft. The defendant, Williams, immediately left the state, and thereafter procured said draft to be cashed at Cayuga, Ind., by Malone & Sons, bankers at that place. The latter were innocent purchasers of the draft. The following extract from the petition shows the nature of the damages sustained by the plaintiff below: "That Malone & Sons, bankers, were innocent purchasers of said draft, and that this plaintiff was liable thereon to said Malone & Sons for the amount of said draft; that, in order to protect itself against loss, it became necessary for plaintiff to counsel and advise with attorneys, and employ a lawyer to go to Cayuga and procure a settlement of said draft by said Williams with said Malone & Sons, by returning to them (said Malone & Sons) of said money paid to him (said Williams) by said Malone & Sons on said draft, which was finally done; that in procuring the settlement of said draft to the extent aforesaid, and repayment of the money to said Malone & Sons, plaintiff was put to large expenses, to wit, for telegraphing, attorney's fees, and other expenses, the sum of \$325.92; that all of said costs and expenses were caused by and through the wrongful, fraudulent, and felonious acts of the defendant in giving said worthless check and representing the same to be valid and good, and said amount is the fair and reasonable value thereof; that said defendant has now in his possession said original draft drawn on the National Bank of North America, and refuses to deliver the same to plaintiff." There is a prayer asking for judgment in the sum of \$2,500 damages, and that the draft be canceled and surrendered to the plaintiff in error. A general demurrer was sustained by the court below to the petition, upon the ground that it does not state facts sufficient to constitute a cause of action.

The demurrer seems to have been considered and held good on the theory that the claim for \$325.92 for telegraphing, attorney's fees, and other expenses is to be treated as a demand for punitive damages. We differ with the trial court in its view of the nature of the damages sued for. The bank, through the fraud of the defendant, was induced to deliver to him a draft for \$2,800, payable to his order, which he wrongfully caused to be cashed. The natural and probable result of his false representations must have been foreseen by Williams, which was that the defrauded bank would use all reasonable means to prevent loss to itself, and, if necessary, employ counsel and incur other expenses in its efforts to recover the draft or its proceeds. The demurring party admits that the expenses mentioned were necessary. Exemplary or vindictive damages are inflicted as a punishment to the wrongdoer, and not as compensatory to the plaintiff. Here an actual pecuniary loss was sustained by one party through the fraudulent conduct of

another, and the former merely seeks to be made whole. The amount claimed is not embraced within the term "smart money." The following authorities uphold the right to recover in such cases: *Philpot v. Taylor*, 75 Ill. 309; *Railroad Co. v. Richardson*, 135 Mass. 473; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; *Bennett v. Lockwood*, 20 Wend. 223; *D. M. Osborne & Co. v. Ehrhard*, 37 Kan. 413, 15 Pac. 590. In *Suth. Dam.* (2d Ed.) § 58, it is said: "If one's property is taken, injured, or put in jeopardy by another's neglect of duty imposed by contract, or by his wrongful act, any necessary expense incurred for its recovery, repair, or protection is an element of the injury. It is often the legal duty of the injured party to incur such expense to prevent or limit the damages, and, if it is judicious and made in good faith, it is recoverable, though abortive." Before the bank can be denied a right to recover, it must be decided that the petition shows no actual damages sustained by it, but that exemplary damages only are sued for. *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804. Counsel for defendant in error rely on the case of *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994. It will be noted that the attorney's fees and expenses for which it was sought to charge the wrongdoer in that case were incident to and incurred in and about the trial of the action to recover damages for a previous conversion of the plaintiff's goods. Ordinarily a party can recover, beyond the amount of his actual damages, only the costs of the action allowed by statute. Counsel fees and expenses of the particular suit to recover actual damages from a wrongdoer are allowed where the defendant has been guilty of fraud, malice, or oppression. They are purely exemplary, and are to be considered only in cases where substantial actual damages may be recovered. The attorney's fees and expenses in the present action of the bank against Williams are not sued for or claimed. The expenses paid by the bank were incurred before this action was commenced. They were necessary, and arose solely as a result of the fraud of defendant below. To hold that the petition sets out a claim for damages not compensatory, and of a nature which can be allowed only as a punishment to the defendant, would be to remove from the category of actual and exact damages a loss resulting directly from the fraudulent conduct of a party, and place it in a class where it might or might not be recovered by one who sustained it, according to the uncertain notion of a jury whether the wrongdoer ought or ought not to be punished for his acts. In an action for damages sustained by malicious arrest and prosecution, the counsel fees and expenses of the party arrested, incident to his preliminary examination, and necessary to secure his release, if charged with a felony, may be recovered, on the principle that they are compensatory; but expenses and counsel fees

attendant upon the particular action brought to recover for the injuries growing out of such arrest can be awarded only as a punishment to the defendant, and are not compensatory in character. Their allowance rests in the discretion of the jury. The damages sought to be recovered in the case at bar may be likened to the expenses in the supposed case incurred by the party maliciously prosecuted in obtaining his discharge from arrest at the preliminary examination. They are compensatory, and, a right to recover being established, the jury cannot, in their discretion, refuse to include the amount in their verdict in favor of the party wronged. The judgment of the court below is reversed, with directions to overrule the demurrer to the petition. All the justices concurring.

(62 Kan. 476)

STATE v. STEGMAN.

(Supreme Court of Kansas. Feb. 9, 1901.)

PROSECUTING WITNESS — COST BOND — FORGERY—INDICTMENT—COMPARISON OF HANDWRITING.

1. When costs are adjudged against a prosecuting witness, the statute provides that he shall be committed until the costs are paid, unless he executes a bond, in double the amount of the costs, that he will pay the same within 30 days. A complainant against whom costs were adjudged tendered a bond for the actual amount of costs due, which was accepted. *Held*, that the fact that the bond was not executed for double the amount of the costs does not invalidate it; nor will the indefiniteness of the recital as to the date of the judgment, which is otherwise sufficiently identified, destroy its validity.

2. An information alleging that the defendant, with intent to defraud, forged a bond purporting to be the act of another, whose name was signed thereto, is sufficient to show that the forger intended to defraud the person whose name was feloniously signed to the bond. *State v. Lee*, 4 Pac. 653, 32 Kan. 360.

3. A writing clearly proved to be genuine, and about which there is no dispute in the evidence, may be used as a basis for comparison of handwritings, and to show that a certain other writing with which it is compared is not genuine.

(Syllabus by the Court.)

Appeal from district court, Ellis county; Lee Monroe, Judge.

Christ Stegman was convicted of forgery, and appeals. Affirmed.

Christ Stegman was prosecuted for forgery upon the following information: "I, James T. Nolan, county attorney of the aforesaid county and state, in the name, by the authority, and on behalf of the state of Kansas, come now here and give the court to understand and be informed that on the 13th day of March, 1900, at the county of Ellis and state of Kansas, one Christ Stegman, a person then and there being, with the intent then and there to defraud, feloniously and unlawfully did then and there falsely make, forge, and counterfeit a certain instrument in writing for the payment of money, to wit, the sum of \$33.30, the same purporting to be the act of

another person, to wit, of one George Konrade, which said false, forged, and counterfeited instrument of writing is of the purport, value, and effect as in the following copy thereof, to wit: 'Hays City, Kansas, March 12th, 1900. Know all men by these presents, that whereas Christ Stegman was the prosecuting witness in an action before Eli Fox, a justice of the peace of Big Creek township, Ellis county, Kansas, wherein the state of Kansas was plaintiff and John Degenhardt was defendant, and upon the trial thereof said defendant was acquitted and discharged; and whereas, the jury that tried the case stated in their verdict and finding that the complaint was made by said Christ Stegman, prosecuting witness, without probable cause, upon which the court taxed the costs to said Christ Stegman, and entered judgment against for said costs, amounting to \$66.30, upon which the defendant paid \$33.00: Now, therefore, we, the undersigned, are held and firmly bound to the state of Kansas that the said prosecuting witness will pay the balance due upon said costs judged (\$33.30) within thirty days from and after March 7th, 1900. Witness our hands this 12th day of March, 1900. Christ Stegman. George Konrade,'—by which said false, forged, and counterfeited instrument of writing a pecuniary demand and obligation was then and there purported to be created, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas." The information was attacked by a motion to quash because it did not state facts sufficient to constitute a public offense, and that the instrument alleged to have been forged was not the subject of forgery, and, further, that the instrument was absolutely void and created no legal obligation against any one. The motion was overruled, and upon a trial the defendant was convicted. He complains of the rulings on the sufficiency of the information, and also of the admission of testimony and of the instructions given to the jury.

Saum & Bryant, for appellant. A. A. Godard, Atty. Gen., J. T. Nolan, Co. Atty., and A. D. Gilkeson, for the State.

JOHNSTON, J. (after stating the facts). The appellant was a prosecuting witness in a criminal proceeding in which the defendant was acquitted, and the jury which tried the case found that the prosecution was instituted without probable cause. The costs in that case, amounting to \$66.30, were adjudged against the appellant, of which he paid \$33; and he was required to enter into a bond for the payment of the balance, or stand committed until the costs were paid. To meet this requirement, a bond was executed, which purported to have been signed by George Konrade, but which is alleged to have been forged, and upon the filing of the same the appellant was released from custody. He attacks the sufficiency of the information, because the

instrument alleged to have been forged is not in the statutory form, and is not valid for the purposes for which it was intended. The statute provides that, when costs have been adjudged against prosecuting witnesses in cases like this one, the justice "shall commit such complainant to jail until such costs be paid, unless he shall execute a bond to the state in double the amount thereof, with security satisfactory to the justice that he will pay such judgment within thirty days after the date of its rendition." Gen. St. 1880, § 5631. The bond in question sufficiently describes the proceeding in which the costs were adjudged, and recites the payment of \$33 of the amount. The bond executed is for the exact amount of the unpaid costs, and not in double the amount of the costs, as the statute prescribes. Because of this departure from the statutory requirement, it is argued that the bond is invalid, and forgery cannot be predicated on it. While the justice of the peace should have required a bond in double the amount of the unpaid costs, the fact that it was for a less amount is not a matter of which those signing it may complain, nor will it invalidate the instrument. If conditions other than those prescribed by statute were written in the bond, which made it more burdensome or imposed greater obligations on the signers than the statute prescribes, there would be good cause to complain. As the variance from the statutory requirement lessens the liability of the signers, there is no room for the claim that the conditions imposed are more burdensome, or that the instrument is thereby invalidated.

It is also contended that it is defective in not giving the date when the costs were adjudged. The bond was dated March 12, 1900, and the costs were required to be paid within 30 days from and after March 7, 1900. Inferentially, then, the judgment was rendered on March 7, 1900, as the statute requires that the complainant must pay the judgment within 30 days after the date of its rendition. The recitals in the bond sufficiently show the identity of the judgment rendered; and the mere absence of a specific recital of the date of the rendition of the judgment will not invalidate the instrument, where the date inferentially appears, and where the identity of the judgment is otherwise sufficiently shown. *Johnson v. Weatherwax*, 9 Kan. 55; *Tillson v. State*, 29 Kan. 322; *Handy v. Town Co.*, 59 Kan. 395, 53 Pac. 67.

The contention that the information is fatally defective because it did not definitely specify the person intended to be defrauded cannot be sustained. It alleges, in substance, that Stegman, with intent to defraud, forged the bond, which is set out in full, and which purports to be the act of George Konrade, whose name was signed to the bond; and that is followed by the averment that by the forged instrument a pecuniary demand and obligation was purport-

ed to be created. These averments point with sufficient certainty to Konrade as at least one of the persons intended to be defrauded. The instrument purports to create an obligation against him, and, as his name was feloniously forged to the instrument, the law implies that the forger intended to defraud him. And the same might be said as to the state and the persons to whom the costs were due. *State v. Foster*, 30 Kan. 365, 2 Pac. 628; *State v. Lee*, 32 Kan. 360, 4 Pac. 653. The case last cited is directly in point, and the information which was there upheld appears to have been used as a pattern for the information in the present case.

Complaint is made of the admission of a bond signed by Konrade, which was used as a basis for comparison with the signature alleged to have been forged. The rule is that writings which are used as a basis for comparison of handwritings must either be admitted to be genuine by the parties seeking to use them, or at least clearly proved to be genuine. In the present case the writing introduced by way of comparison was not admitted to be correct, but Konrade testified that he signed the instrument, and there was no dispute or denial of his testimony. Under the circumstances, the court was warranted in accepting the writing as genuine, and in admitting it as evidence to be used as a standard of comparison. *State v. Zimmerman*, 47 Kan. 242, 27 Pac. 99; *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739.

There is no merit in the objections made to the rulings on the instructions, and, as the case appears to have been fairly submitted to the jury upon sufficient evidence, the verdict and judgment must be upheld. All the justices concurring.

(62 Kan. 448)

HUNT v. BOWMAN et al.

(Supreme Court of Kansas. Feb. 9, 1901.)

RIGHTS OF MORTGAGEE—PURCHASE OF SUPERIOR JUDGMENT—ENFORCEMENT OF NOTE.

1. The holder of a mortgage on real estate which is inferior in lien to a prior judgment on the land mortgaged, but which judgment was not followed by a levy within the year, may rightfully purchase another judgment, also a lien on the land, but inferior in time to both the first judgment and the mortgage, and enforce the same by a levy upon and sale of the mortgaged property within a year from its rendition. The mortgagee buying the land sold under said execution sale will take title paramount to the lien of the first judgment.

2. The holder of a note secured by mortgage may bring an action on the note alone, obtain judgment thereon, and sell the mortgaged property upon execution. Such proceeding is not prohibited by section 3301 of chapter 93 of the General Statutes of 1897.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by John Hunt against H. C. Bowman and others. Judgment for defendants, and plaintiff brings error. Reversed.

Gleed, Ware & Gleed, for plaintiff in error.
Bergen & Dana, for defendants in error.

SMITH, J. This was an action in ejectment. Defendant in error H. C. Bowman was the owner of a judgment against M. E. Martin, which was a lien on the real estate in controversy. Henry King was the holder of a mortgage upon the same property executed and recorded after the rendition of the Bowman judgment, and junior thereto. William Sims was also the owner of a judgment against Martin, which at the time of its rendition was inferior in time and lien to both the Bowman judgment and the King mortgage. This last judgment of Sims was bought by the plaintiff in error, John Hunt, as trustee for King, and for his benefit. The last execution on the Bowman judgment was issued on December 3, 1894, and returned unsatisfied on January 5, 1895, by order of the execution creditor. It was issued more than one year subsequent to the rendition of the judgment, but within five years thereafter. Execution was issued on the Sims judgment (owned by Hunt) within one year after its rendition, and the property in controversy was sold thereunder, and bought in by plaintiff in error. He received a sheriff's deed, upon which is based his right to recover the real estate involved in this action. He was denied a recovery in the court below. He comes here by proceedings in error.

Section 4729 of the General Statutes of 1899 reads: "No judgment heretofore rendered or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of any debtor to the prejudice of any other judgment creditor." If there was no mortgage lien on the property intermediate the two judgment liens, there could be no serious controversy between the parties. In such case the title of plaintiff in error, derived through the sheriff's deed, would be obviously paramount,—made so by the failure of the first judgment-lien holder to take out and levy an execution within a year after his lien became fixed on the land. *Lamme v. Schilling*, 25 Kan. 64. It is insisted, however, that because of the King mortgage the provisions of the statute above quoted cannot be applied in strictness; that Hunt, acting for King, could not, by the purchase of the Sims judgment, and by selling the land upon execution under it, secure to the mortgagee rights superior to those of a judgment creditor whose judgment was prior in time to the mortgage. The industry of counsel for defendants in error has produced two early cases from Ohio which seem, at first reading, to sustain their position. In *Brazee v. Bank*, 14 Ohio, 319,—a case in many respects like the present one as to facts,—the court concluded that because of an intervening mortgage the liens of the prior and subsequent judgments were not equal,

and that the first was paramount. It is said: "The elder judgment is a lien upon the entire land, and the entire value of the land may, if necessary, be appropriated for its satisfaction. But a subsequent judgment creditor has not a lien to the same extent. His lien extends only to that interest in the land which remains after the satisfaction of the mortgage, and there can certainly be no propriety in saying that a lien which attaches to the entire land shall be postponed to one which attaches only to a part of the land, or, more properly speaking, to the interest which remains in the judgment debtor after having executed a mortgage upon the land." See, also, *Fitch v. Mendenhall*, 17 Ohio, 578. In 1846, when the above cases were decided, a mortgagee in that state took something more than a mere lien on the land. After condition broken, the legal title vested in the holder of the mortgage, and he could recover and keep possession of the lands subject only to the right of the mortgagor to redeem. *Childs v. Childs*, 10 Ohio St. 339. In the decision quoted from it will be noted that the court attaches importance to the fact that the lien of the senior judgment covered the entire land, and that the junior lien rested only on the interest which remained in the judgment debtor after having executed a mortgage upon the property, viz. the equity of redemption. The latter judgment is referred to as attaching only to a part of the land. In this state the common-law attributes of mortgages have been wholly set aside. A mortgage is a mere security, creating a lien, but vesting no title and giving no right of possession either before or after condition broken, and the mortgagor's right of control is not impaired by the existence of the lien. *Chick v. Willetts*, 2 Kan. 384. Both the Sims and the Bowman judgments were liens on the whole real estate of Martin, and it cannot be said, under our system, that one of these judgments attached to a part of the land only, by reason of the mortgage lien existing in favor of King. We conclude, therefore, that, as the Sims judgment was enforced by a timely execution, the purchaser thereunder took title unaffected by the Bowman judgment lien; execution to enforce the same not having been issued within a year from the date when the judgment was rendered. In thus applying the express terms of the statute fixing the priority of judgments, we have given little consideration to the King mortgage. Under its conditions the note secured by it has been due since 1894. It seems to have been abandoned as a lien, and right of action upon it and its accompanying note barred by the statute of limitations. We think that the holder of such a mortgage might lawfully succeed by assignment to the rights of the owner of a judgment junior to it, to the same extent that a stranger might have so done. In *Brazee v. Bank*, supra, the land was sold, and the proceeds brought into court. The

claimants, consisting of judgment creditors and mortgagees, were each asserting preferred rights to the fund. We cannot say that the decision would have been the same had the mortgagees made no claim to the money, and that the mere fact of the existence of an old mortgage, probably barred by limitation (under which no rights were asserted), intervening between the judgments, would have moved the court to do otherwise than to enforce the plain provisions of the statute respecting the liens of judgments.

It having been shown that the note upon which the Sims judgment was founded was secured by a mortgage which was never foreclosed on the property in controversy, it is claimed that the execution sale is void, being prohibited by section 396 of chapter 95 of the General Statutes of 1897. This section is merely directed against the sale of real estate pledged for the payment of a debt by the mortgagee, or a trustee in his behalf, under a power of sale, without a decree of court ordering the same. It can have no reference to an execution sale under a judgment like the one under consideration. The owner of a note secured by mortgage may sue and take judgment upon the note alone, and is not required to foreclose his mortgage. *Lichty v. McMartin*, 11 Kan. 424. In some states it has been held that the holder of a note and mortgage may not proceed to judgment on the note only, and then levy on and sell out the mortgaged property under an execution. Several authorities are cited to this effect. One of the chief reasons given why such action is not permitted is that in a proceeding of that kind the time of redemption allowed in foreclosure cases is cut down and shortened, to the detriment of the mortgagor. Here no prejudice could arise in that respect; for by force of chapter 109 of the Laws of 1893 a period of 18 months' redemption exists from the time of sale under a judgment resulting from a suit to foreclose the mortgage, or from an action on the note alone. Again, it appears from the testimony that the plaintiff in error bought nothing but the Sims judgment rendered on the note. Having sued on the note alone, and then having parted with his judgment, we think the mortgagee has by his acts evidenced a waiver of any lien under his mortgage. The claim that the sheriff's deed to Hunt was void, because against public policy, is not tenable. If he had been the attorney of King, his purchase of the Sims judgment would not have been in opposition to the interests of his client, but in furtherance thereof.

The tax deed of defendants in error was deficient in description and void, under the authority of *Spicer v. Howe*, 38 Kan. 465, 16 Pac. 825. It was expressly pleaded in the reply that the tax deed was void on its face. This, in the absence of a verification, was sufficient to raise the question of the validity of the deed. The judgment of the court

below will be reversed, and a new trial ordered. All the justices concurring, except *POLLOCK, J.*, not participating.

(82 Kan. 454)

HARRISON v. MULVANE et al.

(Supreme Court of Kansas. Feb. 9, 1901.)

TRUST—EVIDENCE TO ESTABLISH.

A person charged with the duty of selling corporation stock in order to raise a fund with which to pay incumbrances upon the property of the corporation, and who is himself the owner of one of the incumbrances, junior in time to the others, and acquired by him before he became obligated to sell the stock, is not a trustee as to the property of the corporation covered by the incumbrances, and forbidden to protect his own interests in it by buying the prior liens on it, merely because he was under obligation to sell the corporation stock to raise a fund to discharge the corporation indebtedness.

(Syllabus by the Court.)

Error from district court, Shawnee county; *Z. T. Hazen*, Judge.

Suit by *T. W. Harrison* against *J. R. Mulvane* and others. Judgment for defendants, and plaintiff brings error. Affirmed.

T. W. Harrison and *D. R. Hite*, for plaintiff in error. *Overmyer, Mulvane & Gault* and *Holmes & Perry*, for defendants in error.

DOSTER, C. J. This was an action in the nature of a creditors' bill brought under section 481 of the Civil Code by the plaintiff in error, *T. W. Harrison*, as a judgment creditor of the *Topeka Capital Company*, against the defendants in error, *J. R. Mulvane* and others. The court below made a general finding on the evidence in favor of the defendants, and error has been prosecuted to this court. The question for consideration is, did a trust exist, on the facts disclosed on the trial, in *J. R. Mulvane*, in favor of the creditors of the *Topeka Capital Company*? As stated, the finding was general, and in favor of the defendants; hence we are bound to view the facts as claimed by them. If, therefore, there was evidence to support all of the material claims of the defendants, the judgment of this court must also be in their favor. Summarized, the facts were that *J. K. Hudson* was indebted to one *O. C. Baker* in the sum of \$15,000, secured by first mortgage upon a newspaper property, and also indebted to the late Senator *P. B. Plumb* in the sum of \$10,000, secured by a second mortgage, and to *J. R. Mulvane* in the sum of \$5,000, secured by a third mortgage upon the same property. All this indebtedness was incurred prior to 1890. In that year the newspaper property was sold to the *Topeka Capital Company*, a corporation, in consideration of 500 shares of stock in the company issued to *Hudson*. Contemporaneously with this sale a written agreement was made between *Hudson* and the company by the terms of which 495 of

the shares of stock were deposited with the Bank of Topeka in trust and as security for the payment of all indebtedness constituting liens upon the property; such stock to be sold by the trustee, upon the written request of the board of directors of the Capital Company, for the purpose of raising funds with which to discharge the liens for indebtedness. The writing provided that the sale should be made by the president of the trustee bank, or, in case of his absence or inability to act, then by the vice president. At this and all subsequent times hereafter mentioned J. R. Mulvane was the president of the Bank of Topeka. Soon after the transaction last mentioned, Mulvane sold the debt and chattel mortgage owned by him to the Bank of Topeka, but bought it back in 1895. The amount paid for it was not shown. Its face value, including overdue interest, was nearly \$7,500. The precise date of the repurchase was not shown. It would appear to have been as early as July, 1895, because in that month Mulvane made an affidavit of renewal of the mortgage as a subsisting lien owned by him. However, there is some uncertainty in his testimony as to whether the transaction did not occur at a later time. October 23, 1895, the board of directors of the Topeka Capital Company, in pursuance of the aforementioned agreement with J. K. Hudson, requested Mulvane, the president of the Bank of Topeka, to sell the stock held by the bank as trustee, in order to raise a fund to discharge the indebtedness against the company's property; and at the same time they authorized the execution of a mortgage upon the property to the Bank of Topeka to secure \$3,900 previously borrowed from it, and an additional sum of \$1,100 for present purposes, making \$5,000 in all. This mortgage was executed, and constituted the fourth lien upon the newspaper property. In pursuance of the request of the board of directors of the Capital Company, Mulvane endeavored to sell the stock. It quite satisfactorily appeared from the evidence that he made a diligent effort to dispose of it, but was unable to find a purchaser. At or about the time of the direction of the company to Mulvane to sell the stock, the latter, being the owner of the third lien upon the mortgaged property, bought the two prior liens. He bought the one owned by Baker for \$15,000, paying the principal sum, without an accumulation of several thousand dollars of interest which then existed. He bought the one owned by the heirs of the Plumb estate for \$8,000, which was \$2,000 less than the principal sum, without counting a like accumulation of several thousand dollars interest. His own lien at this time amounted to about \$7,500. He also bought the mortgage last mentioned,—the one given by the Topeka Capital Company to the Bank of Topeka,—for which he paid \$5,000. This made \$35,500 of actual investment in the

various securities mentioned. In 1895, and previous to the matters heretofore stated, a suit in equity had been instituted in the United States circuit court for the district of Kansas by one J. E. Baker, to which all of the persons owning liens upon the newspaper property were made parties defendant, and required to disclose their interest in said property. August 5th of that year J. R. Mulvane filed a cross bill in said suit, claiming a chattel-mortgage lien to secure the aforementioned indebtedness of about \$7,500 from the aforesaid J. K. Hudson. This would seem to be additional and confirmatory evidence of the claim made by him in this suit that the particular indebtedness mentioned was owned by him previous to the time of his purchase of the prior liens of C. C. Baker and the Plumb heirs. In the equity suit in the United States circuit court a decree was rendered in March, 1897, adjudging J. R. Mulvane to have liens upon the property in his own original interest, and as the successor by assignment of the indebtedness and liens of C. C. Baker and the Plumb heirs and the Bank of Topeka, to the amount of \$52,274, and also decreeing a sale of such property to satisfy the indebtedness. This sale was made and confirmed in April, 1897. The sale was made to one D. W. Mulvane, and, as reported by the master, was for the sum of \$52,000. As a matter of fact, it was only for the sum of \$38,500. As before stated, the actual investment of J. R. Mulvane in the mortgages covering the property at the time of and including his purchase of the prior liens of Baker and Plumb and the subsequent lien of the Bank of Topeka, and inclusive of his own lien, was \$35,500. The Baker mortgage of \$15,000 bore interest at 8 per cent.; the Plumb mortgage of \$10,000, purchased for \$8,000, bore interest at 7 per cent.; the Mulvane mortgage of \$5,000 bore interest at 12 per cent.; and the Bank of Topeka mortgage of \$5,000 bore interest at 8 per cent. There had been, therefore, fully \$3,000 of interest accumulated upon J. R. Mulvane's investment of \$35,500 in October, 1895, when the most of it was made, and the date of the sale made by the master to D. W. Mulvane in April, 1897.

Upon the above state of facts, the plaintiff in error contends that J. R. Mulvane was a trustee for the Topeka Capital Company and its creditors, and is accountable to them for the difference between the amount actually invested by him in the various liens upon the company's property and the amount reported by the master to have been realized at the foreclosure sale of such property. The reason for this claim is the familiar rule that a trustee is prohibited from purchasing the property which is the subject of his trust, and which rule, at the election of the cestui que trust, avoids the sale, or gives a right of action for resulting profits against the unfaithful trustee. It is said by the plaintiff

in error that inasmuch as the Bank of Topeka was the trustee for the sale of the Topeka Capital Company's stock, and inasmuch as a corporation can only act by its officers, and inasmuch, also, as the president of the bank was specially designated in the trust agreement as the one to make the sale, Mulvane, as such president, was in reality the trustee. If this were a determining question in the case, we might agree with the plaintiff in error; but the question does not involve the relation between the bank and its officers, nor the duties devolving upon them to discharge trusts resting upon the bank, but the question is, did the trust assumed by the bank, to sell the shares of stock to raise funds to pay the newspaper company's indebtedness, preclude Mulvane, or even the bank, as the trustee, from buying prior liens upon the company's property to protect a subsequent lien held by him or it? It must be observed that the trust was not in relation to the newspaper company's mortgaged property, but it was in relation to Hudson's shares of stock in the company, which had been pledged for the payment of the company's indebtedness. The trust was not in relation to the company's property, but it was in relation to Hudson's stock. It is true that the trust was to sell stock to pay indebtedness upon property, but that does not make the property or the indebtedness upon it the subject of the trust. The subject of the trust was not corporation property, but was shares of corporation stock. Had the trustee charged with the sale of the stock bought it for himself, the doctrine invoked by the plaintiff in error might have application; but the trustee did not buy the stock, the subject of the trust. He only bought liens upon the property to discharge which the proceeds of the sale of the stock were to have been applied if such sale could have been made. We do not believe that equity, rigid as it is in its scrutiny of the conduct of trustees, condemns such a transaction, in view of the fact that the trustee was himself the owner in good faith of a subsequent lien, to protect which it became advisable to make the purchase of prior liens. The Mulvane lien of \$5,000, the third in order of priority, antedated the making of the trust agreement. The debt, to secure which that lien was given, was contracted before Mulvane or the Bank of Topeka became a trustee, and it was in existence during all the time the trust agreement existed. A question has been raised by the plaintiff in error as to whether that indebtedness was in reality owned by Mulvane, or the bank of which he was president. It was contracted to Mulvane, but, as before stated, was afterwards sold to the bank, and by the bank sold back to Mulvane, as he claimed. Now, for the purposes of the case, it is immaterial whether Mulvane or the bank owned it. One or the other of them did. If in reality the bank owned it, no right has been lost to the plaintiff in error through an as-

sertion of ownership by Mulvane, its president. The ownership of the mortgage by the bank, with the consequent right to protect it by the purchase of outstanding liens, would have been as potent against the plaintiff in error as the same ownership with the same right in Mulvane. It might have been different if the Mulvane mortgage had been acquired by assignment from some person other than the Topeka Capital Company subsequent to the making of the trust agreement, and with knowledge of the existence of that agreement. It might then have been claimed that the trustee was scheming to speculate in the trust property, assuming that such property was a newspaper property, and not shares of stock; but the trustee, if he were to be called such, purchased no interest in the trust property, if it were to be called such, with a view to speculation in that property. What the trustee, if he were such, bought, was an outstanding prior lien upon the trust property, if it were such, to protect a subsequent lien acquired by him before he became trustee, and continuously held by him since that time. This, we feel sure, he was lawfully authorized to do. We might agree with the plaintiff in error that Mulvane, if a trustee as to the newspaper property or the liens upon it, was accountable for the difference made by him between his actual investment in the trust property and what he realized out of it at the master's sale. It is this difference which the plaintiff in error asks. He must, therefore, be held to have ratified Mulvane's acquisition of the legal title to the so-called trust property. He does not ask that the transaction be set aside as void, but he permits it to stand, and asks that Mulvane be compelled to pay him such portion of the profits realized out of the transaction as will discharge his judgment. If, therefore, Mulvane made no profits, the plaintiff in error cannot lawfully have the relief asked. As before shown, Mulvane made no profits, except the contract rate of interest on his actual investment. If we could concur with the view of the plaintiff in error as to Mulvane's liability, we could not hold him to the payment of a sum of money as profits upon an unlawful transaction merely because the master reported a sale for a larger sum than was actually realized. It would only be for actual profits that Mulvane could be held, if for anything. That, as before shown, was nothing but simple interest. The difference between his actual investment of \$35,500 and \$38,500, the sum actually realized by him at the sale, did nothing more than cover the interest which accrued between the two periods mentioned on the actual investment made. This, of course, is a form of profit, but it is not of that exaggerated amount or fraudulent character as to be taken seriously into account even in a transaction which the law otherwise condemns.

Other claims of error have been made, but they are either subsidiary to the principal one

above discussed, and therefore need not be mentioned, or they are not well taken. In the presentation of the case many authorities were cited on both sides, none of which, however, has a direct bearing upon the precise question. All of them were simply declarative of abstract and fundamental rules, the soundness of which cannot be disputed. Their applicability to the case in hand is not, however, perceived. The controversy is a peculiar one. That controversy relates to the right of a person charged with the duty of selling corporation stock, in order to raise a fund to pay liens belonging to himself and others, to protect his own lien by buying those prior to it, when his own lien had been acquired previous to the time he took upon himself the obligation to sell the stock. Upon this precise question counsel have not furnished us with any direct authorities, and the multiplicity of our labors has prevented research for ourselves. The judgment of the court below is affirmed. All the justices concurring.

(62 Kan. 436)

STATE v. KIRBY.

(Supreme Court of Kansas. Feb. 9, 1901.)

MURDER—INFORMATION—ALLEGATION AS TO MEANS—EVIDENCE—OTHER OFFENSES.

1. Murder may be committed by several means, and, where both shooting with a pistol and with a shotgun may have contributed to produce the death of the deceased, both means may properly be alleged in a single count of the information, and proof that death was caused by either of the means will sustain the charge.

2. Following *State v. McGaffin*, 13 Pac. 500, 36 Kan. 315, it is held that the information herein contains the essential averments of a charge of murder.

3. A conversation participated in by defendant, his wife, and the deceased, and which was material in the case, was all admissible in evidence, including what was said between the defendant's wife and the deceased in the defendant's presence.

4. Testimony was offered by the state of ambiguous statements made by the defendant before the homicide, which it is claimed indicated a purpose to take the life of the deceased. The defendant admitted the making of a part of the statements, and desired to explain his meaning, and the sense in which the words were used; but the court refused to hear any explanation as to what was in his mind when the statements were made, or of the intent with which the language was used. Held error.

5. Testimony as to the commission of offenses by defendant not in any way connected with that charged in the information, and which would tend to degrade and prejudice him, should be carefully excluded from the jury.

6. The general rule is that, where knowledge of an ultimate fact is in issue, testimony that it is a matter of general reputation in the community is competent, as tending to trace notice to the party sought to be charged; but such testimony is never admissible unless the person sought to be charged with notice stands in such relation or is so situated as to render it probable that he would be informed of what is generally known.

7. There is no such probability that neighborhood gossip and reports or reputation of the unchastity of a daughter will reach a father as to make such evidence receivable against

him in a prosecution for murder, where his defense is that information of the seduction of the daughter excited him to uncontrollable passion, and to an insane impulse to kill the seducer.

(Syllabus by the Court.)

Appeal from district court, Jefferson county; Marshall Gephart, Judge.

Thomas C. Kirby was convicted of murder, and appeals. Reversed.

Morse & Casebier and David Overmyer, for appellant. A. A. Godard, Oscar Raines, Co. Atty., and Shaeffer & Phinney, for the State.

JOHNSTON, J. On the morning of December 21, 1899, Thomas C. Kirby shot and killed G. A. Foley at Perry, Kan. Kirby owned a hotel at Perry, which he managed and operated with the assistance of his wife and children. Foley was station agent for the Union Pacific Railway Company at that place, and lived at Kirby's hotel for some time before the homicide; and it is claimed that while there he seduced Clara Kirby, a daughter of the defendant. The seduction and condition of their daughter came to the knowledge of Kirby and his wife, it is claimed, on December 14, 1899, when they had an interview with Foley, and endeavored to have him marry Clara, and, so far as possible, make reparation for the wrong done her and her family. This he declined to do, and, when further pressed to marry the girl, stated that it was impossible to do so, as he had been married, and had a wife living. Clara was taken to Topeka by the defendant, where an examination was made by a physician, and his report confirmed the fears of the Kirbys as to the condition of their daughter. In behalf of the defendant it is claimed that the disclosure and disgrace first stupefied him, and then, as he came to realize the real nature and effect of the wrong done to his daughter, and that there was no disposition on the part of Foley to make amends or to protect the reputation of the girl, he became more and more excited, and ultimately gave way to uncontrollable passion, and to the insane impulse to take the life of Foley, who had so greatly wronged his daughter and humiliated and degraded the family. His claim and testimony is that on the morning of the tragedy, one week after the disclosure, he went to the room of Foley, and demanded again to know what Foley was going to do as to his daughter, and was informed by Foley that he did not intend to do anything, when the defendant told Foley that he would prosecute him and put him behind the bars for his wrong and crime; that Foley thereupon rushed upon the defendant, declaring with an oath that he would kill him, whereupon the defendant drew his revolver to defend himself, but Foley grabbed the weapon, and, in the scuffle which followed, the revolver was discharged, and the bullet struck the defendant's ankle and foot. The defendant finally gained control of the weapon and

dred, striking Foley on the shoulder, and then the defendant laid down the revolver and took up a shotgun that was near by and shot Foley, who was still aggressively attacking him; the loads from both barrels taking effect in Foley's breast. Foley ran downstairs and out of the house, pursued by the defendant, who was wild with excitement and passion, and who, with the revolver, which he had picked up again, fired another bullet into Foley's body. Foley fell on the sidewalk, and in a few minutes afterwards died. On the part of the state it is claimed that Kirby was not greatly disturbed when he learned of his daughter's condition; that he allowed Foley to continue as a guest of the hotel for a week following the disclosure; that, even if he had been excited and stirred to desperation when first told of his daughter's misfortune, there was a week of time for the cooling of his passions and in which to regain control of his reason; that his conduct in borrowing weapons, purchasing ammunition, and otherwise making preparations betrayed deliberation and a malicious purpose to kill, and this, with certain threats alleged to have been made by the defendant, and other testimony, tended to show that the killing was not done under any insane impulse or in self-defense. Kirby was prosecuted for murder, and the charging part of the information is as follows: "That on the 21st day of December A. D. 1899, in said county of Jefferson and state of Kansas, one Thomas C. Kirby, then and there being, did then and there unlawfully, feloniously, willfully, deliberately, and premeditatedly, and with malice aforethought, kill and murder one G. A. Foley, then and there being, by shooting him, the said G. A. Foley, with a certain gun, commonly called a 'shotgun,' then and there loaded with powder and leaden shot and leaden bullets, and by then and there shooting him, the said G. A. Foley, with a certain pistol, commonly called a 'revolver,' then and there loaded with powder and leaden bullets, which said shotgun and said pistol, both so as aforesaid loaded with powder and leaden shot and leaden bullets, he, the said Thomas C. Kirby, then and there in his hand and hands had and held. A more definite description of said shotgun and said pistol is to this informant unknown. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas." Upon this charge a trial was had, which resulted in a verdict finding the defendant guilty of murder in the second degree.

In his appeal the defendant questions the sufficiency of the information, arguing that it is bad for duplicity, in that it charges two acts of killing, each with a distinct weapon, and that in fact two independent offenses are charged in a single count. This contention is not sound. Only one offense is charged, and that is the willful, premeditated

ed, and felonious killing of Foley by the defendant, at a stated time and place, by shooting him with a shotgun and with a revolver. Death may be produced or murder committed by several means, and, since both the shooting with the pistol and the shotgun may have contributed to produce the death of Foley, both means may properly be alleged in a single count, and proof that death was caused by either of the means will sustain the charge. *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; *State v. Hewes*, 60 Kan. 765, 57 Pac. 959; *State v. Kornstett*, 62 Kan. —, 61 Pac. 805. While the information does not, in so many words, allege that the wounds were inflicted by the shooting, or that they were mortal and resulted in death, it does allege distinctly that Foley was killed and murdered by the defendant at a fixed place, and upon a certain time, by means that are described, and in language that can leave no doubt as to the character of the wounds inflicted or the cause of the death. We think the information contains the essential averments of a charge of murder. *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560.

Many exceptions were taken to rulings upon testimony, only a few of which require consideration and comment. The defendant sought to prove the provocation for the intense feeling and passion which possessed him when the killing was done, and was permitted to show the betrayal of the daughter, and a part of what was said at the conference which occurred between Foley and the defendant and wife shortly after the relations between Foley and the daughter had come to the attention of the defendant. What was said between Foley and the defendant that would stir the feelings and rouse the passions of defendant was received without objection, but when the conversation on the same subject between Foley and defendant's wife, in presence of defendant, was offered, a general objection was made, which the court sustained. This ruling was erroneous. All three participated in the interview, and what was said pertinent to the subject between Mrs. Kirby and Foley was just as competent as the conversation between Foley and the defendant. Whether this error alone is so prejudicial as to require a reversal, it is not necessary to determine.

Testimony was given of vague statements said to have been made by defendant, before the homicide, indicating a purpose to kill or get rid of Foley. In his testimony the defendant stated that he did say to a witness that one boarder had gone, and "that there would be some more in the same fix in a few days, or by to-morrow, or something like that." He was then asked, "What did you mean by that?" But the court, on general objections, excluded the answer, or any explanation of what was in his mind, or to whom he referred in his statement. It was

important testimony, and probably made an impression upon the minds of the jurors. The statements were offered by the state, and were interpreted as hints at violence and threats against Foley, who was killed the next day. The defendant admitted a part of the statements claimed to have been made by him, and desired to explain his intention, or the sense in which the words were used. He claims the explanation he would have made was that one of the boarders had failed to pay his board and had been turned away, and that he referred to another boarder, who was also in default, and would also be turned away. The statements used were open to more than one interpretation, and the defendant, who was on trial for his life, was certainly entitled to tell the jury what his intention was. In *Gardom v. Woodward*, 44 Kan. 758, 25 Pac. 199,—a case involving the good faith of the transfer of property,—it was held that the party might testify directly as to his intention and the state of his mind with respect to the transfer. In deciding the case it was said: "The condition of a man's mind, with reference to what he thinks, feels, believes, intends, and his motives, is always a fact, and it is a fact which is often required to be ascertained both in civil and criminal cases; and only one person in the world has any actual knowledge concerning that fact, and that person is the one whose condition of mind is in question; and where he is a competent witness to prove such condition he may testify to the same directly." See, also, *Bice v. Rogers*, 52 Kan. 209, 34 Pac. 796. The testimony against the defendant of the implied threats, was admitted to show a criminal intent, and, since intent may be thus proved indirectly, no reason is seen why it may not be proved directly; and his testimony of the meaning and intent of the language used, instead of being a mere inference, is based on consciousness and actual knowledge. See, also, *Com. v. Woodward*, 102 Mass. 155; *Seymour v. Wilson*, 14 N. Y. 567; *Nash v. Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753; *Abb. Tr. Ev.* 780; *Whart. Ev.* § 508; 14 Alb. Law J. 387.

The defendant's wife was called as a witness in his behalf, and on cross-examination the court, over objection and protest, permitted the state to ask a number of questions as to other and distinct offenses committed by the defendant, and which would tend to blacken and degrade him in the eyes of the jury. She was interrogated as to whether he had not maintained a "joint" in the hotel, and harbored lewd women there, and whether he had not used and permitted the use of rooms in his hotel for gambling purposes. To most of the inquiries she gave a negative answer, but the state was thereby allowed to insinuate charges and offenses other than the one alleged in the information, and the questions implied an assertion of belief on the part of the attorneys for the state that the defendant was guilty of the

other offenses. In respect to keeping gambling rooms, the witness said that she did not know that the defendant did carry on or allow gambling in the hotel, but on persistent questioning she was compelled to admit that she had seen men playing cards in the rooms of the hotel, but did not know that they were gambling. The charge of gambling imputed by this question is a felony, and it has no connection whatever with the offense of murder, which was in issue, and there is no justification or excuse for the allowance of these questions. To a series of questions the witness was required to answer whether the defendant had not permitted lewd women to come and stay at the hotel for days at a time, and whether at times within two years prior to the homicide the defendant had not required her to carry refreshments to rooms occupied by lewd women. To these questions her answers were substantially in the negative form, but they were qualified by stating that it was not within her knowledge, and not that she remembered of. Another question admitted over objection was whether her husband had not for a long time prior to December 1, 1899, run a joint in room No. 6 of that building. She answered the question by saying that people said that he did, and that she did not see anything sold; and, when inquiry was made as to whether she did not know it, her answer was, "I do not suppose I knew it." The court struck out her answer that people said he ran a joint, and allowed the remainder to stand. These offenses and misconduct, which were made the subject of inquiry, were not linked in any way with the offense charged in the information. The general rule is that the charge upon which a person is being tried cannot be supported by proof that he committed other offenses, even of a similar nature. Evidence which legitimately tends to support the charge, or show the intent with which it is committed, is not to be excluded on the ground that it will prove other offenses, but the other offenses inquired about in this case do not fall within any of the exceptions to the general rule. Presumably, the defendant came to the trial prepared to answer the charge of murder, but, since no other charge was made against him, it is not to be expected that he was prepared to answer the offenses of the unlawful sale of liquor, or the keeping of a gambling establishment or a house of prostitution. The allowance of the questions, which were persistently put with the sanction of the court, together with the halting and qualified answers of the witness, was a manifest injustice to the defendant, and must have created a prejudice in the minds of the jury against his general character.

A number of witnesses were called by the state to testify to the character of Clara Kirby for chastity and virtue. The form of the question put was whether the witnesses "knew her reputation for chastity and virtue

prior to December 21, 1899," and in this way evidence of an impeaching character was elicited. The questions, if relevant and competent for any purpose, were objectionable in form. When character is in issue, the law limits the inquiry to general character, and not to specific acts,—not the estimate of a few nor the opinion of a part of the community; but it can be shown only by common report, general reputation, and opinion generally entertained of the party in the community where he lives. The questions asked did not call for general reputation, but for the character or reputation of a person other than the defendant a proper subject of inquiry? Prosecutions are very rare where evidence of the general character of any one besides the accused is admissible. Of course, the character of a witness in the case is open to attack, but there the inquiry is limited to the general character of the witness for truth and veracity. *State v. Eberline*, 47 Kan. 155, 27 Pac. 839. While Clara Kirby was a witness in the case, the challenged testimony was not admitted to impeach her credibility, and the jury were instructed that it was not competent for that purpose. In trials for seduction and rape the character of the prosecutrix for chastity is involved, and proof like that in question may be received. So, also, is character directly in issue in libel cases; and the character of the deceased may be the subject of inquiry in some cases of homicide, where the claim is that the defendant acted in self-defense. It is easy to understand why the law permits an examination into character in these as well as in a few other cases that might be mentioned; but in none of them is the issue of character so remote, or a showing by testimony of reputation so questionable, as in the case before us. The moral character of the defendant could not be attacked by the state unless he offered evidence of his good character, and yet here the state was allowed to produce evidence of the moral character of an outside party against the defendant, when the issue was his guilt or innocence of a charge of murder. The state contends that it was competent to trace knowledge of his daughter's unchastity to him, because of his claim that the knowledge of the seduction excited his passions and drove him to desperation and to kill the seducer, and that, if such knowledge was traced to him months before the homicide, the claim that his mind was unhinged by the story of the seduction would be contradicted and overthrown. If it be assumed that he had heard reports derogatory of his daughter's character, who can say that information from herself of her seduction by a guest of the house, and of her pregnancy, would not arouse his passions or affect his mind? Again, who can say that reports of the unchastity of a daughter would probably come to a father, and that, if any one was so bold as to repeat to him rumors impeaching her virtue, he would believe

them? Our attention is called to the general rule that, where knowledge of an ultimate fact is in issue and provable, evidence that it is a matter of general reputation is competent, as tending to trace notice to the party sought to be charged with notice; but such proof is never admissible unless the person sought to be charged with notice stands in such relation or is so situated as to render it probable that he would be informed of what was generally known. Counsel for defendant well say that the father would be the last one to hear reports of the lewdness of a daughter. All know that any ordinary person would not only hesitate to believe such rumors, but would also shrink from relating them to the father or speaking of them in his presence. The cases in which people would carry gossip as to the unchastity of wife, daughter, or sister to the male members of a family would certainly be exceptional, and would never occur except under extraordinary circumstances. Instead, then, of its being probable that the father would be informed of these reports, we think it contrary to all reasonable expectation, and that they might be heard by almost every one in the community, and yet the father be in complete ignorance of them. Again, if a bad general reputation of the daughter was shown to exist, and that notice of the same had been brought to the father, his belief in the reports must still be assumed, in order to say that his mind was not affected when he heard from his daughter's lips the story of her seduction by Foley. How can any matter of fact be assumed against a defendant charged with murder, where the law requires that every just presumption of fact, as well as every reasonable doubt, must be resolved in his favor. As we have seen, it was unlikely that he would hear the reports, and, without other and better testimony, it is contrary to reason to hold that he would believe them; and, if he did not give them credence, he was necessarily in the same situation, and would be affected by the story of the seduction the same as though he had not heard the reports. It should be said that, aside from the opinions of the witnesses as to reputation, there is no testimony showing that the defendant ever heard a whisper or entertained a suspicion against his daughter's character until he heard the story of her seduction by Foley. Our conclusion is that the testimony, even if it had been in proper form, was inadmissible as against the defendant. *Tucker v. Constable*, 16 Or. 407, 19 Pac. 13; *Carter v. Carter*, 62 Ill. 439; 5 Am. & Eng. Enc. Law (2d Ed.) 871; *Gillett, Ind. & Col. Ev.* § 296.

Other objections to the exclusion of testimony are taken, but they are rendered immaterial by the fact that subsequently the court admitted the testimony in answer to other questions. Some other exceptions are taken, but they do not appear to us to be sufficiently material to require particular at-

tention or comment; but, for the errors pointed out, the judgment must be reversed, and the cause remanded for a new trial.

(62 Kan. 463)

MORISETTE v. HOWARD (HOLMAN, Intervener).

(Supreme Court of Kansas. Feb. 9, 1901.)

CORPORATION—SALE OF ASSETS—PAYMENT—ACTS OF DIRECTORS—REPLEVIN—DAMAGES—INSTRUCTIONS.

1. A strictly private corporation, owing no peculiar duties to the public, has the same dominion over and power to dispose of its property that an individual has; and, when the exigencies of its business render it necessary, it may, if done in good faith and with the assent of its stockholders, discontinue business and dispose of its entire assets and property, with a view of paying its debts and closing up the affairs of the corporation.

2. For such a purpose the acceptance of real estate by a mercantile company in part payment for a stock of merchandise will not condemn or defeat the sale.

3. Informal or irregular action of the board of directors or agents of a corporation, and which was within the corporate power, may be cured by the ratification of the stockholders.

4. Where, on the face of the records of a corporation, it appeared that the board of directors expressly authorized a sale of certain property, and it appeared to be regularly conferred, the purchaser, in the absence of knowledge or notice to the contrary, had a right to assume that the record correctly recited the facts, and that the authority was formally given at a meeting of the board.

5. *Carson v. Golden*, 14 Pac. 106, 36 Kan. 705, as to the measure of damages in replevin, followed.

6. The refusal of a requested instruction, not signed by the party asking it as required by section 275 of the Civil Code, is not a ground of error.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by W. H. Howard against A. Morisette, sheriff. Fannie L. Holman, intervenor. Verdict for plaintiff, and defendant brings error. Affirmed.

Caldwell; Willmoth & Ackley and Elliss, Cook & Elliss, for plaintiff in error. Pulsifer & Alexander and J. R. Hamilton, for defendant in error.

JOHNSTON, J. This action was brought by W. H. Howard, trustee, to recover the possession of a stock of merchandise from A. Morisette, sheriff of Cloud county, who had seized it as the property of the Clyde Mercantile Company, at the instance of the creditors of that company. After the action was begun, Fannie L. Holman intervened, and alleged that she had previously purchased and paid for the merchandise, and was the actual owner and entitled to the possession of the same. The creditors of the mercantile company, through the sheriff, claimed that the sale of the goods to Holman was fraudulent as against them, and was made by the company without power or authority lawfully exercised, and there-

fore was invalid. The trial resulted in a verdict in favor of the purchaser, and is, in effect, a finding that the sale was made in good faith and for a sufficient consideration. The honesty of the transaction was decided by the jury, and is no longer open to question; but there is a contention that the mercantile company had no power to transfer property, and that, if it had, the power was not exercised in a legal and effective manner. The stock of goods, business, and good will, which constituted the entire assets of the corporation, were sold to Holman for \$3,000 in money, payable in installments, and also for certain real estate in Kansas City, Mo., known as the "Ramsey Flats," upon which there was a mortgage. It is argued that the transfer of the entire assets and good will of the corporation would disable it from continuing the business for which it was organized, and that the attempt to do so is ultra vires and void. It is also contended that the acceptance of real property in consideration of the transfer, as well as holding of the same, are not within the purposes for which the mercantile company was organized. Our statute, which is only declaratory of the common law, provides that a corporation shall not employ its stock, means, assets, or other property for any other purpose than to carry out the objects for which it was created. Gen. St. 1890, § 1243. The mercantile company was organized for the purpose of buying and selling merchandise at retail, but that does not preclude the company from disposing of its property and closing out its business, if it is done in good faith and not for the purpose of delaying or defrauding its creditors. *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 19 Pac. 349. Counsel cites a number of cases to the effect that a corporation cannot abdicate its corporate functions or relieve itself from carrying out the object of its creation by a transfer of its entire property, or by otherwise disabling itself from performing corporate duties. The doctrine of these cases is applicable to corporations established for quasi public purposes, such as railroads and other companies having the right of eminent domain and other extraordinary privileges; but it has no application to corporations of a strictly private character, like the one in question. *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 27 N. E. 831; *Treadwell v. Manufacturing Co.*, 7 Gray, 393; *Howe v. Carpet Co.*, 16 Gray, 493; *Hodges v. Screw Co.*, 1 R. I. 312; *Evans v. Heating Co.*, 157 Mass. 37, 31 N. E. 696; 27 Am. & Eng. Enc. Law, 387. The mercantile company exercises no powers of a public nature, and a sale of its property and a retirement from business do not contravene public policy or affect the public in any way. It does not appear that the mercantile company obtained the real estate with a view of carrying on a real-estate business,

but, on the other hand, that the mercantile business was unprofitable, and the stockholders desired to wind up the affairs of the company by a sale and transfer of the business; and the real estate was taken in part payment, and as a step in the closing up of the corporate business. It appears to have been done in good faith, with the consent of the stockholders; and we see no reason why a mere trading corporation, like this one, may not close up its business in the manner pursued in this instance. The money consideration of the sale was used in paying creditors of the corporation other than those contesting; but it has been held that a corporation has the same dominion and control over the disposition of its assets and property as a partnership or an individual, and may make any honest disposition of them, and also that it has the same power and right to prefer its creditors that a partnership or an individual has. *Grand De Tour Plow Co. v. Rude Bros. Mfg. Co.*, 60 Kan. 145, 55 Pac. 848. Under the general finding of the jury, it must be assumed that the company and its agents acted in good faith in making the sale, and also in taking real estate in exchange for the goods, not as an investment, but as the most advantageous way of disposing of an unprofitable business, and closing it up with the least possible loss.

The next contention is that the power of transfer was not lawfully exercised. While the corporate records of the board of directors authorize the sale of the goods, it appears that a formal meeting of the board was not in fact held. There was an individual assent of the directors reported to be present at a meeting, and there was also the acquiescence and assent of the stockholders and those representing them. The act which they undertook to perform was within the power of the corporation. It was informally done, but the informality was cured by the ratification of the stockholders, who were the owners of the corporate property, and have the ultimate authority and control. On the face of the records, there was express authority by the board, which appeared to be regularly conferred; and Holman, the purchaser, in the absence of knowledge or notice to the contrary, had a right to assume that the record correctly recited the facts, and that the authority was formally given at a meeting of the board. Aside from these considerations, the transaction had been completed, the money had been paid, the property had changed hands. All having been done with the knowledge and consent of those in whom the ultimate authority rested, and from whom the board of directors derives its power, the transaction, however irregular, is not open to attack by any one other than the state. *Association v. Martin*, 39 Kan. 750, 18 Pac. 941; *Town Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569; *Same v. Morris*, 43 Kan.

282, 23 Pac. 569; *Bank v. Shumway*, 49 Kan. 224, 30 Pac. 411; *Town Co. v. Fletcher*, 46 Kan. 524, 26 Pac. 951; *Railroad Co. v. Johnson*, 58 Kan. 174, 48 Pac. 847; *Commercial Bank v. Cheshire Provident Inst.*, 59 Kan. 361, 53 Pac. 131; *Parkinson Sugar Co. v. Bank of Ft. Scott*, 60 Kan. 474, 57 Pac. 126.

Fannie L. Holman was the real party in interest, and the action of the court in allowing her to intervene and set up her rights in the premises was proper. It was competent for her to show that she was the sole party interested in the purchase, and that her husband, who had acted for her in making the purchase, paid no part of the consideration and had no interest in the property.

The measure of damages stated by the court, and to which an objection is made, appears to fall within the rule announced in *Carson v. Golden*, 36 Kan. 705, 14 Pac. 166, and furnishes no ground for reversal.

An attempt has been made to raise questions on instructions requested, but which were refused. It appears that the requested instructions were not signed as the Code requires. It is providing that such instructions shall be reduced to writing, numbered and signed by the party asking them, and delivered to the court. Civ. Code, § 275. This is a plain provision of the Code, and cannot be safely overlooked. The failure to give a requested instruction not signed as the statute requires is not assignable as error. *Douglass v. Geller*, 32 Kan. 499, 4 Pac. 1039; *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456; *Craig v. Frazier* (Ind. Sup.) 26 N. E. 842; *Railway Co. v. Mitchell* (Tex. Civ. App.) 26 S. W. 154. Our examination of the requested instructions satisfies us that, even if they were open to consideration, they would furnish no grounds for reversal. The charge of the court fairly presented the case to the jury, and we see no reason to disturb the verdict or judgment. Judgment affirmed. All the justices concurring.

ELLIS, J., not sitting.

(7 Ariz. 217)

BRILL et al. v. CHRISTY.

(Supreme Court of Arizona. Jan. 30, 1901.)

SALE OF LIVE STOCK—VALIDITY—REGISTRATION OF BRAND—CERTIFICATE—EVIDENCE.

1. Under the live stock law (Laws 1897, Act No. 6), providing that a transfer of live stock on a range may be made by a sale and delivery of the brand, but not prohibiting the sale or transfer of live stock in any other manner, the owner of an undivided interest in cattle on a range can transfer the same, as any other personal property, without delivery, by a bill of sale properly executed, acknowledged, and recorded, conveying his interest in the cattle.

2. Under Laws 1897, Act No. 6, § 50, making the certificate of the registration of a brand on cattle competent evidence of registration of such brand, and prima facie evidence of ownership, such certificate is not competent evi-

dence for the purpose of showing that the title to the cattle is in the party in whose name the brand is recorded.

Appeal from district court, Maricopa county; before Justice Webster Street.

Action by William Christy against Cora Brill, administratrix of the estate of James Roarke, deceased, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Baker & Bennett, for appellants. Charles F. Ainsworth, for appellee.

DOAN, J. An action was brought in the district court of Maricopa county by the appellee, as plaintiff, to recover the undivided one-fourth of a band of cattle branded thus, R, and for an accounting by appellants (the defendants) of their dealings with said cattle, and for a division thereof, and the delivery to the appellee of his alleged undivided one-fourth interest therein. The complaint alleged that one William Roarke was the owner of an undivided one-fourth interest in a certain band of cattle, and that James Roarke, since deceased, was the owner of the remaining three-fourths interest; that William Roarke conveyed his undivided one-fourth interest to William James Roarke, who in turn conveyed the same to the appellee herein; that, after the death of James Roarke, Cora Brill qualified as administratrix of the estate of the deceased, took possession of the entire band of cattle, and claimed title thereto to be in the estate of the said James Roarke, deceased. The answer of the appellants admitted the possession of the cattle to be in the appellant Cora Brill, administratrix; denied the ownership of the appellee, and his right to possession, of the one-fourth interest in said cattle; and alleged the estate of James Roarke, deceased, to be the owner of, and the appellant Cora Brill, as administratrix of the said estate, to be entitled to the possession of the entire band of cattle. Upon the trial of the cause the plaintiff, to sustain his title, introduced evidence to prove title in William Roarke to the one-fourth of the cattle in question, and offered in evidence an instrument in writing executed by William Roarke to William James Roarke, acknowledged before a notary public in California, and recorded in Maricopa and Yavapai counties, Ariz., conveying to said William James Roarke an undivided one-fourth part of a certain band of cattle, together with their offspring, which band of cattle is known by the following brand, R, which said brand is duly recorded on the records of Yavapai county, and which said band of cattle was lately in the custody and charge of James Roarke, who died on February 26, 1898, at Phoenix; also one undivided one-fourth of a certain band of horses, which said band was known by the same brand above set forth, and was likewise in the care and custody of said James Roarke at the time of his decease. Plaintiff

also offered in evidence a bill of sale executed by William James Roarke to William Christy, the appellee herein, acknowledged before a notary public in Phoenix, Ariz., and recorded in Maricopa county, Ariz., selling and conveying to the said William Christy "an undivided one-fourth interest in and to that certain band of cattle and horses known as the Roarke cattle and horses, and branded as follows, to wit, R, on the left hip of both horses and cattle." The case was tried to a jury. The counsel for the respective parties stipulated in open court that the jury return a special verdict upon the question submitted to them, "Is the plaintiff, William Christy, the owner of the undivided one-fourth interest in the cattle described in the complaint?" The jury returned a verdict saying, "We, the jury, in answer to the question submitted to us, 'Is the plaintiff, William Christy, the owner of the undivided one-fourth interest in the cattle described in the complaint?' say, 'Yes.'"

The court thereupon gave judgment to the effect that the appellee, William Christy, was the owner of the undivided one-fourth interest in the cattle, and ordered an accounting, and a division thereof, and the delivery of the said one-fourth, from which judgment and the denial of a motion for a new trial the defendants appeal, and assign as error: First, the court erred in admitting in evidence plaintiff's Exhibits A and B, the conveyances aforementioned; second, the court erred in rejecting defendants' Exhibit No. 1. The only question presented in the case is the admissibility in evidence of the three exhibits offered.

It is conceded that the band of cattle in question were running at large upon the range in Maricopa county, Ariz.; that three-fourths of the cattle rightfully belonged to the estate of James Roarke, deceased; that the administratrix of the said estate held possession of the entire band, claiming title thereto; and that Christy, the appellee herein, claimed title to the one-fourth interest through the conveyances above mentioned, from William Roarke to William James Roarke, and from William James Roarke to himself. Evidence was introduced, without objection on the part of the defendants, showing that at the time of the execution of the conveyance to William James Roarke, the grantor, William Roarke owned the one-fourth interest in the cattle that is now in controversy. Defendants objected to the introduction of plaintiff's exhibits in evidence for the reason that they purported on their face to be conveyances by bill of sale of certain cattle on the range; that they were not such instruments in writing as are provided for by the statute for the conveyance of cattle or brands of cattle upon the range, and consequently were immaterial and irrelevant. This objection does not in fact go to the instruments offered, but attacks the transactions they tend to prove, and is more plainly stated in argument by counsel in the words:

"Under this statute a purchaser only acquires title to cattle upon the range by a compliance with its terms. A bill of sale to cattle ungathered and upon the range, unaccompanied by actual delivery, which bill of sale only purports to convey the cattle themselves, and not the brand, is ineffectual to convey title to either the brand or the cattle, just as much as a verbal sale would fail to convey title to real estate." The question is presented, does Act No. 6, Laws 1897, termed the "Live Stock Law," provide for the conveyance of cattle on the range by bill of sale without actual delivery? An examination of that act discloses no express provision of this character, and the question therefore arises, is such transaction dependent upon special statutory authority, or is it permissible under the general laws for sale of personal property, unless inhibited by special statute? The appellants contend that the law recognizes no power on the part of the owner to sell cattle, except that conferred by the act in question, whereas the appellee claims that the authority to sell is recognized at common law, and can be exercised in the usual method of conveying personal property, except where otherwise provided by statute, and that, as the statute does not provide any particular manner in which cattle such as these in controversy should be sold, the owner could sell and transfer the same in like manner as any other personal property. In *Tome v. Dubois*, 6 Wall. 548, 13 L. Ed. 943, the United States supreme court held that "in a sale of personal property actual delivery is not essential, as it is well settled that when the terms of the sale are agreed on, and the bargain is struck, and everything the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery, and the property and risk vest in the purchaser"; and, unless there is some restrictive statutory provision to prohibit it, a deed or bill of sale, properly executed and acknowledged, attesting such sale and transfer, would be competent evidence to establish the same. In *Nance v. Barber* (Tex. Civ. App.) 26 S. W. 151,—a case very similar to the one at bar,—the question was whether a sale of certain cattle was valid. The sale had been made by bill of sale, unrecorded, of 116 head of cattle, which were, as the court held, running on the range. No segregation of the cattle or delivery of them had been made. The court said, referring to a statute almost identical with ours: "In sales covered by this statute, it cannot be doubted that, in order for the purchaser to acquire title to the property, he must take a written conveyance, and have the same duly recorded. But, in our opinion, the statute does not apply to the sale from Nance to the plaintiff. By its terms it is limited to the transfer of live stock as they run in the range, by the sale and delivery of the brands and marks. * * * Such transactions were commonly known as and designated a 'sale

of a mark and brand.' It is to these sales that the statute in question refers, and, as it places restrictions upon the right of an owner to sell his property,—one of the most valuable rights incident to ownership,—we do not feel at liberty to extend its meaning to transactions that are not embraced within its terms. * * * This was not a transfer by sale of the marks and brands." Does the aforesaid Act No. 6 prohibit the sale or transfer of live stock in the manner here under consideration? An examination of the statute shows conclusively that it does not. It makes special provisions for using and recording brands and for holding and disposing of live stock in several instances, but these are provisions for the benefit of the owners of live stock, and only affect the manner of holding, handling, branding, and transferring live stock as therein provided, and do not affect the general rights of owners of this class of property to sell or transfer their live stock in any other manner than those therein specifically defined. The plaintiff's exhibits were therefore properly admitted in evidence, under the general rules of evidence, and were material and relevant, as they tended to establish the fact in issue.

The second assignment of error alleges that the court erred in rejecting the defendants' Exhibit No. 1, which was a certificate of the secretary of the live-stock sanitary board that the brand on the left hip of cattle and on the left thigh of horses "was duly recorded under the provisions of section 50, Act 6, of the 19th legislative assembly of Arizona, for James Roarke, in the Territorial Brand Book No. 1, page 18," with the seal of the board attached. The defendants offered this certificate in evidence for the purpose of showing prima facie title to the cattle and brand mentioned in the certificate to be in the party in whose name it was recorded. The plaintiff objected to the introduction of the exhibit for the reason that it was not proper evidence of title; that it was incompetent for the purpose as alleged by the party offering it, and established no title whatever to the cattle in question in the defendants, as against the plaintiff; and for the further reason that it was a self-serving declaration,—which objection was by the court sustained. The appellants claimed that under the provision of section 50, Act No. 6, of the Laws of 1897, the certificate was admissible for the purpose of showing prima facie title to the cattle to be in the estate of James Roarke, deceased. Said section 50 provides that "at any time before the first day of July, after the passage of this act, it shall be the duty of the persons owning brands and marks, to file the same with the said board and the said board shall record the same in a book of brands and marks, and shall furnish the owners certificates thereof under the seal of the said board, free of charge, which said certificate shall be competent evidence of the registration of such brands, and prima facie

evidence of ownership." If the ownership of the brand or the fact of its registration was in controversy, the provision quoted would be applicable; but, as we have already seen in the consideration of the former assignment of error, the title to the brand is not in controversy. The conveyance did not purport to be a transfer or conveyance of the brand. Neither is the registration of the brand an issue in the case. Section 50 applies solely to the requirement for and the manner of the registration of brands, the proper evidence of such registration, and the ownership of the brands thus registered, and does not deal with the cattle that may be in such brands, the mode of their transfer, or the evidence of their ownership. There is a very material difference between the certified copy of a record and the certificate of an officer to what a record contains. Under the general rules of evidence, a public record can be proven by a copy thereof duly certified to by the proper and legal custodian of the record, but the courts will not assume that the conclusions drawn by such officer from the inspection of the records are correct. A certificate, therefore, of an officer as to the contents of such public record, based upon his summary or recital of what it contains, is not evidence, except in such instances as such certificate may be expressly constituted legal evidence by statute. *Jones, Ev. par. 356; Tessman v. Supreme Commandery (Mich.) 61 N. W. 261.* While, therefore, section 50 of the said act constitutes the certificate of the registration of a brand competent evidence of such registration, and prima facie evidence of the ownership of such brand, it does not make such certificate either competent or prima facie evidence for any other purpose. Consequently, neither the registration nor the ownership of the brand being in question, the provision of section 50 would not constitute such certificate evidence in this case. Not being a certified copy of any record, it was not entitled to be admitted under the general rules of evidence, and it was therefore properly excluded. These being the only errors assigned, the judgment of the district court is affirmed.

SLOAN and DAVIS, JJ., concur.

(38 Or. 512)

MAYES v. STEPHENS.

(Supreme Court of Oregon. Feb. 4, 1901.)

REFLEVIN—PLEADING—DEPARTURE.

Hill's Ann. Laws, § 76, authorizes the plaintiff to allege in his reply any new matter, not inconsistent with the complaint, which constitutes a defense to new matter in the answer. A complaint alleged ownership and possession of the boiler sued for when it was unlawfully seized. The answer averred that the boiler was real estate, and duly seized on execution against R., its owner. The reply alleged that R. had detached the boiler, and delivered the possession thereof to the plaintiff, to whom he gave a chattel mortgage on it, and that the

conditions of the mortgage had been broken. *Held*, that the reply did not constitute a departure, since evidence of the facts alleged in the reply was admissible under the allegations of the complaint.

Appeal from circuit court, Douglas county; J. W. Hamilton, Judge.

Action by J. G. Mayes against R. L. Stephens. From a judgment in favor of the defendant, plaintiff appeals. Reversed.

This is an action to recover the possession of a tubular boiler, or its value in case possession thereof cannot be secured, and damages for its detention; the plaintiff substantially alleging that he is the owner and was in the possession of the property when it was unlawfully seized by the defendant, who refused to surrender it upon a demand therefor, and that he is entitled to the immediate possession thereof. The defendant denied the material allegations of the complaint, and averred that said boiler was real estate which he, as sheriff of Douglas county, Or., attached as the property of one G. W. Riddle, in pursuance of a writ duly issued out of the circuit court for said county in an action wherein the latter was defendant, which acts constitute the alleged wrongful seizure and detention of which the plaintiff complains. The reply denied the material allegations of the answer, and averred that prior to such seizure Riddle detached said boiler, and delivered the possession thereof to the plaintiff, to whom he also gave a chattel mortgage thereon to secure a promissory note for the sum of \$500, payable on demand, which mortgage was immediately filed with the clerk of said county, and provided that, if said property was attached by the creditors of the mortgagor, the said note should at once become due and payable, and that plaintiff might sell the boiler in the manner prescribed by law. The reply further averred that said conditions have been broken. The court, upon motion, struck out the allegations of new matter in the reply, and, plaintiff having introduced his testimony and rested, a judgment of nonsuit was given, whereupon he appeals.

O. P. Coshaw, for appellant. J. C. Fullerton, for respondent.

MOORE, J. (after stating the facts). It is contended by plaintiff's counsel that the court erred in striking out the allegations of new matter in the reply, while defendant's counsel maintain that the averments so stricken out constituted a departure from the allegations of the complaint, and hence no error was committed in this respect. The statute permits a plaintiff to allege in his reply any new matter not inconsistent with the complaint, which constitutes a defense to new matter in the answer. Hill's Ann. Laws, § 76. The facts relied upon as a ground of action should generally be stated in the complaint; for, if the reply allege mat-

ter which constitutes an original cause of action, the averment of the latter pleading will be treated as a departure. *Lillenthal v. Hotaling Co.*, 15 Or. 371, 15 Pac. 630; *Wyatt v. Henderson*, 31 Or. 48, 48 Pac. 790; *Flisk v. Basche*, 31 Or. 178, 49 Pac. 981. But a new assignment in the reply, designed to affirm the averments of the complaint by correcting the defendant's mistake in regard thereto, is not a departure. *Bliss*, Code Pl. (2d Ed.) § 396. Matter which sustains a pleading is no departure, if set up in the reply, though it might have been set out in the complaint (*Fitnam*, Trial Proc. § 581), the rule being that the complaint and reply, when not repugnant, should be read together to determine the pleader's intent (*Lavery v. Arnold*, 36 Or. 84, 57 Pac. 906, 58 Pac. 524; *Cederson v. Navigation Co.* [Or.] 62 Pac. 637). In *Conklin v. Botsford*, 36 Conn. 105, an action having been commenced to recover damages for the conversion of a horse and a quantity of hay, it was alleged in the complaint that said property was "the plaintiff's own proper estate." The answer averred that the defendant, as an officer, in pursuance of an execution against the plaintiff, levied upon and sold the property. The reply alleged that the horse and hay, at the time they were seized, were held by him in right of his wife, as trustee for her under the statute. A demurrer to the reply having been interposed, it was held that there was no departure between the complaint and the reply. In *Bank v. Richards*, 6 Mo. App. 454, an action was instituted to recover a dividend on certain shares of capital stock which the complaint alleged the plaintiff owned and held, and, the reply having averred that he held said stock as a pledge, it was held that no departure existed, and the judgment thus rendered was affirmed on appeal. *Bank v. Richards*, 74 Mo. 77. A departure occurs when a party in a subsequent pleading abandons the cause of action which he at first stated, and chooses another, inconsistent with, and which does not support or fortify, the theory originally adopted. 6 Enc. Pl. & Prac. 460. In *Herring v. Skaggs*, 73 Ala. 446, it was held that, while it is a general rule of pleading that a replication must not depart from the allegations of the declaration in any substantial manner, yet, when the cause of action is stated generally in the declaration, the plaintiff may, if necessary, in a replication to a special plea, restate it in a more minute and circumstantial manner. To the same effect, see *Bank v. Hartfield*, 5 Ark. 551; *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882; *Hallett v. Slidell*, 11 Johns. 56; *Troup v. Smith's Ex'rs*, 20 Johns. 33; *Rosby v. Railway Co.*, 37 Minn. 171, 33 N. W. 698; *Houston v. Sledge*, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487. The test of departure is determined by a negative answer to the inquiry whether evidence of the facts alleged in the reply is admissible under the allegations of the complaint. 6 Enc. Pl. & Prac. 462; *Estes*

v. Farnham, 11 Minn. 423 (Gil 312). Applying to the case at bar the standard thus suggested for ascertaining a departure in a pleading, the question is presented whether evidence of the plaintiff's special property in the boiler by reason of his chattel mortgage thereon was admissible under the allegation of his general ownership thereof, as stated in the complaint. The statute confers upon the mortgagee of chattels the right to their immediate possession whenever a breach occurs in the condition of the mortgage, and, if possession thereof be not delivered to him upon demand, he may recover the same in an action therefor. *Hill's Ann. Laws Or.* §§ 132, 3837. It was formerly held in this state that a mortgage of chattels created only a lien upon the property affected thereby (*Chapman v. State*, 5 Or. 432; *Knowles v. Herbert*, 11 Or. 240, 4 Pac. 126); but it was subsequently determined that upon a breach of the condition of a chattel mortgage the mortgagee thereby secured a qualified ownership in the property (*Machine Co. v. Campbell*, 14 Or. 460, 13 Pac. 324; *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676; *Reinstein v. Roberts*, 34 Or. 87, 55 Pac. 90). In *Moorhouse v. Donaca*, 14 Or. 430, 13 Pac. 112, the plaintiff, having commenced an action to recover the possession of a header, alleged in the complaint that he was the owner and entitled to the possession thereof. At the trial testimony was introduced tending to prove that plaintiff's interest in the property resulted from a chattel mortgage given thereon, and, the court having instructed the jury that if they found that the machine was his property, either special or general, and that the defendant wrongfully took the same from his possession, they should find for the plaintiff, it was held that no error was committed in this respect. In *Crocker v. Burns* (Colo. App.) 56 Pac. 199, it was held, in an action to recover the possession of certain personal property, that an allegation of absolute ownership thereof was supported by evidence showing a special ownership by virtue of a chattel mortgage upon a breach of its conditions.

In such action, which has been substituted by the legislative assembly of this state for the common-law remedy of replevin, the issue usually tried is the right of possession; the ownership of the property alleged to have been unlawfully taken or detained being important only so far as it tends to establish the right sought to be enforced. Mr. Jones, in his work on *Chattel Mortgages* (4th Ed. § 690), in speaking of the mortgagee's interest in the property and his rights and remedies after a breach of the conditions of the mortgage, says: "In nearly half the states a mortgage of real property has come to be regarded as merely a lien, and not a conveyance of the legal title. But a chattel mortgage is a transfer of the title to the mortgaged property, and not a lien upon it, even in those states in which a mortgage of

real property is regarded as merely a lien upon it, and not a title to it in the mortgagee. Since the title of a mortgagee to real estate only becomes absolute after a strict foreclosure, or after a conveyance to him upon a foreclosure sale, while his title to personal property becomes absolute upon the mortgagor's default, a mortgage of personal property is in this respect a higher security than a mortgage of land." The doctrine thus announced has not been carried to that extent in this state, for it has been held that a mortgagor may sell or assign mortgaged personal property, subject to the lien of the mortgage (*Jacobs v. McCalley*, 8 Or. 124), though the statute, amended after such decision was rendered, makes the mortgagor of personal property a bailee, and, upon being convicted of an embezzlement of such property, prescribes a punishment therefor. *Hill's Ann. Laws Or. § 1771*. In *Machine Co. v. Campbell*, *supra*, decided subsequent to such amendment, Mr. Justice Thayer, in speaking of the interest transferred by a chattel mortgage and the rights of the parties thereunder, says: "The mortgagee, then, certainly has a right to the thing, and may, if a delivery of it to him on demand is refused, maintain an action in the nature of replevin to recover it. Having a claim upon the property, a right to its possession, coupled with the right to have it sold to satisfy his claim, is, it seems to me, more than a lien; it is a qualified ownership. Possession is property when it includes so important a right. The right of possession is a species of title. It is a dominion over the thing; not for all purposes, perhaps, but for a substantial advantage to the party. He may obtain control over it as a matter of right, and hold it as against every one until the mortgagor performs the conditions of the mortgage. The affair at least becomes a pledge of the property, as contradistinguished from an hypothecation. It may be well said, as in the two cases referred to (*Chapman v. State* and *Knowles v. Herbert*, *supra*), that a chattel mortgage simply creates, in the outset, a mere lien upon the property, and vests no title in the mortgagee; but that cannot be said after the conditions of the mortgage are broken. Then a new right arises, which is a legal right. The mortgagee becomes invested with a special property in the thing." It has been held that any interest in the property sought to be recovered, coupled with a right to the immediate possession thereof, constitutes such ownership as entitles the plaintiff, upon proof thereof, to the relief demanded. *Kimball Co. v. Redfield*, 33 Or. 292, 54 Pac. 216. "In replevin," says Mr. Justice Mitchell in *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452, "the plaintiff is not required to plead specially the source of his

title, or the particular facts which entitle him to the possession of the property. He may allege generally that he is the owner and entitled to the immediate possession, and, under that, prove any right of property, general or special, that entitles him to such possession. In replevin the term 'owner' does not necessarily import general or absolute ownership. The action being one for the possession, it is what may be called the 'possessory title' that is important. Hence, under the general allegation in plaintiff's complaint that he was the owner and entitled to the possession, it was competent for him to prove a chattel mortgage on the property from the owner to himself, and a breach of its condition that, by the terms of the instrument, entitled him to the possession of the mortgaged property. It could make no difference whether the condition broken was one for the payment of the debt or some other." A conclusion contrary to that just announced has been reached by the courts of last resort in other states, in which it is held that evidence of a mortgagee's interest upon a breach of the conditions of a mortgage was inadmissible under an allegation of general ownership; but most of these decisions have been predicated upon statutory provisions. Thus, in *Kern v. Wilson*, 73 Iowa, 490, 35 N. W. 594,—a case relied upon by the defendant,—the statute required the complaint to state "the facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership." *Code Iowa 1873, § 3225, subd. 3*. Our statute in respect to the mode of stating the facts in the complaint in an action of this character does not contain such a provision, though, when a delivery of the property is claimed at any time before judgment is rendered, the affidavit therefor must show that the plaintiff is the owner of the property, or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth. *Hill's Ann. Laws Or. § 133, subd. 1*. Construing in *pari materia* the several sections of the statute adverted to, and interpreting them in the light of the recent decisions of this court upon the subject of chattel mortgages and claim and delivery of personal property, we conclude that evidence of plaintiff's special property in the boiler by reason of the chattel mortgage and the breach of its conditions was admissible under the allegation of general ownership, and that the averments of the reply did not constitute a departure, but amplified the general allegations of the original pleading, and hence the court erred in striking out the new matter in the reply. It follows from these considerations that the judgment is reversed, and a new trial ordered.

(33 Or. 343)

CEDERSON v. OREGON R. & NAV. CO.

(Supreme Court of Oregon. Feb. 4, 1901.)

RAILROADS—INJURY TO PERSON ON TRACK—PLEADING—EVIDENCE—ESTOPPEL—INSTRUCTIONS.

1. Where the complaint in an action for the negligent killing of a person near the defendant railroad company's tracks stated that the ownership of the locus in quo was in decedent's employers, as a reason for his right to be there, and the defendant answered that this locus in quo was in its right of way, a reply that the decedent's employers and their servants had been licensed and invited by the defendant to pass over the place where the accident occurred was not objectionable, as a departure in the pleadings, since it merely restated with greater particularity matters going to make up the plaintiff's cause of action.

2. In an action against a railroad company for the negligent killing of a person near its tracks, evidence tending to show special ownership of the locus in quo in decedent's employers was admissible under an allegation of general ownership.

3. In an action against a railroad company for the negligent killing of a person near its tracks, conveyances tending to show the ownership of the locus in quo in decedent's employers were proper to go to the jury as color of title on an issue of adverse possession, if for no other reason.

4. In an action against a railroad company for the negligent killing of a person near its tracks, a deed from the decedent's employers admitting the company's right of way, not pleaded as an estoppel, could not be treated as such on the issue of the ownership of the locus in quo.

5. A requested instruction, in an action against a railroad company for the negligent killing of a person near its tracks, stating that "the plaintiff charges that the place of the accident was on the lands of decedent's employers, but the court charges you that it was on the defendant railway company's right of way," was properly refused, as misleading, since the company's ownership of a right of way was not inconsistent with the general ownership of the other party.

6. Where there was competent evidence in an action against a railroad company for the negligent killing of a person near its tracks that defendant was operating a train of cars on its track near the locus in quo, the trucks of which were too wide for the track, in consequence whereof the cars were derailed, which caused decedent's death, a requested instruction that there was no evidence to sustain the allegation was properly refused.

On rehearing. Petition overruled.

For former opinion, see 62 Pac. 637.

WOLVERTON, J. Counsel for appellant have presented a very able and exhaustive petition for a rehearing of this cause, but devoted largely to a reargument of matters heretofore fully considered. Their chief reliance, however, is based upon questions which they insist the court overlooked in disposing of the case.

Referring to the question of departure in the pleadings, it is asserted with emphasis that the complaint was intended to, and does, state the ownership of the locus in quo to be in Seufert Bros. Company. But, let it be admitted that it does; it is difficult to see how this could help the defendant, because, at most, the reply contains nothing more than a

new assignment,—simply a restatement of matters going to make up plaintiff's cause of action, describing more particularly what had been before described too generally,—and a departure cannot be predicated thereon. Phil. Code Pl. § 273; *Bank v. Richards*, 6 Mo. App. 454, affirmed in 74 Mo. 77. The testimony touching the ownership of the locus in quo would be equally admissible under this view as under the one adopted in the opinion. The conveyances, the admission of which is complained of, if they serve no other purpose, operate as color of title, and were therefore proper to go to the jury. And it cannot be doubted that there is ample evidence in the record upon which to put the case to the jury upon the question of adverse possession.

The defendant tried the cause in the court below upon the theory that the decedent was a trespasser, or at most was upon the defendant's right of way with its mere tacit assent, and hence that defendant owed him no duty of active vigilance to avoid hurting him, or, to state it in another form, that it owed him no duty except that it should not wantonly and willfully injure him. On the other hand, the plaintiff urged the theory that the decedent was something more than a trespasser or mere licensee; that he was at the place where he was killed by the encouragement and invitation of the defendant's officers and employes. At the trial here great emphasis was laid upon this especial issue, which received the greater attention because it presented the most important as well as the most vital question in the case. The instructions fairly presented the issue to the jury, and, while they may not be entirely unexceptionable, they are intelligible, and were undoubtedly understood by that body. The only doubt we entertained touching them was whether the court, in view of the attending circumstances and conditions, had sufficiently described or defined what would be reasonable care on the part of the defendant in the management and operation of its trains, having in mind the different phases of the proposition respecting the decedent's right to be at the place where he lost his life. But no instructions were suggested that were more explicit upon the subject. The jury could not have mistaken the real issue, so we concluded there was no error, and are of the same opinion now. It would have been a work of supererogation to have taken up the instructions one by one, and discussed them separately, the general rule being that they should be construed as a whole; hence the remark at the close of the opinion that what we had said would indicate our views as to those instructions not specially mentioned.

After plaintiff had rested, the defendant introduced in evidence a deed, dated January 7, 1896, from Seufert Bros. Company to E. McNeill, receiver of the defendant company, which recites, among other things, that "whereas, the Oregon Railway and Navigation Company is the owner of a right of way

200 feet in width across the premises above described, upon which right of way the railway of the said Oregon Railway and Navigation Company is at present constructed." Having in mind this deed, the court gave the following instruction: "The fact that Seufert Bros. Company had executed a deed to the railroad company in which they had admitted that the defendant had a right of way across the premises would not be conclusive against their right to the wagon road in this case; and the question of whether or not they did have a right to the wagon road, as well as the question as to whether or not they were licensees, and there by the invitation of defendant, are questions purely of fact for you to consider under the instructions which I have heretofore given you." To this the defendant took an exception, and requested another instruction, namely: "The plaintiff charges that the place at which the accident complained of occurred was upon the lands of Seufert Bros. Company, and that his decedent was at the time employed by the Seufert Bros. Company, and was rightfully upon the premises when he sustained the injury. But on this question I charge you that the uncontradicted evidence is that the place of the accident was upon the right of way of the defendant, and that defendant was engaged in the pursuit of a lawful business thereon." The request being refused, another exception was taken. Now it is strongly insisted that the court was in error in its treatment of the deed, in that it did not give it the effect of estopping the plaintiff from claiming that Seufert Bros. Company had any right inconsistent with the defendant's right of way. Primarily it may be observed that the deed is not pleaded as an estoppel, and cannot be considered in that aspect. Again, the instruction asked and refused contains a vicious non sequitur. It is the same as saying to the jury that, because the locus in quo was upon the right of way, therefore it could not be upon the premises of Seufert Bros. Company, and is misleading, because we have seen that the ownership of a right of way by the defendant is not inconsistent with the general ownership of the premises by Seufert Bros. Company. Nor is the fact that defendant possessed a right of way inconsistent with the idea that Seufert Bros. Company had acquired rights with reference to it as licensees. The instruction given proceeds upon this theory, and is therefore not erroneous.

It is further insisted that there was error in not giving the following instruction, viz.: "The plaintiff charges that the defendant was operating a train of cars over the premises and upon its tracks, the trucks of which were too wide for the tracks; but I charge you that there is no evidence to sustain this allegation and that you cannot consider the same." The vice of this instruction consists in the fact that it invades the province of the jury, because there was some evidence competent to go to the jury upon the subject.

It was sought, by motions addressed to the court, to have the evidence taken from the jury; but it declined to grant them, upon the ground that the evidence had some tendency to prove the charge alluded to in the instruction. The tendency may have been slight, but there is no mistaking the fact that it has some bearing upon the question, and was proper to be submitted to the jury.

Having carefully reconsidered the views expressed in the opinion handed down, we find no reason to doubt their soundness. The petition must therefore be overruled.

(121 Cal. 406)

DOON et al. v. TESH et al. (Sac. 853.)

(Supreme Court of California. Jan. 22, 1901.)

PUBLIC LANDS—MINERALS—ADVERSE CLAIMS
—APPEAL—DILIGENCE—JUDGMENTS
—ESTOPPEL.

Rev. St. U. S. § 2326, declares that, where an adverse claim is filed during the period of publication of a claim to mineral lands within the public domain, all proceedings shall be stayed until the controversy shall have been settled by some court of competent jurisdiction, and that the adverse claimant shall within a specified time commence proceedings in a court of competent jurisdiction to determine the right to possession. *Held*, that where plaintiffs in an action under the statute served a statement on motion for a new trial August 13, 1887, and then took no further steps, and on April 13, 1888, a motion by defendants to dismiss the proceedings for want of prosecution was denied, and thereafter, on April 20, 1900, a similar motion was made, on appeal from the denial of such motion the judgment of the trial court would not be sustained on the ground that the denial of defendants' first motion was conclusive of their right to a dismissal; it not appearing on what evidence the first motion to dismiss was denied, and it being probable that defendants could not obtain a patent until the motion for a new trial had been disposed of.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Lee Doon and others against Daniel Tesh and others. From an order denying defendants' motion to dismiss for negligence to prosecute with diligence, they appeal. Reversed.

R. S. Taylor, for appellants. H. B. Gillis, for respondents.

CHIPMAN, C. Motion by defendants to dismiss for neglect to prosecute with diligence. In 1882 plaintiffs brought the action to determine their right to the possession of certain mining ground, as against defendants' right to possession. The action was brought under section 2326, Rev. St. U. S. Defendants had judgment on demurrer in January, 1882. An appeal was taken to this court, and the judgment was reversed as to one of the plaintiffs, with instructions to overrule the demurrer to his complaint, with leave to defendants to answer thereto, and as to the other plaintiffs the judgment on the demurrer was affirmed. Subsequently, in 1886, the cause was tried by the court with-

out a jury, findings made in favor of defendants, and it was adjudged that the plaintiff, as to whom the action remained, take nothing, and judgment was entered for defendants November 29, 1886. Plaintiffs served a statement on motion for a new trial August 13, 1887, proposed amendments to which were served by defendants September 2, 1887. No further steps were taken on the motion for new trial. The judge who rendered judgment and made the findings went out of office, and on July 3, 1897, a motion was made before his successor by defendants' counsel "to dismiss proceedings now pending in said action." The notice of the motion stated that "said motion will be made upon the records, files, and papers in said cause, and upon the ground of plaintiffs' neglect to prosecute said action with diligence." The motion was to dismiss all proceedings now pending in the action, and the court denied the motion April 13, 1898, and no appeal was taken from the order. Defendants on April 20, 1900, gave notice of a motion "to dismiss said cause and all proceedings now pending therein," stating that "said motion will be made upon the records, files, and papers in said cause, and upon the ground that plaintiffs have neglected and refused to prosecute said action in refusing and neglecting to settle the statement on motion for a new trial, or to take any step for its settlement for the period of ten years." A motion was made in accordance with the notice, and on May 8, 1900, was denied, and the appeal is from this order.

Respondents make no objection to the form of the record, and treat all the matters set out in the transcript as properly here, and we shall also do so.

Respondents concede that the order now here was appealable. *McDonald v. McConkey*, 57 Cal. 325. But they contend that, defendants having failed to appeal from the order denying the first motion to dismiss, made April 13, 1898, that order became res judicata, and terminated defendants' right to move for a dismissal. We do not think defendants were precluded from again making a motion to dismiss, under the facts shown in this case. Here plaintiffs gave notice of intention to move for a new trial, and served a proposed statement, and defendants served their proposed amendments, and there the plaintiffs halted. Defendants had applied at the United States land office for a patent, and plaintiffs interposed adverse claims and filed a protest in the land office, claiming a portion of the land claimed by defendants. Under section 2326, Rev. St. U. S., this protest stayed proceedings "until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." The statute makes it the duty of the adverse claimant "within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction, to deter-

mine the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." The statute also provides that after final judgment the party entitled to possession of the claim may file a certified copy of the judgment roll with the register of the land office, and, upon complying with certain other provisions, patent may then issue. It is probably true that the filing of the judgment roll would not entitle the claimant to a patent under the United States statute, in the face of evidence that an appeal had been taken or was being taken, or that proceedings for a new trial were pending; and hence defendants could not avail themselves of their judgment until the motion to dismiss was disposed of. Where a motion for new trial is to be made on a statement of the case, the moving party must serve the proposed statement on the adverse party within a certain time, and, if the statement is not agreed to by the adverse party, the latter must within a certain time serve his proposed amendments. If the amendments are adopted, the statement shall be amended accordingly, and then presented to the judge for settlement. If not adopted, the moving party must present the proposed statement and amendments to the judge (Code Civ. Proc. § 659, subd. 3); and thereupon such proceedings for the settlement of the statement shall be taken by the parties as are required for the settlement of bills of exception by section 650. This latter section requires the moving party to present the proposed bill and the amendments to the judge who heard the case, and it becomes the duty of the judge to fix the time to settle the bill and notify the parties, and he must then settle the bill. If he should neglect or refuse to do so, the party desiring the bill settled may then come to this court and have the bill settled. Code Civ. Proc. § 652. Section 660 requires an application for a new trial to be heard, after the statement is filed, "at the earliest practicable period after notice of the motion; * * * and may be brought to a hearing upon motion of either party" after the statement is filed. In the present case the proposed statement was served, and so, also, were proposed amendments, but there the proceedings ended. Whether the proposed amendments were adopted or not, it was the duty of the moving party to present the statement and amendments to the judge. Defendants did all they were required to do when they presented their proposed amendments. They had no opportunity to call up the motion for a hearing, as the statement was not filed with the judge. When the first motion to dismiss the proceedings was heard and denied it was upon evidence of which we are not advised, and it must be presumed it was sufficient. Plaintiffs may have made a counter showing satisfactorily explaining the long delay in the matter of the motion for a new trial. At the

hearing of the last motion to dismiss, two years of still further delay appeared, and nothing was shown to have been done by plaintiffs in the meantime or at any time to bring forward their motion for a new trial. There was no counter showing by plaintiffs in any way explaining or excusing their neglect for 10 or 12 years to proceed with their motion for a new trial. Their reliance seems to have been wholly upon the order denying the first motion to dismiss as a bar to the second motion. We think the evidence adduced by defendants in support of their motion showed gross and inexcusable neglect on the part of plaintiffs, and, unless satisfactorily explained, was such as constituted a denial of defendants' motion an abuse of discretion, unless the first order barred the relief. Before we could say that the last order was barred by the first order on the doctrine of *res judicata*, it would have to appear that the last order was made upon the same facts which existed when the first motion was made, and the burden was on plaintiffs to make this showing. The power of the court to dismiss the proceedings looking to a new trial seems to be conceded, and we do not, therefore, pass upon that question. The court clearly could not dismiss the action on this motion, as it had gone to final judgment. We think, however, that the court should have granted the motion to dismiss the proceedings taken under the motion for a new trial. It is advised that the order be reversed, with directions to dismiss the proceedings relating to the new trial.

We concur: GRAY, C.; HAYNES, C

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, with directions to dismiss the proceedings relating to the new trial.

(131 Cal. 461)

LOS ANGELES COUNTY v. EIKENBERRY.
(L. A. 900.)

(Supreme Court of California. Jan. 30, 1901.)
COUNTY BOARD—POWERS—STATUTORY PROVISION—INTOXICATING LIQUORS—LICENSE TAX—ORDINANCE—VALIDITY.

1. County Government Act 1893, § 25, subd. 27, authorizing boards of supervisors to license, for the purpose of regulation and revenue, all kinds of business transacted in the county, is not unconstitutional, in that it authorizes supervisors to license all kinds of business for purposes of regulation and revenue in cities where like power is vested in corporate authorities.

2. The payment of a license tax imposed by a city ordinance for carrying on the business of retail liquor dealer does not exempt the licensee from paying a tax imposed by a county ordinance for carrying on the same business.

3. An ordinance requiring payment of a license tax for engaging in the occupation of retail liquor dealer is not void, as imposing a tax on sales, and not on the business.

4. An ordinance is not void because its subdivisions are not all numbered in consecutive order.

5. An ordinance requiring payment of a license tax of \$13 per month for carrying on the business of a retail liquor dealer is not unreasonable.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the county of Los Angeles, by John A. Gish, tax collector, against S. O. Eikenberry. From a judgment for plaintiff, defendant appeals. Affirmed.

Moye G. Norton, for appellant. Tirey L. Ford, Atty. Gen., for respondent.

COOPER, C. This action was brought in a justice court to recover the sum of \$26 license tax for carrying on the retail liquor business in the city of Los Angeles during the months of June and July, 1899. Defendant in his answer raised the question of the legality of the ordinance under which it was sought to collect the license, and the case was transferred by the justice to the superior court for trial. Findings were filed and judgment entered for plaintiff. Defendant has appealed from the judgment on the judgment roll. Many minor questions are raised and discussed by appellant's counsel, all of which we have examined, but we will discuss only those deemed material to the case as appears from the record here. On the 11th day of August, 1897, the board of supervisors of Los Angeles county duly passed an ordinance entitled "An ordinance imposing licenses, and fixing the rates thereof in the county of Los Angeles, state of California." The portions of said ordinance so far as material here are as follows:

"Section 1. It shall be unlawful for any person or persons, whether as principal, clerk, servant, agent or employé, to engage in, conduct or carry on any business, exhibition, or occupation in this ordinance specified, without first having procured a license so to do, as in this ordinance provided; and every person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor."

"Sec. 2. A license must be procured immediately before the continuance hereunder or the commencement of any business or occupation liable to license tax, as herein provided."

* * * No license issued under this ordinance shall authorize any person to carry on any business within the limits of any incorporated city or town having power to impose or levy any city or town license tax, unless in addition thereto the license required by such city or town be also first procured."

"Sec. 13. It shall be the duty of the tax collector, in the name of Los Angeles county as plaintiff, to bring suit for the recovery of any license tax herein imposed, against any person required by this ordinance to first procure a license before engaging in any business, as herein defined, who carries on or attempts to carry on such business without such license."

"Sec. 15. For the purposes of this ordinance a retail liquor establishment is defined to be: (a) Any place where spirituous, vinous, malt or mixed liquors are sold, served, or given away by the drink or glass. (b) Any place where spirituous, vinous, malt or mixed liquors are sold, served or given away in any quantity to be drunk upon the premises. * * * Any person who, either as owner, agent or otherwise, conducts or carries on, or assists in conducting or carrying on, a retail liquor establishment, as such establishment is herein defined, is for the purposes of this ordinance declared to be carrying on the occupation of a retail liquor dealer."

"Sec. 26. The rate of license for engaging in the occupation of a retail liquor dealer, as defined by section 15 of this ordinance, is hereby fixed at thirteen dollars per month, and such license may be transferred upon the consent of the board of supervisors to said transfer first being obtained."

It appears from the findings that at the time the above ordinance was passed, and while defendant was carrying on the business for which the license tax is sought to be collected, there was in force in the city of Los Angeles (being the place where defendant was carrying on business) a valid ordinance of the city, passed by the city authorities, whereby a license tax of \$50 per month was imposed upon defendant, and that such license tax under said city ordinance was paid by defendant for the identical months for which it is sought to charge him in this action. The main contention of defendant is that subdivision 27 of section 25 of the county government act of 1893 is unconstitutional, because it authorizes boards of supervisors to license all kinds of business for the purpose of regulation and revenue in incorporated cities, where like power is vested in the corporate authorities of the city. The portion of the section claimed to be unconstitutional reads: "To license for purposes of regulation and revenue all and every kind of business not prohibited by law and transacted and carried on in such county; * * * to fix the rates of license tax upon the same and to provide for the collection of the same by suit or otherwise." St. 1893, p. 358. We do not think the above provision is in conflict with the constitution. It has been held that the payment of a license tax under a valid ordinance of a city does not exempt the party so paying from paying a license tax to the county under an ordinance of the board of supervisors. In re Lawrence, 69 Cal. 610, 11 Pac. 217; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775. If there be a conflict between the ordinance of the city of Los Angeles and the county of Los Angeles in the regulations prescribed for carrying on of the business in the exercise of a police power, the ordinance of the city has superior force within the corporate limits of the city. Ex parte Roach, 104 Cal. 272, 37 Pac. 1044; Ex parte Mansfield, 106 Cal. 403, 39 Pac. 775. In Ex parte Roach,

supra, this court said: "The constitution recognizes the division of the state into counties, and has authorized the legislature to establish for them a uniform system of government; but it has also authorized the creation of other municipalities within the boundaries of the several counties, and has given to such municipalities the same power of legislation upon these enumerated subjects as is conferred upon the counties themselves; and the power thus conferred by the constitution is to be construed, if possible, in such a way as to give full effect to its exercise by each of the designated bodies. It is no more necessary that there be a conflict between the power thus to be exercised by the county and the city than if the authority of each had been derived through an act of the legislature." In the case from which we have just quoted, the defendant was arrested for a crime, in violating the county ordinance of Kings county prohibiting the sale of intoxicating liquors between the hours of 10 o'clock p. m. and 5 o'clock a. m. The defendant had paid a city license in the city of Hanford, which contained no such restriction as to time. It was held that there was a conflict between the two ordinances as to the police regulation, and that the county ordinance must give way to the ordinance of the city. In the case at bar the attempt is to collect revenue by a civil action, and there is no conflict as to revenue. Defendant is, under the authorities cited, liable both to the city and to the county for the revenue imposed upon him by the respective authorities of such city and county. It is said by defendant's counsel that the power is given to license "for regulation and revenue," and not for one alone. Conceding this to be true, the power may be exercised, but the regulation or police power must not conflict with a similar regulation of an incorporated town or city. But, aside from the county government act, ample and full power is given to the board of supervisors by section 11, art. 11, of the constitution: "Any county, city or town, may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." It will be observed that the only limitation upon the exercise of the powers so given is that the regulations to be made shall not be in conflict with the general laws. The ordinance in question is not in conflict with any general law. The ordinance passed by the city of Los Angeles is not a general law, within the meaning of this section of the constitution. Ex parte Campbell, 74 Cal. 25, 15 Pac. 318. The power given by the said section of the constitution is ample, regardless of the county government act. Ex parte Roach, 104 Cal. 274, 37 Pac. 1044. It is said by this court in Ex parte Haskell, 112 Cal. 416, 44 Pac. 725, 32 L. R. A. 529, in speaking of the duty of courts in upholding ordinances: "Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-

making power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs, within the law, of course; and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof." In the case at bar, we do not think the ordinance transcends the power of the board of supervisors under the constitution, nor does it conflict with any regulation of any ordinance of the city of Los Angeles.

It is next urged that the ordinance is void for the reason that it attempts to license the sales, and not the business; and we are referred to the case of *Merced Co. v. Helm*, 102 Cal. 150, 36 Pac. 390. In that case the ordinance imposed a license tax for the sale of enumerated articles, and the right to collect the tax by suit was limited to instances in which the persons commence, carry on, engage in, or conduct some "business" for which a license was required. In this case no such objection appears. It is evident, from reading the sections of the ordinance quoted, that the license is for engaging in the business of retailing liquors. By section 1 it is made unlawful to conduct or carry on certain enumerated businesses without first having procured a license. By section 26 the rate per month for engaging "in the occupation of a retail liquor dealer," as defined in section 15, is fixed. By section 15 any person who carries on or conducts a retail liquor establishment, as defined in other parts of the section, is declared to be carrying on the occupation of a retail liquor dealer. It has been said that the rule in *Merced Co. v. Helm* went to the extreme verge of strictness, and the court has been disposed to limit rather than extend its application. *Ex parte Seube*, 115 Cal. 630, 47 Pac. 596; *Ex parte Mansfield*, 106 Cal. 404, 39 Pac. 775. We think the ordinance valid under the authority of the above cases.

It is claimed that the ordinance was never published as required by law. The argument in support of this contention is that section 32 is missing, and that it was therefore published leaving out section 32. Evidently the number of section 32 was by some mistake omitted from the copy of the ordinance; for section 31 embraces two subjects,—pawnbrokers and persons or corporations engaged in the business of loaning money,—and each subject is embraced in separate and distinct sentences. But it is sufficient to say that there is nothing in the record to show that the original ordinance ever had any section numbered 32. It is stipulated that the ordinance as annexed to the defendant's answer and printed in the transcript "was published, as per the copy attached to defendant's answer and cross complaint, on the 14th, 16th, 17th, 18th, 19th,

20th, and 21st days of August, 1897; that said ordinance went into effect August 27, 1897." We know of no rule that would make an ordinance void because the subdivisions of it were not all numbered in consecutive order. The ordinance did not go into effect until 15 days after its passage. The court found that it was passed August 11, 1897. It went into effect August 27, 1897. The ordinance is not unreasonable. If other business carried on in the city of Los Angeles is taxed too low, or even if no license tax at all is imposed upon such business, it might be well for the defendant to bring the matter to the attention of the city and county authorities; but it is not an argument here sufficient for us to hold that \$13 per month is unreasonable for carrying on the business of selling liquors at retail. It has been held here that \$50 per month for such license was not unreasonable. *Ex parte Hurl*, 49 Cal. 557; *In re Guerrero*, 69 Cal. 88, 10 Pac. 261.

The defendant points out and attacks several other different and independent sections of the ordinance which he claims are unconstitutional. It will be sufficient for this court to determine the constitutionality of these sections when some proceeding is here in which they are involved. Defendant is here sought to be charged with a license tax for carrying on the business of retailing spirituous liquors. He has carried on the business, and has not paid the license. Under the views we have expressed, the section of the law under which the license tax is imposed is valid. This is sufficient as to defendant. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 410)

KIERNAN v. SWAN, County Auditor.
(Sac. 784.)

(Supreme Court of California. Jan. 22, 1901.)

CONSTABLES — FEES — COUNTY GOVERNMENT ACT—CHANGING COMPENSATION.

County Government Act 1893 (St. 1893, p. 481, § 196, subd. 14) provides that constables in counties of the thirty-fourth class shall have such fees as are now or may hereafter be allowed by law. St. 1896, p. 271, fixes a fee for such constables for making arrests, for mileage, etc., but provides that in criminal cases he shall not receive more than \$100 in one month, nor more than \$1,000 in any one year. *Held*, that though the act of 1896 was unconstitutional and invalid, so far as it contravened the act of 1893, in changing the compensation by limiting the amount to a fixed sum for a stated time, it was nevertheless valid so far as it regulated the fees for specific services; hence such constable was entitled only to the fee and mileage for arrests as therein provided.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by T. F. Kiernan against C. D. Swan, county auditor, for fees. Judgment for defendant, and plaintiff appeals. Affirmed.

L. W. Fulkerth and C. A. Stonesifer, for appellant. J. M. Walthall, for respondent.

HAYNES, C. This is an agreed case submitted under section 1138 of the Code of Civil Procedure. The defendant had judgment, and the plaintiff appeals.

The plaintiff is a constable in Stanislaus county, and performed services, as such, in criminal cases for which he is entitled to compensation; and the question is whether such compensation is fixed by the act of 1895, establishing fees of county, township, and other officers (St. 1895, p. 267), or whether he is entitled to compensation under the county government act of 1893 (St. 1893, p. 481, § 196, subd. 14). The board of supervisors allowed his claim under said county government act, and the defendant, who is county auditor, declined to audit the demand, claiming that plaintiff's fees were fixed by said act of 1895. The court below held that the constable was entitled to the fees in criminal cases provided in said act of 1895, "so far as such act regulates the fees to be collected for specific services, but not so far as such act limits the amount of fees to be collected in any one month," and gave judgment for the defendant. A statement of the services rendered, and the charges made therefor, is made a part of the agreed case, and shows services rendered from May 4th to May 14th, inclusive, amounting to \$11.30, all in cases of misdemeanor. The demand for said services was made July 6th, and allowed by the board of supervisors July 11th. The charges made by plaintiff for making arrests was \$2, and for mileage in going to place of arrest 30 cents, and for returning with prisoner 30 cents, per mile. The county government act of 1893, in counties of the thirty-fourth class, in fixing the compensation of officers, provides: "Constables, such fees as are now or may be hereafter allowed by law." Section 196, subd. 14. The said act of 1895 (St. 1895, p. 271) fixes the fees of constables "for arresting prisoner and bringing him into court, one dollar," and "for each mile necessarily traveled within his county in executing a warrant of arrest, both in going and returning from place of arrest, fifteen cents." Said act of 1895, however, provided that in criminal cases the constable shall not receive more than \$100 in any month, and not more than \$1,000 in any one year; and it further provided "that the board of supervisors may reject all bills presented to the county by justices of the peace and constables for fees in criminal cases in all cases of proceedings in which the district attorney has not, in

writing, approved the issuance of the warrant of arrest." The county government act of 1893 fixed the compensation of constables in counties of the thirty-fourth class (of which Stanislaus was one) by giving them fees for the services rendered, i. e. all "the fees then or thereafter allowed by law," for all their services; while the act of 1895 gave them the fees therein fixed, provided such fees did not amount to more than a certain sum per month or per annum, thus limiting the fees they might appropriate to their own use, and thereby changing the "compensation" of the officer, which the constitution required should be fixed, and was fixed, by a classification of counties according to population.

It is not questioned that the provisions of the act of 1895 (commonly known as the "Fee Bill") which limit the amount of fees a constable may retain, or which give to the district attorney a supervisory power over the fees he may receive, in effect change the compensation to which he is entitled under the county government act, and are to that extent unconstitutional and void. But it does not follow that those provisions of the act of 1895 which fix the amount that the citizen or the public shall pay for each item of service rendered by the officer are also invalid. The county government act of 1893, in fixing the compensation of constables in counties of the thirty-fourth class, determined that a just compensation to the officer was to give him the fees then or thereafter fixed by law for each item of service rendered; no more, no less. The legislature could not change that provision otherwise than by an amendment of it, since to do so would be to fix the compensation of the officer by some standard other than that fixed by the constitution, viz. the classification of the counties according to population.

But the provisions of the act of 1895 which violate the constitution may be eliminated from the act without affecting its provisions as to the fee which may be charged for each particular item of service. Such fee bill was contemplated by the county government act, and is essential, not only to the ascertainment of the just compensation of the officer, but to the ascertainment of the just charge to be paid by the citizen or by the public from the county treasury. The attempted limitation of the gross amount of fees which the officer might take to his own use is a distinct matter, having no necessary connection with the proper charge for the particular items of service performed. In view of the diversified provisions of the county government act, made for the different classes of counties, what we have said must be understood to apply only to the case before us, or to cases depending upon similar provisions of said act of 1893, which do not fix the fee of the officer for each item of service otherwise than by reference to some other statute. Our conclusion is directly sustained by *Dwyer v. Parker*, 115 Cal. 544,

47 Pac. 372, where it is said: "With the act under consideration no difficulty is experienced in saying that after eliminating the objectionable provisions fixing compensation, as being in conflict with the constitution and the county government act of 1893, there still remains a full and complete fee bill, establishing the fees which all county and township officers are entitled to charge and collect. It would follow therefrom, in accordance with the harmonious plan indicated by the constitution, that the compensation of the officers in question is regulated by the act of 1893. So far as that compensation is governed by the fees which they may retain, that, also, is embraced within the act of 1893. So far as that compensation is dependent upon the fees which may be charged and collected, those fees are fully provided for and established by the act of 1895."

Both parties in the case at bar cite and rely upon *Dwyer v. Parker*, supra. The error of counsel for appellant results from want of attention to the facts of that case, which, however, were not stated fully in the abstracts of the briefs printed in the Reports. The plaintiff in that case was a justice of the peace in Santa Clara county. The act of 1893 gave the justice "such fees as are now or may be hereafter allowed by law," but limited the amount he might retain in criminal cases in any one year to \$2,000. The act of 1895 allowed the justice for all services in a criminal action or proceeding \$3, but not to exceed \$75 in any one month. In May, 1895, the justice disposed of 47 criminal cases, for which he presented his bill for \$141, being the amount allowed under the fee bill of 1895; but that act limited his compensation to a sum not exceeding \$75 per month. He therefore claimed that he was entitled to the fee fixed by the act of 1895 and the compensation which that fee would give him under the limitations of the act of 1893, and this court sustained that contention. I advise that the judgment appealed from be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(131 Cal. 440)

TAYLOR v. FORD. (S. F. 1,602.)¹

(Supreme Court of California. Jan. 26, 1901.)

PARTNERSHIP—SALE OF FIRM BUSINESS—VALUE OF ACCOUNTS—MUTUAL MISTAKE—FALSE REPRESENTATION—COERCION—TRIAL—INSTRUCTIONS—STRIKING OUT PLEADING—HARMLESS ERROR.

1. The only material difference between the answer to a cross complaint and an answer which was stricken out was that the latter stated that, by reason of defendant's alleged acts, plaintiff was damaged in a specified sum, no part of which was paid, satisfied, or discharged in any way, and the former merely

prayed that plaintiff be allowed to recoup against defendant any damages sustained as alleged. Both otherwise contained a full statement of the facts out of which the alleged damages arose, and evidence thereof was allowed as fully as if the rejected answer had remained on file. Held, that plaintiff could not complain of the court's refusal to permit his answer to stand exactly as he desired.

2. In an action on a note made by one partner to his co-partner in buying out the business, a claim that there was a failure of consideration was not sustained, where it is undisputed that the stock was of the value at which it was appraised in the contract of sale, and it was shown that the accounts were valuable, the buyer having collected a majority thereof.

3. Knowledge of the value of book accounts could not amount to more than an opinion, which, in an action on a note given for part of the price thereof, would not support the defense of a mutual mistake or of false representation in relation thereto.

4. Instructions which were unnecessary repetitions or inapplicable to the facts in the case were properly refused.

5. Coercion of a partner in buying out his co-partner cannot be based on threats of the seller to sell out to a stranger in violation of the partnership articles.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Henry W. Taylor against C. D. Ford. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Charles F. Hanlon, for appellant. Martin Stephens and Bishop & Wheeler, for respondent.

VAN DYKE, J. This action was brought to compel defendant to set forth the nature and extent of his claim on a certain promissory note purporting to have been executed by plaintiff to defendant, and to have the same determined by the court to be of no force and validity. Plaintiff and defendant were partners in the lumber business in West Berkeley, and defendant sold his interest in the business and property of the partnership to the plaintiff, and received the promissory note in suit as part payment on the sale. The note originally was for the sum of \$8,509.87, and was given in accordance with a contract previously entered into between the parties, which contract reads as follows:

"This agreement, made this 25th day of August, 1885, between C. D. Ford, party of the first part, and H. W. Taylor, party of the second part, witnesseth, that whereas, the said parties have been heretofore associated as equal partners under the firm name of Ford and Taylor, sometimes known as the West Berkeley Lumber Company; and, whereas, the said parties are desirous of dissolving the said partnership and of transferring the interest of the said party of the first part in the property of said partnership to the said party of the second part: Now, therefore, these presents witnesseth: That the said partnership be, and the same is here-

¹ Rehearing denied February 26, 1901.

by. dissolved, to take effect on the first day of August, 1885. That an inventory of all the property of said partnership shall be forthwith taken, and valuation placed thereon at the following rates, to wit:

"Add 50 cents. Surface redwood, No. 1, per thousand feet, \$23.00.

"Per M, surface redwood No. 2, per thousand feet, \$17.00.

"Cost of rough redwood, No. 1, per thousand feet, \$13.00.

"Add 50 cents per M. costs of—

Surface redwood, No. 1, per 1,000 feet \$23 00

Surface redwood, No. 2, per 1,000 feet 17 00

Rough redwood, No. 1, per 1,000 feet.. 13 00

"Piling same—

Rough redwood, No. 2, per 1,000 feet.. 9 00

Shingles, per 1,000 feet..... 1 55

—Doors, sash, lime, and hardware at cost price, freight added. Horses, wagons, trucks, office furniture, and other personal property at cost price. That an account of the business of said partnership shall at once be taken up to the said 1st of August, and the profits or losses equally divided between the parties hereto. That all the book accounts due said firm shall be inventoried at their face value, and that, upon the payment of the promissory note hereinafter mentioned, said party of the first part shall execute and deliver to the said party of the second part a bill of sale of his interest, to wit, an undivided one-half interest, in all the property therein described. The consideration for this indenture, and for the agreement of the said party of the first part of transfer said property to the said party of the second part, is as follows, to wit: \$5,000 cash paid on the execution of these presents, the receipt whereof is hereby acknowledged by the said party of the first part, said payment to be on account of the sum found to be due from such inventory; and a promissory note executed by the said party of the second part, payable to the order of the said party of the first part, for such sum as may be found to be the difference between one-half of the inventoried valuation of said property and the said sum of \$5,000 paid on account upon the execution of these presents. Said note shall be payable three months after date, and bear interest at the rate of seven (7) per cent. per annum. In witness whereof, the parties hereto have hereunto set their hands and seals this 25th day of July, 1885. Charles D. Ford. H. W. Taylor."

The \$5,000 mentioned in the above contract was paid as therein agreed, and also the sum of \$6,000 was paid on said note in November, 1885, leaving a balance unpaid on the note at that time of \$2,660.44. In addition to the answer by defendant to the plaintiff's complaint, he filed a cross complaint counting upon the promissory note in question, and praying for judgment for the balance alleged to be due and unpaid thereon. In his answer to the cross complaint the plaintiff pleaded want of and fail-

ure of consideration for the note, alleging that he was induced to sign it on the strength of a warranty by defendant, Ford, that certain book accounts and claims forming the consideration of the note were good and collectible, dollar for dollar; also, that plaintiff was coerced into signing the note by threats of the defendant to sell his interest in the partnership in the lumber business "to an entire stranger." He also set up a mutual mistake as to the value of said book accounts, and that they were treated as of their face value, when in fact they were worthless. The cause was tried with a jury, and a verdict rendered in favor of the defendant on his cross complaint for the sum of \$4,382.52. Special issues were also submitted to the jury and answered as follows: "Did the defendant assure the plaintiff at or prior to the execution of the note in question that all of the book accounts outstanding, except the three items stricken out, were good and collectible? A. No. Did the defendant at or prior to the time of the execution of the note in question assure the plaintiff that all the book accounts, except the three items stricken out, were good and collectible, so far as he knew? A. Yes. Did the defendant ever agree with the plaintiff that, if any of said book accounts were not collected, that he (defendant) would allow plaintiff to deduct one-half the amount thereof from the note? A. No." The appeal is taken from the judgment entered on the verdict in favor of the defendant, and from an order denying plaintiff's motion for a new trial.

1. The plaintiff filed an amended answer to the defendant's cross complaint without leave of court, which upon motion was stricken out by the court, and the court also refused leave to file the same amended answer after notice given. The appellant contends that this is error on the part of the court. The court, however, did permit appellant to file an amended answer to the cross complaint, setting up the defenses to the note, substantially as already stated, and praying that the defendant take nothing on said promissory note, and that plaintiff be allowed to recoup against the defendant any damage sustained as alleged. The only material difference which appears between the amended answer on which the case was tried and the one stricken out by the court was that the latter contained the statement that "by reason of which said acts the plaintiff, Henry W. Taylor, has been damaged in the sum of \$3,500, and that no part of said damages have been paid or satisfied or discharged in any way whatever." Both of the answers contain a full statement of the facts out of which the alleged damages to the plaintiff arose, and at the trial the plaintiff was allowed to give evidence of these facts as fully as he could have done if the rejected answer had remained on file. Appellant suffered no injury, therefore, by the

refusal of the court to permit his answer to the cross complaint to stand in the exact form that he desired. If the evidence presented at the trial would not support the defenses to the note which were pleaded, it necessarily follows that it could not support a counterclaim or recoupment for damages arising out of the facts so alleged.

2. The appellant contends that the verdict is not supported by the evidence. The main question in dispute between the parties was whether the defendant positively and falsely represented the accounts which formed part of the consideration to be good, and warranted or guaranteed their collectibility. Upon this question there was a substantial conflict of evidence. The note given was only a part of the entire consideration for the purchase by the plaintiff of defendant's interest in the partnership. There is no contention that the lumber is not of the value at which it was appraised in the contract. It is also shown that the accounts mentioned in the contract were valuable, as plaintiff has succeeded in collecting a majority of them. The contract being entire, there was a good and valuable consideration for the note. From the evidence the jury were warranted in finding adversely to the appellant on his contention as to the failure of consideration.

3. The case does not support the alleged defense of mutual mistake. Knowledge on the subject of the value of these book accounts could not amount to more than opinion, and this will not support the defense of a mistake or false representation. *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Nounnan v. Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Lee v. McClelland*, 120 Cal. 148, 52 Pac. 300. In *Hecht v. Batcheller*, 147 Mass. 335, 17 N. E. 651, the holder of a promissory note sold it through a broker shortly after the maker had made an assignment for the benefit of creditors, but neither the seller nor buyer nor broker knew that fact, but all supposed that the maker was still doing business; and it was held that there was no such mistake as to the subject-matter of the sale as to avoid the contract, and there was no implied warranty that the note was that of a solvent firm. In the opinion the court says: "The mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient, if the thing delivered is existent, and is the identical thing in kind which was sold." *Benj. Sales*, § 54. In *Dortic v. Dugas*, 55 Ga. 484, it was held that an erroneous opinion, common to both parties, as to the value of a partnership interest, is not such a mistake of fact as will warrant a rescission in equity of the sale of such interest. In this case a distinction is drawn between a mistake of fact and a mere mistaken opinion, the court saying: "One theory of the complainant's bill is that an

erroneous opinion, common to both parties, as to the real value of the interest sold, especially if that interest was absolutely worthless, would be such mistake of fact as would warrant a rescission of the contract and a return of the purchase money. We think, on the contrary, that the very nature of the enterprise touching which the partnership existed would be full notice that the value of a partner's share was contingent, and that an estimate of it made in a general way would partake of the loose nature of conjecture, rather than of the definite characteristics of fixed fact." The verdict was against the appellant on the contention that there was a warranty or guaranty on the part of the defendant, and this verdict is supported by the evidence. In fact, the written contract out of which the making of the promissory note grew contains no guaranty of the book accounts, and no agreement that anything was to be deducted from the value of said accounts, as fixed in said contract, for a failure to collect any of them.

4. The instructions given by the court, read together, fairly cover the law of the case, and those which were refused were either unnecessary repetitions or inapplicable to the facts in the case. The jury was not misdirected as to the defense of want of consideration, but the law on that subject was properly given to them; and the same may be said in reference to the defense of breach of warranty, which was specially submitted to the jury, as already shown. At the conclusion of the instructions to the jury, one of the jurors asked: "I would like to ask the court if ignorance on the part of plaintiff or defendant constitutes any point of law. Ignorance of what plaintiff or defendant might be doing when a certain thing is done; can it be brought up as a matter of law?" The court answered this, and a colloquy took place, as follows: "The Court: The presumption is, where the transaction is between grown-up people, that they do know what they are doing. Mr. Hanlon: I ask an instruction that although that is the presumption, that they knew, that we can show to the contrary that either party was not in such condition. The Court: If they show that one of the parties was imbecile or not of sound mind, or that there was fraud or duress. Mr. Hanlon: Or coercion. The Court: It is not claimed that he was coerced. Mr. Hanlon: It is claimed that he was taken advantage of. The Court: All right; or that he was taken advantage of. Mr. Hanlon: We except." We can see no error on the part of the court in the foregoing. The only coercion claimed by the plaintiff is that he was forced to enter into the contract and give the note in question by reason of defendant's threats to sell out to a stranger in violation of his contract for a five-years partnership. That would not amount to coercion in law.

There are no other points presented on the

part of the appellant requiring special notice. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(131 Cal. 489)

VAN LOBEN SELS v. BUNNELL et al.
(Sac. 759).¹

(Supreme Court of California. Feb. 1, 1901.)

MORTGAGES—FORECLOSURE SALE—VACATION—IRREGULAR NOTICE—CONFLICTING ORDERS OF SALE—PRIOR LIEN—CROSS COMPLAINT—SUFFICIENCY—JURISDICTION OF COURT—ATTORNEY FOR DIFFERENT DEFENDANTS—PROPER PARTIES.

1. Where, after a foreclosure sale, one of the defendants had redeemed the property, an order vacating such sale was within the power of the court, since its jurisdiction of the subject-matter and the parties did not cease until the foreclosure was completed by a failure of the parties to redeem.

2. A purchase-money mortgage on realty was foreclosed, and the judgment directed the proceeds of the sale to be applied in satisfying a lien prior to the purchase-money lien. On the issuing of the order of sale an injunction was obtained by the wife of the mortgagor restraining the sheriff from selling the property on the claim that it was a homestead. The judgment rendered in this proceeding, in which the parties to the foreclosure suit were not joined, dismissed the injunction, and ordered the proceeds of the sale to be applied to the payment of the purchase-money lien, and the balance paid into court. A new order of sale was issued, and the sheriff's notice of sale was advertised, whereby the money was to be applied according to the order made in the injunction proceeding. *Held*, that the sale was invalid, since it was not authorized by the original decree, nor was the judgment as modified valid as against the parties to the foreclosure suit, since they were not parties thereto.

3. Where, in a foreclosure proceeding, one of the defendants filed a cross complaint setting up a prior lien for assessments, though not containing a sufficient cause of action, and not served on all the parties, the court acquired jurisdiction to adjudicate as to this lien, since the parties were already in court, and the allegation of the cross complaint of the existence of the lien for assessment and the prayer for general relief was sufficient to identify the subject of the action.

4. Where, in a foreclosure proceeding, one of the defendants filed a cross complaint, it was proper for the same attorney to appear for the cross complainant and another defendant, since the latter admitted the prior lien of the former.

5. Where, in a foreclosure proceeding on realty, a prior incumbrancer is joined, his rights may be adjudicated, and he is entitled to file a cross complaint to foreclose his lien, he being a proper, though not a necessary, party.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Action by P. J. Van Loben Sels against C. Bunnell and others. From an order vacating a foreclosure sale, defendants appeal. Affirmed.

Devlin & Devlin and Henry C. Ross, for appellant. A. L. Shinn and H. W. Johnson, for respondents.

SMITH, C. The appellants are the defendants C. Bunnell and the Germania Build-

ing & Loan Association, and Elizabeth Bunnell, who is not a party to the suit. The defendant Bunnell derived his title from the plaintiff under a deed reserving a lien for certain moneys, part of the consideration which is the lien foreclosed. The building and loan association is a junior mortgagee. It answered, setting up its mortgage, but not praying for foreclosure. The reclamation district No. 551—a defendant—had a lien for an assessment upon the land prior to that of the plaintiff, which it set up by answer and cross complaint. Judgment of foreclosure was rendered directing the sheriff to sell the premises, and out of the proceeds, after retaining his fees, etc., to pay first to the defendant the reclamation district the amount due to it (\$1,707.41), and afterwards to the plaintiff the amount due to him (\$755.78), with attorney's fee (\$150), and costs. This judgment, on the appeal of the building and loan association, was affirmed by this court May 20, 1898. 120 Cal. 680, 53 Pac. 206. An order of sale on the judgment was issued July 8, 1895, and thereupon the appellant Elizabeth Bunnell, wife of the defendant Bunnell, claiming the land as a homestead, commenced an action in the same court against the sheriff, Johnson, the plaintiff, Van Loben Sels, and the reclamation district to enjoin the sheriff from selling; and a temporary injunction was issued. The suit was afterwards dismissed by the plaintiff as to the defendants Van Loben Sels and the reclamation district, and judgment was rendered November 26, 1898, dismissing the injunction and directing the sheriff to proceed with the sale under the judgment in Van Loben Sels against Bunnell and others, but further directing him, after retaining his costs, to pay the proceeds first to the plaintiff Van Loben Sels, and the overplus, if any, into court, thus ignoring the judgment in favor of the reclamation district. Accordingly, a new order of sale was issued December 20, 1898, referring to the judgment, of which a copy was attached; and the sheriff advertised the property for sale, the notice, so far as material, being as follows: "Notice is hereby given by F. T. Johnson, sheriff of the county of Sacramento, state of California, that under and by virtue of a judgment rendered by the superior court of the said county July 8, 1895, in an action therein pending, wherein P. J. Van Loben Sels is plaintiff and C. Bunnell, Germania Building & Loan Association (a corporation), Edward Bunnell, and reclamation district No. 551 (a corporation) are defendants, which said judgment was rendered in favor of said plaintiff and against said defendants Bunnell and Germania Building & Loan Association for \$757.80 and \$150 attorney's fees, together with expenses and costs in said action, and interest upon said amount of said judgment from the date thereof to the date of sale at 7 per cent. per annum, and by virtue of an order of

¹ Rehearing denied March 2, 1901.

sale issued out of said court upon said judgment on the 20th day of December, 1898, and to satisfy said judgment, I will, on Monday, the 16th day of January, 1899, at the hour of 10 o'clock a. m., at the front door of the court house at the corner of Seventh and I streets, in the city of Sacramento, California, sell at public auction, to the highest and best bidder for cash in gold coin of the United States, the following described real property, to wit [describing the property]." At the sale—which was made on the day and at the place named in the notice—the plaintiff became the purchaser for the amount of his debt, and the proceeds were applied in satisfaction thereof. From the return of the sheriff—to which a copy of the notice with affidavit of service was attached as part—it appears that the sale was made under and in pursuance of this notice. The defendant the building and loan association redeemed from the sale January 23, 1899. Thereafter, May 12, 1899, on the motion of the reclamation district, an order was made by the court, May 12, 1899, vacating the sale, which is the order appealed from.

There can be no doubt, I think, of the power of the court to make the order complained of, or of the propriety of its exercise. With regard to the power, the jurisdiction of the court in cases of this kind over the parties and the subject-matter continues until the foreclosure is completed by failure to redeem, and its jurisdiction extends to the purchaser, who, by his bid, submits himself to it. *Requa v. Rea*, 2 Paige, 339; *Cazet v. Hubbell*, 38 N. Y. 677; *Andrews v. O'Mahoney*, 112 N. Y. 567, 20 N. E. 374; *Boggs v. Fowler*, 16 Cal. 559. The sale involved here was not authorized by the foreclosure decree as rendered, but the sheriff proceeded as though the decree had been modified by the subsequent judgment in the suit of *Mrs. Bunnell* against him, which, as to the parties to the foreclosure suit, was of no validity. It was, therefore, if not absolutely void,—a point we need not determine,—at least grossly irregular. Nor can we say that the parties here were not injured thereby. On the contrary, the inadequacy of the price for which the land was sold was in all probability the direct result of the error, for under the decree as rendered it would have been to the interest of the plaintiff to bid more than that amount, as the property appears to have been worth more than the amount due to the reclamation district. So, also, the sheriff seems to have been innocent in this matter; and in reporting the sale not absolutely, but for confirmation, he did all that he could do to relieve himself from the contradictory mandates of the court. It would be unjust to impose upon him a liability to the reclamation district for damages, or at least for the statutory penalty of making the sale without giving the proper notice. Moreover, if the proceedings be regarded as be-

ing under the original judgment, its mandates were not obeyed. It does not appear that any money was paid by the purchaser except for the expenses of the sale, and, as the sheriff, under the directions in the judgment of *Mrs. Bunnell* against him, had applied the balance of the bid upon the judgment in favor of the purchaser, instead of paying it to the reclamation district, it might with reason be contended that there had been no sale. The payment of the purchase money is an essential part of a judicial sale.

It is claimed, however, by the appellants that the judgment in favor of the reclamation district was void for want of jurisdiction in the court, from which it would follow—assuming the proposition to be correct—that the judgment was, in effect, merely a judgment in favor of the plaintiff (as it was afterwards construed in the injunction suit and by the sheriff), and hence that in fact no mistake was made by the sheriff in the sale. The grounds of this contention are that the prior lien of the reclamation district could not be litigated in the suit, and that the cross complaint was insufficient to give the court jurisdiction to foreclose the lien of the district. On the latter point the objection is that no defendants are named in the cross complaint, that none were served except the plaintiff, and that the averments of the cross complaint were insufficient to constitute a cause of action. But none of these defects—if they exist—could affect the jurisdiction of the court. Who the defendants are sufficiently appears from the title of the case and the allegations of the cross complaint. It does not appear that the co-defendants of the cross complainant were not served, but only that the plaintiff was served; and the presence of the attorneys of the parties is recited in the decree. Nor could the failure to serve one of the parties affect the question of jurisdiction, for they were already in court, and subject to its jurisdiction. Nor could the jurisdiction of the court be affected by the insufficiency of the cross complaint to state a cause of action. The cross complaint alleged the existence of a lien for assessment, and prayed for general relief. This was sufficient to identify the subject of the action, and to give the court jurisdiction. *Blondeau v. Snyder*, 95 Cal. 523, 31 Pac. 591; *In re James' Estate*, 99 Cal. 376, 33 Pac. 1122; *Edwards v. Hellings*, 103 Cal. 206, 207, 37 Pac. 218. The only irregularity that clearly appears is that the same attorney, according to the recitals in the judgment, appeared for the cross complainant and the defendant *Bunnell*. This, if the latter admitted the lien of the former, was not improper. As far as can be judged from the record, this was in fact the case; and, indeed, the claim of the reclamation district seems to have been admitted by all the parties, for no objection was made to

the judgment or appeal taken by one of the defendants, and, by the other, who did appeal, no attack was made on this part of the judgment. With regard to the other objection, there is no doubt of the jurisdiction of the court to adjudicate the claims of a prior incumbrancer if made a party. Such incumbrancers are not necessary parties, but they are always proper parties, and it is good practice to join them for the purpose of liquidating their claims. *Helmstreet v. Winnie*, 10 Iowa, 430; *Story*, Eq. Pl. § 193; *Jones*, Mortg. § 1439; *McComb v. Spangler*, 71 Cal. 424, 12 Pac. 347; *Johnston v. Savings Union*, 75 Cal. 140, 141, 16 Pac. 753. Whenever the prior incumbrancer is made a party, it is his right to file a cross complaint to foreclose his lien. *First Nat. Bank v. Salem Flour-Mills Co.*, 12 Sawy. 400, Fed. Cas. No. 580. The order appealed from should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(131 Cal. 472)

In re BENTON'S ESTATE. (Sac. 854.)

(Supreme Court of California. Jan. 31, 1901.)

WILLS—CONTEST—FRAUD—UNDUE INFLUENCE—WIDOW'S RIGHT TO CONTEST—FINDINGS—SUBMISSION—ULTIMATE FACTS—EVIDENTIARY FACTS—PRESUMPTIONS—INTENT TO DECEIVE—KNOWLEDGE—DISJUNCTIVE FINDING—BELIEF BY TESTATOR—PROBATE—DENIAL—MATERIAL ISSUE—FAILURE TO FIND—REVERSAL—EVIDENCE—FORMER TRIAL—REPORTER'S TRANSCRIPT.

1. Where a petition for the probate of a will is contested by testator's widow, and contestant's petition shows her to be an heir at law of decedent, it sufficiently shows her right to attack the will, though she would receive a larger share of the estate under the will than she would take as an heir.

2. Where an application for the probate of a will is contested and tried before a jury, ultimate facts only for the jury's finding, as to whether decedent was competent to make a will, and whether his mind was free from fraud, should be submitted, and not mere evidentiary facts, from which the court is required to reach a conclusion as a matter of law.

3. Where, in a will contest, special findings of evidentiary facts were submitted to the jury and answered, the court, in passing judgment, is not entitled to indulge in any inferences of fact in support of the facts so found, but, as a matter of law, must say that, from the facts found, the judgment must be one rejecting or allowing probate.

4. Under Civ. Code, § 1572, declaring that fraud shall consist in acts committed by a party, or with his connivance, "with intent to deceive another," a finding in a will contest that testator at the time of making the will was actuated and controlled solely by representations of proponent, and that such representations were false and fraudulent, was not sufficient to show that the will was induced by proponent's fraud; there being no finding that the representations were made "with intent to deceive" the testator, or "with intent to induce him to execute the will."

5. Where a will was contested on the ground that it was induced by false representations, findings that it was so induced, but without a finding that proponent knew the representations were false, or that he did not believe them to be true, were insufficient to establish that the will was induced by fraud.

6. Where a will is contested for fraud in inducing its execution, a finding that proponent's representations to testator, inducing the will, were "false or fraudulent," in the disjunctive, is insufficient.

7. Where the probate of a will is contested on the ground that proponent induced its execution by fraud, findings of fact that proponent did make such representations were insufficient to show fraud, in the absence of a finding that the representations were false, made with intent to deceive or induce testator to make the will, or made before its execution.

8. Where a will was contested by a widow on the ground that proponent had induced its execution by fraud, a finding that proponent by false or fraudulent statements caused testator to accuse contestant of theft was immaterial, since, standing alone, such a finding did not indicate the practice of actual fraud.

9. Where a will was contested by a widow on the ground of proponent's fraud in inducing its execution, a finding that testator knew contestant was a dutiful wife, etc., not only failed to show fraud, but tended to show that, whatever representations proponent might have made, they had no effect on testator's mind.

10. In a will contest, a finding that proponent made statements to his father against contestant, testator's wife, which proponent knew to be false, was insufficient to show fraud inducing the execution of the will, in the absence of a finding that proponent made the statements with intent to deceive his father or induce him to make the will, and that the father believed the statements and acted on them.

11. Where a will is contested for fraud, a finding that no fraud or misrepresentation was practiced on testator "at the very time" he signed the will and codicil was immaterial, since, on an issue of fraud, the particular time at which the fraudulent representations were made is immaterial.

12. Where, in a will contest, contestant's petition charges fraud inducing its execution, but the precise question was not directly presented to the jury in the issues on which they were required to return findings, and there was no finding of fact on such issues, though there were various findings on evidentiary facts not sufficient in themselves to show fraud, a judgment denying probate will be reversed for want of a finding on a material issue.

13. Code Civ. Proc. § 273, providing that the report of the official reporter of any court, when written out and certified as a correct transcript of the testimony and proceedings in a case, shall be prima facie correct, does not authorize the introduction of a stenographer's report of the evidence of testator in a divorce suit tried some years before his death, in a subsequent will contest by his widow; the transcript amounting to no more than testator's declarations, which, if admissible at all, might have been proved by the reporter's oral testimony as authorized by Code Civ. Proc. § 2047.

Department 1. Appeal from superior court, San Joaquin county; Edward I. Jones, Judge.

Application by Herbert A. Benton for probate of the will of T. N. Benton, deceased, to which Elizabeth N. Benton, testator's widow, filed objections. From an order denying probate, proponent appeals. Reversed.

J. G. Swinnerton and J. J. Fitzgerald, for appellant. Nicol, Orr & Nutter and Budd & Thompson, for respondent.

GAROUTTE, J. The widow is contesting the probate of the will of her deceased husband, Tolman N. Benton. The proponent of the will is Herbert A. Benton, a son by a previous wife. At the trial before a jury the issues were limited to incompetency, and also fraud practiced upon the deceased by the proponent of the will in the making thereof. Fifty questions purporting to bear upon the issues raised were submitted to the jury, and answers returned thereto. Upon the strength of these answers the will was denied probate, and this appeal is taken from that judgment, upon a bill of exceptions.

It is first asserted that the petition of contestant is substantially insufficient, in not showing that she is beneficially interested in defeating the probate of the will. It is only necessary to say that she shows herself to be an heir at law of decedent, and that fact gives her the right of contest. As bearing upon this right, it is immaterial that the will attacked possibly gives her a larger share of the estate than she would take as an heir at law.

There appears to be some doubt in the minds of counsel in this case, and also in the mind of the trial court, as to the character of the issues which may or should be presented to the jury in a case of the present character. Yet, in view of the provisions of sections 1312 and 1314 of the Code of Civil Procedure, we see no reason for doubt as to the proper procedure to be followed; as, for example, in this case, counsel and court may have submitted to the jury the questions: (1) Was the decedent competent to make a last will and testament? (2) Was the mind of the decedent, at the time of the execution of the will, free from fraud practiced upon him by Herbert A. Benton? These were the ultimate facts in the case. A negative finding by the jury upon either of them would have required a denial of the will to probate. While counsel could, in addition to the ultimate facts, submit issues bearing specifically upon certain branches of the evidence, yet that course is not at all necessary; and in many instances the submission of the ultimate fact to the jury for a finding, when accompanied by clear and explicit instructions as to the law which should govern the jurors in applying the evidence and arriving at a verdict, is the better practice to pursue. If the verdict of the jury condemns the will, a judgment rejecting its probate necessarily follows. If the verdict supports the will, then the court should take evidence upon the matters not involved in the contest, and thereupon, by virtue of the facts declared by the verdict, conjointly with those found

by the court, adjudge that the document be admitted to probate.

We here have the question presented, do the issues determined by the jury justify the judgment made by the court, rejecting the probate of the will? The issue as to the competency of the decedent was found in favor of proponent, and the issue of fraud is the single one remaining. The findings of the jury upon the issues submitted to them stand the same as the findings of fact made by the court in a civil action; that is, when we are brought to the consideration of their sufficiency to support the judgment rendered. In the one case the jury makes the findings, and in the other the court makes them; and as said in *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576, quoting from the syllabus: "Where probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient; but, in order to warrant the appellate court in inferring an ultimate fact from probative facts, it must inevitably follow from the facts found." So, in a case where the probate of a will is contested, if the issues presented to the jury involve simply probative facts, then, to justify the court in rejecting the probate of the will, the ultimate fact of fraud, undue influence, or mental incompetency must appear conclusively from the probative facts found. In other words, the trial court may not indulge in inferences of fact in order to support the judgment it makes. It must weigh and test the facts alone that are presented to it by the jury. Presumptions of law may be indulged in, but the indulgence in inferences of fact as to matters bearing upon the issues presented to the jury are denied to it. The trial court must be able to say, "As matter of law, from the facts found by the jury, the judgment in this case must be one rejecting the probate of this will." If an ultimate fact of fraud or mental incompetency or undue influence be found by the jury, then the court is bound to declare that a certain particular judgment follows as matter of law. So must the court be able to declare from the probative facts found. It is said in the case of *In re Sanderson*, 74 Cal. 208, 15 Pac. 757, "In cases of contest of a will the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it." The court is here speaking alone of the issues involving the ultimate facts alleged and denied by the pleadings.

We pass to a consideration of the issues found upon by the jury, and discussed by counsel in their briefs: "Was Tolman N. Benton, at the time of and in the making of the two papers in contest, actuated and controlled solely by representations to him at any time made by Herbert A. Benton, and were such representations false or fraudulent? A. Yes."

Then follow many questions and answers, of which the following are a fair illustration: "(1) Did Herbert A. Benton at any time represent to Tolman N. Benton that the contestant, Elizabeth Benton, was stealing from him, said Tolman N. Benton? A. Yes. (2) Did Herbert A. Benton at any time represent to Tolman N. Benton that contestant, Elizabeth N. Benton, was making use of the property of Tolman N. Benton for the benefit of others? A. Yes." We then have questions and answers of which the following are fair illustrations: "(1) Did Herbert A. Benton, by any false or fraudulent statement, ever cause Tolman N. Benton to accuse contestant of theft? A. Yes. (2) Did Herbert A. Benton, by any fraudulent or false statements, induce or persuade Tolman N. Benton to apply to contestant any vile names or opprobrious epithets? A. Yes." We then have the following questions and answers: "(1) Did Tolman N. Benton at all times know that contestant had been at all times to him, said Tolman N. Benton, a dutiful wife? A. Yes. (2) Did Tolman N. Benton at all times know that contestant had never at any time given him, said Tolman N. Benton, any cause to act towards her or treat her in any manner other than in kindness? A. Yes." We also have these questions and answers: "(1) Did Herbert A. Benton ever make any statements or representations to Tolman N. Benton about contestant which he, said Herbert A. Benton, knew to be false? A. Yes. (2) Did Tolman N. Benton ever make any will solely by reason of any false representations made to him, Tolman N. Benton, by Herbert A. Benton? A. Yes. (3) Was any fraud or misrepresentation practiced by any person on Tolman N. Benton at the very time he signed the paper purporting to be a will, and dated October 9, 1896? A. No."

That which will vitiate a contract will vitiate a will. In re Kohler, 79 Cal. 313, 21 Pac. 758. And section 1572 of the Civil Code provides: "Actual fraud within the meaning of this chapter consists in any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion as to a fact of that which is not true, by one who does not believe it to be true." Tried in the crucible furnished by this section, do the facts found by the jury establish that the proponent of this will was guilty of fraud practiced upon decedent in the making thereof? Upon a careful consideration of those facts, we have become entirely convinced that they do not constitute a fraud which vitiates the will of decedent. The most important finding of the jury is the one first quoted. Yet it falls far short of showing a case of actual fraud, within the meaning of the aforesaid section of the Civil Code. It is, in substance, a finding that the deceased executed the will and codicil, actuated and controlled solely by representations made to

him by Herbert A. Benton, and that these representations were false or fraudulent. In this statement of facts the all-important element is lacking, to wit, that Herbert A. Benton made these representations with intent to deceive the decedent, or with intent to induce decedent to execute his will. An intent to do one of these things is always an element, and a necessary element, in any given state of facts, in order that those facts may constitute actual fraud. This particular intent is the leaven which permeates the whole, and gives it the name of fraud. Again, there is no finding that these representations were known by Herbert A. Benton to be false, or that he did not believe them to be true. These, also, are elements necessary to a showing of actual fraud. Again, the finding is that the representations were false or fraudulent. As a finding of fact, that is neither one thing nor the other. Perchance these representations were all fraudulent only. The word "fraudulent," as here used, has no well-defined legal meaning, and this part of the finding as to the representations being false or fraudulent amounts to nothing. This answer by the jury is consistent with a finding by it that although the testator, in making the will, was actuated and controlled by the representations of Herbert A. Benton, and that these representations were false, yet that Herbert A. Benton believed them to be true, and made them with the best of motives. It would not be fraudulent for him to seek to control the testator in making his will, so long as his purpose and the effect thereof was proper; and, if he believed that the representations he made were true, his conduct would not be fraudulent, nor would the will, in this respect, be executed by reason of any fraudulent representation. We next have findings as to the representations made by Herbert A. Benton to decedent. These representations do not appear to have any connection with or relation to the representations referred to in the previous finding; and even if, by inference or conjecture, it might be held that they were the same representations, still there is no finding that they were false, or that they were made with intent to deceive the deceased or induce him to execute his will. Neither is there any finding that these representations were made prior to the execution of the will. As to the finding that Herbert A. Benton by false or fraudulent statements caused Tolman N. Benton to accuse contestant of theft, and others of like character, we see no importance whatever in them as casting light upon the question of fraud. Standing alone, they wholly fail to indicate the practice of an actual fraud, and when joined to the other findings they fail to add any strength to them. The next findings, to the effect that Tolman N. Benton at all times knew that contestant was a dutiful wife, and lived up strictly to her marital relations, etc., only serve the purpose of showing that Herbert A. Benton's repre-

mentations to deceased, tending to the contrary, had no effect upon decedent's mind. As to the finding that Herbert A. Benton made statements to his father about contestant which he (Herbert), knew to be false, there is no finding that he made these statements with intent to deceive his father or to induce him to make his will; neither is there a finding that the father believed these statements or acted upon them. It does not even appear that they were made prior to the execution of the will. While the next finding declares that Tolman N. Benton made a will by reason of false representations made to him by Herbert A. Benton, there is no finding that these representations were known by Herbert to be false when made. Again, it is left as a pure matter of conjecture that the language "a will" refers to the will and codicil here under consideration. We do not attach any special importance to the findings declaring that no fraud or misrepresentation was practiced by any person on Tolman N. Benton "at the very time" he signed the will and codicil. Any particular moment of time is a matter wholly immaterial to the issue of fraud.

We are led to the conclusion that the findings of fact returned by the jury do not establish a case of fraud in the execution of the will and codicil here involved. While the petition of contestant charges fraud, for various reasons, not apparent to the court, the question was not directly presented to the jury, in the issues upon which they were required to return a verdict. But, upon the other hand, we find no declaration of the jury that the proponent was not guilty of the practice of fraud upon the decedent in the execution of the will. While we have findings indicating that at the "very time" Tolman N. Benton signed the will and codicil the proponent practiced no fraud upon him, still this finding falls far short of a finding that the making of the will was not had under the influence of proponent's fraud. The case then presents itself exactly as a case where there is no finding of fact upon a material issue, and the judgment must be reversed for that reason.

The official reporter identified a certain document as a certified copy of the testimony of Tolman N. Benton, given by him in an action for divorce tried some years prior thereto. We know of no section of the Code that justifies the admission of this evidence. Section 273 of the Code of Civil Procedure is relied upon to effect that purpose, but it does not go to that extent. The evidence here sought to be introduced stood simply as the declaration of Tolman N. Benton; and, if his declarations were competent and admissible evidence, they could have been placed before the jury by oral testimony of the reporter who heard them, and his recollection as to the testimony may have been refreshed from his notes taken at the time. Section 2047, Code Civ. Proc.; *People v. Gardner*, 98 Cal. 132, 32 Pac. 880. The said

section 273 refers to reports of the official reporter required to be filed in the court. This question is discussed in *Reid v. Reid*, 73 Cal. 208, 14 Pac. 781, and it was there declared: "The unfiled transcript is certainly not a public record, but must be put upon the footing of a private memorandum. * * * We think, therefore, that section 273 does not make the transcript itself admissible in evidence."

The court is convinced that all the testimony tending to the point that contestant was kind to proponent's family, waited upon them, etc., is foreign to any question involved in the issues upon trial. The court is also satisfied that the deed of trust given by Tolman N. Benton was likewise immaterial as evidence. The lease given by the father to proponent also stands upon the same footing. The court is well satisfied that the questions here discussed may be considered upon a bill of exceptions taken upon appeal from the judgment. The court is also convinced that the demurrer to the petition of contestant was properly overruled. For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

(121 Cal. 495)

CARPY v. DOWDELL et al. (S. F. 1,670.)¹
(Supreme Court of California. Feb. 4, 1901.)

CONTRACTS—NOVATION—APPEAL—INCONSISTENT FINDINGS—IMMATERIAL QUESTION—MORTGAGES—FORECLOSURE—DECREE—CORRECTNESS—PRESUMPTION ON APPEAL.

1. Defendants gave notes to a bank, secured by chattel mortgages on certain wine and their manufacturing plant. Afterwards a part of the wine was sold, with the consent of the bank, on the agreement that all payments thereon should be made to the bank and credited on the mortgagor's account. The notes and mortgages were assigned by the bank. Held, on foreclosure of the mortgages, that the contract of sale was not a novation, under Civ. Code, § 1531, providing that novation only takes place by substitution of a new obligation between the same parties with intent to extinguish the old obligation, or by substitution of a new debtor in place of the old one, with intent to release the latter, since the purchaser was not substituted as a debtor with intent to release defendants.

2. Where there was neither an estoppel against plaintiff's maintaining an action to foreclose a mortgage on part of mortgaged property, nor a novation as to the obligations secured by the mortgages, and the decree of foreclosure did not include certain mortgaged wine sold with the mortgagee's consent, a finding that, under the contract of sale, none of the mortgaged property was released from the mortgages, though inconsistent, does not constitute reversible error, since it is immaterial.

3. Where, on appeal from a judgment of foreclosure of chattel mortgages, there was no bill of exceptions, and the description of the property included in the decree coincided with the description in the mortgages, in the absence of a showing to the contrary the decree will be presumed to be correct.

¹ Rehearing denied March 6, 1901.

Department 1. Appeal from superior court, Napa county; F. D. Hamm, Judge.

Foreclosure of chattel mortgages by Charles Carpy against James Dowdell and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rodgers & Paterson and F. E. Johnston, for appellants. Bigelow & Titus, for respondent.

GAROUTTE, J. This case has been before the court in the past. *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695. The facts involved in the litigation are set out in detail in the decision rendered at that time, and we will now only state those which are necessary to a consideration of the questions presented upon this appeal. Defendants are appealing from a judgment of foreclosure rendered against them upon two certain notes and chattel mortgages. Plaintiff, as assignee of the notes and mortgages from the Bank of St. Helena, brings this action of foreclosure.

It is first contended that the findings are substantially the same as those upon the previous appeal, and that by the decision rendered upon that appeal it was held that plaintiff was estopped from bringing the action. By that decision it was held, first, that the acts of the cashier of the bank were the acts of the bank; and, second, that this plaintiff, the assignee of the bank, stood in its shoes. But it was not held that an estoppel existed which barred the prosecution of this action for every part of the mortgaged property.

The salient facts important here are these: Defendants sold 368,000 gallons of wine to Chevalier & Co., to be delivered in 50,000-gallon installments, the purchase price to be paid as the wine was delivered. The Bank of St. Helena held chattel mortgages upon defendants' personal property, which included this wine, other wine, manufacturing plant, etc. The sale by defendants to Chevalier & Co. was evidenced by an instrument in writing which the bank prepared; and at the bank's suggestion and request, and with the consent of both parties to the contract, the following clause was inserted in that writing: "All payments on said wines to be made to the Bank of St. Helena for our account, the cashier of said bank to receipt for the same." As suggested, the substance of the decision upon first appeal as to the question of estoppel is a contested matter here. And, while isolated excerpts may be taken from that decision tending to show that a complete estoppel upon the entire cause of action stood against plaintiff, yet, if the decision as a whole is considered, it is plain that such a holding was never contemplated or intended by the court. In the absence of language in the opinion pointing directly to a declaration of that character, we will not so hold now, for the reasoning

by the court at that time does not demand it, and neither the facts of the case nor general principles of law justify a conclusion that such is the law. The reasonable and fair construction of the decision is therefore that the estoppel only involved the 368,000 gallons of wine. When the cause went back for a second trial, plaintiff was free to litigate his rights as to the balance of the property covered by the mortgages.

It is contended that "the contract between the defendants and Chevalier & Co., consented to by the bank, was a complete novation, by which the new obligation of Chevalier & Co. to pay these moneys to the bank, to be credited by the bank to the account of the defendants, was substituted for the original obligation of the defendants to the bank." Under section 1531 of the Civil Code, a novation in this case could only take place "(1) by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; (2) by the substitution of a new debtor in place of the old one, with intent to release the latter." There is no question here of the substitution of a new obligation between the bank and these defendants. Hence the principle found in subdivision 1 of the aforesaid section cannot be invoked. We deem it equally clear that Chevalier & Co. was not substituted as a new debtor in place of these defendants with intent to release them. The findings in this case neither justify the conclusion that the parties intended to substitute a new debtor nor to extinguish the old obligation. The agreement of Chevalier & Co. to pay these moneys, the various installments of the purchase price of the wine, to the bank for the account of defendants, has none of the essentials of a novation, as demanded by the aforesaid section of the Civil Code. Even conceding this covenant of the contract to be so broad that under it the bank was authorized to credit the payments thus made by Chevalier & Co. upon defendants' notes, still that fact alone does not fill the measure furnished by the statute. We cannot find an intimation in the contract that the bank intended to release defendants from the notes and mortgages, and look to Chevalier & Co. alone for the money due upon them, and the contract has no such legal effect. An intent upon the part of the bank to release these defendants from their original obligations is a vital element going to make up a novation in this case. That intent is lacking, and for this reason alone the claim of novation must fail.

Even conceding the finding of fact made by the trial court to the effect that the bank, under the Chevalier transaction, did not release any of the mortgaged property from the effect of the mortgages, may be inconsistent with some other finding, still the mere presence of an inconsistency in findings does not constitute reversible error.

The Chevalier wine was not included in the decree of foreclosure. Hence appellants have no cause to complain, looking at the case from that standpoint. There being neither an estoppel against plaintiff's prosecution of this action as to the remainder of the mortgaged property, nor a novation as to the original obligations held by the bank, this finding of which complaint is made cuts no figure in the case.

The description of the property included in the decree of foreclosure coincides with the description found in the instruments of mortgage, and, in the absence of some showing to the contrary, this being an appeal from the judgment without a bill of exceptions, the decree will be presumed to be correct. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(131 Cal. 499)

CARPY v. DOWDELL et al. (S. F. 1837.)

(Supreme Court of California. Feb. 4, 1901.)

APPEAL AND ERROR — REJECTION OF EVIDENCE — SUBSEQUENT ADMISSION — MORTGAGES — FORECLOSURE SALE PENDING APPEAL — EFFECT — EVIDENCE — IMMATERIAL — REJECTION.

1. Where evidence was received proving substantially the same facts that rejected evidence was offered to prove, no error amounting to prejudice was committed.

2. Where, pending appeal from a judgment foreclosing chattel mortgages, no stay bond was given, and part of the mortgaged property was sold under the foreclosure, the proceeds being paid to the plaintiff therein, and the judgment was reversed and the cause remanded, such sale and payment of the proceeds did not amount to a payment of the notes, so as to bar a subsequent foreclosure, since by the reversal of the judgment the litigation took the form it had prior to its entry, and the notes stood unpaid.

3. Where certain wine was not included in a judgment foreclosing a chattel mortgage thereon, and also on other property, it was not error to reject evidence, relative to such wine, which was immaterial on the question of estoppel, except as to that wine, and did not tend to establish a novation.

Department 1. Appeal from superior court, Napa county; E. D. Hamm, Judge.

Foreclosure of chattel mortgages by Charles Carpy against James Dowdell and others. From an order denying a new trial, defendants appeal. Affirmed.

Rodgers & Paterson and F. E. Johnston, for appellants. Bigelow & Titus, for respondents.

GAROUTTE, J. This is an appeal from an order denying defendants' motion for a new trial in cause No. 1,670, this day decided upon appeal from the judgment. 63 Pac. 778.

While the original appeal (115 Cal. 677, 47 Pac. 695) was pending in this court, defendants having given no stay bond, a portion

of the personal property mortgaged was sold under foreclosure proceedings. The judgment upon that appeal was subsequently reversed, and the cause remanded for a second trial. Thereupon, defendants filed a supplemental answer, setting out that the notes and mortgages forming the subject-matter of the litigation had been fully paid, satisfied, and discharged. At the present trial in the superior court, for the purpose of establishing this allegation of payment, defendants offered in evidence the execution and proceedings had thereunder pending the first appeal. This evidence was rejected, but evidence was received which proved substantially the same facts; and for that reason no error amounting to prejudice was committed by the trial court, even conceding the ruling erroneous, which proposition we do not decide. It is not disputed but that the sale took place pending the appeal, and that the proceeds of the sale, to the amount of the judgment, were paid over to the plaintiff. But the contention of respondent is that those acts did not, in law, amount to payment of the notes. With that contention we agree, and the court so found the fact and the law. The sale under foreclosure, subsequently followed by a payment of the proceeds thereof over to the plaintiff, may indicate that he has a large amount of money belonging to defendants, but it falls short of proving payment of the notes involved in this litigation. There is no pretense that defendants in any way consented to this sale, but, on the contrary, one of them testified that they did not consent. The judgment upon which the sale was based was reversed and set aside by this court. The foundation upon which the order of sale and all the proceedings had thereunder rested was taken away. By the reversal of the judgment the litigation took the form it had prior to its entry, and the notes stood unpaid. Thereafter the parties stood in the same position as if no judgment had ever been rendered. Counsel for appellants cite no authority which holds that the acts here considered amount to a payment of the notes. Upon the other hand, there is both authority and principle looking to the contrary. 2 Freem. Judgm. § 482.

The property which may be designated as the Chevalier wine was not included in the judgment of foreclosure. Hence, in view of the law as declared in this cause upon appeal from the judgment, no error was committed by the trial court in rejecting the evidence bearing upon that transaction; for this evidence of Chevalier and others was not material upon the question of estoppel, other than as to the Chevalier wine. Neither did it tend to establish a novation. For the foregoing reasons, the order appealed from is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(16 Colo. App. 60)

DES MOINES LIFE ASS'N OF DES
MOINES, IOWA, v. OWEN.¹

(Court of Appeals of Colorado. Jan. 14, 1901.)

LIFE INSURANCE—ACTION ON POLICY—IN-
STRUCTIONS.

1. A defense in an action on a life policy was based on the answers to two questions in the application for insurance, the falsity of either of which would have avoided the policy. *Held*, that an instruction to the effect that the jury could not find for the defendant unless both answers were shown to be false was misleading.

2. An instruction in an action on the life policy that, before the jury could find for defendant, they must find that the habit of the assured as to the use of liquors prior to the application for insurance had been intemperate, "through life," was erroneous.

3. It is erroneous to submit an undisputed fact to the jury as a question in dispute under the testimony.

Appeal from district court, Arapahoe county.

Action by Katie M. Owen against the Des Moines Life Association of Des Moines, Iowa. From a judgment for plaintiff, defendant appeals. Reversed.

M. J. Bartley and Bicksler, McLean & Bennett, for appellant. W. Hy. Smith and Charles L. Richards, for appellee.

WILSON, J. This suit was brought by the beneficiary to recover upon a life insurance policy which was alleged to have matured by the death of the insured. The company set up two defenses, each of which, it was claimed,—and correctly so if the defense was sustained by the evidence,—relieved it from liability. The first was based upon the following questions and answers in the application for insurance, viz.: "Ques. What is your practice as regards the use of spirituous or malt liquors? State amount and kind consumed. Be very exact." To which the applicant answered: "None." And also the following question: "What has been your habit in this respect through life?" To which the applicant answered: "Temperate." The answer of defendant alleges that each of the answers to such questions was, at the time of making them, false, fraudulent and untrue, and that the applicant well knew them to be such. The second defense is that the contract of insurance, by virtue of its express provisions, became null and void because "subsequent to the issuing of the said policy of insurance the said Owen became so far intemperate in the use of intoxicating liquors as to permanently impair his health and to increase the hazard upon his life, and such intemperance directly, materially, and effectually contributed to his death." The question whether the statements in the application for insurance were warranties or merely representations does not arise. It was alleged in the answer that they were warranties. The case was tried upon that

theory, and the court so instructed. In fact, this was not denied by the plaintiff in her replication. The matters in controversy under both defenses were purely questions of fact, which the jury decided in favor of the plaintiff. There was some conflict of testimony, but it was entirely sufficient to sustain the verdict of the jury; and, under the well-settled rule, this verdict is binding upon this court, provided that the questions for the jury to determine were submitted to it under proper instructions. Herein lies the difficulty in the case.

Instruction No. 7, requested by the plaintiff and given by the court, was as follows: "The court instructs the jury that, to enable you to find for the defendant on the first defense, it will be necessary for you to find from a preponderance of the testimony that at the time of making of said answers the practice of said Edmond M. Owen as regards the use of spirituous and malt liquors, and his habits through life in that respect, had been immoderate and intemperate, and that said Edmond M. Owen had been addicted to periodical spreeing for years before the time of said application, and during such periodical spreeing the practice and habit of said Edmond Owen as to the use of spirituous and malt liquors were grossly intemperate and immoderate, and at such time said Edmond M. Owen consumed large quantities of spirituous or malt liquors; that the habit of said Edmond M. Owen through life as to the use of spirituous or malt liquors, prior to signing said application, had been intemperate and immoderate; and that, if said facts as to the immoderate and intemperate use of spirituous or malt liquors or as to periodical spreeing had been known to the defendant, it would not have issued the policy of insurance sued upon in this action. You are further instructed that, unless you can so find from a preponderance of the evidence, your verdict should be for the plaintiff upon the first cause of defense." This instruction was clearly erroneous. The first defense was based upon the answers to two questions, the falsity of either of which would have avoided the policy. This instruction confounded and joined together, by the copulative conjunction "and," the answers to both questions, and also other independent facts bearing upon such answers. It thereby told the jury, in effect, that both answers must have been shown to have been false, before the jury would have been justified in finding in favor of the defendant. It confused two distinct propositions in such a manner that it might have been clearly misleading to the jury. The jury was further told by this instruction that, before it could find for defendant, it must find from the preponderating weight of the testimony that the habit of the insured as to the use of liquors prior to the signing of said application had been intemperate and immoderate

¹ Rehearing denied February 11, 1901.

through life. This was manifestly erroneous. If the practice of the applicant at the time of the application as to the use of spirituous and malt liquors was intemperate or immoderate, or had been such at any time within one year or several years immediately preceding the application, it would have been a violation of the terms and conditions in the contract of insurance, the same, and with the same effect, as if the applicant had been so intemperate and immoderate in such use of liquors throughout his entire previous life. The instruction was further erroneous because it required the jury, before it could render a verdict for the defendant, to further find that if the alleged facts as to the immoderate and intemperate use of spirituous or malt liquors, or as to the periodical spreeing of the applicant, had been known to the defendant, it would not have issued the policy of insurance. This was not an issue in the case. It was so alleged in the answer, and was not denied in the replication. If material at all, it was an admitted fact. The only tendency of this portion of the instruction, if considered at all, would have been to mislead and confuse the jury. To have made any finding as to this point, the jury would have been required to indulge merely in speculation, because there was no evidence with reference to it. It is error to submit an undisputed fact to the jury as a question in dispute under the testimony. *Jenks v. Colwell*, 66 Mich. 420, 33 N. W. 528.

Instruction No. 8 is open to the same objection. The jury was, in effect, told that although it might find that after the issuance of the policy the insured became so far intemperate as to impair his health, and that such intemperance evidently contributed to his death, yet, before the jury could return a verdict for defendant, it must first find from a preponderance of the testimony that the defendant company did not learn of such intemperance until after the death of the insured. Even if this had any material bearing upon the question of the avoidance of the policy, there was no testimony bearing upon it. It was an undisputed allegation of the answer only, and it was improper to submit it to the jury as a disputed question.

The tenth instruction given at the request of the plaintiff was in such language as also tended to mislead and confuse the jury. It might have concluded from this that if the defendant had failed to establish one of its defenses, even though it had sustained the other, it would have been its duty to return a verdict for the plaintiff.

It is true that in some instructions given on behalf of defendant the court, to some extent, laid down the law correctly and clearly. This court, cannot, however, determine by which instruction the jury was controlled. Our determination must be governed by the fact that error may have intervened. We see nothing in the record from which

we may conclude which instructions the jury followed upon the material issues presented. *City of Boulder v. Niles*, 9 Colo. 421, 12 Pac. 632; *Grant v. Varney*, 21 Colo. 334, 40 Pac. 771.

This case has once before been heard in this court,—not upon its merits, however,—and under these circumstances we regret to again render judgment of reversal, but we see no escape from it. Because of fatal error in the instructions to which we have referred, the judgment must be reversed. Reversed.

(16 Colo. App. 25)

MASTER BUILDERS' ASS'N et al. v.
DOMASCIO.

(Court of Appeals of Colorado. Jan. 14, 1901.)

BOYCOTTS—INJUNCTION—DAMAGES—BUILDERS' ASSOCIATIONS—FREEDOM OF CONTRACT—LETTERS—NOTICES—AUTHORITY.

1. A letter to architects of a building, signed by members of a master builders' association, in which they declined to bid on the building if plaintiff's bid should be received in competition, would not authorize a judgment for damages or the issuance of an injunction against such members, since no coercion or intimidation was suggested, and the architects were at liberty to receive bids from numerous builders who had not signed the letter.

2. A notification by a builder to an architect that, if he should receive plaintiff's bid for work, numerous members of a master builders' association would refuse to bid thereon, would not authorize a judgment against such members, in the absence of any evidence to show authority of the builder to give such notice.

3. Where counsel admitted that a letter to an architect, stating that if he accepted plaintiff's bid on certain work others would refuse to bid thereon, was written, signed, and delivered as stated, the use of the words "as stated" did not constitute an admission that all the other allegations of the complaint were true, so as to authorize a judgment against the signers of the letter.

Appeal from district court, Arapahoe county.

Action by Frank Domascio against the Master Builders' Association and others for damages and for an injunction. From a judgment for plaintiff, defendants appeal. Reversed.

Benedict & Phelps, for appellants. O'Bryan & O'Bryan, for appellee.

WILSON, J. The plaintiff and the individual defendants are all builders and contractors in the city of Denver. The great length of the complaint precludes its insertion in full. Its material averments are that in the said city, and in the state of Colorado, the architects, and also the owners of ground who contemplate erecting buildings, are the patrons and customers of the contractors; that a general and universal custom has been adopted, whereby architects solicit contractors and builders to examine plans and specifications prepared by them for proposed buildings, and deliver their bids to the said

architects, who afterwards, in the presence of the contractors, open the several bids so solicited and award the contract; that at the time set forth in the complaint the individual defendants were united and combined together for the purpose of regulating bids of contractors for the construction of such buildings as might be erected within their said city and state, by pledging themselves not to bid less than certain amounts previously agreed upon by them for the whole or parts of such projected buildings, and more particularly were they combined and united and confederated together to prevent, by inducement, threats, or intimidation, not only all other contractors and builders who were not members of the defendant association (a corporation of which it was alleged the individual defendants were all members) from bidding or entering into any contract to build any structures to be erected within said city or state, but also for the express purpose of inducing others—the patrons and customers of such contractors—to cease patronizing, trading, or doing business with any contractor or builder not a member of such organization; and that the express purpose of such combination and confederation was to injure those who were not members of such association, and to benefit each and all of said defendant persons, at the expense of other contractors who were not members of the association; and that all of the said unlawful purposes and objects were acquiesced in, ratified, and acted upon, not only by the said members of the association, but also by the said defendant association itself. As specific acts of injury to the plaintiff, in furtherance of this alleged conspiracy and confederation, the complaint charged that certain architects in Denver,—the firm of Marean & Norton,—being about to construct a building for one McCartney, requested plaintiff to make a bid therefor; that, when he presented his bid, said architects informed him that they would not receive it for consideration, because they had received a written notice, signed by each of the individual defendants herein, and in words as follows: "Denver, May 10th, 1897. Messrs. Marean & Norton—Gentlemen: We, the undersigned members of the Master Builders' Association, decline to bid on the McCartney building if Mr. Domascio's bid is received in competition. Respectfully yours." The complaint further charges that afterwards the individual defendants, through one of them, William Simpson, notified, verbally, William Cowe, another architect, that, should he accept or receive any offer or bid from plaintiff for the construction and erection of a building contemplated to be erected by him, each of said defendants would refuse to bid upon the said work, or allow any one else so to do, and thereby financially ruin and destroy the business of said architect by inducing others to desist from patronizing or employing him; that said Simpson stated to

said Cowe that it was the intention of defendants to protest against the plaintiff doing any work or labor for any of the architects within the city of Denver; that all of said threats, words, inducements, and acts were done with the express purpose to injure plaintiff and destroy his business, and benefit the said defendants, and each of them, at the expense of plaintiff, and were made and done without legal excuse, and in willful disregard of plaintiff's rights, and were a wanton and malicious interference; that by reason thereof they did induce the said Cowe to notify plaintiff that he could not accept plaintiff's bid for the building proposed; that the defendants had adopted the above set forth systematic course of threats, inducements, and intimidations, which, if persisted in, would destroy the plaintiff's business, and had expressly stated to divers and various other persons, more particularly to the above-mentioned architects, that they proposed to so continue their systematic course of injury to the plaintiff, and to destroy his business, by inducing customers to refrain from doing business with him. The individual defendants filed a verified answer, specifically denying all of the material allegations of the complaint, except the execution and delivery of the notice to Marean & Norton. They denied that the Master Builders' Association was composed of the individual defendants, but, on the contrary, averred that at least four of the defendant individuals and firms were not members of said association. They further averred that said association included in its membership only about 15 contractors and builders, whereas outside of the association, and not members thereof, there were about 50 builders and contractors in the city of Denver, and also that none of the architects in said city were members of the association. They denied that they, or any of them, through the defendant Simpson, who was not a member of the association, ever notified any patron or customer of plaintiff that, should he accept or receive any offer or bid from plaintiff for the construction of a building, they would refuse to bid thereon; denied that they, or any of them, ever stated to said Cowe that they would induce others to desist from patronizing or employing him if he received any bid from plaintiff, or that they ever stated that it was their purpose to protest against the plaintiff doing any work or labor for any architect in the city of Denver, or that it was their purpose to enter similar protests whenever any of plaintiff's patrons should open bids for the construction of buildings, and denied that the defendant Simpson was in any manner authorized or empowered to speak or act for the association or for the individual defendants. The Master Builders' Association filed a separate answer, in which, after admitting its incorporation, it denied all the specific allegations of the complaint with reference to it; denied that it had anything whatever to do, or that

any purpose of its organization had anything to do, with the regulating of bids of contractors and builders for the construction of any building in any manner or form whatsoever, or anything in any way relating to the prevention of any person or persons whomsoever from bidding upon or entering into building contracts; denied that it had in any manner either acquiesced in or ratified, or in any manner acted upon, any of the purposes or objects alleged in the plaintiff's complaint. No reply was filed.

The case being called for trial, the defendants objected to the introduction of any testimony, on the ground that the complaint stated no facts to constitute a cause of action. This objection was overruled. Thereupon the case was submitted upon an agreed statement of facts, the attorneys for the defendants admitting in open court that the letter or notice to Marean & Norton was written, signed, and delivered by them to the architects as stated, and, further, that the architects would testify that, except for such notice, they would have received plaintiff's bid in competition with the others. Defendants further admitted that the plaintiff could show, by reason of the time which he spent in connection with the bid and in damage to his business, he sustained a loss to the amount of \$50,—this showing, however, to be considered as made and admitted by the court against the objection of defendants that it was not admissible under the pleadings; that there was no right of recovery of any damages, even nominal damages, or any other sum, on account of the alleged wrongs; and that nothing appeared which would justify the court either in awarding any damages or in granting injunctive relief. The court found the issues for the plaintiff, awarding him judgment for damages in the sum of \$50, and a permanent writ of injunction directed to each of said defendants, and the officers and members of the Master Builders' Association of Denver, restraining them, and each of them, from in any manner or way interfering with or molesting the business of plaintiff by sending written or verbal messages to any of the architects of Denver, notices or messages of their objection to the bidding by the said plaintiff upon any contemplated work, as well also inhibiting them from "in any manner or way interfering with the business of the said plaintiff, or inducing others to desist or refuse to employ" him.

In cases arising from "strikes" or "boycotts," the most delicate and frequently close legal questions are presented, and in their determination courts cannot be too careful to avoid trenching upon the rights and liberties of the individual citizen, guaranteed by, and universally recognized under, our constitution and our system of government. It is true that no question growing out of a "strike" is here involved; the controversy not being between employers and employes, nor capital and labor. It does, however, if the allegations of the complaint are to be taken

as true, involve some legal principles which are included in, arise in, or are closely allied to, those controlling the determination of cases of boycott. Whether such a case is here made by the specific allegations of plaintiff and by the evidence as will constitute a good cause of action, and a wrong for which the law will give a remedy, is the question to be determined. It may be stated as a general principle, so universally recognized in this country as to become axiomatic, that every man has a lawful right to work for or deal with, or to refuse to work for or deal with, any man or class of men as he sees fit; and upon the same principle he has a lawful right to compete with, or refuse to compete with, any person or persons or class of men as he sees proper. A lawyer may refuse to be associated in a case with another, a physician may decline to be called in consultation with another physician, and a mechanic may decline to enter into competition for a contract with any other mechanic or class of mechanics. This each of these parties may do in the exercise of his individual right and liberty, and whatever may be his motive, or whatever may be the resulting injury arising from it, the law can afford no redress. There may be some loss to the physician, resulting from the refusal of another to act in consultation with him, and to the lawyer whom another may refuse to have employed as his associate, but the actual refusal by these parties, being lawful, will not sustain an action by the other for damages, and what one lawyer or physician or mechanic may lawfully do any number may do. In the written notice of Marean & Norton there was no threat, expressed or implied, either against the plaintiff or against the architects, nor was there any language even suggestive of coercion or intimidation. The latter were at perfect liberty to have received the bid of the plaintiff, and in so doing not have become liable to any threatened loss, injury, or penalty. It cannot even be said in this case that they would have been embarrassed by reason of the number of contractors who had signed this notice, because it is undisputed that there were at least 50 other contractors in the city from whom they could have solicited and received bids. We think, therefore, there was nothing in this specific act which could have sustained a judgment against the defendants for damages or the issuance of the injunctive writ. The Cowe case still less furnishes any ground for the judgment. The answer of the defendants specifically denied that Simpson was authorized by the other defendants, or any of them, to act or speak for them in this matter, and there was neither evidence nor admission to sustain any allegation of the complaint in respect thereto. The judgment against the defendant association cannot be sustained on any ground. The acts charged against it by the complaint were specifically denied, and there was not a scintilla of evidence or admis-

sion to the contrary. The views which we have expressed are not only consonant with reason, but we believe are, without exception, supported by the best authority. We here cite a few: *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119; *Macaulay v. Tierney* (R. I.) 33 Atl. 1, 37 L. R. A. 455; *Carew v. Rutherford*, 106 Mass. 14; *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Hunt v. Simonds*, 19 Mo. 588; *Payne v. Railroad Co.*, 13 Lea, 507; *Brewster v. C. Miller's Sons* (Ky.) 41 S. W. 301, 38 L. R. A. 505; *Cooley*, Torts, pp. 278, 688.

The facts and the legal principles here involved are very similar to those in the two cases first cited, and in each there was presented upon the facts a stronger case for relief than here. In each there was an express agreement among the members of an association not to deal thereafter with wholesale dealers who should at any time sell lumber to those not members of the association. Here was nothing of that kind. Defendants did not notify or threaten the architects that, in case they received the bid of the plaintiff, they (the defendants) would thereafter refuse to deal with them. All that the defendants did say to the architects was (giving the notice and the allegations the broadest construction): "If you receive the bid of the plaintiff for any contract, we will not give you our bids in competition therewith."

The authorities cited by the plaintiff are not in point, and they can be readily distinguished from the case at bar. As we read them, all expressly turn upon the fact that there was coercion, intimidation, or malicious threats to do an unlawful injury. In *Van Horn v. Van Horn*, 52 N. J. Law, 285, 20 Atl. 485, 10 L. R. A. 184, there were allegations in the complaint that the defendants, in pursuance of an unlawful conspiracy to ruin the business of plaintiff, had endeavored to prevent her customers and friends from dealing with her by falsely representing to them that she would not be able to carry on her business, but would have to close up, as she was selling goods that did not belong to her, and living off the proceeds, instead of accounting therefor; also by sending threatening notes and messages to them, designed to intimidate them from having any dealings with her; also that they threatened to pursue her until she was ruined; also that the defendants, by corrupt, fraudulent, and deceitful representations, did induce the wholesale firm which was supplying plaintiff with goods to remove the stock already supplied her, to refuse to deliver to her other goods as agreed for, and to break its contracts with her, leaving her entirely without any stock to sell or purchasers to buy from her, by means whereof she could not obtain goods, and was driven out of her business and occupation. In *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, it was shown

that the defendants had induced various persons with whom the plaintiff had contracts to do work to break such contracts, and also threatened persons with whom she was doing business to utterly ruin their business if they continued to deal with her, and that by means thereof the business of the plaintiff was utterly destroyed and broken up. The case of *Casey v. Typographical Union* (C. C.) 45 Fed. 135, 12 L. R. A. 193, was that of a boycott against a newspaper. The court found it to have been clearly shown that the boycott was to be enforced by threatening loss of business to those who, having no connection with the union, should continue to advertise with, or in any way patronize, the plaintiff. Even in *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588, upon which plaintiff most strongly relies, the court, in speaking of the acts or policy in cases of this character which would create a liability for damages, says: "It is not a mere passive, let-alone policy—a withdrawal of all business relations, intercourse, and fellowship—that creates the liability, but the threats and intimidation shown in the complaint." All other cases called to our attention by the plaintiff are found, upon examination, to be of a similar tenor to those to which we have referred.

In his oral admission of fact, which was, as we have seen, the only evidence in the case, the counsel for defendants used the following language: "I have admitted, and do again admit, if necessary, that the letter or communication mentioned in the complaint, and signed by these defendants, or nearly all of them, was written, signed, and delivered by them to the architect as stated." Plaintiff seeks to base a contention upon the use of the words, "as stated"; that the admission thereby embraced not only the fact of writing, signing, and delivering the statement, but all of the allegations of the complaint as to the purpose, objects, and intent of the defendants in the giving of such notice. We think this claim entirely untenable. The connection in which the words were used clearly indicates that they had reference only to the alleged writing, signing, and delivery of the notice to the architects. If there could be any doubt about this, it would be entirely set at rest by the fact that in their answer the defendants expressly denied the alleged intent to intimidate and coerce or ruin the business of the plaintiff or of the architects.

We do not go to the extent of holding that the complaint wholly failed to state a cause of action. It is possible that some parts of it did. We do hold, however, that the allegations of the complaint with reference to the notice to Marean & Norton, signed by defendants, did not, of themselves, state a cause of action, nor did the proof or admission as to the giving of such notice and its contents support any judgment in favor of

the plaintiff, nor sustain the court in granting the injunctive writ which it did.

There was not a scintilla of evidence, either by admission or otherwise, against the defendant corporation, the Master Builders' Association of Denver, and hence the court had no authority whatever to render a judgment or issue a writ of injunction against it. The judgment will be reversed. Reversed.

(15 Colo. App. 520)

KAUFMAN v. BURCHINELL¹

(Court of Appeals of Colorado. Dec. 10, 1900.)

FRAUDULENT CONVEYANCE—STATEMENTS OF AGENT—TELEGRAM—HEARSAY EVIDENCE—ADMISSIBILITY—ASSIGNMENT OF NOTE—SETTING ASIDE CONVEYANCE—RIGHTS OF ASSIGNEE.

1. Where a creditor, on going to his debtor's store, found it in possession of K., who was engaged in packing the goods, statements of K., who was the agent of another creditor, as to what disposition was being made of the goods, were admissible to show a fraudulent conveyance to K.'s principal, though there was no proof of K.'s agency for any specific purpose.

2. Where a debtor's store was in the possession of a creditor's agent, who was engaged in packing the goods, and the agent showed S., another creditor, a telegram stating that an explanation would be mailed to S. in a short time as to what disposition was being made of the goods, such telegram was admissible in proof of a fraudulent conveyance.

3. Answers in a deposition which consisted of what others had told the witness are not admissible.

4. Where a charge was given orally, and did not consist of specific propositions, and was not divided into particular paragraphs, a general exception to the charge as a whole will not be considered on appeal.

5. Where an insolvent debtor agreed to secure a note by a transfer of the bills of lading for certain goods, but without transferring such bills fraudulently conveyed the goods prior to an assignment of the note, the assignee cannot maintain an action to set aside the conveyance.

Appeal from district court, Arapahoe county.

Action by Charles Kaufman against William K. Burchinell. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Westbrook S. Decker, for appellant. E. T. Wells and M. F. Taylor, for appellee.

BISSELL, P. J. This is one of those contests between creditors of an insolvent debtor which frequently develop surprising differences of recollection, and wherein the parties, in attempting to save their claims, sometimes depart from the lines established by high commercial honor. It looks very much as though the appellant had not only attempted, but succeeded, in getting the better of Mrs. Hinda Solomon in the struggle for preference. Notwithstanding this fact, we are not able to see that the conduct of Mrs. Solomon's agents in the transaction would be

wholly exempt from criticism. The judgment, which possibly worked out substantial justice, cannot be permitted to stand. In 1893, Mrs. Cohn was doing a merchandise business in the city of Denver, carrying it on through her husband, Fred Cohn. The business was unprofitable, and Cohn and Mrs. Hinda Solomon had some business transactions. Mrs. Solomon, however, did business through her husband, who managed it, and executed all papers for her, precisely as though the business was his own. There were some real-estate dealings carried on by the Cohns, and they seem to have borrowed some money from Mrs. Solomon through Isaac, her husband. We are not able from the record to dig out the history of all these matters, nor do we regard them as essential to the determination of the appeal. They are simply suggested to show the intimacy of the relation between the parties. The Cohns bought goods of the appellant, Kaufman, who was a merchant in Chicago, for which they failed to pay. Kaufman came on once or twice to make some arrangement about the debt, and on one of his trips had an interview with the Solomons, and the scheme was concocted to get Cohn to give his note for 30 days, and Mrs. Solomon hers at 60 days, the latter to be taken care of by the Cohns in the purchase of goods in Chicago with the money thus obtained. At the time this matter was talked about and arranged there was a good deal of evidence tending to show that Kaufman stated to Solomon that there were goods at the depot on bills of lading which should be turned over to the warehouse, of which one Howard was the manager, to hold as security for his note. The weight of the proof is that way. Isaac Solomon then, on behalf of his wife, executed the paper which was delivered. The bills of lading were turned over to Howard, but, in some way which is not very well explained, Kaufman and another went to the warehouse, and the bills of lading and invoices disappeared, so that all Mrs. Solomon got for her note, which was good, was the unsecured note of a bankrupt. Of course, this was, if true, a fraud on Solomon, and Kaufman should reap no benefit from it. The jury seem to have thought that way, and found a verdict for the defendant. To proceed, however, and develop the case, and show the difficulty with the judgment, we must state that after this thing was done, when Isaac Solomon found out the goods were not in the warehouse, he got suspicious, and went to the store to find out what was being done, and found a person there who turned out to be the brother of the appellant. He could get no satisfaction from him as to what was being done, though it looked very much as if the goods were being spirited away, since the brother showed him a telegram which stated substantially that the goods were to be shipped to Muscatine, Iowa, and Solomon would be advised by letter of the situation. Thereupon Isaac, in the name

¹ Rehearing denied February 11, 1901.

of his wife, transferred the note to his son Jacob, who brought an attachment suit, and levied it on the property. After this was done, Kaufman commenced his suit against the sheriff to recover the goods, alleging a title by virtue of the bill of sale which had been executed to him by Fannie Cohn. The suit went to trial on an issue tendered by the answer, which was to the effect that this sale, as between Cohn and Kaufman, was made to defraud creditors, was in fact and in law fraudulent, and stating, also, that Jacob's title was a naked one as trustee, holding only for his mother, and that he was to account to her for the proceeds. Obviously, the plea was put in this way to avoid the difficulties with the defense, which, as we shall see, is unavailing to an assignee of a claim who acquires title after the transfer has been made and the fraud committed, who cannot, by a transfer of the debt, acquire the right to maintain a suit on account of the fraud, or maintain a defense based on it. It will be observed that Jacob's title to the note was perfectly good as averred; the title to a note passes by assignment or indorsement. He had good title, and had a right to bring suit by attachment. He acquired it, however, after the transfer was made, and there was no attempt at the time to convey to him the right to bring suit on the ground of fraud.

This narration covers all the substantial facts which we need to state for the purposes of the decision. We shall pass over most of the errors which the appellant has discussed in his brief, regarding them as wholly immaterial, and only cursorily mentioning them.

We are quite of the opinion it was competent to prove what was said by the person apparently in charge of the store after the transfer, although he happened to be the brother of the appellant, and although there was no proof that he was the appellant's agent for any specific purpose. He was there in the store, and apparently packing up the goods, and when the Solomons inquired of him what he was doing, and he stated it, the transaction was such as to make the testimony entirely admissible. We entertain the same opinion regarding the telegram, because it contained, by its terms, a direction to state to Solomon that an explanation of the shipment of the goods to Muscatine, or away from Denver, would be made in a letter which was to follow. This very distinct reference to Solomon would undoubtedly make the telegram admissible.

We think that the objections to the answers made in the depositions were well sustained, for, in reality, they amount to nothing except statements by Kaufman of what somebody else had said to him in regard to the attachment of the stock, and advising him to come at once and arrange matters. None of these errors are of much significance, except the first two. As regards the depositions, they can be easily

fixed for the subsequent trial. We might have some difficulty with the instructions, but for the fact that they were given orally, and the only objection taken was a general one at the conclusion of the charge, and in the general form, to the giving of which, and to every one of which, the plaintiff excepted. The charge was an entirety. It was not divided into paragraphs or numbered, nor did it consist of specific parts or specific propositions, but was given as a whole, and covered the entire case. As has been repeatedly decided by appellate tribunals, objections of this sort are wholly unavailable to save any question for the purposes of an appeal.

Coming, now, to the fundamental question which, we think, controls the matter, we may very briefly state that Jacob Solomon's title, which was the basis of the attachment, and which the sheriff pleaded as a defense, was simply a title to the note by virtue of an assignment or indorsement from Mrs. Solomon, his mother, to him. This was after the fraud had been perpetrated, the sale had been made, and the goods delivered, and, as we understand it, this subsequent holder of the paper acquired no title which will enable him to attack the transaction on the ground that the transfer was fraudulent and intended to defraud creditors. Jacob Solomon was not a creditor when he took the paper, nor had he been, and taking title, as he did, after the sale was completed, as we understand the cases, he is in no condition to attack the sale. No proof was made of any sort which tended to support the averment in the answer to the point that he was simply a conduit or a naked trustee, enforcing title for the benefit of the holder, Mrs. Solomon, who was originally the creditor. *Vanderveere v. Gaston*, 25 N. J. Law, 615; *Anderson v. Anderson*, 61 Ala. 403; *Pennington v. Seal*, 49 Miss. 518; *Soden v. Soden*, 34 N. J. Eq. 115; *Hodges v. Taylor*, 57 Tex. 196; *Jones v. Roberts*, 65 Me. 273; *Janvrin v. Janvrin*, 60 N. H. 169.

It is equally clear that the transfer of the note did not carry with it the right of action which had accrued to Mrs. Solomon by reason of the fraudulent transfer, and that there could have been no such assignment of title as to vest it in Jacob, and authorize him to bring suit. In other words, this sort of an action, to set aside a claim on the ground of fraud, seems not to be assignable. There was no attempt to transfer the right to maintain the action because of the fraud, and it is quite clear the indorsement of the note would not carry with it any such right. We refer to the point, because it seems to be, under the authorities, quite clearly conclusive of Jacob's rights. *Zabriskie v. Smith*, 13 N. Y. 322; *Carroll v. Potter, Walker* (Mich.) 353; *Morris v. Morris*, 5 Mich. 171; *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182; *Brush v. Sweet*, 38 Mich., 574; *Foster v. Wightman*, 123 Mass. 100. These principles, which are well estab-

lished by the cases cited, demonstrate the invalidity of the judgment on the case made by the evidence. What the ultimate proof may be, or whether it will be varied at all, we cannot foresee, but, as the case stands on the record, the verdict and judgment entered thereon cannot be upheld, and will accordingly be set aside, and a new trial ordered in accordance with this opinion. Reversed.

(15 Colo. App. 526)

ESTES et al. v. FIRST NAT. BANK OF DENVER et al.¹

(Court of Appeals of Colorado. Dec. 10, 1900.)
CHATTEL MORTGAGES—COVENANT AGAINST SELLING—CONSENT TO USE UNTIL DEFAULT.

1. A mortgage of chattels, a part only of which was merchandise, covenanted that until the mortgage was fully paid the mortgagor would not sell "any part" of the property without the written consent of the mortgagee, and it was agreed that until default in the keeping of some one of the "covenants" of the mortgage the mortgagor might "retain and use" the mortgaged property. *Held*, that the consent to "use" the property was not the written consent to sell referred to in the covenant against selling.

2. The mortgage was not capable of the construction that the covenant not to sell referred to sales in bulk, and that the consent to "use" was permission to sell in the usual course of business, as some of the property, not being merchandise, was subject to "use" otherwise than by selling it.

Error to district court, Arapahoe county.

Action by Edwin P. Estes and others against the First National Bank of Denver and others. From a judgment for defendants, plaintiffs bring error. Reversed.

George N. Hurd and H. L. Ritter, for plaintiffs in error. Rogers, Cuthbert & Ellis, Charles J. Hughes, Jr., Bicksler & McLean, John T. Bottom, and Pierpont Fuller, for defendants in error.

THOMSON, J. On the 1st day of March, 1897, Charles A. Estes executed his chattel mortgage to M. G. Palmer, Edwin P. Estes, and the Post Printing & Publishing Company, whereby, to secure an indebtedness from him to them, evidenced by certain promissory notes made by him, he transferred, assigned, and sold to them a stock of merchandise, together with one safe and certain fixtures, furniture, counters, and shelving; all the property so mortgaged being in the storeroom of the mortgagor in the city of Denver. The mortgage was duly recorded immediately upon its execution. In his mortgage the mortgagor covenanted and agreed that he would well and truly pay the notes which it described in accordance with their terms, and the installments of interest as they should become due, and that he would, until full payment of the debt, keep the property insured against loss by fire in the sum of \$10,000 for the benefit of

the mortgagees. The mortgage also contained the following covenant: "That until said indebtedness, and every part thereof, and all interest aforesaid, shall be fully paid, said party of the first part, his heirs or legal representatives, will not sell or dispose of, or attempt to sell or dispose of, the said property, goods, or chattels, or any part thereof, without the written consent of the parties of the second part or their successors or assigns." We find the following further provisions in the instrument: "Now, therefore, if the said party of the first part shall well and truly and promptly pay the aforesaid notes, and each and every one of them, when the same shall severally become due, without days of grace, and shall also well, truly, and promptly pay each and every installment of interest when the same shall become due and payable as aforesaid, and shall also well and truly abide by, keep, and perform each and every of the aforesaid covenants and agreements, then these presents to be null and void, except as hereinafter provided; otherwise, to remain in full force and effect. And it is hereby agreed that, until default shall be made by the party of the first part, his heirs or legal representatives, in the keeping or performance of some one or more of the conditions, covenants, or agreements above herein or hereinafter mentioned, the said party of the first part may keep, retain, and use the said property, goods, and chattels." Shortly after the execution of this mortgage, the property which it described was levied upon, taken, and sold by the sheriff by virtue of executions issued upon judgments severally recovered against Charles A. Estes by certain of the appellees, and by virtue of writs of attachment issued in suits severally instituted against the same party by certain other of the appellees. The mortgagees, Edwin P. Estes, Moses G. Palmer, and the Post Printing & Publishing Company, brought this action against the appellees to recover damages for the seizure and sale of the property. The complaint set forth the mortgage in full, and alleged the indebtedness to the appellants, its nonpayment, the seizure and sale, and the value of the property. It also alleged that immediately upon the execution of the mortgage the representative of the plaintiffs took possession of the property, and that it was in his possession when it was taken by the sheriff. The defendants demurred to the complaint on the ground that it did not state a cause of action. Upon the overruling of their demurrer, they answered, denying certain allegations of the complaint, setting forth the proceedings in pursuance of which they severally caused the property to be seized, and averring that the purpose of the mortgagor in executing the mortgage was to hinder and delay his creditors. When the jury were impaneled, and the plaintiffs were about to proceed with their case, the defendants ob-

¹ Rehearing denied February 11, 1901.

jected to the introduction of any evidence on the ground that the mortgage, as set forth in the complaint, by reason of the provision which it contained allowing the mortgagor to keep, retain, and use the property until default by him, was void as to creditors. The objection was overruled, and the trial proceeded. When the plaintiffs rested their case, the court, on motion, directed a verdict in favor of the defendants, which was returned accordingly. Judgment followed the verdict. The plaintiffs bring the case to this court by writ of error.

As far as we are able to discover from the record, the various objections taken by the defendants, whether in the form of demurrer, motion, or otherwise, involve but one question; and certainly the parties, by their briefs, have presented but one question to us. It is asserted by the defendants, and denied by the plaintiffs, that the agreement in this chattel mortgage permitting the mortgagor, until some default by him, to keep, retain, and use the property, renders the mortgage void. It is settled in this state that a provision in a mortgage of a stock of merchandise which authorizes the mortgagor to "retain, use, and enjoy" or "retain and use" the property mortgaged invalidates the instrument as to creditors. *Wilson v. Voight*, 9 Colo. 614, 13 Pac. 726; *Brasher v. Christophe*, 10 Colo. 284, 15 Pac. 403; *Harblison v. Tufts*, 1 Colo. App. 140, 27 Pac. 1014. In the case of a mortgage of chattels other than merchandise, those words would be harmless, because the use and enjoyment of such chattels would be consistent with their continued possession in the mortgagor. But the use which is ordinarily made of a stock of merchandise is the sale, in due course of business, of the articles composing it; and giving the mortgagor the use and enjoyment of the stock is, therefore, equivalent to giving him authority to sell it, and appropriate the proceeds to himself, and thus defraud his other creditors. In the cases to which we have referred the covenant for the use and enjoyment of the property by the mortgagor was not affected by any other provision in the instrument; and so, if in this mortgage there were nothing outside of the agreement in relation to the use of the property, by which the meaning of its language might be controlled, we should be compelled to hold that, as against these defendants, the plaintiffs took nothing by their mortgage. The purpose of all rules for the construction of written instruments is the ascertainment of the intention of the parties to them, and, in general, in each instance, such intention must be deduced from the language found in the contract. The writing must be considered as a whole; apparently inconsistent expressions must be harmonized, if possible; if one portion serves to explain the meaning of another portion, it must be used for that purpose; and, if the writing will admit of a construction which will make the whole and its several parts rea-

sonable, such construction must be adopted, for it cannot be presumed that the parties intended their contract to be senseless or absurd. *Stout v. Whitney*, 12 Ill. 218; *Barton v. Fitzgerald*, 15 East, 530; *City of Decorah v. Kesselmeyer*, 45 Iowa, 166; *Buckingham v. Jackson*, 4 Bliss. 295, Fed. Cas. No. 2,090; *Belch v. Miller*, 32 Mo. App. 387; *Blitz v. Steamboat Co.*, 51 Mich. 558, 17 N. W. 55; *Walker v. Tucker*, 70 Ill. 527. The instrument before us contains a covenant that, until the entire indebtedness, including interest, should be paid, the mortgagor would not sell or dispose of, or attempt to sell or dispose of, any of the property mortgaged, without the written consent of the mortgagees. Of course, the latter, by giving their consent, written or unwritten, to the sale of the property, or any part of it, by the mortgagor, for his own benefit, would have invalidated their mortgage as against other creditors. *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966; *Wille v. Butler*, 4 Colo. App. 154, 34 Pac. 1110. If no such consent was ever given, the mortgagor was, at the time of the seizure of the goods by the sheriff, under an absolute prohibition against the sale by him of any part of the property. For the defendants two propositions are advanced: First, that the provision of the mortgage authorizing the mortgagor, until default by him in the performance of his covenants, to retain and use the property, was the written consent which was contemplated in the covenant not to sell; and, second, that the permission to use the property was an authority to dispose of it in the usual course of trade, whereas, by the covenant not to sell, the parties simply proposed to guard against the sale of the property in any other manner; in other words, that it was the intention of the parties that the mortgagor might sell in the ordinary course of business, but that he might not sell except in the ordinary course of business; so that the two provisions are in perfect harmony, and, construed together, render the mortgage fraudulent as to creditors.

1. We think the phraseology of the authority to use the property furnishes a complete refutation of the first proposition. If that provision were disconnected from and independent of the covenant not to sell, counsel's argument would be plausible, and, perhaps, conclusive. But the right to retain and use was contingent on the keeping by the mortgagor of all his covenants, including that against sale. As between the mortgagor and the mortgagee, that right could not be lost until default by the former in the keeping of some one or more of his covenants. A violation by him of any of his covenants would terminate the right. If he should sell the whole or any part of the mortgaged property, the privilege of retaining and using it would cease. We are compelled to dissent from the proposition that a permission to use, so long as the mortgagor shall not sell, is a consent that he may sell.

2. The other proposition involves questions of somewhat greater difficulty, but we think that it also is untenable. However, in view of the vigor and ability with which it is supported, we deem it well to give the argument and the authorities cited in its support a careful and critical examination. First, however, we deem it proper to say that we are in entire accord with counsel in so far as most of their statements of the law are concerned. We agree that there is in every mortgage of chattels, where the instrument is silent on the subject, an implied agreement of the mortgagor not to sell the mortgaged property, or any part of it, without the consent of the mortgagee; that an authority to use the property, if it consists of a stock of goods, is an authority to sell in the usual course of trade, and not otherwise; that, where the mortgagor reserves the possession and use of the property without limitation, a covenant not to sell, outside of the usual course of trade, is implied; that in such case, as between mortgagor and mortgagee, the latter is bound by sales made in the ordinary course of business, but is not bound by sales made otherwise; and that while the power in the mortgagor to use the property is valid as between parties, it is void as against creditors. Inasmuch as counsel and the court are agreed upon the foregoing statements, it is unnecessary to refer to the authorities which have been cited in their support. If the authority given the mortgagor to retain and use the property were unaffected by any other provision in the instrument, our decision would be little more than a matter of form; but there was another provision by which the mortgagor was forbidden to sell the whole or any part of the property, and the question of its effect upon the permission given to retain and use the property is the sole question in the case. We proceed, therefore, to an examination of the authorities with which we have been furnished, bearing upon that question.

In *Bank v. Caperton*, 74 Miss. 857, 22 South. 60, the mortgage contained the following provision: "That it shall be lawful for the said mortgagor, its successors or assigns, to retain possession of the goods or chattels, and at its own expense to keep and use the same until its successors or assigns shall make default in the payment of the said sum of money, above specified, either in principal or interest, at the date or times and in the manner hereinbefore stated. And the said mortgagor hereby covenants and agrees that, * * * if the mortgagor shall sell or assign, or attempt to sell or assign, the said goods or chattels, or any interest therein, * * * said mortgagee, its successors or assigns, or any of them, shall thereupon have the right to take immediate possession of said property." Respecting those provisions, the court, after saying that the right of the mortgagor to

keep and use the property, reserved on the face of the mortgage, avoided the instrument as to creditors, spoke as follows: "It is said that the subsequent provision that, in case the mortgagor should sell or assign said property, or any interest therein, the mortgagee should take immediate possession, etc., saves the instrument. But the use first referred to is clearly the usual use in the ordinary course of business; but the latter provision relates to a selling out of the business otherwise than at retail, in such ordinary course of business, and a clause providing such selling out at retail, as usual, cannot be permitted. It would operate as a fraud on those who gave credit to the mortgagor on the faith of an apparent ownership, serving the purpose of continuous cover."

In *Walker v. Clay*, 42 Law T. (N. S.) 369, the question was whether a purchaser from the mortgagor or property covered by a mortgage took a good title as against the mortgagee. In the instrument the mortgagor covenanted that, as long as any money should remain owing on the security, he would not remove any of the mortgaged property without the previous consent, in writing, of the mortgagee, except for necessary repairs. The mortgage contained the following further provision: "And it is hereby declared and agreed by and between the said parties hereto that, until default shall be made in payment of the said sum of £100 and other moneys (if any) and interest, contrary to the tenor and effect of the provision hereinbefore contained, or until default shall be made in payment of the interest on any principal money due on this security, or some part or parts thereof, etc., it shall be lawful for the said mortgagor, his executors and administrators, to hold, make use of, and possess the said premises hereby assigned or intended so to be without any hindrance or disturbance of or by the said mortgagee, his executors and administrators, provided that the total principal moneys shall not exceed £300." The following is the language of Lindley, J., in construing those provisions: "The bill of sale is given as a security for a loan of money, and the object of the security is not to paralyze the trade of the grantor, but to enable him to carry on his trade, and the security would be worthless if we were to construe it so as to paralyze his trade. The covenant by the grantor not to remove any of the things comprised in the bill of sale without the consent of the grantee is not a covenant not to sell at all, for that, to my mind, would be contrary to the intention of the parties, and would destroy the value of the security. The covenant not to remove the chattels must be construed and regarded as a covenant not to remove or dispose of them otherwise than in the ordinary course of trade. Then there is a covenant that 'it shall be lawful for the said mortgagor, his executors and administrators, to hold, make use of, and possess the said

premises hereby assigned or intended so to be without any hindrance or disturbance of or by the said mortgagee, his executors, administrators, or assigns, provided that the total principal moneys shall not exceed £300.' Taking all these provisions together, the conclusion is arrived at that the grantor is to carry on his business in the ordinary course of trade, but, if he is desirous of disposing of anything in any other sense, then he is not to do so without consulting the grantee, and obtaining his consent,—as if, for instance, he required to move the goods into another house."

Counsel inform us that it appears from the abstract of the record, filed in the supreme court in the case of *Wilson v. Voight*, supra, that the mortgage out of which the litigation grew contained the following provisions: "That, until default be made by the said party of the first part in the performance of the condition aforesaid, it shall and may be lawful for him to retain possession of the said goods and chattels, and to use and enjoy the same; * * * or, if the said party of the first part shall attempt to sell (or remove) the same without authority or permission of the said party of the second part in writing expressed, then it shall and may be lawful for the said party of the second part, or assigns, to take immediate and full possession of the whole of said goods and chattels." No point seems to have been made upon those provisions. They are not alluded to in the opinion, and no question of their meaning or effect was decided by the court.

We have examined all the cases cited by counsel in which the particular question we are considering is alleged to have been involved; and we are now to see what, if any, likeness there is between them and the case at bar. In *Bank v. Caperton* the mortgage made provision against the sale or assignment, or the attempted sale or assignment, of the mortgaged property, or of any interest therein. By the sale or the assignment of the whole of the property, the mortgagor would part with his entire business, and such a transaction would certainly not be in accordance with the ordinary course of business. By the sale of an interest in the property, the purchaser would acquire an ownership in every article composing it. The title to the whole would be in the vendor and the vendee jointly, and just as certainly as in the other case the transaction would not be in accordance with the usual course of business. There was, therefore, no conflict between those provisions and the provision allowing sales in the ordinary course of business, and it was upon the harmony existing between them that the decision of the court was based. In *Walker v. Clay* the covenant of the mortgagor was not to "remove" any of the mortgaged property without the consent of the mortgagee, except for necessary repairs. The court held

that a covenant not to remove was not a covenant not to sell, but amounted to a covenant not to remove or dispose of the property otherwise than in the ordinary course of trade. The whole decision turned upon the definition which the court placed on the word "remove." The provision in the mortgage construed in *Wilson v. Voight*, found in the abstract filed in the case, but not considered by the court, was directed against the sale or removal of the entire stock of goods; and we have no doubt that, if it had been made the subject of consideration, the supreme court would have held that the intention was to prevent the sale of property, outside of the ordinary course of business, and was, therefore, without effect upon the authority in the mortgagor, elsewhere reserved, to use and enjoy the property. If, in the case before us, the covenant not to sell is to be construed as a covenant not to sell except in the ordinary course of business, then, of course, it is not a limitation upon the right reserved by the mortgagor to himself to keep, retain, and use the property; and the presence of that reservation, unlimited and uncontrolled, would render the mortgage void as to the creditors of the mortgagor. Let us see whether the language of this covenant will bear any such construction. The agreement was that the mortgagor would not sell or dispose of, or attempt to sell or dispose of, the mortgaged property, or any part thereof, without the written consent of the mortgagee. It is difficult to conceive of language more comprehensive. The disposition of the goods in the usual course of trade would be the sales of portions of them from day to day to customers. The sale of a single article to a customer would be the sale of a part of the property, and, consequently, a breach of the covenant. But it would be, nevertheless, in accordance with the regular course of business. The sale of the whole of the stock at once would be contrary to such course, but not necessarily the sale of a part. The language of the covenant is sweeping. A sale outside of the ordinary course of trade and a sale within the ordinary course of trade are alike provided against, unless authorized by the mortgagee. Without the consent of the latter, the mortgagor had no right to sell a single article from the stock, or dispose of any part of the property in any manner to any person, and none of the cases to which our attention has been directed is in point. But if the permission reserved to the mortgagor to retain and use the property must be construed as an authority to sell the property, even in the usual course of business, then the two provisions are in direct and hopeless conflict; and the latter, being in fraud of creditors, must be disregarded, while full effect is given to the other. *Crittenden v. French*, 21 Ill. 598; *Brown v. Slater*, 16 Conn. 192; 2 Whart. Ev. § 1249. But we do

not think there is any inherent inconsistency between those provisions. Speaking generally, there is no use of property apart from its possession, and to sell is not to use. But because a stock of merchandise is held for the sole purpose of its sale, in order that effect may be given to an authority to use the property, and in order that the obvious intention of the parties may be carried out, courts have been compelled to give the word "use" a signification different from that fixed by the standard lexicographers. However, where it clearly appears from the whole instrument that the parties could not have intended an authority to use to be an authority to sell, then it must be concluded that the word "use" was not employed in any extraordinary sense, and courts would have no right to give it a forced definition. In this case the mortgagor covenanted, in language so plain that, as it seems to us, misapprehension of its meaning is impossible, not to sell at all; and, inasmuch as a permission to use is not necessarily a permission to sell, a supposition that the reservation of the use of the property was intended as a reservation of a right to violate the covenant not to sell is not to be entertained. A considerable amount of the property mortgaged—but what proportion of the whole we are not advised—consisted of articles which were not merchandise, which were not held for the purpose of sale, and the use of which was incompatible with their sale. The policy of the law is to uphold contracts, not to destroy them, and, if any definite idea was intended to be conveyed by the word "use," for the purpose of giving the mortgage the effect contemplated by the parties, the application of the word must be confined to the articles of which we have spoken. They could be used without detriment to creditors, and a supposition that it was their use which the mortgagor intended to reserve would be consistent with the language employed, and harmonize all the provisions of the mortgage. But speculation is needless, for, upon an examination of the whole instrument, it is clear to our minds that, whatever meaning was attached to the word "use," it was not intended to import a privilege to sell. Let the judgment be reversed. Reversed.

(16 Colo. A. 96)

PERKINS et al. v. ADAMS et al.

(Court of Appeals of Colorado. Feb. 11, 1901.)

RECORDS—NOTICE—BONA FIDE INCUMBRANCE—ATTACHING CREDITOR—MORTGAGE SALE—PURCHASE BY EXECUTOR.

Gen. St. § 215, declares all conveyances or agreements in writing affecting title to real estate shall, when recorded, take effect as to subsequent bona fide incumbrancers without notice. *Held*, that where executors loaned the estate's funds, taking a note as executors, secured by a trust deed on real estate, and on foreclosure a deed reciting the form of the note and receipt of consideration from the pur-

chaser was given one of the executors individually, he having in fact bid in the property as executor, his creditors attaching the land were, under the statute, entitled to subject the same to their claims, there being nothing of record to notify them of the true state of the title, and they being presumed to know the executor had a right to purchase the property individually.

Appeal from district court, Arapahoe county.

Suit by Edward C. Perkins and another, executors of the estate of Albert E. Touzalin, deceased, against Frank Adams and George W. Holmes. From a judgment for defendants, plaintiffs appeal. Affirmed.

Charles H. Toll and D. V. Burns, for appellants. Thomas, Bryant & Lee and Sprigg Shackleford, for appellees.

THOMSON, J. Edward C. Perkins and Charles S. Maurice were executors of the will of Albert E. Touzalin, deceased. Touzalin died on the 12th day of September, 1889, and his will was admitted to probate in the county court of El Paso county on the 12th day of November, 1890. It directed that no division whatever of his property should be made for a period of five years after his death. On the 26th day of September, 1891, the executors loaned \$30,000 of the money of the estate to George Bailey, who secured the loan by a trust deed upon real estate in East Denver. Henry Van Kleeck was the trustee to whom the property was conveyed. The note that evidenced the debt was described in the trust deed, and, by its terms, was payable to "Charles S. Maurice and Edward C. Perkins, executors." The note was not paid at its maturity, and the trustee, upon the request of the executors, proceeded to advertise and sell the property pursuant to the terms of the deed. The notice of sale described the note, and mentioned the names of its payees as "Charles S. Maurice and Edward C. Perkins, executors." At the sale, the property was purchased by Edward C. Perkins, and it was conveyed to him by the trustee. The deed by which it was conveyed recited that he was the highest and best bidder, and invested him personally with the title. It was dated September 4, 1895, and was recorded on the 6th day of September, 1895. On the 21st day of January, 1897, Frank Adams and George W. Holmes commenced suit against Edward C. Perkins and others to recover the amount of an indebtedness alleged to be owing to them by the last-mentioned parties, and caused a writ of attachment to be issued in the suit, and levied upon the property which had been conveyed to Perkins. Afterwards, on the 29th day of January, 1897, T. J. Kane commenced suit against the same parties, in which a writ of attachment was issued and levied upon the same property. On the 15th day of March, 1897, Perkins executed a conveyance of the property to Charles S. Maurice and himself, as executors of the will of

Albert E. Touzalin. On the 18th day of August, 1897, the executors commenced this action against Adams, Holmes, and Kane to remove from their title the cloud created by the levy of the attachment writs, alleging, in addition to matters we have stated, that Perkins never paid any part of the purchase price of the property from his own money, but took and held the title as trustee for the estate of the decedent; that from the 4th day of September, 1895, the plaintiffs were in the possession of the property as executors of the will of Touzalin; and that each of the defendants had due notice of the capacity in which Perkins held the title, and of the possession of the property by the plaintiffs as executors, before they caused their attachments to be issued. The defendants answered, setting up their attachment liens, and denying notice or knowledge that Perkins was not the absolute owner of the property, or that he held the title otherwise than in his individual capacity. The trial resulted in a judgment for the defendants, and the plaintiffs appeal.

Upon an examination of the record, we find the following undisputed facts: The price bid by Perkins for the property, being \$27,500, was not paid by him, but was credited upon Bailey's note. The conveyance was taken in his name, because the general business of the estate was done in his office in Boston, Mass.; and as his co-executor lived in Athens, Pa., and was frequently absent from home, and in case of a sale it might be inconvenient to send the papers to him for execution, it was desirable to avoid the necessity of so doing. For a considerable period before the sale the executors, by their agent, collected the rents due from the tenants on the premises. As against the estate, Perkins never had or claimed any right in the property, but held the title solely for its benefit, and none of the defendants had any actual notice of the interest of the estate in the premises. There can be no doubt that, as between Perkins and the estate, the property belonged to the latter; but we must look further to find what the rights of the estate, as against these defendants, may be. It is provided by section 215 of the General Statutes as follows: "All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, and powers of attorney for the conveyance of any real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office, and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent bona fide purchasers and incumbrancers by mortgage, judgment or otherwise, not having notice thereof." By virtue of that provision, a purchaser or incumbrancer of land may rely on the title which he finds upon the record, and will be protected against an

outstanding claim which the record does not show, and of which he has no actual notice. And it has been held by the supreme court and this court that the lien of an attachment is an incumbrance within the meaning of the statute, and takes precedence of an unrecorded title or interest of which the attaching creditor had no notice at the time of his attachment. *Jerome v. Bank*, 22 Colo. 37, 43 Pac. 215; *Campbell v. Bank*, 22 Colo. 177, 43 Pac. 1007; *Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *Wahrenberger v. Waid*, 8 Colo. App. 200, 45 Pac. 518. These defendants found the title to the property in question standing upon the record in the name of Mr. Perkins, and in their suits against him levied their attachments upon it. They had no actual notice of the interest of the estate in the premises, and, unless they are chargeable with notice of something else calculated to excite suspicion, and suggest an inquiry, which, if followed up, would lead to a knowledge of the true situation, the claim made in behalf of the estate is subject to their lien. A purchaser of land, or one asserting an interest in or claim upon it, is presumed to have notice of everything which the record discloses concerning the title; and if, in a deed which constitutes a link in a chain of title, there is a recital, or an inference, or a word which is not self-explanatory, but which indicates the existence of some condition by which the title may be affected, he is bound to follow up the clue by investigation; and he will be charged with knowledge of the facts to which it points, whether he makes the investigation or not. No doctrine is more thoroughly established than this: That what is enough to put a purchaser on inquiry is equivalent to actual notice, and that when he has information sufficient to lead him to a fact he will be presumed to know it. It is upon this doctrine that the plaintiffs rely to avoid these attachment liens. The line of reasoning on which counsel proceed is that the trust deed, and the deed from the trustee to Perkins, notified the defendants that Perkins was acting in a representative capacity. The trust deed was executed to secure a note payable to "Charles S. Maurice and Edward C. Perkins, executors"; and the notice of sale, which was incorporated into the deed from the trustee to Perkins, contained the same description of the payees of the note. Therefore it is said that the defendants were bound to know the extent of the authority conferred upon the executors by the will, and were also bound to know the capacity in which Perkins took the title. We agree with counsel that the word "executors," as it occurs in the instrument, is not necessarily a mere descriptive personarum; and, if it had been the note which was the subject of Perkins' purchase, or if, in the deed to him, the word "executor" had followed his name, a person dealing with him in relation to either the note or the land would

be bound to inquire into the effect which the word was intended to have upon his title. But the land was not conveyed to him as executor. Whatever effect might be given to the instrument of conveyance by the preceding records, on its face it invested him personally with the title. It recited that he was the highest and best bidder, and that the property was sold to him for the amount of his bid. It also acknowledged the receipt from him of the purchase price. He was a party to that instrument in his individual capacity, and the intention of the parties, as it appears upon the face of the deed, was to invest him with the title in his own right. This is not the case of a trustee purchasing at his own sale, for Perkins did not make the sale; and it is not the case of an executor purchasing property belonging to the estate of his testator, for the estate did not own the land. Neither the legal nor the equitable title to the premises sold was in the estate. The legal title was in Van Kleeck, and the equitable title in Bailey. The only right which the estate had in connection with the land was the right, in case of Bailey's default, to have it sold by the trustee, and the net proceeds applied in payment of its note. The estate was interested in having it bring the best price obtainable up to the amount due; and, so far as the land was concerned, it was interested no further. The sale was not made by the executors, and land of the estate was not the subject of the sale. The authority to sell was vested in Van Kleeck as trustee. It was his duty to strike the property off to the highest and best bidder, and the interests of the estate demanded that he should do so; but, provided the purchase money was paid, it was a matter of supreme indifference to the estate who was the successful bidder. The money of its executor was as good to it as the money of a stranger. None of the reasons for which a trustee is forbidden to deal for his own benefit in the property of his cestui que trust has even a remote bearing upon such a transaction as this appears upon the records in the office of the recorder of deeds to have been.

We have been cited to no decisions, and we have found none, which are at variance with the views we have expressed. There are cases, however, which shed some light upon the question under discussion, a few of which we shall notice. In *Dillinger v. Kelley*, 84 Mo. 561, the administrator with the will annexed was interested in the purchase of land of the testator at a foreclosure sale. His purchase was attacked on the ground that the administrator was a trustee, and could not buy at the sale. The court, in disposing of the question, said: "In the matter of the foreclosure sale, Daws Kelley, as administrator, had, in that capacity, neither power to exert nor duty to perform. I prove this by asking this question, which suggests at once its own negative answer:

Suppose the administrator had not attended the foreclosure sale, or purchased the land sold thereat, would that have rendered him liable on his bond as and for a breach of that bond? If it would not, then it stands to reason that, having no duty to perform regarding that land which required his presence at the sale, when he went there and bought the land he did so on the footing of the merest stranger, free to buy or free to forbear." That was a case in which land belonging to the estate was sold. *Briant v. Jackson*, 99 Mo. 585, 13 S. W. 91, was a case in which land of a party against whom the estate had recovered judgment was sold under execution issued upon the judgment, and the administrator was charged with being interested in the purchase. The right of the administrator to be a purchaser was denied, and upon the question of such right the court said: "Having, as said administrator, recovered said judgment, it was his privilege and duty to direct the clerk to issue the execution, and this, we suppose, was done by the administrator in this case, or perhaps by his attorneys. But, after the execution came to the hands of the sheriff, the sheriff, and not the administrator, was charged by law with the execution of the process, with the return and application of the purchase money, with the due execution of proper deeds to the purchasers, and, in short, with the entire responsibilities of the sale. * * * So that, if the administrator was, in effect and in fact, the purchaser, as is charged by the bill, he had, we think, a right to be at that sort of sale, provided his conduct was fair and just in all respects." The same doctrine was announced in *Johns v. Norris*, 22 N. J. Eq. 102, and *Hollingsworth v. Spaulding*, 54 N. Y. 636. See, also, *Den v. Hillman*, 7 N. J. Law, 180; *Wilson v. Miller*, 30 Md. 82. Counsel for the plaintiffs have cited us to the case of *Dusing v. Nelson*, 7 Colo. 184, 2 Pac. 922, but for what purpose we confess our inability to understand. No question made here was involved in that case. *Dusing* executed to *Graves*, as trustee, a trust deed to secure the payment of a promissory note to *Butler*. The note not being paid at maturity, the premises were advertised for sale, as required by the trust deed. The amount due upon the note was \$1,800. At the sale the highest bid offered was \$625. Thereupon the trustee bid for the executors of *Butler*, who was then deceased, the sum of \$1,500, and that being the highest bid, the premises were struck off and sold to them for that sum. A few days afterwards *Nelson* purchased their bid for \$1,800, and, by their direction, the trustee made the deed directly to him. The entire sum of \$1,800 was credited on *Dusing's* note. *Nelson* brought ejectment against *Dusing*, and his defense was irregularity in the sale and the execution of the deed. It appears that the property was struck off to the executors in their

representative capacity, and the point was made that they could not so purchase at the trustee's sale, even if present. Respecting that the court said that, as an unlimited proposition of law, it was not correct. The features of the case are very indistinctly outlined, but it is evident that the controversy related only to the power of the executors to purchase the premises for the benefit of the estate. The court held that they possessed such power, and cited in support of its decision *Schouler, Ex'rs*, § 323, where it is laid down that when it becomes necessary to save the estate from loss, it is not only the right, but the duty, of the executor or administrator to purchase the property for the benefit of the estate. But the right of an executor or administrator to purchase for himself land sold to satisfy an indebtedness to the estate was not in question. We feel satisfied that, as between Perkins and the estate, in the absence of fraud, there was no reason why he should not purchase the premises in question for himself. But, as a matter of fact, he did not do so. By an arrangement between himself and his co-executor he took the title for the benefit of the estate, proposing to sell the property, and turn the proceeds over to the estate. As between himself and the estate, he was a trustee, and equity would compel him to account to the estate for the property; but third persons would not be affected by the trust, unless they had actual notice of its existence, or unless there was something which they were bound to know suggestive of its existence. Now, it is true that by examining the records the plaintiffs would have found that Maurice and Perkins held Bailey's note as executors, and that, as executors, they had the right, if Bailey made default, to cause the real estate described in the trust deed to be subjected to the payment of the note. And, if they had consulted the will, they would have found that Maurice and Perkins were, as executors, in charge of the estate of Albert E. Touzalin, deceased. From the records they would also have found that at the request of Maurice and Perkins, as executors, the trustee advertised and sold the property, and that Perkins was the purchaser. But none of these discoveries, which they might have made, and probably did make, conveyed the smallest hint that the deed which the trustee made to Perkins conveyed anything short of an absolute title. The executors had the right to demand the sale of the property; the trustee had the right to sell it; and, when sold and conveyed by him, it would be discharged from the lien of the trust deed, and from all claim of the estate upon it by virtue of the trust deed. So that the mere fact that Maurice and Perkins held the note and trust deed, and procured the sale of the property, as executors, would indicate nothing as to the nature of the title taken by the purchaser. What that title might be

must be determined by an examination of the deed by which it was conveyed, and, if that purported to convey an absolute title, and contained nothing to excite suspicion of the existence of an outstanding interest, then, as to purchasers and incumbrancers not having actual notice, the grantee would be the owner of the land in his own individual right. And the plaintiffs were not charged with notice of any weakness in this title by the fact that the purchaser was one of the executors, because, as we have seen, at that sale, he was upon the same footing with a stranger, and had the same right to purchase. Now, an examination of the deed from the trustee to Perkins discloses nothing to suggest a necessity for inquiring whether there might not be some secret trust connected with the title. The deed recites that Perkins was the highest and best bidder, and that the property was sold to him. It acknowledges the receipt of the purchase money from him, and conveys the land to him, his heirs and assigns, forever. This is the record which the estate, by its executors, caused to be made upon the title; and as to outside parties, with no knowledge of the situation except what may be gained from it, it imports absolute verity. The plaintiffs were entitled to rely upon that record, and were not called upon to look further. They are supposed to have known that Perkins might lawfully purchase for himself at the sale by the trustee, and, finding upon the record a deed from which it appeared that he had so purchased, they had the right, in the absence of other knowledge, to regard the property as his. Furthermore, the records disclosed that always theretofore Maurice and Perkins had transacted the business of the estate jointly, being careful in every instance that the representative capacity in which they were acting should appear. The money was loaned by them jointly as executors; the note was payable to them jointly as executors; in the deed of trust they, as the beneficiaries, were described as executors; and the land was advertised for sale, at their instance, as executors. But at the sale the property was struck off, not to Maurice and Perkins, and not to Perkins as executor, but to Perkins personally; and the deed was a conveyance to him as an individual. From the fact that down to the sale the executors had always been careful to notify the world that they were acting as such, the natural supposition would be that the reason why the deed to Perkins did not describe him as executor was that he did not purchase as executor.

In the case of *Appelman v. Gara*, 22 Colo. 307, 45 Pac. 366, to which we are referred, the facts were as follows: Gara loaned Shugart \$1,200. The loan was evidenced by a promissory note, the payment of which was secured by a trust deed whereby Shugart conveyed a city lot to Griswold, with power,

In case of default in the payment of the note, to sell the property at public auction for cash after three weeks' notice. The deed was duly recorded. Shugart afterwards conveyed his equity in the property to Lack, who then conveyed it, subject to the trust deed, to McIntyre. McIntyre soon afterwards conveyed her interest to Hoffman, and the latter almost immediately conveyed the property to Griswold, the original trustee, subject to the trust deed. All these conveyances were duly recorded. Afterwards, and before the maturity of the note, without authority from Gara, the beneficiary, and without the payment of the note, Griswold, the trustee, executed and caused to be recorded a deed of release to Shugart. Some time thereafter Griswold executed a trust deed to McAdams as trustee to secure the payment of \$1,400 to Appelmann. Gara brought suit to set aside the release deed, and the court held that there was sufficient in the fact that the debt was not due when the deed was made, coupled with the other fact that the release deed made by Griswold was virtually a release to himself of a debt to which his purchase of the property was subject, to excite suspicion, and put Appelmann on inquiry. The act of Griswold was peculiar, and out of the ordinary. A release of property from a trust deed before the debt becomes due is not very usual; but, coupled with that feature, the additional fact, disclosed by the record, that the only benefit derivable from the release accrued to the man who executed it, would seem to call for investigation by one who proposed to become interested in the property under Griswold. That case is not in point. Some other authorities are cited in support of the familiar doctrine that a trustee cannot lawfully be a purchaser at his own sale, or deal for his own benefit with the property of his cestui que trust. No purchase by a trustee at his own sale is involved in this case; neither was the subject of Perkins' purchase the property of the estate.

But counsel say that the statutory provision quoted early in this opinion cannot be made applicable to this case, for the reason that it puts an attaching creditor upon the same footing with a purchaser only as against an unrecorded deed or contract. The long-established rule of which the statute is a modification was that the lien of an attachment bound only the interest of the attachment defendant in the property attached. The reason of the rule was that, if the levy should fail of its purpose, the plaintiff would lose nothing. Having parted with no value, his position would be no worse than it was. *Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667. That rule is still in force, except in so far as the statute has changed it; and, if we consider only its letter, the statute has made no change in the rule, except in respect to a title to real estate evidenced by an unrecorded deed or contract, of the existence of which the attachment plaintiff is ignorant.

There is much force in the argument that the statute is not applicable to an outstanding equity, which does not subsist in writing; and that hence, in this case, the interest of the estate in the property arising out of a trust with which the law charged Perkins, and being evidenced by nothing which could be the subject of record, the defendants took nothing by their attachment. But upon the question which counsel seek to raise the supreme court has expressed itself, holding that an outstanding unrecorded interest in land, whether it rests in a resulting trust or in a deed, must yield to the lien of an attachment acquired without knowledge of its existence. *Campbell v. Bank*, 22 Colo. 177, 43 Pac. 1007. We are bound by that decision. It is, however, suggested that the utterance is mere dictum,—unnecessary to the decision of the case; but, until the court which is responsible for it says so, we must regard it as law. The judgment is affirmed. Affirmed.

(15 Colo. App. 533)

BRUN v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.¹

(Court of Appeals of Colorado. Dec. 10, 1900.)

INSURANCE—LAPSED POLICY—REINSTATEMENT—REQUIREMENTS.

Where a member of a fraternal insurance society was suspended for nonpayment of assessments, a tender of the amount required for reinstatement, together with a physician's certificate that the member was in good health, would not entitle the member to reinstatement if unaccepted by the society, and not shown to be a full compliance with its by-laws and regulations respecting reinstatement.

Appeal from district court, Arapahoe county.

Action by William H. Brun against the Supreme Council American Legion of Honor on an insurance policy. From a judgment for defendant, plaintiff appeals. Affirmed.

Warwick M. Downing, for appellant. Joseph N. Baxter (John H. Butler, of counsel), for appellee.

BISSELL, P. J. William Brun, as beneficiary in a policy issued on the life of his wife by the Legion of Honor, after her death brought this suit to recover on the policy. It probably could be safely stated as a general proposition that appellate courts are somewhat astute to find reasons which will permit the trial of all issues of fact on such policies by a jury. They are well aware that insurance companies, both life and fire, are always eager to accept premiums and do business, but are not always equally prompt to settle claims. The criticism does not usually extend so broadly to companies insuring lives as to the other line of business. Life insurance companies ordinarily pay their policies, even though there may be some doubt respecting their validity because of misrepresentations or concealments made to ob-

¹ Rehearing denied February 11, 1901.

tain the insurance. The value of life insurance policies is so fully recognized in modern times by the American people that there is a great desire on the part of most to protect their families after death, and, even though they may be practically conscious of their ineligibility, if the fact is not discovered by the medical examiner, many people will make statements in their applications which render them eligible, whereas, if the facts were known, they could not procure a policy. All these various considerations lead to the practice intimated in the opening of this opinion. We are very frank to say that, if we could see our way clear, we would send this case back, and permit it to be tried by jury, regardless of the bold statement of plaintiff's counsel when he opened the case to the jury. The case comes up in a somewhat peculiar fashion. The complaint was demurred to. This demurrer was overruled, and the case came to trial, and, after plaintiff's counsel had made his opening statement, the attorney for the company then moved for judgment on the pleadings and statement. Judgment went for the company, and this is appealed from. On this record we are called on to consider the propriety of this action. We have no doubt the judgment was properly entered, regardless of the opening statement. We do not quite understand why the demurrer was not sustained, because, as we view it, the complaint does not state a cause of action. There is one matter to which we will refer, because it is somewhat discussed in the briefs of counsel, and in a very peculiar way. The only possible paragraph in the complaint which in the remotest manner tends to support a cause of action in favor of the plaintiff is the fourth paragraph. Respecting this, plaintiff's counsel served notice on the defendant's attorney that paragraph 4 would not be relied on, and no evidence would be given in support of it. When, on this appeal, the appellee's counsel discusses the point that there is no cause without it, counsel for the appellant accepts the proposition; but he says, if he has not got a cause of action without paragraph 4, he has no cause at all, and does not desire us to support his complaint. Recurring now briefly to the complaint, for we shall not attempt to state it in its entirety, it appears that Mrs. Brun was insured in the Legion of Honor, and had carried the policy for some little time. In August, 1896, she was suspended for the nonpayment of assessments. This suspension continued until about the month of February, 1897. At that time she applied for reinstatement, and requested information respecting the amount necessary to reinstate her, and to be furnished blanks on which the examination could be made. Either the secretary of the company, or some one in his office, sent a statement that the amount due for reinstatement was \$78.40, and sent blanks on which an examination

which, when completed, presumably would authorize the reinstatement. Mrs. Brun sent the money, and filled out the blank, which stated that she was in good health, and which fact was confirmed by the certificate of a physician on a general inspection. On receipt of the money and the certificate at the office, it was immediately returned by the officers of the company, and Mrs. Brun was advised that that certificate was insufficient for a reinstatement under the circumstances, and blanks were sent the same as in the case of an original membership, to wit, a complete physical examination and statement concerning the condition of her health. When these came back, and the doctor came in to make the examination (and I take this from the statement of counsel in his opening remarks), he discovered the odor of a cancer in the womb, and immediately informed Mrs. Brun that she was suffering from that complaint, and within less than 30 days from that date she died. Counsel stated that she died from that disease, and that she could not at that date have taken the examination for a new membership. He tried unsuccessfully afterwards to amend the statement by stating that she died from appendicitis. This statement clearly demonstrates the situation to be this: A policy was issued, and had lapsed. The insured no longer had the legal right to keep up the policy, or to pay the premiums, and be reinstated without complying with the conditions and requirements of the by-laws and rules controlling that company. This the plaintiff concedes by the statement of his cause of action. Therefore, to state a cause of action on that policy, it was incumbent on Brun to show an actual reinstatement by the company, and a revival of the lapsed contract, or the doing of those things which, under the by-laws and regulations of the company, entitled him to reinstatement. There was no actual reinstatement. Therefore the plaintiff must aver the doing of what was indispensable to the initiation or inception of the right to reinstate. This he wholly failed to allege or offer to prove. When he said that the amount of money was sent which the secretary required, and that he filled out a certain certificate, and sent it, that of itself does not establish his right, nor, on proof thereof, could he recover. It was incumbent on him to show either that the certificate which he sent was an actual compliance with the by-laws and regulations of the company, or that the company accepted it as such. Now, in his plea, he did neither. He simply attempts to establish his right by showing that he sent the money required, and received a certificate, which he sent on to the company. When it appears that the certificate blank was returned, and another one sent, which he was required to fill out, he either had to do what the officers of the company required in the last instance, or show that what he had already done was done in accordance with

the by-laws, and entitled him as a matter of law to the reinstatement. We can discover no allegation anywhere in the complaint, even including paragraph 4, which will bring the case within this very well settled principle of pleading. When a party has failed to comply with his contract, and relies upon the performance of a condition subsequent, whereby his right, under the terms of the agreement, is to be revived, he must undoubtedly both allege and prove the performance of the condition or the happening of the event, either one or the other of which revives his right, and establishes the obligation of the other party. What we have said is enough to indicate the fatal difficulty with the complaint, and, since we are unable to discover that the plaintiff has stated a cause of action, we are without the right or authority to reverse the judgment and give him an opportunity to try his case, and attempt to establish those facts on which his cause of action must rest. The judgment of the court below was, under these views, entirely right, and will accordingly be affirmed. Affirmed.

(25 Mont. 38)

BROWNLEE et al. v. YOUNG et al.

(Supreme Court of Montana. Feb. 11, 1901.)

PRINCIPAL AND SURETY—JUDGMENTS—ENTRY.

1. Code Civ. Proc. 1895, § 1001, providing that if, on the rendition of any judgment, it shall be shown that one or more defendants against whom the judgment is to be rendered are principal debtors, and others are sureties, the court may order the judgment so to state, and shall direct the sheriff to make the amount due thereon out of the goods, etc., of the principal debtor before resorting to the sureties, refers to judgments on obligations, the makers of which signed in fact as principal and surety, and not to judgments on those on which the makers are all principals, though, as between themselves, some are sureties merely.

2. The statute applies to cases in which the parties whose rights are to be determined are before the court, and not to cases in which judgment is sought, at the option of plaintiff, as authorized by Code Civ. Proc. §§ 585, 593, and Civ. Code, § 1941, against but one of the obligors.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Malcolm B. Brownlee and others against William H. Young and others. From a judgment for plaintiffs, defendant John E. Lloyd appeals. Affirmed.

Wm. H. De Witt, for appellant. Wm. Scallon and W. W. Dixon, for respondents.

BRANTLY, C. J. Action to recover the amount due upon a joint and several promissory note made and delivered to plaintiffs by defendants on December 31, 1894, for the sum of \$1,500, bearing interest at 1 per centum per month from date. All the makers were made parties defendant. Lloyd and E. H. Irvine were served with summons. Young and F. F. Irvine were not found, nor did they appear in person or by

counsel. E. H. Irvine suffered judgment by default. Lloyd filed a separate answer, in which, after admitting categorically all the material averments in the complaint, he alleged specially: "That while the said defendants herein, to wit, the signers of said note, appear upon the face thereof as joint makers, yet in truth and fact, as between themselves, the said defendants, they are simply sureties, each one for the other, for three-fourths of the amount which they, the said defendants, may be required to jointly pay." The answer concludes with a prayer that "it be adjudged that this defendant, John E. Lloyd, is, as to three-fourths of the amount of said note, only a surety for the three other defendants, and that [the judgment] shall direct the sheriff to make three-fourths of the amount due thereon out of the goods and chattels, lands and tenements, of the said defendants other than this defendant, before he attempt to levy an execution upon the property, personal or real, of this defendant." On motion of plaintiffs a separate judgment in the ordinary form was entered against Lloyd, the foregoing allegation and prayer being disregarded. It is now contended that the court below erred in failing to render the judgment as prayed. Defendant, in support of this contention, cites section 1206 of the fifth division of the Compiled Statutes of 1887, which is brought forward into the Code of Civil Procedure of 1895 as section 1001, which follows: "Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it determine the ultimate rights of the parties on each side, as between themselves." It is apparent from a careful reading of this provision that it refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety, and not to judgments upon those on which the makers are all principals. It applies also to cases in which the parties whose rights are to be found and determined are before the court, and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors. Under the provisions of

the Code of Civil Procedure (sections 585, 593) and of the Civil Code (section 1941), all of which were in force at the time the note in question was executed (Comp. St. 1887, div. 1, § 20; Id. div. 5, § 1296), this may properly be done, and it was evidently the purpose of the plaintiffs to avail themselves of these provisions in this case. Under these circumstances the execution could not run against any of the other obligors, for the reason that they are and could not be included in the judgment, and it would not, therefore, have been proper for the court to modify the judgment to meet the views of the defendant. True, "where two persons execute a note, and each of them receives one-half of the consideration, they are, as between themselves, principals for half the debt and sureties for each other to the extent of the other half" (24 Am. & Eng. Enc. Law [1st Ed.] 723), and this is so no matter what may be the number of the obligors; but the principle finds application to cases where the right of contribution arises, and not to the rendition of the judgments provided for under the statute above quoted. It is conceded by the appellant that all the parties to the note were principals. This excludes him from the operation of the statute. Let the judgment be affirmed. Affirmed.

PIGOTT and MILBURN, JJ., concur.

(25 Mont. 85)

WETZSTEIN v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO.

(Supreme Court of Montana. Feb. 11, 1901.)
INJUNCTIONS—APPEAL—SUCCESSOR IN INTEREST—NEW ACTION—PENDING APPEAL.

Before final decision on appeal from a decree finding plaintiff was not the owner of alleged interests in mining property, he could not obtain an injunction pendente lite against the original defendant's successor in interest in a subsequent action, wherein his claim of title was identical with that of the original suit.

Appeal from district court, Silver Bow county; John Lindsay, Judge.

Action to quiet title by Adolph Wetzstein against the Boston & Montana Consolidated Copper & Silver Mining Company. From an order denying an injunction pendente lite, plaintiff appeals. Affirmed.

McHatton & Cotter, for appellant. Forbis & Evans and Wm. H. De Witt, for respondent.

MILBURN, J. This is an appeal from an order denying an injunction pendente lite. The injunction was asked for pending an action in the district court to quiet the title in plaintiff to a certain interest in the Comanche mining claim, and for an accounting to him for his interests in the profits of said mining property, and for a receiver. It appears from the complaint, filed December 14, 1899, that on the 22d day of March, 1894,

plaintiff commenced a certain other action in the same court against the predecessors in interest of the defendant in the action at bar, claiming title to the same interest in the said mining property, and praying that the court order a conveyance to be made to him for said interest in said property; that the action last referred to was tried before a jury, which returned special findings adverse to plaintiff; that these findings were adopted by the court, with additions; that on or about January 3, 1899, a decree against the plaintiff was made and entered; that plaintiff's motion for a new trial was denied, and an appeal was taken, and is now pending. Plaintiff asked for the injunction to restrain defendant from mining, extracting, carrying away, or converting to its own use any ores from said mining property, in the possession of which it has been since 1896. In the light of the fact, together with others, not necessary to state, appearing to the district court, that it had in the action commenced in 1894, as aforesaid, found and decreed that the plaintiff was not the owner of any interest in said mining claim, the decree not having been reversed or set aside, we cannot see any abuse of discretion in the action of the lower court in refusing to grant the injunction asked for. The temporary injunction heretofore by this court granted pending this appeal, the application for which is numbered 1,516, is hereby dissolved. The motion of plaintiff filed and submitted February 8, 1901, requiring the defendant to give him a bond to protect him pending this appeal, is, in view of the above opinion, denied. Order appealed from is hereby affirmed. Affirmed.

BRANTLY, C. J., and PIGOTT, J., concur.

(25 Mont. 81)

CAPLICE COMMERCIAL CO. v. CASSIDY et al.

(Supreme Court of Montana. Feb. 11, 1901.)
MORTGAGES — FORECLOSURE — PAYMENT — DEFAULT — INTEREST — PLEADING — CAUSES OF ACTION — DEMURRER — DISMISSAL AS TO ONE — EFFECT.

1. Under Code Civ. Proc. § 778, requiring the court to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, a demurrer to a complaint on the ground that two causes of action were improperly united therein was properly overruled on plaintiff's dismissing as to one cause of action.

2. Where a mortgage provided that, in case of default for 30 days in the payment of the notes or interest secured by it, the mortgagee could consider the whole principal due and payable, a complaint which alleged the non-payment of one of the principal notes within the time prescribed would support a judgment for the full amount secured, though all accrued interest had been paid.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by the Caplice Commercial Company against Terence Cassidy and others to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Affirmed.

J. E. Healy, for appellants. W. E. Carroll, for respondent.

PIGOTT, J. From a final judgment entered against them, the defendants have appealed. The plaintiff has neither filed a brief nor made an oral argument. Counsel for the defendants presents two questions for consideration:

1. The order of the trial court overruling the demurrer to the complaint is specified as error. Two causes of action are stated, and the defendants demurred on the ground that the causes had been improperly united. Without objection by the defendants, and presumably at the instance of the plaintiff, the court dismissed the complaint as to the second cause of action, and at the same time overruled the demurrer. The demurrer was well interposed, for the causes of action were such as may not properly be united in the same complaint, but the dismissal of the action as to one of them removed the ground of objection made by the demurrer. As it does not appear that the costs prescribed by section 1861 of the Code of Civil Procedure were paid by or taxed to the defendants, and as the plaintiff, presumably before the decision on, or even the submission of, the demurrer, exercised the privilege of dismissing his complaint as to the second cause of action, and as an order thereafter made sustaining the demurrer and requiring the plaintiff to pay the costs prescribed by section 1861, *supra*, would have been erroneous, manifestly the overruling of the demurrer, when considered with the dismissal, did not affect any substantial right of the defendants. The judgment will not be reversed when it is clear that the error urged was of such character. This is the rule declared in section 778 of the Code of Civil Procedure, and by *Murphy v. Patterson*, 24 Mont. —, 63 Pac. 380.

2. The first cause of action was based upon two promissory notes made by the defendants Cassidy, the payment whereof was secured by a mortgage executed by the Cassidys simultaneously with the notes. Defendant Rowan was made a party because he asserted some interest (subsequent and subject to the lien of the plaintiff's mortgage) in the property. The relief sought was a judgment of foreclosure. Each note was dated September 9, 1899, and was for the sum of \$500, with interest thereon at the rate of 12 per cent. yearly from date until paid, interest payable monthly. According to their terms, one of the notes fell due on the 9th day of September, 1900, and the other will mature on the 9th day of September, 1901. The mortgage contained these provisions: "But these presents shall be void if such payment be made; but in case default shall be made in the payment of the said principal sums of money, or any part thereof, as provided in said notes, or if the interest that may grow due thereon, or any part thereof, shall be due and unpaid for the space of

thirty days after the same should have been paid according to the terms of said promissory notes, then and from thenceforth it shall be optional with the said party of the second part * * * to consider the whole of said principal sum expressed in the said notes as immediately due and payable, although the time expressed in the said notes for the payment thereof shall not have arrived, and immediately to enter into and upon, all and singular, the premises hereby granted, or intended so to be, and to sell and dispose of the same, or any part thereof, and all benefit and equity of redemption of the said parties of the first part, * * * according to law, and of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory notes,"—which were followed by the language usual in such instruments. The complaint was filed on the 11th day of September, 1900. It contains a copy of the mortgage, and states that all of the interest on the notes had been paid up to and including August 9, 1900; that more than 30 days have elapsed after the interest accruing thereon should have been paid according to the terms of the notes; and that plaintiff has exercised the option given in the mortgage to consider the principal sums of the notes as immediately due and payable upon the default in the payment of the interest. The complaint further states that the note which matured on the 9th day of September, 1900, is due, owing, and unpaid, and that the note which upon its face was to become due on September 9, 1901, is also unpaid, and the plaintiff declared the principal sums expressed in the notes as due and payable. The allegation was also made that payment of the notes was demanded, but refused. The defendants did not in any way attack the statement of this cause of action. The default of the defendants for want of further appearance or answer having been entered, the court, after hearing evidence, found, among other things, that the defendants Cassidy had made default in the payment of the notes, and that by the terms of the mortgage both notes became due and payable on the 9th day of September, 1900, and remained due, owing, and unpaid, together with the interest thereon from August 9, 1900. Judgment was rendered accordingly, declaring that the principal sums of, and the unpaid interest accrued on, the notes, together with costs and counsel fees, were a valid lien upon the property mortgaged, and directing that the property be sold to satisfy the amount due to the plaintiff.

It is contended here that the complaint does not state facts sufficient to warrant the finding that the note which by its terms will fall due on September 9, 1901, was due by virtue of the exercise of the option granted by the mortgage. In support of this contention counsel argues that the note could not be considered as mature under the terms

of the mortgage until 30 days after the 9th day of September, 1900; the interest having been paid up to and including the 9th day of August, 1900. His position is that the interest must have been due and unpaid for 30 days after it should have been paid, in order to permit the holder of the note to consider the note as due. It is true that the note did not become due by reason of any failure to pay the interest; for, the interest having been paid to August 9, 1900, the next payment was to be made on September 9th, and not until 30 days had elapsed after the interest should have been paid, to wit, not before October 9th, could the plaintiff for this reason declare the principal sum of the note to be due. If this were all, counsel would be right, but he overlooks the allegation that the note which matured on September 9, 1900, was not paid. In legal effect, the mortgage provided that if default should be made in the payment of the principal of either note, or any part of either, as provided therein, then and thenceforth the holder should have the option to consider the whole of the principal sums of both notes as immediately due and payable, although the time expressed therein for payment had not arrived; and the complaint alleges, as counsel in his brief concedes, that the principal sum of each note remained unpaid when the complaint was filed. One of the notes was due and payable on September 9, 1900. Failure to pay the principal thereof at maturity was, by the terms of the mortgage, sufficient cause for the holder to consider both notes as immediately due. The 30-day period was applicable to a default in the interest, but not to the failure to pay the principal of the note first maturing. This is manifest. At the time the complaint was filed one of the notes was due, and its principal sum wholly unpaid. The plaintiff had the right to consider the other note as immediately due and payable, and this right or option it exercised and declared by demanding payment of both notes and by commencing this action. The judgment is affirmed. Let remittitur issue forthwith. Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

(7 Idaho, 518)

STATE v. DIXON.

(Supreme Court of Idaho. Feb. 20, 1901.)

ASSAULT—SUFFICIENCY OF INFORMATION—RESISTING TRESPASS.

1. Where the information states in ordinary and concise language the commission of a crime, it is sufficient.
2. A mere civil trespass, unaccompanied by such force as to make it a breach of the peace, is not a sufficient provocation to warrant the shooting of the trespasser.
3. One in the possession of land may resist an entry thereon, but he has no right to shoot

63 P.—51

the trespasser, unless that be rendered necessary to prevent a felony.

(Syllabus by the Court.)

Appeal from district court, Nez Perce county; Edgar C. Steele, Judge.

Levi Dixon was convicted of assault with intent to commit great bodily harm, and appeals. Affirmed.

James W. Reid, for appellant. Frank Martin, Atty. Gen., for the State.

SULLIVAN, J. The appellant was prosecuted for the crime of assault with intent to murder, convicted of an assault likely to produce great bodily harm, and sentenced to three years' imprisonment. This appeal is from the judgment. Nineteen errors are assigned for the reversal of the judgment. Most of them pertain to the giving or refusal to give certain instructions. However, the first error assigned is that the court erred in overruling the demurrer to the information. The information states in ordinary and concise language the commission of the crime of assault with intent to murder, and it was not error to overrule the demurrer. *State v. Ellington* (Idaho) 43 Pac. 61.

The record, inter alia, shows the following facts: The appellant and one Allen Linke had a contest in the United States land office, at Lewiston, over a tract of land concerning and on which the acts occurred of which the appellant was convicted as above stated. Said Linke was successful in said contest, and the appellant appealed to the commissioner of the general land office, at Washington, D. C. During the pendency of said land contest a suit was brought by the appellant against said Linke in the probate court of Nez Perce county for the possession of said disputed premises, which finally resulted in a judgment in favor of the appellant, and appellant was placed in the possession of said premises by writ of restitution. Thereafter, on the 12th day of April, 1899, said Linke, his father, two brothers, and John Wunders and Frank Bogner entered upon a portion of said premises and began to seed the same to wheat, as they were advised by their attorney they had a right to do. There is a conflict in the evidence as to whether the said Linke, and others with him, destroyed the gate through which they entered on said premises. The defendant and his witnesses testified that the gate was torn to pieces, while Linke and others testified that the gate "was wired up with one staple"; that they drew the staple, unwired the gate, and went in. After Linke had commenced seeding said premises, the father of the appellant appeared and ordered them to quit seeding and to leave or quit the premises, which they refused to do. Thereupon he returned to where the appellant and his brothers were (some distance from where Linke was sowing grain), and, after having some conversation with the defendant, got on a horse, and he and his sons returned to the place where

Linke and others were sowing grain. He rode up to the head of the mules that Alvin Linke was driving, and told him that he must not seed that land. Linke did not reply, but kept urging on his mules; and the father of the defendant testified that he (the father) had to get out of the way of the mules pretty quick, as the blind mule came near running over him and the pony he was riding. It appears that Linke drove on and continued sowing grain, and the father of defendant followed him to the west end of the field; and there Linke turned his mule team, which was hitched to a spring wagon in which sat Bogner sowing grain from a box, and started back across the field, and was there met by the defendant, his brothers, Grant and Henry, and his father. It appears that not far away were the father of Alvin Linke, the brother, one Hammond, and Wunders. All of the persons above named were near by. There is some conflict in the evidence as to what then occurred. It appears that the appellant caught one of the mules that Alvin Linke was driving by the bit. Alvin was in the spring wagon at that time, with the lines in one hand and a thorn or willow stick in the other, which he had for the purpose of urging the mules. Alvin Linke then urged the mules forward, and the appellant drew his pistol and shot him three times, each shot taking effect. Linke thereupon jumped out of the spring wagon and ran off, and there is considerable evidence in the record to show that appellant fired a fourth shot at him while he was running. It appears that the father of Alvin Linke stood near by with a walking stick in his hand, and several of the witnesses testified that after the shots were fired he struck the appellant over the head with his walking stick, and thereupon the father of appellant took the stick away from him. Thereupon, according to the testimony of old man Linke, the appellant shot at him, the ball passing through his coat, and then placed the pistol against his breast and snapped it, and it did not go off. The evidence shows that neither Alvin Linke nor his friends were armed. However, it does appear that the brother of Alvin Linke, just before the shooting occurred, ran 30 or 40 feet away and got a stick or club, and was returning to the spring wagon with it, when Alvin Linke told him to throw it away, as they did not want any trouble, and thereupon he threw it away. It is also shown that shortly before the shooting occurred the appellant had a conversation with said Wunders and ordered him off those premises, and pulled a pistol out of his pocket and told him to go quick, and he went.

It is contended by counsel for appellant that under the facts of this case the appellant had a right to drive Linke off from said land, and that he had the right to use such force as was necessary to do so, even if it resulted in taking life,—in short, that the men's refusal to leave the land when requested by

appellant would justify him in shooting them down. We know of no principle of law that sustains such contention. It is not shown that Linke and those with him intended or endeavored to commit a felony in getting possession of said land. Indeed, all of the facts established by the evidence repel that idea. They did not intend to kill appellant or any of the persons with him, or to destroy or carry away any property belonging to him. They were not armed, and made no assault whatever on any one. Conceding that Linke and those with him were trespassers, it is too well settled to require citation of authorities that one is not justified in taking life to repel a mere civil trespass; and especially is that true where one through stealth gets possession of land. The one entitled to the possession would not be justified in shooting the trespasser if he did not quit the premises at his request. Had appellant been at the gate through which the Linkes passed to get possession of said land, and then and there ordered them to desist from taking down said gate and coming upon said land, he, no doubt, would have been justified in using reasonable force to prevent the contemplated trespass. But that is not this case. The Linkes had gotten possession of said land, and had already seeded about three acres of it, when appellant appeared and ordered them off. They did not attempt to assault the defendant until after he had shot Alvin Linke. They only attempted to continue seeding when appellant seized one of their mules by the bit and undertook forcibly to eject Linke from the land. In *Carroll v. State*, 58 Am. Dec. 282, it is held that a mere civil trespass, unaccompanied by such force as to make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter under circumstances from which the law would imply malice, and that the owner of the premises may resist an entry, but he has no right to kill, unless it be rendered necessary to prevent a destruction of his property, or to defend himself against loss of life or bodily harm. In *Noles v. State*, 26 Ala. 31, cited in note to *Carroll v. State*, supra, it is held that a mere trespass which created no reasonable belief in the mind of the slayer that the trespasser would commit any felony or do any great bodily harm could not be permitted to constitute an excuse for the person committing the murder. At section 500 of Wharton's Criminal Law (volume 1, 10th Ed.), discussing the question of how far trespass is a palliation or excuse for killing, and the reason of the well-settled rule on that subject, the author says, "The reason is that in the given cases of trespass the killing was unnecessary; the party killing knowing that only a trespass, or at most a trivial larceny, was intended." And at section 506 of the same volume it is stated that, where an intruder is in the house, the owner cannot kill him simply for refusing to leave. In the case at bar there is no evidence

showing or tending to show that Alvin Linke had committed or intended to commit any crime whatever, unless it be a mere trespass or contempt of court, on said premises; and it is clearly shown that the shooting done by the appellant was wholly unjustifiable.

Neither of the authorities cited by counsel for appellant on the point under consideration is applicable to the facts of the case at bar. After a most careful examination of the instructions given by the court and complained of, we find no error in them. Some of those requested by counsel for appellant and refused were covered by those given; and the court did not err in refusing to give other instructions requested by counsel for appellant, as they were not applicable to the facts of this case. The evidence is amply sufficient to support the verdict. The judgment of the trial court is affirmed.

QUARLES, C. J., and STOCKSLAGER, J., concur.

(7 Idaho, 486)

MILLER v. HUNT.

(Supreme Court of Idaho. Feb. 9, 1901.)

SETTLEMENT OF STATEMENT—TIME OF MAKING.

When a proposed statement on motion for a new trial is served on the adverse party within the statutory time, and no amendments thereto are proposed by the adverse party, the statement as proposed may be presented to the judge or delivered to the clerk for settlement within any reasonable time thereafter. Under such circumstances subdivision 3 of section 4441 of the Revised Statutes does not limit the time within which to present the statement for settlement.

(Syllabus by the Court.)

Appeal from district court, Idaho county; Edgar C. Steele, Judge.

Action by L. A. Miller against William Hunt. Judgment for plaintiff. From two orders after final judgment, defendant appeals. Reversed.

James De Hoven and McDuffie & Griffith, for appellant. Geo. W. Goode, for respondent.

STOCKSLAGER, J. This is an appeal from two orders made after final judgment, one refusing to settle a statement on motion for new trial, and the other refusing to relieve the appellant from said order refusing to settle said statement. The following facts appear from the record: The said cause was tried by a jury on the 23d day of May, 1900, and a verdict was returned against the defendant. On the 2d day of June, 1900, a notice of intention to move for a new trial was filed with the clerk and served on the plaintiff, and on the 11th day of June, 1900, a statement on motion for a new trial was served on the plaintiff, and no amendments were ever proposed. On the 10th day of October, 1900, the defendant served notice that he would move the court to settle said statement. This motion was taken up, by consent

of the parties, on the 12th day of October, 1900; also an objection to the settlement of said statement, filed on behalf of the plaintiff, which said statement and objection were taken under advisement. On the 16th day of October, 1900, the judge of said court filed the following order: "At this time plaintiff, by counsel, filed objections to said statement being settled, and, after hearing the argument of counsel, I find that the defendant has been guilty of negligence and laches in not having presented said statement to the clerk of said court, or the judge thereof, within a reasonable time after the service thereof, and that there is no excuse offered or claimed for such neglect. Therefore the objections of plaintiff are hereby sustained, and the settlements of said statement disallowed." The affidavit of counsel for defendant filed November 5, 1900, among other things, says that there was no term of court in Idaho county between the 11th of June (the day on which he served statement on plaintiff) and the 8th day of October, 1900, and that the district judge was not in said county, to his knowledge, between said dates; that Lewiston is the nearest county seat to Grangeville, where he might reach the judge and settle his statement,—that being 70 miles by nearest route, and about 100 miles by rail and stage.

It will be seen by the foregoing statement of the facts that we are called upon to construe section 4441 of our statute, which in part says the party intending to move for a new trial must, within 10 days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court, etc., file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the records and files in the action, or the minutes of the court, or a bill of exceptions, or the statement of the case. Subdivision 3 of this section provides that, if the motion is to be made on a statement of the case, the moving party must within 10 days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. All these steps seem to have been taken within the statutory time, and the reasons assigned by the court in refusing to settle the statement were that the defendant had not been diligent in the prosecution of his appeal, or the settlement of his statement, rather. The supreme court of California, in the case of Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63, in construing a statute from which ours is taken, says: "Where a proposed statement on motion for a new trial is served on the attorney of the adverse party within the time limited by law, and the proposed amendments thereto are adopted by the moving party, the statement, as amended, may be

presented to the judge or delivered to the clerk for settlement within any reasonable time thereafter. Under such circumstances subdivision 3 of section 659 of the Code of Civil Procedure does not limit the time within which to present the statement for settlement." We quote from the syllabus, which is fully borne out by the opinion. In the case at bar the statement was served within the statutory time, and, no amendments being proposed, it clearly falls within this rule. Under the provisions of section 4231 of our statute the statement should have been settled. We also believe, under the California authorities, that appellant should be permitted to amend his statement by inserting the specifications of the particulars wherein he claims the evidence is insufficient to support the verdict. *Smith v. City of Stockton*, 73 Cal. 204, 14 Pac. 675. We are unable to see how the substantial rights of the plaintiff would have been affected by the settlement of the statement in this case at the time it was presented for settlement. This is especially true when we consider that the record shows that counsel for the plaintiff presented his statement for settlement within four days after the district judge returned to Idaho county, being the first time he had been there after the adjournment of his court at the term in which this case was tried. The orders of the court refusing to settle the statement and refusing to grant relief are reversed, and the case remanded, with orders to settle said statement.

QUARLES, C. J., and SULLIVAN, J., concur.

(15 Colo. App. 511)

CITY OF DENVER v. WEBBER.¹

(Court of Appeals of Colorado. Dec. 10, 1900.)

MUNICIPAL CORPORATIONS—POWERS IMPLIED
—HIRING SPECIAL COUNSEL—CONTRACT—
REQUISITES—RATIFICATION—PRIOR APPROPRIATION.

1. A town council, not being expressly restricted by legislation, has power to employ special counsel to appear in litigation arising out of proceedings to annex the town to a city, though there is a town attorney whom the council has required by resolution to represent the town in all legal proceedings in which it may become involved.

2. Every resolution or order to enter into a contract by a board of town trustees required the concurrence, by a yea and nay vote, of four of the six members of the council. A resolution authorizing an attorney to appear as special counsel for the town in annexation proceedings received only three votes to two against it. At the same meeting, and immediately after the first resolution, the clerk was instructed, by four yeas and one nay vote, to send a certified copy of the resolution to the attorneys who appeared before the council, and advised with them as to the proposed proceeding, and, by four yeas to two nays, a warrant was ordered drawn in favor of the attorney for an amount to apply on costs and fees in the suit. Held that, if an express contract was not properly entered into, the subsequent acts

of the council ratified the contract of employment.

3. 2 Mills' Ann. St. § 4449, providing that no contract shall be made by town trustees unless an appropriation shall have been previously made for the expense thereby created, refers only to the making of such contracts as may be necessary in carrying out powers expressly granted, and not to the exercise of implied powers necessary to carry out powers expressly granted, and no appropriation other than the annual one being made, except on submission to a vote of the electors, a contract by the town council for the employment of special counsel in litigation arising out of proceedings to annex the town to a city was proper without a prior appropriation for the expense.

Appeal from district court, Arapahoe county.

Action by Dewitt C. Webber against the city of Denver. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. C. Norris, Emerson J. Short, Jas. M. Ellis, City Atty., and Guy Le R. Steavick, for appellant. Geo. Q. Richmond, for appellee.

WILSON, J. Plaintiff sues to recover from the defendant city the value of legal services rendered by him under an alleged appointment by the town of Colfax as special counsel in litigation arising from proceedings for the annexation of said town to the city of Denver. No question is raised as to the rendition of the services nor their value. Neither is there any question as to the city of Denver being the proper party defendant, the annexation having been complete. Counsel for defendant very properly suggest in their briefs that the assignments of error are embraced in, and may be discussed under, three heads: (1) There was no prior appropriation covering the expense; (2) there was no valid contract of employment of the plaintiff; (3) the town council did not have authority to employ the plaintiff. We shall consider these questions in the inverse order of their presentation.

1. Towns and cities, from a very remote period of time, have been invested to some extent with local jurisdiction. In Rome municipal corporations existed and were recognized and provided for by Roman law. Then, as now, they were created in furtherance of the principle of local self-government. Their objects then, as now, were to invest them with such powers, and impose upon them such duties, as might be necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience, of their inhabitants. These are expressly declared by the statute of this state to be the primary objects and duties of such corporations. Gen. St. § 3313; 2 Mills' Ann. St. § 4431. As a broad general rule, such corporations are entitled to exercise only the powers with which they are specifically invested by the legislative authority which creates them. It being impossible, however, for the legislature to foresee and provide for every contingency

¹ Rehearing denied February 11, 1901.

which might arise in the government of a town or city, it has long since been settled, and is now the universal rule, supported by an unbroken line of authority, both in England and America, that such corporations can also exercise those powers necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation, so as to enable it to discharge the duties expressly imposed upon it, and exercise the powers granted in express words. One of these powers, necessarily and plainly implied and clearly essential to the proper discharge of its duties, is, in the absence of express legislative restriction, the power to employ special counsel to appear in litigation in which it may be involved, when, in the exercise of a reasonable discretion, the interest of a municipality may require it. This results from the power with which the corporation is invested to make contracts, to own property, and to incur liabilities, in the exercise of which the corporation is liable at any time to be involved in litigation in courts where the respective rights of the parties must be ultimately determined. 1 Dill. Mun. Corp. (4th Ed.) § 479; Rice v. Gwinn (Idaho) 49 Pac. 412; Smith v. Mayor, etc., 13 Cal. 532; City of Memphis v. Adams, 9 Helsk. 526; Tied. Mun. Corp. § 176. As aptly said in Smith v. Mayor, etc., supra: "The duty of protecting the public property carries along with it the duty to employ the usual means of protecting it. Legal assistance stands as a means for the protection of property in direct relation to the general power to hold, acquire, preserve, and protect it." And this is true, even where the corporation has its regularly elected or appointed attorney. Smith v. Mayor, etc., supra; Tied. Mun. Corp. supra. In this state there is no restriction upon such appointment by statute. The latter simply provides that a board of trustees of an incorporated town shall appoint a town attorney, and shall prescribe the duties of his office. The city relies, however, in this case, upon a resolution of the board of trustees of the town of Colfax, which attempted to specify the duties to be performed by the town attorney, and, among other things, required that he should "represent the town in all legal proceedings before any and all courts of the state in which it may become involved." This did not, either in terms or by implication, exclude the employment of other counsel. If the contention of defendant be correct, a most anomalous condition of affairs would exist. Litigation of great importance to the municipality might arise, involving large interests, and, even though it might be deemed patent that the town attorney should and ought to have assistance, the municipality would be powerless to act. Again, the town attorney might fall or refuse to appear for or represent the town, and yet it could do nothing to have the important interests of its people looked

after and represented in the courts by the only person whom it could have,—a licensed attorney at law. Surely, it was never the intention of the legislature to permit such a condition of affairs to be brought about. Indeed, in this case it was alleged in the pleadings, and not denied, that the town attorney appeared in the courts in behalf of the protestants against annexation, which had been approved by a majority vote of the people of the town and by the board of trustees. Should the board of trustees have quietly acquiesced, and seen their own wishes, and the wishes of the people for whom they were trustees, thwarted? The question suggests its own answer in reason, common sense, and in law. If such were the case, the employé would be more powerful than the employer. There would be no need of a board of trustees in much of the important business of the corporation, the town attorney being invested with the sole power and authority to bind the corporation and its people in all litigated matters. Besides, the town attorney of an incorporated town holds his position solely at the will and pleasure of the board of trustees. He may be, at any time, by either ordinance, resolution, or any form of corporate action showing clearly the intent of the corporate authorities, divested of any or all power, and relieved from the discharge of any or all duties, theretofore imposed upon him. We think it beyond dispute that the corporate authorities of the town have, in proper cases, the implied power to employ special counsel in its litigation, being responsible only for a reasonable exercise of that power.

2. The next contention of defendant is that "there was no valid contract of employment of the plaintiff." This grows out of the following state of facts: The corporate authority of the town was invested in a board consisting of one mayor and six trustees. Laws 1889, p. 454; 2 Mills' Ann. St. § 4508. The statute provides that, on the passage or adoption of every by-law or ordinance and every resolution or order to enter into contract by a board of trustees, the yeas and nays shall be called and recorded, and that there shall be necessary to its passage or adoption the concurrence of a majority of the whole number of members elected to the council. Waiving the question, which we do not decide, as to whether the employment of plaintiff in this case was such an entering into contract as was contemplated by the statute and intended by the legislature, we will consider it as if such was the case. The first action taken in the premises was at a meeting of the board of trustees, regularly convened, when a resolution was introduced which, after reciting that, at a special election held in the town, a majority of the legal votes cast was for annexation, and that the board of trustees had heretofore recommended to the county court that the report of such elec-

tion, signed by the mayor and clerk, under the seal of the town, should be approved, it was resolved "that D. C. Webber, Esq., an attorney at law, is hereby authorized and directed to appear as sole and special counsel for this town in said proceeding, and on behalf of this town to consent to the approval of said report; and be it further resolved that George N. Hurd, be, and hereby is, relieved as attorney for the town of Colfax for the purposes herein set forth." The vote was taken by yeas and nays, there being three affirmative votes and two negative. If, therefore, this appointment was the entering into such a contract as contemplated by the statute which we have cited, then the resolution, having failed to receive four affirmative votes, clearly failed of adoption. It is well settled, however, that a municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of its corporate powers, and not ultra vires, and such ratification, as in the case of natural persons, is equivalent to previous authority. *Town of Durango v. Pennington*, 8 Colo. 257, 7 Pac. 14; *Town of Bruce v. Dickey*, 116 Ill. 534, 6 N. E. 435; *Dill. Mun. Corp. (4th Ed.)* § 463. At the same meeting at which the resolution above referred to was adopted by the vote stated, and immediately subsequent thereto, it was moved and seconded, as appears from the town records, that "the clerk be instructed to prepare a copy of the said resolution, and certify to the same, said copy to be sent to Attorney D. C. Webber." This motion carried by a vote of four yeas and one nay, and immediately subsequent to this, as the recorded minutes recite, "Attorney D. C. Webber, heretofore employed as special counsel to represent the town in the matter of the annexation of the town to the city of Denver, was present, and called the attention of the board" to various matters concerning the litigation, and made various suggestions as to what was necessary to be done. Immediately thereafter it again appears from the town record that, by a vote of four yeas and two nays, a warrant was ordered drawn in favor of D. C. Webber for the sum of \$100, "to apply on the costs and fees in the suit in which he had been employed." All these matters, occurring, as they did, at the same meeting of the board, were part and parcel of the same transaction, and are manifestly sufficient to constitute a ratification, under the most rigid rules applying thereto, even if an express contract was necessary for the employment of plaintiff, which we do not decide, and even if the first-mentioned resolution was intended to be such a contract. The trustees having authority to employ special counsel, and neither statute nor ordinance prescribing any particular method or form of procedure which they should resort to or follow in making such employment, or in entering into such con-

tract, if express contract were necessary, their action might be taken, and be absolutely effective, by a vote upon a motion, or the adoption of a resolution, or by any other corporate action which might clearly manifest the intent, and which would be a matter of record. *Board v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; *City of Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503; *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518. We think, therefore, that ratification was complete and perfect, even if an express contract were required, and comes within the strict rule laid down by our supreme court in *Town of Durango v. Pennington*, supra, to the effect that to constitute the ratification of an invalid contract, where an express contract is necessary and where the contract is required to be made in a specified manner, requires the observance of the same formalities and provisions necessary to be complied with in the making of a valid contract. In this case, the only formality required, if at all, was that the matters relied upon to constitute ratification should have received four votes, being a majority of all the members elect. This was the case.

3. The remaining objection of defendant is that "there was no prior appropriation covering the expense." This is based upon the provision of the statute to the effect that no contract shall be made by the board of trustees of a town, and no expense shall be incurred by any of the officers or departments of the municipal corporation, whether the object of the expenditure shall have been ordered by the board of trustees or not, unless an appropriation shall have been previously made for such expense. *Gen. St. p. 979; 2 Mills' Ann. St. § 4449*. It is the duty of courts in construing a statute to do so in such a manner as to give effect, if possible, to the whole and every part of it,—such a reasonable construction as would tend to effectuate the purposes and objects of the statute, and carry out the intent of the legislature in its enactment. Applying this rule, and bearing in mind the multifarious duties, many of which it is impossible to foresee or anticipate, which devolve upon the governing bodies of municipal corporations, it seems evident to us that the statute which we have cited refers only to the making of such contracts or the incurring of such expense as may be necessary in carrying out the powers expressly granted to the corporation by the statute, where contracts are expressly required, or where the nature and character of the work or act proposed is such as to seemingly require that an express contract should be entered into to protect the city's interest. We think it would be unreasonable to say that it applies to the exercise of all those implied powers necessary for the corporation to carry out the powers expressly granted. The trustees of incorporated towns are required, within the last

quarter of the fiscal year, to pass an ordinance termed, "The Annual Appropriation Bill," for the next fiscal year, specifying the objects and purposes for which the appropriation is made, and it is provided that no further appropriation shall be made during said ensuing fiscal year, unless the proposition therefor is first submitted to, and sanctioned by, a majority of the legal voters therein. It is a matter of common knowledge that conditions frequently arise in towns and cities which it was impossible to have foreseen a few weeks, much less months, beforehand, and which require immediate and prompt action on the part of the municipal authorities in order to protect the interests of the people. Can it be said that if a violent epidemic should break out, threatening the lives of the inhabitants, the authorities would be powerless to incur any expense until they had first secured the sanction of a majority of the people? They are employed generally to do all acts, and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease. This provision might be entirely defeated if the contention of defendant be correct. Likewise, important property interests of the municipality might be involved, and an emergency arise requiring for their protection prompt action and the employment of an attorney. In such case, it would be the imperative duty of the trustees to act at once if the emergency seemed to so require. Authorities being empowered to protect the property of a municipality, we believe that the employment of an attorney would in such case be proper without the formality of a prior appropriation for the expense, which, by the way, it might be impossible to accurately estimate in advance, and without incurring the dangerous delay of waiting until the wishes of a majority of the legal voters could be ascertained. These views are not in conflict with any of the decisions of our supreme court, to which we have been cited by counsel. An examination of *Town of Durango v. Pennington*, supra, will disclose that it sustains the views which we have expressed, so far as at all applicable to this case, and unquestionably sustains the right of plaintiff to recover herein. In that case the town authorities, without the formality of a ye and nay vote, undertook and did enter into a written contract with a party to grade a certain street. The court held that the action upon this contract could not be maintained, because of noncompliance with the statute in its execution, but it called attention to the fact that the statute requiring a ye and nay vote upon a contract, and the concurrence of a majority elected as members of the board, before it could be entered into, specified no cases where contracts were required to be entered into, nor did the general incorporation act require that a street improvement like the one in question should be let out upon contract. It therefore held

that by reason of this, and the fact that the statute authorized the board of trustees to make improvements of the character in question, to appropriate money for corporate purposes, and to provide for the needs and expenses of the corporation, there being no express regulation upon the subject, the defendant would be liable, under proper issues, for the reasonable value of the services rendered. In other words, the court held that suit could not be maintained upon the written contract, because it was not entered into in compliance with the requirements of the statute, but that no contract was necessary, and the town was liable for the reasonable value of the services rendered in a suit brought upon the proper issue. This, it seems to us, covers this case exactly. *Sullivan v. City of Leadville*, 11 Colo. 483, 18 Pac. 736, involved an alleged contract for grading and macadamizing streets, which was the attempted exercise of a power expressly granted in terms by the statute. For the reasons given, we think the objections raised and discussed by the city are untenable, and the judgment will be affirmed. Affirmed.

(16 Colo. App. 54)

MORRELL HARDWARE CO. v. PRINCESS GOLD-MIN. CO.¹

(Court of Appeals of Colorado. Jan. 14, 1901.)

JUDGMENTS—MOTION TO VACATE—NOTICE—TIME OF MAKING—SUFFICIENCY OF AFFIDAVITS—MECHANICS' LIENS—CONTRACT WITH LESSEE OF MINE—APPEAL.

1. Where a motion to vacate a judgment is filed during the trial term, but no notice thereof is given to the adverse party until after the commencement of a subsequent term, it will be considered as made during the subsequent term.

2. Under Code, § 75, authorizing the trial court to relieve against a judgment taken through mistake, inadvertence, surprise, or excusable neglect at any time within six months thereafter, on motion of the aggrieved party, supported by affidavits that the party has been unable to appear during term time, a motion supported by affidavits to vacate a judgment taken through mistake, inadvertence, or excusable neglect is not required to be filed during the trial term.

3. Mechanic's lien law, as amended by Sess. Laws 1895, p. 202, authorizing a lien against mining property in favor of those who perform work or furnish materials for the development of mines, does not give a lien for services and materials furnished under a contract made by and for the benefit of a lessee of the mine.

4. Code, § 75, authorizes the vacation of a judgment for mistakes, etc., by the trial court at a time subsequent to the trial term, when the party applying therefor has been unable, for a cause satisfactory to the court, to make the application during the trial term. A defendant filed an affidavit and a motion to vacate a default judgment, showing that a co-defendant had agreed to file an answer, and that relying thereon he did not know of the judgment until after its rendition. The complaint showed that the defendant was not liable. *Held*, that an order vacating a judgment would not be reversed on the ground that the affidavit was not sufficient to show that the motion could not have been made at the trial

¹ Rehearing denied February 11, 1901.

term, since the determination of the sufficiency of the affidavit rests in the discretion of the trial court.

5. An attempted appeal from an order denying a motion to vacate a judgment does not defeat the jurisdiction of the trial court to afterwards review its decision and vacate the judgment, since no appeal can be taken from such order.

Appeal from district court, El Paso county.

Action by the Morrell Hardware Company against the Princess Gold-Mining Company to enforce a mechanic's lien. From an order setting aside a default judgment in favor of the plaintiff, he appeals. Affirmed.

Henry Trowbridge, for appellant. Gunnell & Hamlin, for appellee.

THOMSON, J. The appellant brought this suit to enforce an alleged mechanic's lien against mining property of the Princess Gold-Mining Company. The complaint averred the sale by the plaintiff to certain persons who were working the property under a lease and option to purchase, executed to them by the mining company, of materials and articles necessary in mining operations, all of which were purchased to be used and were used by those persons in and about the property. The lessees and the Princess Gold-Mining Company were made defendants. Default was made by all the defendants, and judgment was entered as prayed in the complaint. The date of entry of the judgment was July 26, 1897. On the 3d day of September, 1897,—that being the last day of the May term of the court, 1897,—the Princess Gold-Mining Company filed its motion in the cause to vacate the judgment and for leave to file its answer, for the reason, as alleged in an affidavit made in support of the motion, that it had intrusted one of its co-defendants with the filing of its answer together with theirs; and that, relying upon his agreement so to do, it had given no further attention to the case, and did not know that its answer had not been filed until after the rendition of the judgment. The court denied the motion. The Princess Company prayed and was allowed an appeal from the ruling, and upon its filing its appeal bond an execution which had been issued was recalled. Afterwards, on the 8th day of November, 1897, the Princess Company applied to the court to set aside its order denying the motion to vacate the judgment, and to rehear the motion, and permit the company to answer. The application was allowed, the order vacated, the default set aside, five days given the company for answer, and ten days after receiving a copy for the plaintiff to reply. The answer denied that the lessees, by the terms of their lease or their option, had any right, power, or authority to charge against the property of the company any indebtedness of any kind contracted by them. The answer required no replication. On motion of

the company the court entered judgment in its favor on the pleadings. The plaintiff has appealed to this court.

The motion to vacate the judgment was filed on the last day of the term, but notice of its filing was not given to the plaintiff until after the commencement of the next term. Until the notice was given, there was no motion, so that this motion was a motion of the term following the judgment. For the plaintiff it is contended that the court was without power to open the judgment after the lapse of the term at which it was rendered, and that hence its action in undertaking to vacate it was nugatory. If there is no statute applicable to the case authorizing applications like this notwithstanding the expiration of the term, we must concede counsel's position. But section 75 of the Code provides that the court may, upon affidavit showing good cause therefor, after notice to the adverse party, relieve a party from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect; and that when, for any cause satisfactory to the court, or the judge at chambers, the party has been unable to apply for the relief sought during the term at which the judgment was taken, the court or judge at chambers may grant the relief upon application made within six months after the adjournment of the term. Now, this motion to vacate the judgment for the reasons set forth in the affidavit was an application to relieve the Princess Company from a judgment taken against it through its alleged mistake, inadvertence, or excusable neglect. The application, so far as its form was concerned, was in conformity with the Code provision. Whether the affidavit showed good cause for the relief asked, and whether it was filed in time, are questions we shall look into further on. Certain terms employed in an act of the legislature, approved April 13, 1893, and purporting to amend the mechanic's lien law then existing, gave rise to a supposition that the purpose of the act was to create a lien against mining premises in favor of parties doing work upon or furnishing materials for the mine by contract with persons working the property under lease. Sess. Laws 1893, p. 202. But in *Wilkins v. Abell*, 26 Colo. 462, 58 Pac. 612, it was decided that such interpretation of the law was not warranted, and that no lien could attach to the interest of an owner on account of work done for or materials furnished to lessees. That decision was followed by this court in *Milling Co. v. Ingersoll*, 59 Pac. 970. The complaint before us, therefore, did not state a cause of action in so far as this appellee or its property was concerned. To authorize the making of an application to set aside a judgment after the lapse of the term, the inability of the party to present it during the term must be made to appear to the satisfaction of the court or the judge. Proof of want of knowledge of the judgment, or want of facts which would

charge the party with knowledge, would amount to proof of inability to act. Want of knowledge was alleged here, and, if the showing was otherwise sufficient, we think the motion came in apt time. We must concede that the affidavit does not present very satisfactory reasons for the relief asked by the motion. The appellee evidently rested easy while the default and judgment were going against it, in the expectation that its co-defendants would embrace it in an answer which it was supposed they would make, and which expectation and supposition were based upon an agreement with one of them. Its confidence in its co-defendants, as the event proved, was misplaced; and, speaking generally, it would be difficult to say that the appellee exercised ordinary prudence in thus turning its defense over to another, and leaving it in his charge without further inquiry; or that the default and judgment were not, after all, the result of its own negligence. But motions like these are addressed to the sound discretion of the trial court, and, unless it is clear that its discretion has been abused, appellate courts are disposed to leave its judgment undisturbed. Now, however faulty the affidavit may be, and whatever, under a different state of facts, we might feel it our duty to declare concerning it, we certainly shall not condemn the action of the court upon it, as an abuse of discretion, when the complaint shows upon its face that the purpose of the suit was to subject the property of the appellee to the payment of a debt which it never contracted or authorized, and which was not contracted for its benefit. Since the complaint was insufficient to support the judgment that was rendered, and the effect of the judgment, if suffered to stand, would have been positive injustice, we are not disposed to inquire very closely into the showing upon which the court moved.

But it is said that by the company's appeal from the order denying the motion to set aside the judgment the court lost jurisdiction of the case, and had no power afterwards to entertain a motion for a review of its decision. If the appeal had been taken from the judgment, such might have been its effect; but there was no appeal from the judgment. The following is the record entry: "At this day, in open court, comes the said defendant, the Princess Gold-Mining Company, by Gunnell & Hamlin, its attorneys, and prays an appeal to the court of appeals of the state of Colorado from the order denying the motion of said the Princess Gold-Mining Company to set aside the judgment heretofore entered herein, which is allowed upon condition that it file herein on this day its appeal bond in the sum of \$2,500, with sureties to be approved by the clerk of this court." There can be no appeal to this court except from a final judgment. A mere order cannot be the subject of an appeal. The judgment had been rendered; it was

final; and it was from it only that an appeal could be taken. For any purpose of an appeal, no motion to set the judgment aside was necessary. Mills' Ann. Code, § 393. The court had no authority to allow an appeal from the order. The allowance of the appeal, and whatever was done in pursuance of the allowance, were nullities. There was no appeal, and the jurisdiction which the court had when the appeal was attempted remained. The motion for a review of the former decision was made and determined before the court had lost control of the record; and, whatever difference of opinion there might be concerning the propriety of its action, there is no room for a jurisdictional question. While the court still had possession of the case, with full power to dispose of any and all questions which might be raised touching the regularity or correctness of the proceedings, the court reversed itself, and rendered the judgment it ought to have given at first, and the judgment we should have given if the case had come to us for review. We see no error in that. The judgment is affirmed.

Affirmed.

(15 Colo. A. 487)

GRIFFIN v. SEYMOUR et al.¹

(Court of Appeals of Colorado. Sept. 10, 1900.)

MECHANIC'S LIENS — SUFFICIENCY OF CONTRACT — LAW GOVERNING — AMENDMENT — OWNERSHIP OF PROPERTY — GRANTOR'S LIENS.

1. Where a contract is not sufficient as a basis of a mechanic's lien under the statute in force at the time of its execution, the subsequent amendment of the statute, authorizing a lien for services performed under similar contracts, does not give a lien for work performed under such contract, since it is to be governed by the law in force at the time of its execution.

2. Under the mechanic's lien law of 1883, which only authorized a mechanic's lien under a contract with the owner, a contract made before the amendment of the statute, with persons having only a vendor's lien on the property on which the work is to be performed, though they are in possession thereof, is not sufficient as a basis for a mechanic's lien, since such lienholders are not the owners of the property.

3. Plaintiff entered into a contract as custodian of a mine while the mechanic's lien law of 1883, which did not authorize a lien for such services, was in force. He was to receive a monthly compensation, and the contract could be terminated by either party at any time. Held, that an amendment of the law authorizing a mechanic's lien for similar services would not entitle plaintiff to a lien on the theory that, as the contract could be terminated at the option of either party, it was in effect a new contract made at the commencement of each month, but that the services were performed under the original contract until it was terminated, which would prevent a lien for such services.

Appeal from district court, Boulder county.

¹ Rehearing denied February 11, 1901.

Action by Henry C. Griffin against Ellen R. Seymour and others to establish a mechanic's lien. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

T. E. Watters and C. M. Kendall, for appellant. Teller & Orahood, for appellees.

BISSELL, P. J. This appeal is prosecuted from a judgment sustaining a demurrer to a complaint filed to establish an alleged mechanic's lien. Our conclusions respecting one or two propositions serve to affirm the judgment, and we therefore state generally a few of the material allegations of the complaint: In January, 1889, three persons, Seymour, Sanderson, and Pell, as the plaintiff alleged, employed him as a custodian to care for and preserve the mining property described, and to do such work as might be necessary, for a fixed compensation, to wit, \$125 per month. The engagement was for no specific period, but was to continue so long as the arrangement should be satisfactory, and as the parties might agree. The plaintiff thereunder took possession of the property as custodian, to care for and preserve it, but under no agreement to do any work; nor did he do any work under the contract. This is an inevitable inference from the language of the pleading because it is only averred that he was to do such work as was necessary, and the plaintiff did not aver that he did any, except, that he states that he did all he was required to do, which is not an allegation of performance of work. The plaintiff then proceeds to state that on the date of the contract Seymour, Sanderson, and Pell were lawfully in possession of the property, holding thereon a grantor's lien for a large amount of money. He states that the legal title was in the Slide & Spur Gold Mines, Limited, a corporation of Great Britain; further, that the grantor's lien claim was held in the names of Seymour and Pell, but that Sanderson owned a half of it. But one further fact need be stated: The plaintiff set up generally that subsequently a bill in equity was filed to foreclose the grantor's lien, and the complainants obtained a decree; that there was a sale of the property, which was bid in by Teller, as trustee for the complainants, and Sanderson. There was a subsequent conveyance of the property, but whether absolute or as security plaintiff was unadvised. After setting up all the other matters requisite to support a lien if a lien could be sustained in his favor, he prays judgment. This sufficiently exhibits the controversy.

The statutes giving liens to mechanics and others have been the subject of much amendment, and almost every case that comes up is in reality determined by a consideration of the time at which the lien was filed. The act of 1883 remained in

force for six years. It was amended in 1889, and then again in 1891, and still again in 1893. The appellant's rights, however, are to be measured and controlled, as we look at it, by the terms of the act of 1883, because this statute was in force when the contract was made on which the appellant's rights necessarily rest. We do not believe that the subsequent changes in the statute at all vary or alter this conclusion, nor that there is anything in the amendment or in the terms of the new act which enlarges or modifies or controls the determination of the lien claim which the plaintiff asserts. According to the act of 1883, whoever made a contract with the owner to do work on property might have a lien. We only speak generally, without attempting to assert the kind of work or determine the class of persons to whom the statute was applicable, because these considerations are wholly foreign to our present inquiry. We start out with the premise that the contract must be made with the owner. This is enough to defeat the appellant's claim to a lien. As will be observed by a consideration of the allegations of the complaint, Seymour, Pell, and Sanderson were not the owners when they made the contract with Griffin. The complaint avers that the title was in the Slide & Spur Gold Mines, Limited, of Great Britain. This must be taken as true, against the plaintiff, and he therefore states that the parties who hired him were not owners. We see no force in the suggestion that this matter is aided by the averment that they were lawfully in possession. The appellant's counsel has built up quite an argument to the proposition that the possession is a quasi title, and the law presumes some sort of a title in parties who are in possession. The trouble with the argument is there is no room for legal presumptions. In the face of the direct averments of the pleading. If there had been no statement that the legal title was in the corporation, but the plaintiff had been satisfied with alleging that these three persons, Seymour, Pell, and Sanderson, were lawfully in possession and made a contract, we might, in the consideration of the demurrer, have followed counsel to the conclusion that the law would presume a title sufficient to uphold a lien. When he goes on and avers that the title was in some one else, there is no presumption that there is any title resulting from the possession. We therefore dismiss the consideration of the matter of possession, and this leaves only the inquiry whether Seymour, Pell, and Sanderson could in any sense be called owners. They were without any sort of title to the property. As the plaintiff puts it, the only thing they had was a grantor's lien. The profession will understand that a grantor's lien is nothing but an equitable right to follow the property in the hands of the grantee, and subject the title which the grantee got by

the conveyance to the payment of the consideration money or purchase price,—in other words, to protect the grantor, who has parted with his title, and has not received the purchase price. It never was nor is in any definite or actual sense a lien, which can ordinarily only exist as the result of some contract between the parties, or because of some statutory provision which gives this sort of a right under specific conditions. The term is accurate enough to describe the right which the grantor has to pursue the property, but it would not appear to be wholly and technically accurate, according to the legal definition of the term "lien." This is unimportant, but, as we look at it, the fallacy of the argument for the appellant proceeds from the theory which he attempts to enforce,—that this grantor's lien is an interest in the property. Because the grantor has in equity a lien for some purposes and under certain conditions, he fallaciously concludes that that lien is necessarily an interest in the property. The importance of the argument comes from the circumstance that there is in the law a provision that the word "owner" includes any person having a transferable or conveyable interest in a claim. Being partially right in his assumption, he supports his position by the contention that the vendor's lien is an interest in or a claim to the property. We start out with the theory that there must be a contract with the owner. It is on the plaintiff to allege it and to prove it. The work must be done and the material furnished by contract with the owner, and the claimant must ascertain for himself whether the other party to the contract has or has not an interest in the land. This has been clearly decided by our supreme court in *Mining Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 459. This decision shows the necessity for the appellant to carry his logical process to the result that Seymour, Pell, and Sanderson, having a grantor's lien, were, by virtue of the necessary construction of the statute, therefore owners. If they were not owners, he made a contract with persons who were incompetent to enter into a contract which would make the sum due them a lien on the property. He has, therefore, as we have already suggested, attempted to argue that the grantor's lien, under the phraseology of the act, is of such a nature as to make the holder of it an owner in the property. We do not so understand. In the first place, this is not the necessary nor the legitimate construction of the language of the act. The party through whose contract the claimant derives his right to file a lien must have an interest in the land or a claim to the land. Such is the statutory language. The grantor's lien is certainly not a claim to the land or an interest in it, nor has it ever been so held. It has been directly decided otherwise by the supreme court. *Fallon v. Worthington*, 13 Colo. 559, 22 Pac. 900, 6 L.

R. A. 708. That was a well-considered case, and is a lucid and accurate statement of the law by Commissioner Pattison. Therein it was held that such a lien was but a chose in action. It excludes any idea of ownership. It was further held that this lien, whether it arose from a contract, or was implied by the law from equitable considerations and circumstances, conferred no right to the property on the holder. As it was said, quoting from another case, "It is neither *jus ad rem* nor *jus in re*." This being true, and this being its definition, it cannot be legitimately contended the grantor's lien was an interest in or a claim to the property. It was simply a naked, equitable right, which might be enforced in equity, and reinvest the grantor with the title which had passed. We therefore conclude that there is nothing in the statute from which it may be adjudged that the plaintiffs were owners, and that no legitimate deduction can be drawn therefrom that these persons who were holders of a grantor's lien had any interest as owners in the property.

The appellant insists that the claim is assignable, and that because it is assignable, and the statute says that, wherever any person has any interest in or claim to property which is assignable, it may be subjected to liens, Seymour, Pell, and Sanderson had an interest which could be made the subject of a lien. It may be very gravely doubted whether such a claim is assignable. Counsel say that such is the trend of modern authority. We can only respond that such is not the current of it, and probably not the weight of it. What our supreme court might conclude, we do not know, and therefore we do not decide the question. It is debatable. 3 Pom. Eq. Jur. § 1254. We are not ready to concede that, because the supreme court has said that descendibility and assignability go hand in hand, it follows, even though we should hold that a grantor's lien would descend to the heir, that it is therefore assignable. This general principle is not asserted by the supreme court, and what conclusion they might reach about it we do not know. It is enough to say that the fallacy of the argument proceeds from the circumstance that Griffin's claim, whether assignable or descendible, is in no sense an interest in or a claim to the property. This wholly destroys the argument that, because the vendor's lien is assignable and descends, therefore it is property on which the plaintiff had a right to file a lien. We do not believe that the work for which Griffin contracted was work for which a lien could be filed by the terms of the statute. He was simply a custodian to see that the property was not destroyed,—a person directed, as he says, to preserve it. It might admit of a good deal of argument whether, taken in its broadest sense, this would be work within the lien statute, even under the amended act. Mining property is not preserved by being watched. It is quite impossible to pick

up mining property and run off with it. It might be that the contract for preservation or guarding included the doing of those things which would bring the case within this language, but it is exceedingly doubtful, at best, whether a custodian alone could ever acquire a lien on mining property. It might be very essential to have a custodian look after the improvements and machinery, and, while he might possibly have a lien thereon, it admits of debate, at least, whether such a contract would give him a lien on the realty. At any rate the question is so doubtful that we do not desire anything said in this opinion to be regarded as an expression of our conclusion on this subject. It is enough for the purposes of this decision to say that such work was not provided for by the act of 1883. We cannot follow counsel to his logical conclusion that because the act was amended in 1880, and a lien given for work done in the preservation of mining property, therefore Griffin might have a lien for the work done after the enactment of that statute. One very good answer to the contention is that we must look to the contract to determine his rights. When he contracted he acquired no such right. There is nothing in the complaint to show that there was any change in the employment, or any modification in the terms of it, but he continued from that time on, as he claims, to work thereunder until 1895. In order to determine whether or not he was entitled to a lien, we should go back to his contract; and, if by its terms he acquired no right, we cannot hold that because he continued in the service he acquired any right under the provisions of the act as amended. The argument that, because it was terminated at the option of the parties, the law is to take it as a new contract made from month to month, seems to us an unwarranted contention. We know of no legal principle which justifies any such conclusion. If the parties had terminated or modified it, and agreed to anything respecting the appointment, there might be some basis for the contention. Nothing, however, was said or done from the time of the original hiring until the lien was filed. We must therefore assume the contract as originally made was continued in force to the date of the filing of the lien. We cannot indulge in a legal fiction in order to give the appellant some rights. We must not assume that there was a new hiring each month; nor can we indulge in the assumption that there was a new hiring each month because the parties had a right to terminate it, especially in the face of the allegations of the complaint that he made a contract in January, 1889, and continued down to 1895. The appellant has destroyed all possibility of indulging in presumptions by the allegations of his complaint.

The appellant insists that, although he had no right under the original contract, yet, because he did work after the amendment, therefore and in that case he might have a

lien. We shall not undertake to dispose of this abstract legal proposition, and decide that there are no cases to which the amendment would apply. If the plaintiff had made a contract with the owners of the property, so that his contract would have supported a lien, and the amendment contained a provision to protect that sort of work, it might be, though we do not decide, that the question whether the provisions of the act as amended would be applicable might be presented. The possibility of this, however, is entirely foreclosed by the consideration that he never had any contract with the owners. When he made his agreement he made it with persons without title. This contract continued in force from its inception to its conclusion without change or modification, and when it appears that he did not contract with the owners or with anybody who represented them, or with anybody who had a title, he cannot, because they got title afterwards, and because the act was amended, bring his case within the operation of the amended act. As made, his contract was fundamentally bad for the purposes of a lien. Having been unchanged from its origin to its end, it is impossible by presumption or deduction to give it life for the purposes of a lien.

There are some other questions suggested in the arguments of counsel, but since these propositions wholly dispose of the appeal, and justify the judgment which was entered on the demurrer, we need proceed no further with the discussion, but conclude the opinion with the simple affirmation of the judgment. Affirmed.

(23 Utah, 190)

NORTH POINT CONSOL. IRR. CO. v. UTAH & S. L. CANAL CO. et al.

(Supreme Court of Utah. Jan. 30, 1901.)

INJUNCTION—DAMAGES—RESERVATION FOR FUTURE HEARING—JUDGMENT FOR DEFENDANT—REVERSAL—SUPPLEMENTAL COMPLAINT—ADDITIONAL DAMAGES—FINAL JUDGMENT—APPEAL—PLEADING DAMAGES—GENERAL ALLEGATION—SPECIAL DAMAGES—MEASURE OF DAMAGES—PROVINCE OF JURY—LOSS OF WATER BY WRONGFUL ACT—MEASURE OF DAMAGES—PRESUMPTION OF CONTINUITY.

1. Where, in an equitable action for an injunction, damages are claimed, the court may order, on the stipulation of counsel, that the question of damages be reserved for hearing after the determination of the equitable issues; and, although the lower court may have decided for the defendant, yet, if the case is wholly reversed and plaintiff's rights determined by the supreme court, the plaintiff has a right to file a supplemental complaint alleging and setting forth his damage since the action was commenced, and to make proof under it.¹

2. In an action for an injunction and for damages, a judgment for defendant after a hearing on the injunction is a final judgment, from which an appeal will lie because it has disposed of the entire case as to plaintiff, his claim for damages resting on the tort he is seeking to enjoin.

3. The plaintiff who makes a case for damages is entitled to recover all damages which

¹ Previous appeal of this case, 52 Pac. 163, 9 Utah, 243.

are the natural and proximate consequence of, and traceable to, the act complained of, under the general allegation of damage in the complaint.²

4. Only those damages which are not the probable and necessary result of the injury are termed "special," and are required to be stated specially in the complaint.

5. Where, from the nature of the action, as in personal torts, the law furnishes no rule for the measurement of damages, their assessment is peculiarly within the province of the court or jury.

6. A measure of damages for the loss of the use of water by the wrongful acts of another is the value of the water in the market for irrigation purposes.

7. Where a wrongful act, in its nature continuous, and which results in an injury to another, is once shown, the presumption follows that it continues until the contrary appears; and damages which are the natural and proximate consequence of the wrongful act, and result from it, may be recovered by the injured party by showing his right, and the amount of damages resulting from being deprived of it, under the general allegation for damages in a complaint.

Baskin, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by the North Point Consolidated Irrigation Company against the Utah & Salt Lake Canal Company and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Richards & Varian, for appellants. E. W. Taylor, O. T. & F. O. Loofbourow, John M. Zane, and Zane & Rogers, for respondent.

PER CURIAM. The original action upon which these proceedings are predicated was commenced in November, 1895, wherein the plaintiff claimed the ownership of certain dams, flumes, ditches, water rights, and water, and that the defendants had deprived it of the use and enjoyment of the same since 1892, and still deprived it of the use and enjoyment of its property, and prayed for an injunction and for damages. The equitable issues, only, arising under the complaint, were tried in the court below, and the question of damages was expressly reserved for hearing after the determination of the equitable issues. A decree was rendered for the defendants. On appeal to this court the decree of the lower court was reversed, and a decree directed to be entered in favor of the plaintiff, with costs. Thereafter a supplemental complaint was filed, charging that continuously since November, 1895, to June, 1908, defendants had discharged into plaintiff's irrigation system foul and impure seepage and drainage water through a drain ditch by them constructed and maintained from Decker's Lake to White Lake, as charged in the original complaint, by reason of which the plaintiff was wholly deprived of the use of its irrigation system during the period aforesaid, to its damage in the sum of \$30,000. Upon the trial of the legal issues,

involving the question of damages, the appellants (defendants below) claimed that the court erred in overruling their objection to the further trial or consideration of any issue as to damages, because the court had no jurisdiction to proceed in the premises, a final decree having been entered for an injunction and costs.

It is clear from the record that only the equitable issues involved in the case were first tried and decided, and it is equally clear that by agreement of counsel, entered of record, and recited in the decree of the court below, the question of damages was reserved for hearing after the determination of the equitable issues. The first decree, of June 21, 1895, on the equitable issues, was final upon the issues submitted, tried, and determined; but as to the question of damages, which had been expressly reserved for determination until after the equitable issues were disposed of, it was not final until the issue as to damages had been tried. The court very properly left the question of damages until after the main question was determined. The fact that costs had been taxed on the first hearing on appeal, and paid on execution, does not change the rule, nor deprive the respondent of its right to proceed to a final hearing of its case as to damages. Upon the first hearing the district court rendered its decree in favor of the defendants upon the equitable issues. If this decree had not been reversed, it would have been final as to damages. In that case there would have been no other question to try. That decree found against the plaintiff. Upon appeal the decree was reversed, and one entered for the plaintiff. The first decree was final, as it disposed of the litigation between the parties against the plaintiff, and an appeal would lie from that judgment. If the plaintiff had no equitable rights under the complaint, it would follow that it was entitled to no damages, as the latter were predicated upon the former, and costs would follow the determination of the case in the supreme court, because that determination wholly reversed the case and established plaintiff's right in the premises. The next step was to proceed to a hearing upon the remaining issues that were expressly reserved at the first hearing. But for the reversal by this court, there would have been no other issue to try. The amended complaint was filed in November, 1895. The decree for injunction was entered June 21, 1898. The plaintiff had been deprived of the use of its property since and including 1892. The supplemental complaint was filed March 13, 1895, under the provisions of section 2998, Rev. St., and embraced damages prior to that date. We find no error in permitting the supplemental complaint to be filed, nor in allowing proof under it.

No claim for special damages was made, as appears from the complaint, but it is claimed that the plaintiff has been damaged in its said property, and in its use thereof afore-

² Croco v. Railroad Co., 54 Pac. 985, 18 Utah, 311, 44 L. R. A. 285.

said. Plaintiff claims that the loss of the use by the befouling of the water in the irrigating ditch is the obvious and necessary consequence of the act complained of, and that it was unnecessary to aver or prove special damages. This position is controverted by the appellants, who also contend that the evidence is insufficient to support the decree, in that there is no evidence of any damage shown. In *Croco v. Railroad Co.*, 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285, this court held the proper rule to be that: "The plaintiff is always entitled to recover all damages which are the natural and proximate consequence of, and are traceable to, the act complained of; and those damages which are probable, traceable to, and necessarily result from the injury are termed 'general,' and may be shown under the general allegation of the complaint. Only those damages which are not the probable and necessary result of the injury are termed 'special,' and are required to be stated specially in the complaint." 3 *Suth. Dam.* (2d Ed.) 2261, 2262; *Johnson v. McKee*, 27 Mich. 471. We are of the opinion that the plaintiff was entitled to recover all damages which were the natural, obvious, and proximate consequence and result of the act complained of, under the general allegation for damages. Where, from the nature of the action, as in personal torts, the law furnishes no rule for the measurement of damages, their assessment is peculiarly within the province of the court or jury. *Wood, Nuis.* (2d Ed.) 806; *Aldrich v. Palmer*, 24 Cal. 513.

It is contended here that the measure of damages for the loss of the use of the water by the wrongful acts of the appellants is measured by the value of the water so lost, or its use destroyed. *Handforth v. Maynard*, 154 Mass. 414, 28 N. E. 348, was an action for damages for the loss of ice occasioned by the defendant drawing the water from a pond; and the court held that "the true measure of his damages was the value of his right to harvest the ice upon the pond, and so make it his property, at the time when the ice was destroyed, and plaintiff's right made worthless by the defendant's act." In *Farr v. Griffith*, 9 Utah, 419, 35 Pac. 506, it is held that, in a suit for damages for flooding certain ice ponds used for putting up ice, the measure of damages will be the value of the ice that might have been put up with reasonable diligence, less the cost of putting it in the ice house. The testimony in this case is very voluminous, and when considered together with the findings of fact, as directed by this court, and which were placed in evidence, tends to show that the respondent owns and has operated a large system for irrigation; that a large quantity of land, consisting of several thousand acres, owned by the respondent's stockholders and others, is under this system, and is capable of irrigation, and all were dependent upon this canal for irrigation; that up to 1892 its waters

flowing through its ditches were used for irrigation and domestic purposes; that much of the land under plaintiff's canal would be productive and valuable if irrigated with suitable water; that its ditches carried about 90 cubic feet of water per second, and prior to 1892 irrigated about 9,000 acres of land, and that the reasonable yearly market value of the water from 1892 to 1898, inclusive, for irrigation purposes, had it not been befouled, ranged from fifteen to twenty-four thousand dollars, or, as some witnesses expressed it, about \$1.80 per acre; that there were homestead and desert claims and other land that was and could be watered from the ditches since 1892; that, owing to the drainage system artificially constructed by the appellants, quantities of foul, impure, mineralized, seepage, and drainage water, destructive to vegetation, were wrongfully discharged into the respondent's system of ditches by the appellants, which deprived the respondent of the use of its water, and rendered it unfit for domestic and irrigation purposes during the irrigating seasons since and including 1892; and that the said befouled water was emptied into respondent's canal and became a nuisance. A statement of the facts embraced in the former hearing, and the orders and findings as directed, will be found in 16 Utah, 246, 52 Pac. 163, to which reference is had. Where a wrongful act, in its nature continuous, is once shown, which results in an injury to another, the presumption follows that it continues until the contrary appears; and damages which are the natural and proximate consequences of the wrongful act, and result from it, may be recovered by the injured party, by showing his right, and the amount of damages resulting from being deprived of it; under the general allegation for damages in a complaint. Respondent was deprived of the use of the water in its system of ditches by the wrongful acts of the appellants. What the water was worth in the market for irrigation purposes was a proper inquiry. Under this state of facts, we are of the opinion that the evidence is sufficient to sustain the findings and judgment. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

BASKIN, J., dissenting.

(23 Utah, 94)

HILL v. SOUTHERN PAC. CO.

(Supreme Court of Utah. Jan. 5, 1901.)

EVIDENCE — SUFFICIENCY — PROVINCE OF COURT AND JURY — CONTRIBUTORY NEGLIGENCE — WHAT MAY BE CONSIDERED — DUTY OF EMPLOYER — ORDINARY CARE — SAFE PLACE IN WHICH TO WORK — ASSUMPTION OF RISK.

1. Under Const. art. 8, § 9, the question of the sufficiency of the evidence to support a verdict or judgment in a case at law, when there is some testimony to support it, is exclusively

within the province of the trial court and the jury.¹

2. Where the question of whether or not the plaintiff was guilty of contributory negligence has been determined by the jury, upon conflicting evidence, their judgment is final.¹

3. In the deliberations by a jury upon the question of contributory negligence they have a right to take into consideration plaintiff's age, inexperience, and lack of knowledge or understanding of the risks incident to his employment, in the absence of any explanation to him of the dangers connected therewith by his employer.²

4. An employer owes a duty to his servant to use ordinary care and diligence to provide for use in the service such sound and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant in performing the service. He is also bound to use ordinary care and skill to discover and repair defects in such instrumentalities, and to exercise reasonable caution and prudence to provide the servant a reasonably safe place in which to perform the service. If the employer fails in either of these respects, and injury results to the servant because of such failure, the employer will be liable; and where, as in the case at bar, the evidence as to such matters is conflicting, the determination of the jury will not be disturbed.

5. While a servant, upon employment, assumes all ordinary risks thereof, he does not assume risks caused by the negligence of his employer.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Henry A. Hill, Jr., by John A. Hill, his guardian ad litem, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit to recover damages for personal injuries alleged to have been caused through the negligence of the defendant company. It was alleged in the complaint, *inter alia*, that Henry A. Hill, Jr., was on August 4, 1898, in the employ of defendant as a car repairer, and on that day was required to and did go under a box car on the company's railroad track for the purpose of repairing the car; that the car was standing on four wooden supports, known as "candlesticks," its trucks having been removed; that the candlesticks "had become old, weakened, defective, broken, and worn out, and were insufficient, inadequate, and unsafe to be used" for the purpose of supporting the car; that this was known to the defendant; that while said Hill was so under the car for the purpose of making repairs, the car, because of the broken, defective, and insufficient condition of the candlesticks, fell upon him, and caused the injuries for which he seeks redress. The answer denies all the allegations of the complaint referring in any way to any defective condition or inadequacy or insufficiency of the candlesticks. From the evidence it appears that Henry A. Hill, Jr., the complainant, at the time of the accident, was a minor under 19 years of age; that he was

employed as car repairer by the company on August 3, 1898; that he was inexperienced, and had never seen or used candlesticks previous to his employment; that an empty box car, weighing, without trucks, about ten or twelve thousand pounds, was placed on the repair tracks in the company's yard to be repaired; that certain employes of the company removed the trucks, and placed four candlesticks under the car, one under each corner; that, on account of the difference in height of the candlesticks or unevenness of the floor on which they stood, blocks were placed on top of two of the candlesticks; that the blocks and candlesticks were selected by the workmen; that there were about twenty-five to thirty candlesticks to select from; that on August 4, 1898, the plaintiff, with three other employes, began to repair the car; that he went under it to tighten some bolts with a wrench; that while he was so at work, screwing up a nut, the car fell, and injured him; and that all the candlesticks but one fell over with the car, and one of them was broken. Just what caused the candlestick to break—whether the weight of the car or the falling of it thereon—does not clearly appear. Nor is the evidence harmonious as to what was the immediate cause of the car falling. There is evidence tending to show that the candlesticks, if properly placed under the car, were sufficient to support it, and there is evidence tending to show that the candlesticks were old, worn, and unsafe, and that occasionally such candlesticks would break; one of the witnesses stating that he had several times seen the same kind break. The witness Sharp testified that just before the car fell the plaintiff was jerking, and that he told him to "pull steady on the wrench," and then told him to "look out, the car is falling"! The plaintiff testified that he did not hear Sharp's warnings, that he had no difficulty at his work, that the nuts all worked perfectly easy, and that all he did was to screw them up. The witness Sharp also stated that the plaintiff assisted in placing the candlesticks under the car, while the plaintiff testified that he "had nothing to do with putting them under the car," and that he "never touched them." It further appears that each morning all the workmen in the shops, including the complainant, were given a time card on which were printed the words, "Examine personally scaffolding, tackle, and all other appliances before trusting them;" but the complainant stated that he never saw these words on his card. Otherwise there appears to be nothing to show that he was notified or cautioned about any danger before entering upon the duties of his employment. At the trial the jury returned a verdict in favor of the plaintiff in the sum of \$7,150, and judgment was entered accordingly. Thereupon the defendant appealed.

Marshall, Royle & Hempstead, for appellant. Zane & Rogers, for respondent.

¹ Nelson v. Southern Pac. Co., 49 Pac. 644, 15 Utah, 325; Harrington v. Mining Co., 53 Pac. 737, 17 Utah, 300.

² Anderson v. Mining Co., 49 Pac. 126, 15 Utah, 22.

A statement of the case as above having been made, BARTCH, C. J., delivered the opinion of the court.

The appellant, in the first instance, insists that the evidence fails to show, in accordance with the allegations of the complaint, that the candlesticks, which supported the car under which the plaintiff was injured, were defective, insufficient, or unsafe for the purpose for which they were being used, and that, therefore, the proof fails to justify the verdict and judgment. This was a question of fact to be determined by the jury, and, without referring to the evidence in detail, it suffices to say that there is some evidence in the record tending to show that the candlesticks were defective and unsafe for the use to which they were put, while there is also evidence tending to show that they were sufficient and safe for such use. The testimony being thus conflicting, and this being a case at law, we have no power to determine on which side the proof preponderates. Section 9, art. 8, Const. The question of the sufficiency of the evidence, in a case at law, to support a verdict or judgment, where there is some testimony to support it, is exclusively within the province of the trial court and the jury. *Nelson v. Southern Pac. Co.*, 15 Utah, 325, 49 Pac. 644; *Harrington v. Mining Co.*, 17 Utah, 300, 53 Pac. 737.

It is further insisted by the appellant that the plaintiff was guilty of contributory negligence in so forcibly jerking the wrench, while tightening the nut on the bolt, as to cause the car to sway, and fall upon him. That the injured party himself caused the car to fall upon him is an assumption which we cannot say is justified by the evidence. It is true, the witness Sharp stated that the plaintiff was jerking the wrench, and that he told him to pull steady; but, on the other hand, the plaintiff testified that he did not hear Sharp's warnings, and that the nuts all worked perfectly easy; and the proof fails to show that more force was used than was necessary to perform the work to which he had been assigned. Then the evidence shows that the plaintiff was young, and never had any experience at such work, having worked about the cars but one day,—the day previous to the accident,—and that he never had any experience in the use of such mechanical instruments until the morning he was injured. There is also evidence indicating that the car fell because the candlesticks were insufficient to support it. Under this and other testimony, some of which is conflicting, it was clearly the province of the jury to determine whether or not the plaintiff was guilty of contributory negligence, and, having determined this in the negative upon conflicting evidence, their judgment is final. *Nelson v. Southern Pac. Co.*, supra. And in their deliberations upon this question they had a right to take into consideration his age, inexperience, and any lack of knowledge or understanding of the risks incident to his em-

ployment, in the absence of any explanation to him of the dangers connected therewith by his employer. "After all, it is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed." *McGowan v. Smelting Co. (C. C.)* 9 Fed. 861; 1 *Shear. & R. Neg.* § 219; *Anderson v. Mining Co.*, 15 Utah, 22, 40 Pac. 126; *Roth v. Lumbering Co.*, 18 Or. 205, 22 Pac. 842; *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Hungerford v. Railway Co.*, 41 Minn. 444, 43 N. W. 324.

Nor can the position of the appellant that the injury sustained by the respondent was caused by his own negligence and that of his fellow servants in selecting, placing, and adjusting the candlesticks and blocks placed underneath the car, be upheld in view of the evidence upon this point. It is true, there is testimony tending to show the candlesticks and blocks were not placed properly under the car by the employes, and that this caused the car to fall; but then there is also evidence indicating that the candlesticks were unsafe from use and wear, and insufficient to support the weight of such a car, and that this caused the car to fall. As to whether the plaintiff had anything to do with the placing of the candlesticks under the car, the proof, as we have seen, is conflicting. Under such testimony as appears in this record, it was clearly the province of the jury to determine what was the proximate cause of the injury, and they must have found that the injury was occasioned because of defective candlesticks and blocks or appliances, and not through the negligence of the injured or his co-employes. Such being the fair inference of the action of the jury, this point furnishes no ground for interference with the verdict, for an employer owes a duty to his servant to use ordinary care and diligence to provide for use, in the service, such sound and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant in performing the service. The employer is also bound to use ordinary care and skill to discover and repair defects in such instrumentalities, and to exercise reasonable caution and prudence to provide the servant a reasonably safe place in which to perform the service. If the employer fails in either of these respects, and injury results to the servant because of such failure, the employer will be liable for the injury. 1 *Shear. & R. Neg.* § 194; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876.

Nor, under the evidence in this case, can we say, as is insisted by the appellant, that

the injury received by the plaintiff was one of the risks assumed by him when he entered the employ of the company. The respondent cannot be held to have assumed the risk of defective and unsafe appliances, which the jury evidently found were the proximate cause of the injury. While a servant, upon employment, assumes all the ordinary risks thereof, he does not assume risks caused through the negligence of the employer. Whatever may be the real facts as to the exact cause of the accident and injury in this case, the evidence is of such a conflicting character that we must regard the determination of the trial court and jury upon the questions of fact as conclusive.

The questions presented by the assignments of error, but not argued in the briefs of counsel, we do not feel called upon to discuss herein. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(23 Utah, 84)

GUTHIEL v. GILMER et al.

(Supreme Court of Utah. Jan. 3, 1901.)

NONTRADING PARTNERSHIP—BUSINESS OUTSIDE GENERAL SCOPE—DEALINGS WITH INDIVIDUAL MEMBER—ABSENCE OF RATIFICATION—EVIDENCE—BURDEN OF PROOF.

1. In the absence of affirmative proof, it cannot be assumed that mining or dealing in mines is within the scope of the business of a nontrading partnership, engaged primarily in the business of running stages, carrying United States mails, and transporting express matter and passengers.

2. One dealing with an individual member of a co-partnership, as to matters not within the real or apparent scope of the business of the concern, does so at his peril, and, in the absence of subsequent ratification of the transaction, no liability attaches to the partnership.

3. The mere execution of a quitclaim deed for a nominal consideration by defendant and wife to a corporation in which they were not interested, 12 years after the execution, by defendant's partner, of the agreement on which it is now sought to bind the defendant, is not sufficient evidence of ratification.

4. A partner in a nontrading partnership has prima facie no authority to bind the firm or another partner in a transaction not within the scope of the partnership business, and he who seeks to hold the firm liable by virtue of such transaction has the burden of showing that the contracting partner had authority to enter therein.¹

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by Kate Guthiel, administratrix of Moroni R. Williams, against J. T. Gilmer and others, partners under the name of Gilmer, Salisbury & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

Truman & Williams, J. E. Frick, and G. M. Sullivan, for appellant. W. C. Hall and Dickson, Ellis & Ellis, for respondents.

BARTCH, C. J. This is an action upon contract brought by the administratrix of the estate of Moroni R. Williams, deceased, against the defendants, as partners doing business under the firm name of Gilmer, Salisbury & Co. to recover \$5,500. The suit, in fact, is against the defendant O. J. Salisbury, as a partner of the firm, he being the only one upon whom summons was served. In the complaint it is alleged, in substance, that on November 20, 1882, the defendants, as co-partners, entered into a contract with the plaintiff's intestate, Moroni R. Williams, by the terms of which the defendants were to pay Williams \$5,500 upon the sale of a certain mining property known as the "Peabody Mining Claim," and that such payment was to be made only out of the proceeds of the sale when the same was effected by them. On information and belief, it is alleged that, on April 20, 1894, the defendants conveyed the mining claim in question for more than \$5,500, but that they paid no part of that sum either to Williams in his lifetime or to any one for the benefit of his estate since his death. The complaint also contains allegations of demand and refusal to pay before the beginning of the suit, and alleges that the sum due, including interest, is \$7,920. From the complaint and the record, it further appears that on March 29, 1881, the mining claim in dispute was conveyed by Williams to Monroe Salisbury; that the grantee, at the time of the execution of the contract, held the legal title; and that the contract was executed in the name of Gilmer, Salisbury & Co. In his answer, defendant O. J. Salisbury denies specifically all the allegations of the complaint referred to above, and denies that the defendants sold the mining claim mentioned in the contract set forth in the complaint for the consideration alleged, or for any other consideration, or that they received any consideration or money therefor. From the evidence introduced by the plaintiff, it appears that the firm name of Gilmer, Salisbury & Co. was signed to the contract by John T. Gilmer, a member of that firm; that the firm was composed of John T. Gilmer, Monroe Salisbury, and O. J. Salisbury; and that Gilmer was working other mines in the vicinity of the Peabody mine, but it is not shown that the firm, or the defendant O. J. Salisbury, was interested in any of them. Among the instruments introduced in evidence was a deed dated March 29, 1881, from Williams to Monroe Salisbury, conveying the mining claim in dispute for a consideration of \$25,000, the receipt whereof is acknowledged by the grantor in the instrument. The deed is absolute in form, and contains nothing to indicate that it was a conveyance in trust, or that the grantee took it in trust for the firm or the defendant O. J. Salisbury. The contract sued on, and a quitclaim deed from O. J. and Monroe Salisbury and their wives, conveying the Peabody mining claim to the Stewart Mining Company, for the consideration of one dollar,

¹ Cavanaugh v. Salisbury, 63 Pac. 39, 23 Utah, —, 63 P.—52

were also admitted in evidence. There is likewise testimony showing that the individual members of the firm of Gilmer, Salisbury & Co. were engaged in mining, but there is nothing to show that the firm, as such, was so engaged. On the contrary, it is shown by the proof that the firm of Gilmer, Salisbury & Co. was engaged in the business of carrying mails of the United States government, express matter, and passengers. At the close of the testimony the court, on motion of the defendant, entered a judgment of nonsuit, and its action in the premises has been assigned as error.

The decisive question presented is whether the contract sued on renders the firm of Gilmer, Salisbury & Co., and, consequently, the individual members thereof, liable for the sum claimed to be due thereon. Counsel for the appellant insist that the presumption of law is that a contract made in the firm name is a co-partnership contract, and argue that the contract itself was prima facie proof that it was made on partnership account, and shifted the burden upon the defendant to show that it was not binding on the firm or on him. The clause of the agreement referring to the contracting parties reads: "This agreement, made and entered into this 20th day of November, 1882, between J. T. Gilmer, Monroe Salisbury, and O. J. Salisbury, co-partners, and doing business under the firm name of Gilmer, Salisbury & Co., parties of the first part, and Moroni R. Williams, party of the second part." Then follow clauses to the effect that the same mining claim was previously conveyed by Williams to Monroe Salisbury for \$16,000, of which \$10,500 was paid; that such sale was made for the use and benefit of the firm of Gilmer, Salisbury & Co., with the expectation that the purchaser would effect a sale of the property to third parties, and pay the balance of the purchase price out of the proceeds, and that no sale has been effected. Then follow stipulations that the first parties will pay the second party \$5,500 out of the proceeds of any sale of the mining claim which they make, with interest after sale; that the second party releases the first parties from any liability or obligation to pay such balance, except out of the proceeds of sale; and that the first parties will exert themselves to make a sale. The contract is signed, "Gilmer, Salisbury & Co. M. R. Williams."

If it be conceded that this instrument, in itself, is sufficient to raise a presumption that it was a partnership contract, then the question is whether the plaintiff's own evidence is of such a character as to rebut the presumption, and show that no recovery against the defendant can be had in this case. Upon careful consideration, we are of the opinion that this question must be answered in the affirmative. It is apparent from the proof that the firm of Gilmer, Salisbury & Co. was a nontrading partnership. It was engaged in the business of running stages, carrying Unit-

ed States mails, and transporting express matter and passengers. The very nature and character of that business is such that, in the absence of affirmative proof, it cannot be assumed that mining or dealing in mines was within the scope of the partnership. No member of the firm, therefore, could bind the partnership, or any other partner thereof, by a transaction, not within the ordinary or apparent scope of the partnership business, without special authority for that purpose. Of this a person dealing with a partner was bound to take notice. The law, in general, is that one dealing with an individual member of a co-partnership, as to matters not within the real or apparent scope of the business of the concern, does so at his peril, and, in the absence of subsequent ratification of the transaction, no liability attaches to the partnership. When, therefore, the plaintiff's intestate entered into the contract in question with Gilmer he was bound to take notice that Gilmer, without special authority, had no power to bind his firm, because the transaction was not within the scope of its ordinary business. There is no evidence whatever to show that Gilmer had any special authority to make the contract. Nor is there any proof to warrant a holding that either the firm or the defendant O. J. Salisbury ever ratified the transaction, or that such defendant was aware of the existence of the contract, until about the time this suit was commenced. The mere fact that, about 12 years after the making of the agreement in dispute, the defendant and his wife executed a quitclaim deed for the same property to the Stewart Mining Company for the nominal consideration of one dollar, when there is no proof that the grantors were interested in that company, or that the existence of the contract was known to them, is not sufficient to justify the assumption that the defendant ratified the contract. Nor is there anything, except the mere declaration of the contracting parties that the sale to Monroe Salisbury was for the benefit of the firm, to show that the contract was made for either the partnership or the defendant, or that the firm, or any member thereof except Gilmer, had anything to do with the transaction, or received any benefit or advantage because thereof. From the pleadings and the testimony, it is manifest that the transaction because of which this controversy arose was without the scope of the ordinary business of the firm, and, Gilmer having had no special authority for the firm, there being an absence of any ratification by the firm or the defendant, no liability attached to either. There appears to be an entire failure of proof to hold the defendant liable, and therefore the nonsuit was properly granted. In the case of *Cavanaugh v. Salisbury* (decided at the present term) 23 Utah, —, 63 Pac. 39, where practically the same question was presented, this court said: "A partner without special authority can bind the firm only within the scope of the busi-

ness, and the firm, in the absence of ratification, is not bound by any transaction of a partner outside the real or apparent scope. Where, therefore, as in this case, a partnership is engaged in the stage business, or the carrying of mails, passengers, and express matter, a partner has prima facie no authority to bind the firm or another partner in a transaction relating to the business of mining, and he who would seek to hold the firm liable by virtue of such transaction has the burden to show that the contracting partner had the authority to enter therein. The law, in the case of a nontrading partnership, implies no such power in a partner." There are other questions presented, but, from the view we have taken of the case, further discussion is not regarded important. We find no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(23 Utah, 79)

GEORGE v. ROBISON et al.

(Supreme Court of Utah. Jan. 3, 1901.)

DEEDS — GENERAL WARRANTY — CONSTRUCTION—PERSONAL PROPERTY—WATER RIGHTS.

1. A deed of general warranty of "quiet and peaceable possession" does not warrant water rights unless they are appurtenant to the land.

2. Water rights represented by shares of stock in a water company are personal property, and may be sold and transferred independent of any land, and the water represented by such shares cannot be considered as appurtenant to the land upon which it is used.¹

(Syllabus by the Court.)

Appeal from district court, Fifth district; E. V. Higgins, Judge.

Action by James A. George against Almon Robison and Josephine Robison. Judgment for plaintiff. Defendants appeal. Reversed.

C. W. Collins, for appellants. Joshua Greenwood, for respondent.

BARTCH, C. J. This is an action to recover damages for a breach of warranty contained in a deed conveying certain land, with the appurtenances, executed by the defendants to the plaintiff, who claims that the water used to irrigate the land was appurtenant thereto, and was included in the covenant of warranty, and that he has been ousted and deprived of the use and enjoyment of the water. The land is situate in the town of Kanosh. The deed bears date October 26, 1894, and the plaintiff claims that he was deprived of the use of the water about May 1, 1897. At the trial, which was before the court without a jury, he recovered judgment for \$115 and costs, and the defendants have appealed therefrom, and, among other things, have attacked the

findings of fact, maintaining that there is no evidence to support them.

The most important question presented is whether the water was appurtenant to the land. As to this the finding of the court is as follows: "That at the time of the execution of said deed there existed certain water rights as appurtenant to said land, to wit, sufficient water in the Corn Creek Irrigation Co. to irrigate the said lots, and to produce agricultural crops on the same, and that the said water has been used to irrigate said lots ever since the year 1891 up to and including the time of the purchase of said lots and their appurtenances; that the said water formed a part of the appurtenances, and that its use was necessary to irrigate the said lots; that in said deed the defendants warranted that they had a good and sufficient title in fee simple to said lots and the appurtenances and water rights thereunto belonging, and would defend the plaintiff in the use and possession of the same." The covenants contained in the deed, which was introduced and admitted in evidence, so far as material here, read: "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining; * * * to have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever. And the said parties of the first part and their heirs, executors, and administrators, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend." This is a general warranty of the "premises in the quiet and peaceable possession" of the grantee, but it will be noticed that nowhere in these covenants, nor anywhere in the instrument, is there any express reference to water rights or water for irrigation or other purpose, yet the court found that water rights were included in the warranty. Were, then, the water rights in fact appurtenant to the land? If they were, the absence of any mention of them in the deed is immaterial; but, if not, the warranty does not include them. To determine the question thus presented reference must be had to the evidence dehors the instrument of conveyance. From such evidence it appears that the water which was used for some years prior to and since the execution of the deed, and over which this controversy arose, was obtained from the Corn Creek Irrigation Company, a corporation organized in April, 1887, which company had distributed the water from Corn creek, a stream flowing through Kanosh, among its stock-

¹ Section 330, Rev. St. 1898; Snyder v. Murdock, 59 Pac. 91, 20 Utah, 419.

holders; that the plaintiff was aware that the company was incorporated, and at times attended the meeting of the stockholders; that, to obtain water for irrigation, it was always necessary for a person to be a stockholder; that each share of stock entitled the owner thereof to water sufficient to irrigate one acre; that the plaintiff had no stock in the corporation, nor had the defendants any stock, entitling them to water to irrigate that land; that the stock on which the water was distributed to the land at the time of the execution of the deed was owned by Mrs. M. A. Dorrity; that on August 9, 1897, she sold it, and had it transferred on the books of the company to the purchaser; that thereafter the purchaser had the right to use the water which the stock represented, and this deprived the plaintiff of its use; and that the plaintiff not only owned no stock in the corporation, but never paid any assessment on the water, the assessments, up to the time of the sale of the stock, having all been paid by the vendor, Mrs. Dorrity. Such is the trend of the evidence on this point, and it appears to be uncontradicted. In fact the fair result of the plaintiff's own testimony is to the effect that the water of Corn creek, of which that in dispute formed a part, is and was owned and controlled by a corporation; that each share of its capital stock represented sufficient water to irrigate one acre; and that stockholders only were entitled to water for the purposes of irrigation. There is nothing to show that any share of stock represented water for any particular acre of land. So far as appears from the proof, each stockholder had the right to use the water to which he was entitled on any land he saw fit. Under such arrangements as are here disclosed by the testimony, the water cannot be regarded as a part of the land, and is not appurtenant to it. The stock of such a corporation is mere personal property, and may be sold and transferred independent of any land; and the sale carries with it the right to use the water on any land or for any purpose the new owner may choose. The stock is merely the evidence of the holder's title to a certain amount of water. That it is personalty is settled in this state by statute. Section 330, Rev. St. 1898. It is not a corporeal, but an incorporeal, species of property, and has nothing which gives it the character of realty. 1 Schouler, Pers. Prop. (3d Ed.) §§ 68, 482; 1 Cook, Stock, Stockh. & Corp. Law, § 12; Snyder v. Murdock (Utah) 59 Pac. 91; Tregear v. Water Co., 76 Cal. 537, 18 Pac. 658. From an examination of the evidence the conclusion is irresistible that the water rights in question were treated by the owners as personal property, constituted no part of the realty, and, not being expressly mentioned or referred to in the deed, were not conveyed with the land, and that there is no proof that warranted the court in finding that

the water was appurtenant to the land, or that the water rights were included in the warranty. Having come to this conclusion, it is not regarded important to discuss any other question presented. The case must be reversed, with costs, and remanded, with instructions to the court below to set aside its judgment, correct its findings in accordance with the proof, and enter judgment accordingly. It is so ordered.

MINER and BASKIN, JJ., concur.

(23 Utah, 71)

MCCORNICK v. QUEEN OF SHEBA GOLD MIN. & MILL. CO.

(Supreme Court of Utah. Dec. 19, 1900.)

AGENCY—EVIDENCE—OPINION OR CONCLUSION—QUESTION OF LAW—CONFLICTING EVIDENCE—MIXED QUESTION OF LAW AND FACT—INSTRUCTIONS.

1. Where agency is the question directly involved in a case, the reputed agent, as witness, may not give his opinion or state his conclusion as to such agency, but may state the facts and circumstances concerning the various transactions between him and the alleged principals, leaving the court and jury to determine, under the facts disclosed, whether or not he was such agent.

2. Where evidence in support of a particular agency is undisputed, the question of whether or not the agency exists is one of law for the court; but where such evidence is disputed the existence of the agency becomes a mixed question of law and fact, and is one for the jury to determine under proper instructions from the court.

3. H. was operating the mine of defendant for an English company having a lease and bond on the property, and in possession during the life of the bond, and while so acting created an overdraft in the name of the company. The question being whether the credit was extended to the lessors or lessee, letters, reports, or statements sent during the lease by H. to his foreign corporation, and the escrow papers, including the contract of sale and lease, were competent evidence, admissible, and for the jury to say how weighty, in determination of the question of agency.

4. Where the entire charge of the trial court fairly states the law applicable to the case, the judgment will not be reversed because a portion of the charge omits one element which might have been stated to the jury.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by W. S. McCornick against the Queen of Sheba Gold Mining & Milling Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Pierce, Critchlow & Barrette, for appellant. Marshall, Royle & Hempstead, for respondent.

BARTCH, C. J. The plaintiff, who is a banker, brought this action to recover \$2,673.48 and interest alleged to be due him from the defendant because of an overdraft at his bank. At the trial a verdict was returned and judgment entered against him. This appeal is from the judgment.

It appears from the evidence: That the de-

endant was a mining corporation, and owned a group of mining claims in Western Utah. That one George D. Haven, a mining man of experience and means, in the early part of 1896 went to England for the purpose of interesting English capitalists in mining property situate in this state. That before his departure Haven, who held a few shares of stock and was a director in the defendant company, was authorized by special power of attorney to sell the corporate property. That he did not dispose of the property under these powers, but while in England succeeded in interesting some friends in the enterprise. These Englishmen and Haven organized, it appears, the Clifton Utah Mining Company at London, England, Limited, and Haven became a one-ninth owner therein. That upon his return from England the English and defendant companies entered into an agreement, bond, and lease as to the defendant's mining property, under the terms of which, among other things, the possession of the property was turned over to the English company, and the company within two years from April 14, 1896, was to spend £1,500 sterling in developing the property, building mills, etc., and was to have the right at any time within the two years to purchase the property at a certain price fixed, or, in the event the purchasing company did not exercise its option to purchase, then it was to have a certain number of shares of the defendant company's stock in return for the expenditure of the £1,500 for development work. And that the documents relating to this lease and option to purchase were deposited in escrow with the banking house of the plaintiff, with an indorsement on the envelope as follows: "The within deed of the Queen of Sheba G. M. & M. Co., a corporation, to Alfred Stebbing, and 25,000 shares of the capital stock of said company, indorsed in blank by George D. Haven, are hereby placed in the hands of McCornick & Co., bankers, of Salt Lake City, Utah; and they are instructed to deliver said deed and shares of stock to said Stebbing, or order, upon a compliance with the terms of a certain contract this day entered into by and between said company and said Stebbing for the purchase of the property described in said deed and contract, and, on failure to comply with the terms of said contract upon demand of said company, said deed shall be delivered by McCornick & Co. to it. The Queen of Sheba G. M. & M. Co., T. C. Rooklidge, President." Upon the mining property being turned over to the purchasing company, Haven became the manager thereof, and that company from time to time forwarded to him the money for development work required by the terms of the contract, and Haven thenceforth made his reports concerning the enterprise and development and expenditures to the English company. The defendant ceased doing business during the term of the lease. After assuming the duties of manager, and money coming into his hands from the Eng-

lish company, he opened an account with the plaintiff's bank in the name of the "Queen of Sheba Mining Co.," and the account was so continued until it finally resulted in the overdraft for which the plaintiff is seeking to hold the defendant company responsible. Haven also deposited to his individual account on December 23, 1897, with McCornick & Co., \$16,000, which it appears is the same date on which the overdraft was commenced to be made. The evidence further shows that the defendant company never kept an account with the plaintiff's bank; nor is there anything to show that the defendant company authorized by resolution, or otherwise instructed, Haven to open an account with that bank, or ratified his action in the premises.

Under the evidence the principal question appears to be whether Haven was, during the term of the lease, acting as manager or agent of the lessor, or of the lessee. At the trial, sworn as a witness in behalf of plaintiff, he was asked: "Were you manager of this English company [the Clifton Utah Company], or for any of the gentlemen referred to?" To this question the defendant interposed an objection as being improper to establish agency by such evidence, and the court sustained the objection, stating that a man cannot prove his agency by his own statements. The action of the court in the premises has been assigned as error, and it is now insisted that it was prejudicial to the rights of the appellant. We think not. Whether or not the court assigned a correct reason for sustaining the objection, the question, under the circumstances of the case, was objectionable. It was in effect the same as asking the witness whether he was the agent of the English company, which, as we have seen, was one of the main issues in the case, to be determined by the court and jury from all the facts and circumstances shown by the evidence. Whether he was an agent was a mixed question of law and fact, and not one upon which the witness could properly give his opinion. The general rule is that witnesses must testify to facts, and not to conclusions. It was competent for the witness to state all the facts and show all the circumstances relating to or concerning the various transactions which he had with either or both companies prior and leading up to and during the term of the lease, and at the time when the overdraft sued for was contracted; and then, from such facts and circumstances and the other evidence, it was the province of the court and jury to determine whether in such transactions and at such time he was the agent of or was acting for the English or the defendant company. Where the question of agency is, as in this case, made a principal issue at the trial of the cause, it is not competent for a witness to express an opinion upon such question. The authorities which the appellant cited are not in point here. They merely declare the general principle that an agent is a competent witness to prove the

nature and extent of his authority, and to testify to facts and circumstances tending to establish the relationship of principal and agent. Mechem, Ag. § 102; 1 Am. & Eng. Enc. Law (2d Ed.) 969. Where, in such case, the evidence in support of the agency for a particular concern is undisputed, the question whether or not the agency exists is one of law for the court; but where, as in the case at bar, such evidence is disputed, the existence of the agency becomes a mixed question of law and fact, and is one for the jury to determine, under proper instructions from the court. Mechem, Ag. § 106; 1 Am. & Eng. Enc. Law (2d Ed.) 967.

Nor, under the facts and circumstances, do we think that the court erred in admitting in evidence the letters, reports, or statements which Haven, as manager, sent the English company, showing the progress of his work at the mines in question, and his receipts and expenditures as manager. Such documents, prepared and sent during the term of the lease, were proper for the jury to consider in determining whether or not Haven was acting for the English company when he overdrew the account at the bank.

Nor did the court err, as claimed by the appellant, in admitting in evidence the bond and lease and other papers which had been placed in escrow in the appellant's bank. The jury were required to determine who was operating the mine during the time of the overdraft, and as to whether or not the appellant had extended credit to the lessor or the lessee of the property. The witness Haven had testified that all the money overdrawn was expended in developing the mine. The escrow papers included the contract between the lessor and lessee, and constituted evidence showing that the English company had the right of possession of the property, that it was its duty to develop it and furnish the funds therefor, and that, the documents having been deposited with the banking house of the appellant, he was chargeable with notice of their contents; the instructions on the envelope containing the papers, as we have seen, referring to them. The contents of the envelope were therefore proper evidence for the consideration of the court and jury.

The appellant also complains of the charge of the court, because, as is claimed, it omits the element that the failure of officers within a reasonable time to disaffirm the acts of an alleged agent of the company, when he acts with the knowledge of the officers, often works an estoppel on the company; but, upon examining the entire charge, the law applicable to the facts disclosed by the evidence appears to be fairly stated, and hence the objection here urged can be of no avail.

There are other questions presented, but, finding no reversible error in the record, we do not regard further discussion necessary. We are of the opinion that the great preponderance of the evidence is unfavorable to the appellant, and shows no right in him to

recover against the defendant company in this case. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(38 Or. 495)

NOTTINGHAM v. McKENDRICK et al.

(Supreme Court of Oregon. Feb. 18, 1901.)

MECHANICS' LIENS—LIEN NOTICE—ASSIGNMENT OF LIEN—NOTICE BY OWNER OF NONLIABILITY.

1. A notice of lien, stating that, by virtue of a contract made with M., the original contractor, with T., lessee of a building described from D., claimants have furnished building material for, and which was used in the erection of, a certain building, etc., sufficiently shows that the material was furnished to M., within Hill's Ann. Laws, § 3673, requiring a lien claim to contain the name of the person to whom the material was furnished.

2. An assignment of "our claim against M." for material furnished on a building, made after the filing of the lien and prior to the commencement of the suit, is sufficient to constitute an assignment of the lien as against the owner; both the assignor and assignee testifying that it was intended as an assignment of the lien, in order that it might be foreclosed in the same suit with the lien of the assignee.

3. A complaint, on foreclosure of a mechanic's lien, is not insufficient for failure to allege that the lien claims as filed contained a statement that the material furnished was actually used in the building; the statute not requiring a lien notice to contain such a statement.

4. The owner of a building testified that the lessee objected to the owner's notice of nonliability being posted in a public place, and, in deference to his wishes, it was put on a partition wall several feet back from the street. The lien claimant testified that he searched carefully, and saw no notice, but, after material had been furnished, the owner had told him that he was going to post notices, but, because of the lessee's objection to having them posted in a public place, he had put them in a little recess, and showed witness the notices posted in a little recess, where they would not be seen. Held to support a finding that the notices were not posted in a conspicuous place on the property, as required by Hill's Ann. Laws, § 3672, so as to exempt the owner from liability for the lien.

5. On foreclosure of a mechanic's lien, it is no defense, as to the owner and lessee, that a portion of the material was used in the room sublet by the lessee to a third person.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Judge.

Foreclosure of mechanic's lien by C. W. Nottingham, doing business as Nottingham & Co., against J. McKendrick and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a suit to foreclose two mechanics' liens. In brief, the facts are that in August, 1897, the defendant Dammeler, who was the owner of a three-story brick building on lot 5, block 62, in the city of Portland, and of a leasehold interest in the ground, leased the corner room on the ground floor of such building to the defendant Trummer, who entered into a contract with McKendrick to furnish material and perform the labor necessary in plastering, painting, and inside

finishing such room. During the progress of the work, McKendrick purchased material of the plaintiff and Rasmussen & Co., to be used, and which was used, in the repairing and finishing of such room. Thereafter, and within the time provided by law, the plaintiff and Rasmussen & Co. filed notices of mechanics' liens on the building and lot for the balance due each of them for the material so furnished. On October 14, 1897, this suit was commenced to foreclose such liens, the plaintiff alleging that Rasmussen & Co. had sold and assigned their lien to him. Trummer and Dammeler answered, denying the allegations of the complaint, and for further and separate defenses alleging (1) that the defendant Dammeler, for herself and Severson, the owner of the fee, within three days after obtaining knowledge of the construction, alteration, and repairs mentioned in the complaint, gave notice, by a writing posted in a conspicuous place upon the land, as required by section 3672 of the statute, that she and Severson would not be responsible for the same or any part thereof; (2) that only a small portion of the material furnished by the plaintiff and Rasmussen & Co. was furnished to be used, or was used, in the construction, erection, or repair of the building mentioned and described in the complaint; (3) that, prior to the date of the alleged assignment to the plaintiff, Rasmussen & Co.'s lien had, for a valuable consideration, been waived and released. The allegations of the answer were put in issue by a reply, and upon the trial a decree was rendered in favor of the plaintiff, from which the defendants appeal.

S. C. Spencer, for appellants. R. F. Bell, for respondent.

BEAN, C. J. (after stating the facts). The first objection to the decree of the court below is that the notices of lien filed by the plaintiff and Rasmussen & Co. are each fatally defective, because they do not state to whom the materials were furnished. The statute provides (Hill's Ann. Laws Or. § 3673) that a material man, claiming the benefit of the act, shall file with the county clerk a claim, containing, among other things, "the name of the person * * * to whom he furnished the materials," and a claim or notice which does not so state, either directly or by necessary inference, is insufficient. *Getty v. Ames*, 30 Or. 573, 48 Pac. 355. The notices in question are substantially the same, that of the plaintiff, so far as material, being as follows: "Know all men by these presents that C. W. Nottingham, doing business as Nottingham & Co., have, by virtue of a contract heretofore made with J. McKendrick, a contractor, with L. Trummer, lessee of the building hereinafter described, under a lease with M. C. Dammeler, for the furnishing of building material, to wit, lime, etc., furnished said material, to be and which

was used in the construction and erection of a certain three-story brick building, constructed and being upon the following described land, to wit," etc. This language is perhaps faulty, and open to some verbal criticism, but the meaning evidently is that the plaintiff, by virtue of a contract with McKendrick, furnished material to be and which was used in the construction of a certain building, and, while it is not directly asserted that the material was furnished to McKendrick, such is the only inference to be drawn from the language employed. The lien notice is therefore sufficient. *Rowland v. Harmon*, 24 Or. 529, 34 Pac. 357.

It is next contended that the proof of the assignment by Rasmussen & Co. of their lien to the plaintiff is insufficient. On the trial there was offered and admitted in evidence the following writing: "We hereby assign and deliver to Nottingham & Co. our claim against James McKendrick, \$16.09, for material furnished on the Dammeler building, corner 5th & Morrison Sts. [Signed] Rasmussen & Co., pr. J. P. Rasmussen." It is argued that this writing is not sufficient to constitute an assignment, and was not executed or delivered until after the commencement of this suit. There is some uncertainty in the testimony as to when the writing was actually executed and delivered, but the cumulative result of the evidence is that it was made after the filing of the liens, and prior to the commencement of the suit. Both the plaintiff and Rasmussen testified that the writing was intended as an assignment, so as to vest in the plaintiff the title to the Rasmussen lien, in order that both might be foreclosed in one suit; and, inasmuch as plaintiff's title is not questioned by Rasmussen & Co., the defendants are not entitled to a reversal because of a mere technical defect in the testimony on this question.

It is next insisted that the complaint is insufficient because it does not allege that the lien claims as filed contained a statement that the material furnished was actually used in the building. There is no merit in this objection, because the statute does not require a lien notice to contain such a statement. *Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54. In the complaint the notices are pleaded according to their legal effect, and everything required by statute to be set forth in a claim of lien is alleged to be therein contained; hence the complaint is sufficient.

It is further asserted that the liens cannot be enforced against the defendant Dammeler, for the reason that she gave notice, as provided in section 3672, that she would not be responsible for the repairs or alterations mentioned in the complaint. Upon this point the court below found, in substance, that at some period during the time the work was being performed on the building the defendant Dammeler posted a notice upon one of the partition walls to the effect that neither she nor the owner of the legal title would be re-

sponsible for any work or material furnished, but that such notice was not posted, nor intended to be posted, in a conspicuous place upon the building or land, nor was it posted within three days after the defendants obtained knowledge of the work and repairs being done by the defendant McKendrick under his contract with Trummer. This finding is abundantly supported by the testimony. Mr. Dammeler, the agent of the defendant Dammeler, testified that Trummer, the lessee, objected to a notice being posted in a public place, and, in deference to his wishes, it was put on a partition wall, several feet back from the street. Mr. Nottingham said that he was careful to observe whether a notice had been posted, but did not see any; that, after the material had been furnished, he had a conversation with Mr. Dammeler about the matter, and the latter told him that "he was going to post notices, and Mr. Trummer objected to his posting them up where they would be seen, and that he put the notices in a little recess, he said, showing me on the corner of the building, and posted the notices in there in the little recess, where it would not be seen."

It is next contended that a large part of the material furnished by the plaintiff and Rasmussen & Co. was not used in the room rented by the defendant Trummer. Upon this point the evidence is to the effect that, after Trummer rented the room, he sublet a portion thereof for a cigar store; that McKendrick did a part of the work therein; and that probably some of the material furnished by the plaintiff and Rasmussen & Co. was used in the latter place. But there is no evidence to show how much of it was so used, and the impression we get from an examination of the record is that it was small and inconsequential. In any event, it was used in the room Trummer rented of the defendant Dammeler. It follows that the decree of the court below must be affirmed; and it is so ordered.

(38 Or. 65)

MARKS v. STEPHENS et al.

(Supreme Court of Oregon. Feb. 18, 1901.)
INJUNCTION—EXECUTION—IRREGULAR—ADEQUATE REMEDY—MOTION TO QUASH.

Where individual personal property of a surviving partner, who was administrator of the partnership estate, was seized under execution on a judgment against the firm, injunction will not lie to restrain a sale thereunder because the execution was issued in the name of the judgment creditor, who had been dead for a considerable time, and because the judgment had been presented as a claim against the partnership estate and neither allowed nor disallowed, and because the property levied on was individual personal property, since there was a complete and adequate remedy for the irregularity in the issuance of the execution and the subsequent proceedings thereunder, by a motion to quash in the court issuing the execution.

Appeal from circuit court, Douglas county; H. K. Hanna, Judge.

Injunction by Asher Marks against R. L. Stephens and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

This is a suit to enjoin the sale of personal property belonging to the plaintiff, under an execution issued on a judgment rendered in July, 1891, in favor of John Pearce and others, and against the plaintiff and S. Marks, partners as S. Marks & Co., and one F. C. Buell. The complaint alleges, in substance: That John Pearce, one of the judgment creditors, died in 1891, and S. Marks in 1893. That the plaintiff was appointed administrator of the partnership estate of Marks & Co., and in 1894 a transcript of the judgment referred to was presented to him, as such administrator, for allowance. That thereafter, on the 28th day of February, 1899, an execution was issued thereon, and in March 150 sacks of wheat, the individual property of the plaintiff, were levied upon and advertised for sale, and will be sold thereunder unless the sheriff is restrained. That such execution was wrongful and unlawful for the reasons (1) that it was issued in the name of John Pearce, who had died long prior to the date thereof; (2) that prior to its issuance Pearce's administrator had presented the judgment as a claim against the estate of S. Marks & Co., and it had neither been allowed nor disallowed by the administrator thereof; and (3) that the levy on the property of the plaintiff is wrongful and void, because his individual property is not liable to seizure and sale under execution issued on a judgment against the firm of S. Marks & Co. A demurrer to the complaint was sustained in the court below, and the plaintiff appeals.

J. C. Fullerton, for appellant. O. P. Coshow, for respondents.

BEAN, C. J. (after stating the facts). It is elementary law that an injunction will not issue where there is an adequate remedy at law; and therefore equity will not restrain a levy or sale of property under execution on account of mere errors or irregularities in its issuance or proceedings thereunder; for, as said by Mr. Freeman, "courts of equity do not presume to exercise supervisory power over courts of law with a view of correcting the decisions of legal tribunals. They interfere only in cases of fraud, accident, mistake, surprise, or where some unconscionable use of a legal right or title is made or threatened. If an execution is irregularly issued, or is being executed in an irregular, oppressive, or fraudulent manner, the court out of which it issued can usually, on motion, grant appropriate and adequate relief; and, where it can do so, equity will not interpose, except to stay proceedings until the ordinary means of obtaining redress can be pursued at law." 2 Freem. Ex'n (2d Ed.) § 436. See, also, 8 Enc. Pl. & Prac. 475; Stafford v. Sibley, 106 Ala. 189, 17 South. 324; Foard v. Alexander,

64 N. C. 69; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639. Now, the only ground assigned for relief is alleged irregularity in the issuance of the execution and the subsequent proceedings thereunder, for which a motion to quash in the court issuing the process would have afforded an adequate and complete remedy. There is no allegation of any fact requiring the interposition of a court of equity, or giving it jurisdiction to interfere by injunction. It is argued that, because the property levied upon is personal, the sale of which would pass the title without right of redemption, equity should interfere by injunction, because such sale might take place before a motion to quash could be heard. But there is no allegation in the complaint upon which to base such a contention; and, if there were, it would not give the court jurisdiction to perpetually enjoin the enforcement of the execution, although, according to some of the authorities, it might stay the proceedings until the motion to quash could be disposed of. It follows from these views that the plaintiff's remedy was by a motion in the court issuing the process, and not by a proceeding in equity. There was, therefore, no error in sustaining the demurrer, and the decree of the court below will be affirmed.

(25 Mont. 41)

BUTTE & B. CONSOL. MIN. CO. v. MONTANA ORE-PURCHASING CO. et al.

(Supreme Court of Montana. Feb. 11, 1901.)

MINES AND MINING—CO-TENANTS—STATUTES—CONSTITUTIONAL LAW—VESTED RIGHTS—AMENDMENTS—CONSTRUCTION—INTERPRETATION—RETROSPECTIVE OPERATION—INJUNCTION.

1. Code Civ. Proc. § 592, as amended by Laws 1899, p. 134, provides that, if any person shall exercise acts of exclusive ownership over, or injure property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury as if such tenancy did not exist, with the further proviso that a co-tenant or joint tenant shall not thereby be prevented from entering the common property at a point not actually occupied by his co-tenants, and extracting ore, subject to an accounting for the profits to the other tenants. *Held*, that the act applied to co-tenants whose estates were in existence either before or after the passage of the act.

2. Such act being an attempt to impair vested rights of co-tenants to enter and extract ores without accounting therefor, under Code Civ. Proc. § 592, existing at the time it became operative, it was repugnant to Const. art. 3, § 3, declaring the right of all persons to acquire and possess property and be protected from deprivation thereof.

3. When one state adopts a statute from another state, after a judicial interpretation thereof by the courts of the parent state applicable to the conditions of the adopting state, the legislature will be presumed to have adopted the interpretation with the statute.

4. Act Feb. 8, 1865, § 1 (Bannack's St. p. 454), providing that the property of deceased joint tenants shall be treated as if there had been a tenancy in common, affected subsequently accruing rights only, and was not retrospective in its operation, since the legislature had no power to interfere with existing rights by converting joint tenancies into tenancies in common.

5. Act Feb. 8, 1865, § 2 (Bannack's St. p. 454), provides that, if any person shall exercise exclusive ownership over or injure property held in joint tenancy, tenancy in common, or coparcenary, the party aggrieved shall have his action of trespass or trover for the injury in the same manner as if such tenancy did not exist. *Held*, that this section was not merely remedial, but was intended to substantially alter the rights of co-tenants, and make violation of these rights constitute legal injuries, and hence could not be retroactive in its operation, so as to violate the constitutional safeguard protecting vested rights.

6. Under Act Feb. 8, 1865 (Bannack's St. p. 454), substantially re-enacted by Code Civ. Proc. § 592, which converts joint tenancies into tenancies in common, and tenancies in common into estates with rights and privileges incident to several ownership, protecting such rights by giving the actions of trespass and trover, it is an unauthorized taking away and lessening in value of the property for one co-tenant to mine and remove ore from the common property without the consent of the other, and injunction will properly issue to restrain violation of the rights given by the act.

7. Laws 1899, c. 134, amending Code Civ. Proc. § 592, by allowing a co-tenant to take ore from mines held in common or joint tenancy if he should account to his co-tenants for the profits therefrom, deprived one class of tenants of rights created by the original act, and conferred new rights on another class; and hence a co-tenant whose estate was created after the adoption of the act embodied in section 592, and before the amendment thereto became operative, was entitled to restrain by injunction the commission by his co-tenant of any of the acts denounced in the original statute, but allowed by the amendment, the amendment being only prospective in its operation.

On rehearing. Reversed.

For former opinion, see 60 Pac. 1039.

Forbis & Evans, Wm. H. De Witt, Ransom Cooper, and T. J. Walsh, for appellant. McHatton & Cotter, Clayberg & Corbett, Robt. B. Smith, and Chas. R. Leonard, for respondents.

PIGOTT, J. The former opinion in this case is reported in 24 Mont. —, 60 Pac. 1039. Being inclined to the view that, if the provisos of house bill No. 1 of the Session Laws of 1899 (Laws 1899, p. 134, hereinafter referred to) are applicable to co-tenancies created prior to the passage of that bill, the injunction was probably too broad in its terms, we granted a rehearing, and the cause has been again argued. The facts upon which the original decision was based are stated in the former opinion. The following facts are pertinent to the question which we shall consider upon the rehearing:

The plaintiff and the defendants Heinze are, and since 1893 have been, tenants in common of the Snohomish and Tramway lode mining claims. The defendant administrator and the defendant Larkin, as heir, assert that the equitable title to the undivided interests of which the plaintiff is the legal owner is in the heir, but this is controverted by the plaintiff. The defendant Montana Ore-Purchasing Company owns the Rarus lode mining claim, and this defendant and the defendants Heinze had entered the Snohomish and Tramway from the Rarus

through underground workings of the latter, had mined large quantities of valuable ore from the veins of the common property, had hoisted and removed the same through the Rarus shaft, and had appropriated it to their own use, all without the consent of the plaintiff. These acts they threatened to continue doing. In its former decision this court reversed the order of the district court refusing to grant an injunction pendente lite, the effect of which was, in the particular case, a direction to the court below to issue the injunction as prayed, restraining the defendants from entering upon and mining the common property at any place. If the defendants, who are co-owners with the plaintiff in the Snohomish and Tramway, should sink a shaft or make an opening on either one of these claims, and mine and extract ore therefrom, a question different from that determined in the former decision would necessarily arise. The constitutionality of section 592 of the Code of Civil Procedure, as amended by the act of February 28, 1899, commonly known as "House Bill No. 1," would be involved. If it be constitutional when applied to the co-tenancy between the plaintiff and the Heinzes, and the defendants in mining and removing the ore through openings on the Snohomish or Tramway should bring themselves within the provisos of the act, the injunction would be too broad. We think the court is therefore in duty bound to determine whether the act, if intended to be applicable to co-tenancies existing at the time of its passage, is, as to such co-tenancies, repugnant to the constitution. The plaintiff argues that the act attempts to deprive co-tenants whose estate existed when the act of 1899 became operative of their property without due process of law, disturbs their vested rights, and is a law impairing the obligations of contracts.

We are satisfied that the provisos of house bill No. 1 of the Laws of 1899 were intended to apply as well to co-tenants whose estates were in existence when the law was passed as to those whose estates have been or may be created after its passage. Does the amendment made by the act of 1899 to section 592 of the Code of Civil Procedure disturb or impair the vested rights of co-tenants whose estates were in existence at the time the amendment became operative? If it does, it is repugnant to those parts of sections 3 and 27 of article 3 of the constitution of the state declaring that all persons have the natural, essential, and inalienable right of acquiring, possessing, and protecting property, and ordaining that no person shall be deprived of property without due process of law. If it does, it is repugnant also to the "due process of law" clause of the fourteenth amendment to the federal constitution.

In 1845 the general assembly of Illinois passed the following statute, entitled "An act concerning joint rights and obligations" (Rev. St. Ill. 1845, p. 299):

"Section 1. * * * If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common.

"Sec. 2. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common or coparcenary, the party aggrieved shall have his action of trespass or trover for the injury, in the same manner as he would have if such joint tenancy, tenancy in common, or coparcenary did not exist.

"Sec. 3. All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants."

Section 2 received an interpretation in *Benjamin v. Strempfle*, 13 Ill. 466, and *Boyle v. Levings*, 23 Ill. 314, decided in 1851 and 1862, respectively. These three sections were adopted by Montana. At the first session of the legislative assembly of the territory of Montana an act entitled "An act concerning joint rights and obligations," approved February 8, 1865, was passed (Bannack's St. p. 454). It is as follows:

"Section 1. If any partition be not made between joint tenants, the property of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to execution or administration, and be considered to every intent and purpose in the same view as if such deceased joint tenants had been tenants in common.

"Sec. 2. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common, or coparcenary, the party aggrieved shall have his action of trespass or trover for the injury in the same manner as he would have if such joint tenancy, tenancy in common, or coparcenary did not exist.

"Sec. 3. All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants.

"Sec. 4. This act to take effect, and be in force, from and after its passage."

Thereafter the provisions of the act of 1865 were included in an act entitled "An act revising, enacting, and codifying the general and permanent laws of Montana territory," the act of 1865 constituting chapter 36 of the compilation of 1871-72, the subject of the chapter being designated as "Joint Rights." In the subsequent compilation of 1887 the provisions of the act of 1865 were re-enacted without change, appearing as chapter 77 of the General Laws, and found at page 1006 of

the Compiled Statutes of 1887, the chapter being entitled "Joint Rights." Until the adoption of the Code of Civil Procedure of 1895, the act of 1865 remained in force as originally passed. For more than 30 years, therefore, the act of 1865 constituted the only legislation of this territory and state touching the subjects affected by it. What, then, was the purpose and what the effect of these enactments, which were among the earliest legislative steps taken by the territorial government, and which remained for so long a time unchanged?

By its title the act declares that the subject sought to be affected by its provisions is "Joint Rights and Obligations," and, as the third section of the law treats specifically of "Joint Obligations," it should seem clear that, if the title of the act may be treated as any evidence of its meaning, sections 1 and 2 were designed to treat of "Joint Rights." It is hardly needful to observe that, if the provisions of the enacting portion of the statute actually depart from the purpose indicated by the title, they would not, under the organic act as it then was, be restricted by it; but if sections 1 and 2 render the meaning ambiguous, or leave the legislative intent doubtful, the avowed purpose of the legislation, as the purpose is declared in the title, would prove, at the least, of benefit in the effort to ascertain the design of that branch of the government whose purposes, when ascertained, must be respected and announced by the judiciary. We find that by the first section of the act itself the legislative assembly plainly intended to destroy the right of survivorship which constituted the distinguishing feature of the species of tenure known as "joint tenancy," and the provisions and unmistakable purpose of the act are thus far consistent with its title; for, manifestly, such a substantial modification of the rights of joint tenants deals exclusively with "joint rights" and accounts, at least in part, for that portion of the title declares that the act is one concerning "joint rights." We cannot agree with the courts which hold that the legislature has power to convert existing joint tenancies into tenancies in common. The right of survivorship—the indispensable ingredient and characteristic of the estate, and not a mere expectancy or possibility, as, for example, is the inchoate right of dower—accrues as a vested right when and as soon as the joint tenancy is created, and the legislature is without authority to divest or interfere with such right. A joint tenant cannot be so deprived of his property. Constitutional limitations, state and national, prohibit it. We observe, therefore, that the first section was not and could not have been retrospective in its operation, but that it affected subsequently accruing rights only, which, in the absence of the statute, would have constituted joint tenancies.

Turning, now, to the second section, and expecting, by reason of the terms of the ti-

tle, to find that its provisions relate either to "joint rights" or to "joint obligations," we are surprised to find its language more suited to legislation concerning remedial procedure than to either of the subjects indicated by the title. It provides that if "any person" (not necessarily a co-tenant) "shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common, or copartenary," then "the party aggrieved shall have his action of trespass or trover for the injury," and that this aggrieved party shall have such action "in the same manner as he would have if such joint tenancy, tenancy in common, or copartenary did not exist." Without consideration, for the present, of the significance of the word "any" in the first line of the section, and assuming that the section relates solely to co-tenants, what was its purpose and effect as to them? It declares that, under the circumstances described, "the aggrieved party [co-tenant] shall have his action of trespass or trover for the injury." A superficial examination of this provision would naturally induce the conclusion that it relates only to the remedy "for the injury" to an aggrieved co-tenant; but no very serious reflection is required to suggest the indisputable proposition that some, at least, of the acts recited in the section do not constitute "injuries" to the co-tenant, or make him an "aggrieved party," unless the statute modified the rights of co-tenants. For instance, no wrong was done under the common law if one co-tenant, without the consent of the other owners, in the proper way mined and took away the product from the subject of the common ownership which had been acquired for the purpose of mining, and was adapted to that use, or worked in a miner-like manner mines open when the co-tenancy was created, and removed the ores and deposits, although the value of the land might be lessened thereby.

Whether these sections worked a change in the law by creating rights not theretofore existing, or provided remedies only, is the important and difficult question presented in the case at bar. If merely remedial, then they did no more than provide additional means of redress for the violation of rights recognized at law or in equity. If, on the other hand, these sections created new rights in property, and incidentally prescribed remedies for the invasion of such rights, it will be sufficient, for the purposes of the present inquiry, to determine whether the supposed right asserted by the plaintiff was so created, and whether it became vested before the amendment of 1899 went into effect; and the extent of the changes made by the act of 1865 with respect to the obligations and liabilities of co-tenants the one to the other need not be examined, except in so far as a discussion of them may be necessary to a clear understanding of the points here presented.

Before the passage of the statute of 1865, a tenant in common, although liable in trespass to his co-tenant for an unlawful destruction of the common property or of part of it, or of the interest of the co-tenant, had the right to "assume and exercise exclusive ownership over" (provided neither ouster nor conversion resulted), "or take away, * * * lessen in value, or otherwise injure or abuse" the common property (provided the act did not amount to ouster, waste, conversion, or unlawful destruction), and hence the exercise of that right could not operate as an "injury." In other words, under the common law one tenant in common is not aggrieved—that is to say, he has suffered no legal injury—by his co-tenant's assuming and exercising exclusive ownership over, taking away, lessening in value, or otherwise injuring or abusing the common property, unless the act amounts to an ouster, to waste, to a conversion, or to an unlawful destruction of the common property or of some part of it, or of the interest of the other tenant. If, therefore, this section does not affect joint or common rights, as the title would indicate that it does, and if it relates exclusively to a remedy, it manifestly constitutes an attempt by the legislature to create a privilege to resort to judicial procedure for the purpose of preventing the exercise of certain lawful rights. Such an attempt would, of course, be futile, as it would exceed the constitutional powers of any legislative body, and hence such a purpose ought not to be attributed to the legislative assembly, unless no other construction of the law is consistent with the legislative purpose, within the scope of its recognized authority. A remedy without a right to be protected thereby, or a wrong without a correlative right, is inconceivable. Although thus forced to reject the view that this section relates exclusively to remedial procedure, we are still impelled to recognize and concede the fact that it plainly purports to make provisions for actions between co-tenants which could not have been maintained prior to the act, and that such actions should be maintainable by reason of certain wrongs which formerly were not wrongs and could not have constituted causes of action. Such, in effect, were the principles upon which *Benjamin v. Stremple* and *Boyle v. Levings*, supra, were based, and the statute bore this interpretation at the time it was adopted from Illinois. When a statute has been adopted by this state from another state, after a judicial interpretation suitable to the conditions of this state has been placed upon it by the parent state, the legislative assembly will ordinarily be presumed to have adopted the interpretation with the statute, and the courts will depart from it only for strong reasons. *Stadler v. Bank*, 22 Mont. 190, 203, 56 Pac. 111.

In view of this plain purpose, declared in unmistakable terms in the act; in view of the fact that this purpose could be accom-

plished only by modifying the relations incident to co-tenancy, and creating new rights in the co-tenants; and in view of the avowed object of the statute as declared in its title,—the conclusion cannot be escaped that the legislative assembly clearly intended by this awkwardly worded section to alter substantially the rights of co-tenants, make violations of those rights constitute legal injuries, and designate the appropriate remedies for such injuries. We may observe, also, that it is only by this construction that the seeming legal significance of the word "any" in the first line of section 2 is understood; for if this section is not intended to declare the rights, and incidentally prescribe the remedies, of co-tenants inter sese, but merely regulates remedies, then it must be held to give a separate cause of action to each co-tenant against "any" person who does any of the things recited therein, and to entitle each co-tenant to maintain (though perhaps the judgment would be only for the amount of damages suffered by him) such an action against a stranger "in the same manner as he would have if such joint tenancy, tenancy in common, or copartenary did not exist." Possibly it may have been intended that, as against a stranger committing any of the acts denounced as wrongs, a tenant might, as sole plaintiff, maintain trespass or trover to enforce his rights under circumstances where, at the common law, he would be required to join his co-tenants with him, or, upon their refusal to join, make them defendants. Subject to certain exceptions, joint tenants and tenants in common must, by the rules of the common law, join in actions for damages resulting from tortious wrongs done to the common property; and if one purpose of the statute of 1865 was to permit a co-tenant, when aggrieved by a stranger, to recover as sole plaintiff for the injury suffered by him, it does seem somewhat peculiar that the statute prescribed the actions of trespass and trover as the forms to be employed in redressing his grievances, and omitted reference to those other actions—such as trespass on the case, replevin, detinue, and the like—which are the appropriate and exclusive remedies for many wrongs as serious as are those which may be righted by judgments in trespass or trover. We need not, however, determine whether the statute of 1865 enlarged the rights or remedies of co-tenants as against strangers. That question is not directly involved in the case at bar. Suffice it to say that the statute did create rights in co-tenants among themselves, and if the statute provided also rights or remedies, or both, in favor of co-tenants as against strangers, this provision in no wise affected the provision in respect of the rights of co-tenants inter sese. If, in a case involving the rights and remedies of co-tenants as against strangers, the determination should be reached that the statute of 1865 was designed to give rights or remedies as against strangers, such a decision

would not militate against the conclusion which we have announced touching the rights of co-tenants among themselves, and, neither purpose being in conflict with the other, each would be recognized and made effectual. Counsel in their learned and able arguments make incursions into the domain of ethics, and make plausible suggestions touching the moral rights and remediless wrongs of co-tenants, which they assert existed prior to the act of 1865, though they concede that no action or suit could be invoked to protect the rights or redress or prevent the wrongs; but we are of the opinion that the purpose of this section was to destroy those characteristics of tenancies in common wherein they mainly differ from holdings in severalty, leaving the necessity for voluntary or judicial partition as the chief remnant of the distinguishing features of this species of ownership. In other words, the first and second sections, which concern joint rights, practically convert a joint tenancy into a tenancy in common, and then convert tenancy in common into an estate with many (whether with all we need not decide) of the rights and privileges incident to several ownership, and giving the actions of trespass and trover for their protection.

Having thus reached the conclusion that the second section of the statute created new property rights in co-tenants, we must hold, as we have already held concerning the first section, that it could not, under the organic law, have been retroactive in its operation. As is admitted, the co-tenancy in the case at bar came into existence after the act of 1865 became law, and before 1895. For one co-tenant, without the consent of the other, to mine and remove ore from the common property, is an unauthorized taking away and lessening in value of the property, within the meaning of the act of 1865. It is a permanent injury thereto (*Murray v. Haverty*, 70 Ill. 316; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642); and the principle declared in the act of 1865, at least as respects co-tenancies in quartz and placer mining claims, is that the common property shall remain an entirety until partition, and that no one of the owners may, without the consent of the other owners, work it or lessen its intrinsic value by mining and removing the ore or deposits. With these views as to the force and effect of this early and long-standing legislation, we now approach the consideration of the more recent enactments concerning this subject. In the Code of Civil Procedure adopted in 1895, section 2 of the act of 1865 became section 592, being a portion of title 3 of part 2 of that Code. Section 592 omits the word "copartenary" and also the words "of trespass or trover" from the language of section 2 of the act of 1865, but in other respects it is the same as section 2 of the original act. We do not think that the placing of this so slightly modified section into the Code of Civil Pro-

cedure, and into that part of it entitled "Parties to Civil Actions," is of real significance, or could possibly operate vitally to alter the legal meaning and effect of the long-established legislation; and this view is strengthened by section 3454 of the Code of Civil Procedure, which is as follows: "The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." We therefore regard section 592 of the Code of Civil Procedure as a substantial re-enactment or continuance of the old act of 1865, except in so far as it was modified by the omission of the words, "of trespass or trover." In *Anaconda Copper Min. Co. v. Butte & Boston Min. Co.*, 17 Mont. 519, 43 Pac. 924, this court, after an examination of the section, considered especially as an amendment to the previous legislation, held that its effect was to enlarge the remedies of co-tenants by permitting any appropriate action for such injuries as were contemplated by that section and the statutes substantially re-enacted by it. This case was followed by *Mining Co. v. Esler*, 18 Mont. 174, 44 Pac. 523; by *Connole v. Mining Co.*, 20 Mont. 523, 52 Pac. 263; and by *Harrigan v. Lynch*, supra. If the decision in the *Anaconda Case* deserves adverse criticism, as counsel for the defendants insist that it does, it is not because of the result reached, but rather because of the undue significance attached to the amendment omitting the words, "of trespass or trover." It should seem that, even under the act of 1865, the tenant who was entitled to maintain an action of trespass against his co-tenant in the same manner as he would have if such joint tenancy or tenancy in common did not exist was, in the proper case, entitled to an injunction as an ancillary remedy to prevent a repeated or continuing trespass; the right to such equitable aid not being the creature of the statute, but arising under the operation of the principles of equity applicable to all cases of continuing and irreparable trespass, both in order to prevent a multiplicity of suits, and in order to prevent the commission of a threatened legal wrong, for which, when done, an action at law for damages would be an inadequate remedy. We feel satisfied that injunction would be an appropriate auxiliary remedy in such a case, especially where, as in Montana, law and equity are administered by the same court, and often in the same case; but, in any event, it is apparent, from the authorities last cited, that the remedy by injunction, if not granted by the act of 1865, is granted by section 592, and the giving of this new remedy for an old wrong violates no constitutional right.

With this understanding of the meaning and general purpose of the act of 1865, with its slight amendment of 1895, we now address ourselves to the amending provis-

contained in the act of 1890, commonly called "House Bill No. 1," and entitled "An act to amend section 592 of the Code of Civil Procedure of Montana, relating to property held in joint tenancy and tenancy in common." This act is as follows:

"Be it enacted by the legislative assembly of the state of Montana:

"Section 1. That section 592 of the Code of Civil Procedure of Montana be and the same is hereby amended so as to read as follows:

"Sec. 592. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist: provided, that nothing herein contained shall prevent one cotenant or joint tenant, or any number of cotenants or joint tenants, acting together less than all, from entering on the common property at any point or points not then in the actual occupancy of the non-joining cotenants or joint tenants and enjoying all rights of occupancy of the property, without waste; and in the case of mining property, from mining the same in a minerlike manner, and extracting, milling and disposing of the ore from the common property, paying its or their own expenses, and subject to accounting to the non-joining cotenant or joint tenant for the net profits of such mining operations, if any made; and all liens for labor and materials incurred in such mining shall attach only to the undivided interest or interests of the working co-tenants or joint tenants, but nothing herein shall prevent or preclude the cotenant or joint tenant not joining in the operation of such mining property from receiving his, its, or their proportionate share of all ore or ores on the dump upon payment or tendering payment of the actual cost of mining the same."

If our interpretation of the second section of the act of 1865 is correct, and if we are justified also in the opinion that the section, when so interpreted, could not be retrospective in its operation, and could apply to and affect only estates created after the act was passed, it seems quite clear that a like view must be taken with respect to the amendment of 1890, touching the working of a mine and the taking of ore therefrom by one tenant without the consent of his co-tenants; for it was plainly intended to restore to one class of co-tenants certain valuable rights which were taken away by the act of 1865, and to deprive another class of valuable rights which were created by that act. Careful examination of the amendment must, we think, result in the view that it could not impair any rights then existing, and is therefore inoperative as to them. Its language is not such as would seem appropriate for the purpose of any positive enactment, but is rather suitable as expressive of merely legislative construction. Its declaration is "that nothing herein contained shall prevent," and while, if such a clause had been inserted in the original act of 1865, it would have operated as a restriction upon the legislative force of the main body of the section, yet, considered as an amendment, it must be regarded as trespassing upon the powers and functions of courts, or as meaning that "nothing con-

tained in this section shall so operate on tenancies hereafter created as to prevent," etc. The preventive force of an act, as well as its positive effect, is to be determined by the judiciary, and, though the legislative assembly may, and often does, alter existing statutes because of their legal meaning as ascertained and announced by the courts, the lawmaking power cannot determine the past legal force and effect of any statute. Such power would involve the right to review and reverse the rulings of those tribunals to which the people have intrusted exclusively the power and duty of interpreting all acts, and determining both their positive force and their preventive operation. Whatever rights are created or conferred by the amendment of 1890 did not exist theretofore, and, unless we have erred in the views expressed as to the force and effect of the act of 1865, and as to the vested rights of co-tenants under it before the amendment, the conclusion that the amendment does not apply to property rights of persons whose co-tenancies were created prior to the time it took effect must be correct. Our opinion is therefore that any co-tenant whose estate was created after the act of 1865 took effect, and before the amendment of 1890 became operative, is entitled to restrain by injunction the commission by his co-tenant of any of the acts denounced in the original statute of 1865, and in section 592 of the Code of Civil Procedure, provided, of course, that the remedy at law is inadequate, and the threatened injury irreparable; in other words, we do not consider that any rights in property conferred upon or taken away from co-tenants by the act of 1865 are affected by the act of 1890, and that the latter act is only prospective in its operation. Further than they are involved in the case at bar we do not attempt to define the character or extent of the rights so created by the act of 1865. In so far as the part of the amendment under consideration and affecting the present case was intended to apply to estates existing at the time the act of 1890 became operative, it must be held to be an attempt to disturb or destroy vested rights, and therefore to be void. Whether the amendment is void as to the plaintiff upon the further ground that it impairs the obligation of a contract is a question which, being unnecessary to a decision, is reserved. The order refusing an injunction is reversed, and the cause is remanded. Reversed and remanded.

BRANTLY, C. J., concurs. MILBURN, J., not having heard the argument, does not participate in the foregoing opinion.

(25 Mont. 87)

BOSTON & M. CONSOL. COPPER & SILVER MIN. CO. v. MONTANA ORE-PURCHASING CO. et al.

(Supreme Court of Montana. Feb. 16, 1901.)

Application for leave to file a petition for a rehearing on the question of the qualification of the surety on a bond. Application denied.

For former opinions, see 59 Pac. 919, and 60 Pac. 807, 990.

Forbis & Evans and Wm. H. De Witt, for appellant. McHatton & Cotter and Toole & Bach, for respondents.

PER CURIAM. The petition of the respondent Montana Ore-Purchasing Company praying the court to grant a rehearing on the question of the qualification of F. Augustus Heinze as surety on the bond or undertaking of \$550,000 heretofore filed in the action above entitled, or, in the alternative, that a re-examination of said Heinze as surety on said bond or undertaking be allowed, so as to enable him to give a detailed statement as to the value of all his property, to the end that the Montana Ore-Purchasing Company and said Heinze may thereby be enabled to protect themselves as to their credit and financial standing, and praying also that the record of the examination of said Heinze as surety be corrected in respect of certain alleged errors referred to in the petition, is presented in open court, together with the affidavits of F. Augustus Heinze and Arthur P. Heinze in support thereof, and leave is asked to file the same, which motion the court takes under advisement. And now, upon consideration of the subject-matter of the petition, the court is of the opinion that no further proceeding is necessary, since no just or fair construction of the language used in the order of January 22, 1901, touching the qualification of the sureties on the additional bond, can be made to the effect that the court believed or held that, as a matter of fact, the said F. Augustus Heinze was or was not worth as much as he claimed to be, namely, \$10,000,000. The court is of the opinion that the only reasonable construction of which the language of the order is susceptible is that upon the evidence as submitted it did not appear that said Heinze had qualified in a sum in excess of the sum of \$200,000, named in the court's order, over and above his liability on the previous bond, exclusive of the stock owned by him in the Montana Ore-Purchasing Company, as it was apparent to the court that the surety did not describe in detail the property which he claimed to own, his reference to his property being, with some exceptions, in general terms, and not of sufficient particularity to give the court the information necessary on a hearing for the purpose of justification. It appearing, therefore, that the court did not decide or intend to hold that said F. Augustus Heinze was financially responsible (after excluding his shares in the capital stock of the Montana Ore-Purchasing Company) to the extent of \$200,000 only, but did determine simply that the evidence as taken and reported at the particular hearing failed to show that said Heinze had qualified as surety for more than \$200,000 upon the additional bond or undertaking required to be given by the order of December 5, 1900, and that said order could in no wise be interpreted as declaring him to be actually worth less than the amount (\$10,000,000) which, on the hearing, he asserted the net value of his property to be, without properly specifying the various items thereof, going to establish his qualification in an amount exceeding \$200,000; and it further appearing that the order of January 22, 1901, was in all respects correct upon the evidence as taken and reported,—the court orders that the application for leave to file said petition be, and the same is hereby, denied. Denied.

(24 Mont. 569)

EGAN v. MONTANA CENT. RY. CO. et al.
(Supreme Court of Montana. Jan. 7, 1901.)
RAILROADS—INJURIES TO TRESPASSER—NON-SUIT—USE OF TRACK AS FOOTPATH.

1. Defendant operated a spur track extending to a mine about a mile from town. Plain-

tiff and other mine employes were in the habit of walking into town on the track, and plaintiff, while so walking with other employes, was knocked down by a train. The engineer was looking back for a signal, and did not see the men, and the noise of the train was drowned by the mine whistle. *Held*, that plaintiff was properly nonsuited, since he was a trespasser, and defendant was not obliged to keep a lookout to avoid injuring him.

2. The fact that a railroad company which operated a spur track a mile in length to a mine tolerated the use of the track as a footpath by the mine employes in going to and from work, without any expressed or implied invitation to so use it, did not entitle such employes to the rights of licensees.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Michael Egan against the Montana Central Railway Company and another. From an order denying a new trial, and from a judgment in favor of defendants, plaintiff appeals. Affirmed.

John W. Cotter and Howell & Harney, for appellant. A. J. Shores, for respondents.

PIGOTT, J. Having sustained personal injuries through the alleged negligent operation of a train of cars by the defendants, the plaintiff brought this action for damages. At the close of the plaintiff's case the court granted a nonsuit, and judgment was entered in favor of the defendants. From an order denying plaintiff's motion for a new trial, and from the judgment, the plaintiff has appealed.

The single question is whether the plaintiff made a sufficient case to go to the jury, and in considering this question everything which the evidence tended to prove must be taken as established. So viewing the evidence in connection with the pleadings, the following facts, which we adopt, in substance, from the briefs of counsel, appeared: The defendants were operating a line of railway which ran on the south side of the Boulder river, and into and through the town or village of Basin. The Hope mine and mill, where the plaintiff was employed on December 30, 1894, when the accident occurred, was situated about a mile above Basin, and immediately adjoining the right of way of the defendants; and at that point the railway was near the bank of the river, while the mine and mill were on the hillside immediately above, with only sufficient intervening space for a spur track and platform, which had been constructed for the use of the mine. Between the mine and Basin the roadbed of the defendants was high and narrow, being wide enough for a single track only. At the foot of the grade on the north side ran the Boulder river, and on the south side was a pond or slough. On the south side of the river the railway grade was the only road or path over which a man could walk between the mine and Basin. This grade, however, did not afford the only roadway between the Hope mine and the town, for there was a wagon bridge about 175 feet above the mine, and near the bridge was a road on the north side of the river leading down to the town. Notwithstanding the existence of the upper

road, the miners and other inhabitants of Basin habitually used the railway track for going to and coming from the mine. Two shifts of from 30 to 35 men each were employed at the mine, and these men passed over this portion of the railway twice, and sometimes four times, a day. The railway track had been so used as a pathway for more than a year prior to the accident, and during that time the defendants had known, or possessed the means of knowing, that their track was frequently so used, but took no steps to prevent the trespasses. On the day of the accident the miners, including the plaintiff, quit work at noon, and started down the railway track towards Basin while the whistle at the Hope mine was blowing. The plaintiff stepped upon the track at the mill, and looked to see if there were any trains upon the track, because, as he testified, "there was trains liable to come along any time," and walked slowly towards town. He walked in the middle of the track, following the other men, 12 or 15 in number, who were ahead of him. He walked north about 150 feet before he was struck. The view of the track was unobstructed to the south for a distance of 800 feet or thereabouts. After he started to walk towards town, he did not look back. The freight train which struck him was running at the rate of about 20 miles an hour. The whistle was not blown or bell rung, nor was any signal or warning given. The engineer was leaning out of his cab, looking backward for signals from the rear of the train. The man immediately in advance of the plaintiff turned half way around, and jumped from the track just as the engine struck the plaintiff. At the moment he was struck the whistle of the mill obscured or rendered indistinct minor noises. The plaintiff had often been on that track before when trains had passed along. The men who were ahead of him at the time of the accident were either in the center of the track or close to the track on the end of the ties.

The first question is, were the defendants guilty of negligence proximately causing the injury? Counsel for the plaintiff insist that the defendants were negligent in failing to give notice or warning of the approach of the train. Whether they were or not must, under the facts, be determined by the answer to the question whether the omission of the defendants to observe the presence of the plaintiff on the track in time to warn him of the approach of the train was an act of negligence. It is contended that the defendants were under the legal obligation to maintain a lookout when the train was approaching the stretch of track upon which persons were in the habit of walking, and to give such notice or warning of the approach of the train as would have permitted the plaintiff to escape from his position of peril. It appears that the plaintiff and others had been in the habit of using the defendants' track as a footpath.

The right of way at the point where the accident occurred was the exclusive property of the defendants. Without their consent, the plaintiff could not lawfully use that part of the track for his own convenience. Neither the plaintiff nor the other persons were expressly or by implication invited to walk upon the track. Forbearance is not ordinarily permission. It may be equivalent to permission when the law imposes upon the person who forbears the active duty not to forbear. Passivity is not assent, unless legal duty demands speech or action. Silence or nonaction is implied consent only when legal obligation requires speech or action to evidence objection or protest; in other words, silence or nonaction is not of itself alone evidence of assent, unless legal duty demands speech or action as the expression of dissent. *State v. Fisher*, 23 Mont. 551, 59 Pac. 919. Mere tolerance or endurance of past trespasses will not justify the inference that other acts of the same kind were licensed. No legal duty expressly to object to the use made of the track by trespassers rested upon the defendants; and hence, by omitting to warn or eject those who had theretofore intruded, they waived none of their rights, nor granted an implied license to the plaintiff authorizing him to do like acts in the future. The plaintiff and his companions were trespassers, and the mere fact that the defendants had, without formal or express objection, tolerated or suffered their use of the track as a footway, did not make the users licensees. The defendants owed to the plaintiff no greater or different duty than they owed to persons trespassing on other parts of their property. The defendants owed to the plaintiff, as they did to any other trespasser, the duty to refrain from any willful or wanton act occasioning injury, and the duty of exercising reasonable care to avoid injuring him after becoming aware of his presence on the right of way; but further than this the defendants were under no obligation to the plaintiff. In the case at bar the engineer at the time of the accident was looking backward for signals from the rear of the train, and did not keep a lookout for persons on the track; nor does the plaintiff contend that the engineer or any other employé of the defendants saw him in time to avoid striking him. The defendants were under no legal obligation to maintain an active lookout for the purpose of avoiding injury to the plaintiff, a trespasser, and there was, therefore, no breach of legal duty committed by the defendants in the omission; in other words, there was no negligence on the part of the defendants. This conclusion seems manifest, and support for it is found in *Railroad Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Glass v. Railroad Co.*, 94 Ala. 581, 10 South. 215; *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50; *Railway Co. v. Perkins* (Ky.; not yet official).

ly reported) 47 S. W. 259; *Spicer v. Railway Co.*, 34 W. Va. 514, 12 S. E. 553; *Railroad Co. v. State*, 62 Md. 479, 50 Am. Rep. 233; and *Ward v. Railroad Co.*, 25 Or. 433, 36 Pac. 166, 23 L. R. A. 715,—although in some of these cases the courts fail to observe the distinction, which is important, between mere toleration of continued trespasses and license by express or implied invitation. Upon principle the same doctrine seems applicable where trains are running through cities or thickly populated districts. *Glass v. Railroad Co.*, *supra*. As we have said, the plaintiff was not, in any proper sense of the term, a licensee; but, if it be conceded that at the time of the accident the plaintiff was upon the track by tacit permission only, without any invitation, express or implied, his case is not bettered, for he went and remained there at his own risk, and to such a licensee by sufferance or tolerance (if the expression may be used to describe the plaintiff) no duty was imposed by law on the defendants other or greater than they would have owed to a naked trespasser. Sound reason and the decided weight of authority are in accord with these views. *Sweeny v. Railway Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Richards v. Railway Co.*, 81 Iowa, 426, 47 N. W. 63; *Weldon v. Railway Co.* (Del. Super.) 43 Atl. 156; *Settoon v. Railroad Co.*, 48 La. Ann. 807, 19 South. 759. Holding, as we do, that no inference of negligence on the part of the defendants could have been deduced from the facts, it follows that the question whether the plaintiff was guilty of contributory negligence is eliminated. The nonsuit was properly granted. The judgment and order refusing a new trial are affirmed. Affirmed.

BRANTLY, C. J., and WORD, J., concur.

(131 Cal. 516)

TALLY v. PARSONS et al. (L. A. 984.)

(Supreme Court of California. Feb. 11, 1901.)

BUILDING CONTRACT—DEFAULT OF CONTRACTOR—COMPLETION BY OWNER—EXPENSE—RECOVERY—CERTIFICATE OF ARCHITECTS—NECESSITY—LIABILITY OF SURETY.

A contract for the erection of a house provided that on default of the contractor the owner could terminate the contract, and complete the building, the expense thereof to be audited and certified by the architects, whose certificate should be conclusive between the parties, and the contractor gave a bond conditioned for his faithful performance of the contract. The contractor abandoned the contract, and the owner completed the building, but did not have the expense thereof audited and certified by the architects, who had been discharged as incompetent. *Held*, that the expenses incurred by the owner could not be recovered from the sureties on the bond without the architect's certificate, they not having been shown to have been incompetent or dishonest, as charged, or to have refused to certify the expenses.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. C. B. Hebbard, Judge.

63 P.—53

Action by Thomas L. Tally against H. Parsons and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J. C. Brown, for appellants. Clarence A. Miller, for respondent.

COOPER, C. This action was tried before the court, findings filed, and judgment entered for plaintiff. Appellant Ganahl has appealed from the judgment on the judgment roll. The only question necessary to be determined is as to whether the findings entitled the plaintiff to judgment against appellant. It appears from the findings that plaintiff's assignor entered into a written contract with defendant Parsons, under the terms of which Parsons agreed to build a dwelling house for said assignor upon the premises described in the complaint for the sum of \$2,344, to be paid in certain installments. The contract provided that, in case the said Parsons should fail to prosecute the work with diligence, or in the performance of his agreement in any respect, the owner (plaintiff's assignor) shall be at liberty to terminate the employment, enter upon the premises, and complete the building. It further provided that, in case of the failure of Parsons to complete the building according to the contract, the owner should have the right to employ any other person or persons to finish the work and provide the materials therefor, and contained the following clause: "The expense incurred by the owner as hereinbefore provided, either for furnishing materials or finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive between the parties." At the time of the execution of the contract the contractor executed and delivered to the owner his bond in the sum of \$800, with appellant as one of the sureties thereon, conditioned that the contractor should faithfully perform all the terms and conditions of the contract, and complete the building according to the plans and specifications, and, when completed, deliver the same up to the owner free from all liens. After the commencement of said building and the payment of various amounts, the contractor, without any just cause, refused to complete the building, and abandoned the contract. The owner thereupon took possession, employed men, purchased materials, completed the building, and necessarily expended in its completion according to the plans and specifications the sum of \$513.33 over and above the contract price, for which sum plaintiff recovered judgment. The court found that the architects "never did audit and certify to the costs and expenses for materials and labor for the completion of said building by said Mary A. Tally, and that said architects never did audit or certify to any or all of the expenses for the completion of said building; * * * that said architects were never called upon or asked by said Mary A. Tally, or by any other

person, to audit and certify, or audit or certify, to the expenses for material and labor for the completion of said building." The court further found that, immediately after the abandonment of the contract by Parsons, the owner discharged the architects on the ground that they were careless, dishonest, and incompetent, and never afterwards employed them.

Appellant was surety for the faithful performance of the contract by Parsons. He was bound only by the express terms of his contract, and to the extent, and in the manner, and under the circumstances pointed out in his bond and the building contract, to which it referred, and no further. He was entitled to stand on its precise terms. *Pierce v. Whiting*, 63 Cal. 543; *Carter v. Mulrein*, 82 Cal. 169, 22 Pac. 1086, 16 Am. St. Rep. 99. It was a part of the terms and conditions of his contract that if the owner, by default of the contractor, should be compelled to furnish labor and materials and finish the building, any damage incurred through such default should be audited and certified by the architects. This was a condition precedent, and was inserted for the protection of the contractor and the sureties. The architects were named in the contract, and were the agents of both parties. The sureties agreed to the contract and as to the selection of the architects therein named. It was competent for the parties to agree that, in case of loss, expense, or damage to the owner, such loss should be audited by a tribunal of their own selection. They did make such agreement, and selected such tribunal, and, unless some valid reason is shown, the auditing by such tribunal is a condition precedent to plaintiff's recovery. In *Smith v. Briggs*, 3 Denio, 73, the defendant had covenanted with the plaintiff for doing the carpenter work of certain houses, and to pay him when he should receive from the architect his certificate that the work was fully and completely finished according to the specification annexed to the contract. It was held that giving the certificate by the architect was a condition precedent, the performance of which must be averred in an action brought to recover payment for such work. In *Smith v. Brady*, 17 N. Y. 174, the contractor was to be paid the balance "when all the work should be completed and certified by the architects to that effect." It was held that the certificate was a condition precedent, and in the opinion it is said: "The parties have seen fit to make the production of such a certificate a condition precedent to the payment. The plaintiff is as much bound by this part of his contract as any other. It is not enough for him to bring his action, and say that he has completed the work which he undertook to do. He has agreed that the architects named should decide whether the work is completed or not." See, also, *President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 263; *U. S. v. Robeson*, 9 Pet.

328, 9 L. Ed. 142; *Wolf v. Michaelis*, 27 Ill. App. 337; *De Mattos v. Jordan* (Wash.) 46 Pac. 403. In the latter case the action was upon the bond of a contractor, and is in many respects similar to the case at bar. The clause in the contract was: "The expense incurred by the owner as herein provided either for furnishing materials or finishing the work shall be audited and certified by the architect, and his certificate thereof shall be conclusive upon the parties." In the opinion it is said: "We deem it proper to observe that appellant can, under the terms of the contract, only recover such of the expenses incurred by him for furnishing materials or finishing the work as shall have been audited and certified by the architect. * * * The purpose of this provision was to protect the sureties against excessive and unjust charges for work and material, and it was agreed that the certificate of the architect should be conclusive as to the amount of expenses incurred by the owner." This court has held that, where a contract provides for the payment of such sum as may be determined by arbitrators, the submission to arbitrators and procuring an award is a condition precedent to recovery. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Scammon v. Denio*, 72 Cal. 395, 14 Pac. 98. It is said by respondent that the rule does not apply to the present case, for the reason that the contractor repudiated the contract by abandoning it, and giving notice to the owner, and for the reason that the owner of the premises discharged the architects. The abandonment of the contract by the builder and contractor would not impair the clause as to procuring a certificate from the architects. If the contractor had not failed to perform his duty, and abandoned the contract, there would never have been any expense incurred by the owner, and no necessity for procuring the certificate. The sureties never repudiated the contract, nor waived any condition therein. The condition was inserted in order to provide a method of arriving at the damage to the owner in case the contractor abandoned or failed to perform his contract. When the contractor abandoned the contract, and the owner completed the building, the very contingency arose for which provision was made as to procuring the certificate. The contractor could not repudiate this provision of the contract as to the sureties, no matter what effect his repudiation might have upon himself. Neither does the finding of the court that the owner discharged the architects relieve plaintiff of the condition in the contract. The finding states that the owner discharged the architects on the ground that they were careless, incompetent, and dishonest; but there is no finding that such grounds were true. Even if they were true, there would have to be some allegation or finding showing a good and sufficient excuse for not having the amount audited and certified by the architects. If the architects had refused to

act in the matter, or if they had acted, but acted fraudulently, or corruptly, or through mistake, the plaintiff could have alleged and proven such excuse, and thus relieved himself of the condition. It follows that the judgment should be reversed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

(131 Cal. 521)

HORGAN v. JONES et al. (S. F. 1,748.)
(Supreme Court of California. Feb. 11, 1901.)
STREET RAILROADS—COLLISION WITH VEHICLE—EVIDENCE—SUFFICIENCY.

Defendant's electric car collided with the rear end of a heavy truck drawn by a four-horse team, causing the leaders of the team to run away against the plaintiff. The conductor, who was called as plaintiff's witness, testified that the track was dry, and that a reversed current could have stopped the car in 30 feet. The result of the collision, which occurred while the car was coming down grade at a speed of more than six miles per hour, demonstrated that the motorman, who was inexperienced, did not slacken the speed, and that the cars were pushed more than 60 feet, half of that distance being on level ground. The driver of the wagon testified that no signal was given of the approach of the car, as stated by the conductor and motorman. *Held* sufficient to sustain a verdict that the motorman's negligence contributed directly to plaintiff's injury.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by John Horgan against Hugh P. Jones and another, as partners, and the Market Street Railway Company and others. From a judgment for plaintiff, the defendant company appeals. Affirmed.

W. H. L. Barnes, for appellant. Perl E. Allen and M. B. Kellogg, for defendants Jones and others. Sullivan & Sullivan, for respondent.

TEMPLE, J. On the 11th of January, A. D. 1897, the corporate defendant the railway company owned and was operating a street railway on Page street, in San Francisco, between Broderick and Devisadero streets. On this block the street is 68 feet 9 inches wide, and the sidewalks 12 feet each. From the curb on the southerly side to the nearest rail is 11 feet and 4 inches. The grade from Broderick street to Devisadero street is 12.12 per cent. descending. At about 3 o'clock p. m. of that day an electric car was descending from Broderick on the southerly track easterly towards Devisadero street. A four-horse team, hauling a heavy, but unloaded, truck, was descending on the southerly side of the street, having its northerly wheels very near, but not on, the track. It was in advance of the car, but how far when the car left Broderick street the evidence does

not show. When the car was about half way to Devisadero, the conductor of the car thought the truck was about 50 feet ahead. From street to street the block is 412½ feet. The truck was so situated that it must have been obvious to the motorman that the car could not pass without a collision. A collision did occur, which resulted in a serious injury to plaintiff. The suit is against the owner of the street railway; Lidstrom, the motorman; and against Jones and King, owners of the truck, and Norman, the driver of the truck. The action is so brought upon the theory that the negligence of all contributed to the injury. The leaders of the team ran down the street and against plaintiff. At the trial the appellants admitted all the facts necessary to establish the case for the plaintiff, except negligence on the part of such defendants. Of course, it does not matter how negligent the driver of the truck may have been, if there was proof to sustain the verdict to the effect that the motorman was also guilty of negligence which contributed directly to the injury. In other words, there is no purpose in the inquiry as to whether the driver of the truck was guilty of mere contributory negligence, such as would have prevented him from recovering damages for personal injuries against the railway company. The real contention of the appellants is that the injury resulted solely from the negligence of the driver of the truck, and that the motorman was not negligent.

The plaintiff, to make out his case, called the defendant Norman, who drove the truck, and the conductor, McCormick. Each of these, in some important respects, made confused or contradictory statements. Mr. McCormick, the conductor, stated that about one-half way down the block he went forward to turn the switch into Devisadero street, and discovered the truck on the right-hand side, so close that the car could not pass. The motorman rang his bell, and put on the brakes, and when within about 25 feet reversed the current. Still the collision occurred, and the leaders on the team broke loose, and ran down Page street. "After the car struck the wheel, it went forward about twenty feet before coming to an actual standstill,—right down to the level there. * * * A car traveling at the usual rate of speed on the grade could be brought to a standstill by applying the brakes and reversing the current in about fifty feet or so, I should judge. * * * When I first observed the wagon, I should judge it was probably twenty or thirty feet from the car,—about twenty feet ahead of the car when I first observed it. The car was then about the middle of the block. When I first observed the lumber wagon, it was about twenty feet ahead of the car. I cannot say at what rate of speed the car was coming down the grade, but it was a slow rate of speed. It was coming down at the usual rate for that grade. * * * I noticed the motorman apply the brake and re-

verse the current when the car was about twenty-five or thirty feet from the lumber wagon. After the car struck the wheel, the car went about twenty feet down to the level there. He stopped the car at Devisadero street. The collision occurred on Page street, about twenty-five feet from the corner. The car stopped on Devisadero street. After striking the wheel, the front of the car went about twenty feet before it came to a full stop. It came to a standstill about the middle of Devisadero street. My best recollection is we stopped right on Devisadero street, and the front of the car was about in the middle of Devisadero street." On cross-examination the witness testified that the car went slowly down the hill, under the brakes, all the way, and he knew the bell was rung. He said: "I judge the rear end of the truck was about fifty feet or more from the front of the car when he rang the bell for the wagon. He rang quite a while. I cannot say how many times he rang the bell. And he applied the brakes and the current also, and he had to stop ringing the bell first. I was looking at the man driving the team, and at no time, as near as I could judge, did the driver pay any attention to him whatever. I did not see him turn. He kept on going on the right-hand side of the car. He did not seem to pay any attention to the bell, if he heard it. That I don't know. I know the bell was rung. * * * I should judge the car was going down the grade about two miles an hour, probably more. * * * There are no other means provided for checking the speed of the car except the brake and reversing the current. I saw him use both of these." Here the witness repeats three times over that the wagon was about 50 feet ahead of the car when he first saw it, about half way down the grade, and the bell was then ringing. Also that he saw the motorman reverse the current, and release the brakes, when about 25 feet from the wagon. The track was dry on that day, and a reversed current might have stopped the car in 30 feet. Again, he said the driver did not seem to hear the bell; acted as though he did not hear it. The witness did not hear the noise of the wagon. The car made no particular noise. The motorman did all he could to stop the car. The motorman had never been on a car with him before. Did not know he was a green hand. Knew that he had been longer than a week in the employ of the company. Upon being recalled he stated, among other matters: "When I first went to the front the car was, maybe, one hundred feet from the wagon, and he was ringing the bell then. I should judge he rang it all of the way down to within thirty feet of the wagon. He rang the bell a distance probably of seventy feet." The witness was preparing to step out to turn the switch when the collision occurred. The switch is about 20 feet from Devisadero street, and the grade is as heavy there as upon any part of

the hill. The car generally stops without reversing the current, so that, had there been no danger of a collision, the motorman should have been prepared for a stop. The result demonstrated that there was no unusual slackening of the car, but the contrary. Instead of making the usual stop, it carried the heavy truck, overcoming the resistance of the horses as well, more than 30 feet over the level ground on Devisadero street. Instead of carrying the wagon 20 feet, as stated by McCormick, it must have gone more than 60 feet, and was only stopped after leaving the grade. The jury were justified in believing—as I certainly do—from the evidence that the car was not slackened at all by the attempt to reverse the current, but, to the contrary, that the motorman lost control of the car, and it was precipitated, unchecked by any brakes, upon the truck. In other words, there was gross negligence, or utter incapacity,—probably the latter,—on the part of the motorman. Norman, the truck driver, testified that his horses were walking at the rate of from three to four miles per hour. The conductor saw the wagon when the car was about one-half way down the hill, at which time he says the wagon was about fifty feet ahead, and the collision occurred about 25 feet above Devisadero. The speed must have been sufficient to overtake the wagon while the latter was going 130 feet, more than 6 miles per hour. Norman and Zoberbier, the only other witness, agree that the collision occurred when the wagon was about two-thirds of the way down the hill. If this be true, the wagon must have been pushed more than 100 feet, and the speed must have been much greater than 6 miles per hour. Norman also testified most positively that the bell was not rung at all: that he would surely have heard it if it had been rung, and could easily have avoided the collision had he been notified of the approach of the car in the usual mode. The preponderance of evidence is decidedly in favor of the proposition that the bell was rung, but surely there was evidence before the jury which they were at liberty to adopt to the effect that it was not. On the whole, it seems clear that the verdict and judgment against the appellants are fully sustained by the evidence.

The owners of the truck and the driver have not appealed, and, if it be admitted that Norman was also guilty of negligence, such admission would not affect the case of the appellants. We need not discuss, therefore, the question as to how the failure of the truck driver to look back or to listen would affect his rights as against the railway company. That the position of the truck and the conduct of the driver could affect the liability of the appellants is urged upon the proposition that the motorman had a right to assume that the driver would get out of the way, and not obstruct the track. It is evident from the testimony of the conductor

that before the motorman attempted to reverse the current the driver was not heeding the signals, if made, and, as already stated, the jury were warranted in finding that when the motorman attempted to reverse the current, through his incompetence he failed to do so, but merely loosened the brakes, and let the unchecked car loose upon the wagon.

Appellants complain of the modification of an instruction asked by them. The modification did not, in a respect material in this case, change the meaning of the instruction. The instruction as given was fully as favorable to appellants as they were entitled to have given. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(6 Cal. Unrep. 634)

PEOPLE v. YOUNG. (Cr. 631.)

(Supreme Court of California. Feb. 9, 1901.)

HOMICIDE—INSTRUCTIONS—CHARACTER OF DECEASED.

A charge on a murder trial that evidence of the character of deceased, tending to show that he was a violent, quarrelsome, and dangerous man, was not admitted as tending "in any way" to justify his slaying by accused, was not improper when qualified by the rest of the instruction, to the effect that the evidence of bad character was to be considered only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression.

In bank. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

G. G. Young was convicted of manslaughter, and he appeals. Affirmed.

Arthur J. Thatcher and L. J. Maddux, for appellant. Tiley L. Ford, Atty. Gen., for the People.

PER OURIAM. The defendant was charged with murder, and appeals from a judgment convicting him of manslaughter and from an order denying him a new trial.

It appears that on the 20th day of July, 1899, at 4 or 5 o'clock in the afternoon, the defendant and Caleb Greenwood, with several other persons, were in the saloon of Charles Lockhart, near Monroe post office, in Mendocino county. Greenwood and defendant being both under the influence of liquor, they were soon engaged in a war of words, which concluded with Greenwood committing a violent, brutal, and unjustifiable assault on Young, in which Young was thrown down on the floor at least twice. He was kicked and badly wounded in the face, the clothes were torn from his body, and he was otherwise maltreated by Greenwood. This brutality finally ended, without any interference on the part of the bystanders, and Young retired to a rear room; re-clothed himself, returned, treated all hands, including Greenwood, and left the saloon. About two hours later Young reappeared

at the saloon with a Winchester rifle in his hands, and inquired for Greenwood. He remained on and about the premises for about half an hour, and during that time he took a drink with a friend, and asserted that he was a bad man, and would not be walked on, talked about shooting the bottles off the bar, wanted to find Greenwood, and said, "I'll fix him; I'll allow no man to stamp me in the floor." Soon after all this, and about 2½ hours after the assault on him by Greenwood, the defendant went out at the front door of the saloon, with his gun still in his hands, intending, as he testified, to go to the pump at the rear of the saloon to wash the blood off his face. When the defendant was near the rear end of the saloon, he saw Greenwood at the rear door thereof, and shot him twice, from the effects of which Greenwood died on the following day. The defendant testified that immediately before the shooting Greenwood straightened up, and slapped his left hand on his hip pocket, and said, "I am heeled, you son of a bitch." Defendant also testified that before the trouble with Greenwood, and on that same day, he saw the handle of a pistol in Greenwood's pocket. An apparently disinterested eyewitness testified that at the time of the shooting Greenwood was standing with one foot on the step, with his hand on the door, and the right hand by his side, and made no hostile movement, and, when Young came around, Greenwood said, "Don't shoot me, Gib." Another witness, who heard the shooting, and went to Greenwood where he fell, and stayed with him till he was removed, testified that he searched Greenwood, and found no weapon on him. There was no evidence except defendant's testimony tending to show that Greenwood was armed at the time of the shooting. It was shown without conflict in the evidence that Greenwood's reputation in the neighborhood for peace and quietude was bad, and that defendant was well acquainted with that fact.

The only reasons urged for a reversal on this appeal are that the court erred in refusing defendant's offered instruction No. 7, and in giving the instruction No. 12 requested by the prosecution. Said refused instruction reads as follows: "Evidence has been offered as to the character of deceased, Greenwood, for peace and quiet. I charge you that, in case of doubt as to who was the aggressor, the previous character of the deceased for peace and quiet is an important element to be considered by the jury. If you believe from the evidence that the deceased was a quarrelsome and dangerous man, and had the reputation of being a dangerous and quarrelsome man in the community in which he lived, you have the right to take these things into consideration in determining as to the danger the defendant, Young, was in when he fired the fatal shot." The instruction given is as follows: "Evi-

dence has been introduced before you of the character of the deceased, and tending to show that he was a violent, quarrelsome, and dangerous man. This was not admitted as tending in any way to justify his slaying by the defendant. A party has no more right to slay a bad man than a good one. Both are equally protected under the law. The unwarranted slaying of either is equally a crime. The evidence of bad character is to be considered by the jury only as a circumstance illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression; it being more probable that a man of violent and dangerous character would make an unprovoked and deadly assault than that a quiet and peaceable man would do so." There is no valid objection to the instruction given. The words, "This was not admitted as tending in any way to justify his slaying by the defendant," when read with and qualified by the rest of the instruction, are not improper; and the instruction, thus read, correctly enunciates a principle of the law of evidence applicable to the case in hand. The instruction given substantially covers every proposition contained in the refused instruction, and is as favorable to the defendant as he could reasonably ask. In addition to this, the court also instructed the jury fully as to the law of self-defense as it applied to the case. For the reasons given, there was not any error in refusing the one or in giving the other of the instructions quoted. The judgment and order are affirmed.

(131 Cal. 415)

In re ADAMS' ESTATE. (Sac. 715.)

(Supreme Court of California. Jan. 22, 1901.)
EXECUTORS—ACCOUNTING—ANNUAL SETTLEMENTS—FINAL ACCOUNT—CREDITS—INDIVIDUAL TRANSACTIONS—FINDINGS—APPEAL.

1. Code Civ. Proc. §§ 1622, 1636, require an executor to render accounts showing amounts received and expended and the amount of claims presented, and that notice be given of final accounting, and that all claims not passed in former accounts may be contested by heirs for cause shown. *Held*, that an executrix who filed and had settled annual accounts from 1890 to 1897 on final accounting might present, and have allowed, a claim for machinery rented to the estate for the years 1890 to 1893; such claim not having been passed on, and an opportunity being given to contest its allowance.

2. A finding by the court that a claim by an executrix for attorney's fees was reasonable will not be interfered with on appeal except for a plain abuse of discretion.

3. Where an executrix sold property of the estate and also property of her own, taking the purchaser's notes and afterwards crediting a partial payment on her own note, on the purchaser becoming insolvent and returning the property the executrix was not entitled to transfer all the property to the estate, crediting her note with what she deemed the value of her property, and to charge the estate with the balance due her, though the purchaser was the lessee of the realty of the estate, and used the property thereon, and after its return it was sold, and the estate received the proceeds.

4. Findings filed in contesting an accounting by an executrix may be considered on appeal,

though it is not necessary to have findings made in such case.

5. A decree allowing an account by an executrix, erroneous as to some of the items, may be corrected on appeal, and so affirmed.

Department 2. Appeal from superior court, Yolo county; E. E. Gadis, Judge.

Accounting by Elizabeth Adams, as executrix of D. Q. Adams, deceased. From a decree allowing the account, the Bank of Woodland, a creditor, appeals. Corrected and affirmed.

Mr. Craig, Mr. Hawkins, and Thos. B. Bond, for appellant. R. L. Simpson and Hurst & Hurst, for respondent.

PER CURIAM. Elizabeth Adams, the executrix of the will of deceased, filed her final account, asking for its settlement and allowance. The Bank of Woodland, a creditor of said estate, filed a written contest as to certain items of the account. Findings were filed, and a decree entered allowing the account and the contested items. This appeal is from the decree and an order denying a new trial.

It is claimed that the court erred in allowing the executrix the item of \$4,295 for the use of her steam engine and harvester for the years 1890 to 1893. The main argument urged in support of this contention is that the executrix filed and had settled her annual accounts from 1890 to 1897, and during this time rendered four such accounts; and, for the reason that in those accounts no charge is made for the use of the steam engine and harvester, she should now be estopped and precluded by the decrees settling said accounts. The accounts, as so settled, made no mention of the items in dispute, and the question is as to whether in such case the executrix can charge such item in her final account. We think the settlement of the annual accounts were conclusive only as to such matters as were actually included therein, and directly passed upon by the court. It is provided in Code Civ. Proc. § 1622 et seq., that six months after his appointment, and at any time when required by the court of its own motion, or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit, under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. Any person interested may appear, and by objections in writing contest any account or statement therein. Within 30 days after the expiration of the time mentioned in the notice to creditors the executor or administrator must render a "full account and report of his administration." This account must exhibit all debts which have been presented and allowed during the period embraced in the account. If the account be for a final settle-

ment, the notice of settlement must state such fact. On the day appointed for settlement any person interested in the estate may appear and file his exceptions, in writing, to the account, and contest the same. It is then provided by section 1636: "All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown." This item was a matter not passed upon on the settlement of any former account, and the contestant had its day in court, and was allowed to and did contest the charge. It could not have contested the item in any former account, because no former account contained it. No matter what was contained in former accounts, the item in dispute here has been only once in any account, and, when so in, the contestant filed his objection in writing, produced its witnesses, and was given a hearing. Section 235 of the probate act of 1861 contained the same language herein quoted from Code Civ. Proc. § 1636. In *Walls v. Walker*, 37 Cal. 424, it was held that an annual account of an executor or administrator is not conclusive, except as to such items as are included in it, and actually passed upon by the probate court. In the opinion it is said: "The fact that the heirs, legatees, and creditors are thus expressly permitted to contest matters not included and passed upon in any former account necessarily implies that the administrator is not precluded from going behind a former account, and bringing forward charges which, through inadvertence or oversight, may have been omitted." Mr. Woerner, in the second edition of his work on the American Law of Administration (page 1126, § 504), says: "But, even where the accounting or settlement is conclusive as to the matters adjudicated, it cannot be conclusive as to matters omitted from the account, which may, therefore, be surcharged in subsequent settlements." The text refers to and is supported by *McLellan's Appeal*, 76 Pa. St. 235; *Saxton v. Chamberlain*, 6 Pick. 422, 425; *Blake v. Pegram*, 109 Mass. 541, 551.

It is further claimed that the item should not be allowed for the reason that the executrix agreed at the time of the settlement of her third annual account that, if contestant would consent to the allowance of said account as rendered, she would make no charge for the engine and harvester. It is sufficient to say that there was a conflict of evidence as to whether or not any such agreement was made, and the finding of the court is in favor of the executrix upon the proposition. The executrix testified that she made no such agreement. As to the suggestion that the executrix incurred loss to the estate by the farming operations for which the charge is made, there appears to be no evidence or finding upon the point. If it had been alleged, and found upon evidence, that the item was incurred in carrying on farm-

ing operations by the executrix of her own volition, and that such farming resulted in loss to the estate equal to the amount of the charge, the court no doubt would not have allowed it.

The account contained a charge of \$800 paid as attorney's fees to one Hopkins for services in behalf of the estate as assistant counsel. The court found "that the services for which the sum of \$800 were paid were properly rendered for and on behalf of said estate, and said sum is the reasonable value of said services, and that the same is a proper charge against said estate." There is evidence sufficient to support this finding. The court below had the right to determine what services were rendered, and the reasonable value thereof. The order of the lower court as to attorney's fees will not be interfered with, except in case of a plain abuse of discretion. *Freese v. Pennie*, 110 Cal. 470, 42 Pac. 978.

The account charged the estate with the following: "Balance on note of \$7,111.11 due Elizabeth Adams from J. R. Williams, Sept. 1st, 1892, for which she received from Williams property of the value of \$5,000 (steam engine and harvester), and estate received from Williams property of the value of \$2,111.11, the same being still due from the estate and unpaid, \$2,111.11." The court erred in allowing this item. The evidence shows that in the year 1890 the executrix leased the lands of the estate to one Williams for the term of five years. Williams bought of the executrix a large amount of personal property of the estate, for which he gave two notes, one for \$9,700, and another for \$1,826. He also bought the steam engine and harvester, giving the executrix his note for the purchase price, \$6,500. On September 1, 1892, Williams owed the estate on the two notes, with interest, \$13,434.73, and the executrix on the note and interest for the engine and harvester \$7,111.11. Williams had paid the executrix \$690.20 prior to September 1st, which she had applied on her own \$6,500 note. Williams, at the last-named date, was insolvent, and transferred all the property he had bought of the estate, with some other property, to the executrix for the estate. He also transferred the engine and harvester to the executrix in her own right. In other words, the estate took back from Williams its property, and the executrix, in her own right, took back the engine and harvester. The executrix received on her note of \$6,500 the \$690.20, credited the note with \$5,000, the amount she deemed to be the value of the engine and harvester when returned to her, and seeks to charge the estate with the balance due on the note, \$2,111.11. There is nothing in this record to justify any theory upon which the estate could be held for the balance of Williams' debt to the executrix. The estate claimed no interest in the transaction. It was not the guarantor of the debt of Williams to the executrix. The property returned to the estate was for the benefit of

the estate. If the entire amount of property returned was sold for sufficient to pay the notes in full due by Williams to the estate, and the note due the executrix in her own right, and the account clearly showed this, a different question would be presented. But what right had the executrix to take back her own property, fix her own appraisal upon it, credit her note with the amount so fixed, and charge the estate with the balance? She has charged the estate with \$4,295 for the use of this property so returned to her, she received the \$690.20 from Williams, and she now seeks to charge the amount of the face of the note, less her own value placed upon the engine and harvester. In selling the property of the estate to Williams and in taking it back the executrix acted without any order of court. Williams, it is claimed, was insolvent as to the estate, but it is sought to have the estate make him solvent as to the executrix. There was not any separate account kept of the property so returned to the estate, and it cannot be said that the estate ever received even the face value of its notes given by Williams. The executrix testified: "The property received from Williams on this settlement has all been received by the estate. Most of it has been sold, the funds derived from the sales paid into the estate, and the accounts show it. Of course, a large amount of this property was used for the estate, and some of it worn out on the lands of the estate." When findings are filed in a contest of this kind, they may be considered for the purpose of determining the issues upon which such findings are made. *Miller v. Lux*, 100 Cal. 613, 35 Pac. 345, 639. But it is not necessary to have findings in such case. In *re Levinson's Estate*, 108 Cal. 455, 41 Pac. 483, 42 Pac. 479. When the decree allowing a final account is found to be erroneous as to an item or items, this court may direct the decree to be corrected, and, as corrected, affirm it. In *re Parsons' Estate*, 65 Cal. 240, 3 Pac. 817. The court below is directed to correct the decree as to the item of \$2,111.11 in accordance with this opinion, and, as so modified and corrected, it is affirmed, with costs to appellant.

(131 Cal. 504)

JOOST v. CRAIG et al. (S. F. 1,592.)

(Supreme Court of California. Feb. 7, 1901.)

NOTARIES PUBLIC—ACKNOWLEDGMENT—NEG-
LIGENCE—IDENTITY OF AFFIANT—CON-
TRIBUTORY NEGLIGENCE.

1. Under Pol. Code, § 801, providing that a notary public and the sureties on his bond are liable to a party injured for all damages sustained by the misconduct or neglect of the notary, a notary does not act judicially in taking an acknowledgment, and is liable for negligence.

2. In an action against a notary for negligence in taking an acknowledgment, in certifying that the person appearing before him was the person described in the deed, a nonsuit, on the ground that the plaintiff was guilty of contributory negligence, implied that plaintiff's case

as to the negligence of the notary was made out.

3. Where a notary, in acknowledging a deed, certified that the person appearing before him was known to him to be the person described in the deed, there was no negligence in the grantee in relying on such certificate.

4. Under Civ. Code, §§ 1185, 1189, providing that an acknowledgment of an instrument should not be taken unless the officer taking it knows, or has the oath of a credible witness, whose name must be stated, that the person making the acknowledgment is the person described in the instrument, a notary public not obeying the statute is liable for damages to any one injured by relying on the certificate of acknowledgment.

5. Where a notary, in acknowledging a deed, certified that he knew the person to be A., "and the person described in the deed," and in an action against the notary by the grantee it was shown that the person described in the deed did not execute it, the notary was not entitled to have a motion for nonsuit granted on the ground that it did not appear that some person known to the notary by the name of A. did not appear and make the acknowledgment.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by Behrend Joost against Lee D. Craig and others. From a judgment in defendants' favor, plaintiff appeals. Reversed.

Mullany, Grant & Cushing, for appellant. Denson, Oatman & Denson and W. T. Baggett, for respondents.

TEMPLE, J. This is an action against a notary public and his sureties for damages charged to have resulted from the negligence of the notary. As appears from the record, in April, 1891, one Fisher, who was a real-estate broker in San Francisco, as such broker offered to sell to plaintiff 10 lots of land situate in San Mateo county, then standing in the name of Charles A. Anderson. The lots were part of the Abbey Homestead Association's lands. Plaintiff was familiar with these lands, and had bought a portion of them. He contracted with Fisher at once for the property, agreeing to pay \$1,000 for it, conditioned, as usual, upon the title. He had an abstract made, and, finding that the title of Anderson was good, informed the broker that he would pay whenever he received a deed from Anderson properly executed. A deed was produced, apparently executed by Charles A. Anderson, and acknowledged before the defendant notary, and certified by him as follows: "On this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one, before me, Lee D. Craig, a notary public in and for said city and county, duly commissioned and sworn, personally appeared Charles A. Anderson, known to me to be the person described in, whose name is subscribed to, who executed, the within and annexed instrument, and he duly acknowledged to me that he executed the same," etc. In the body of the deed the grantor is described as "Charles A. Anderson, of Redwood City, county of San Mateo, state of California." It turned out that the

deed was a forgery, and was not executed or acknowledged by Charles A. Anderson, of Redwood City, or by any person known by that name, but the name of Charles A. Anderson was written by one Frank C. Koen. Plaintiff accepted the deed and paid his money, relying solely upon the certificate of the notary. The lots were of the market value of \$1,000. The plaintiff, through his reliance upon the certificate, paid the said sum of \$1,000, which was thereby lost.

It is provided in section 801 of the Political Code that, "for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." This statute sets at rest one of the contentions of respondent that in making an acknowledgment a notary acts judicially, and is therefore not liable in damages for mere negligence.

At the trial the court, on motion of defendants, granted a nonsuit, on the ground "that it appears from the evidence that plaintiff was guilty of such negligence as to put it beyond his power to recover anything from defendants." This ground implies that in other respects the case for plaintiff was made out. There could not be contributory negligence unless there was first negligence to which it contributed. There was no evidence which tended to show negligence on the part of the plaintiff, except that when the deed, apparently executed by Anderson, acknowledged before the defendant notary, and certified as above set out, was delivered to him by Fisher, he paid over the money to Fisher without further inquiry as to the identity of the grantor. This was not negligence on the part of plaintiff. He had a right to rely upon the certificate of the notary, and to presume without question that such officer had done his duty. No circumstance was brought to his attention which could raise a suspicion to the contrary. There was nothing which could have put the most prudent man upon inquiry. And the notary cannot excuse his negligence, under such circumstances, by the claim that the party who has been injured has trusted to his faithful performance of duty. The whole theory that the record of such instruments gives constructive notice of the contents of recorded instruments is founded upon the proposition that upon proper investigation the genuineness of such instruments has been determined. The certificate is also received as evidence in a trial in a court of law that the deed is genuine. If the deed is not genuine, but is forged, the notary and his sureties ought to be held for all damages, unless they have taken the precautions expressly required by the statute. The legislature has taken great care, though, considering the importance of the matter, not too great, to make this certificate reliable. Section 1185 of the Civil Code provides as follows: "The acknowledgment of an instrument must not be taken unless the officer tak-

ing it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation." The notary is expressly forbidden to take the acknowledgment unless he knows that the person making the acknowledgment is the person described in the instrument. Here such person was described as Charles A. Anderson, of Redwood City. If he did not know this, it should have been proven by the oath of a credible witness, whose name must be stated. Section 1189, *Id.* It is not enough that the person be introduced to the notary by a responsible person. If that were enough, there would be no purpose in requiring the oath; for such person could always furnish the introduction. This point has been often decided, although sufficiently obvious from the statute. To take an acknowledgment upon such introduction, without the oath, is negligence sufficient to render the notary liable in case the certificate turns out to be untrue.

The matter was considered in *Jones v. Bach*, 48 Barb. 568. It is there said: "The object of all these well-considered provisions, relative to the proof and recording of conveyances of real estate, was to protect owners of property and their creditors against forgery, as well as to secure the rights of grantees and mortgagees against spurious and fraudulent conveyances. Would this object be effected by the manner in which the acknowledgment in this case was made? Any one could be falsely personated without check or liability to punishment for crime, if a mere introduction at the moment shall authorize the officer to take the acknowledgment. The person who introduces, if the statement be false, only commits a falsehood; but, if he is sworn as to the truth of his statement, should it be knowingly false, he is guilty of perjury, and liable to a prosecution for a felony." The statute of New York there considered was not as clear on this proposition as ours. It did not expressly require the oath, but only "satisfactory evidence." But, even under that language, it was held that a mere introduction is not enough. The certificate here gave assurance that the notary knew of his own knowledge, and not upon mere hearsay, that the grantor was Charles A. Anderson, of Redwood City. If this certificate was not true, the notary should be held. The same matter was discussed in *State v. Meyer*, 2 Mo. App. 413. The court makes some suggestions as to what degree of acquaintance will authorize the notary to certify that he has personal knowledge, and also upon the proposition that an introduction, even by a responsible person, could not be relied upon, and says: "It is obvious that, when an officer taking an acknowledgment

and making a certificate assumes any such fact, he does it at his own risk. The law warns him, when he has not 'personal knowledge' of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. * * * But such a certificate is infinitely less liable to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clue for conducting it, and it complies with the law." This makes the certificate upon personal knowledge a guaranty of the genuineness of the instrument, and the court adds: "It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. That may be taken for granted, but it is nothing to the purpose. His business was to know that it was true." A notary may take all due precautions, and fully comply with the statute, and still be deceived. In such case he would not be held liable, but, if he has not fully complied with the statute, the rule announced above is not a whit too stringent. This case was followed and commented upon in *State v. Balmer*, 77 Mo. App. 463.

It may be here remarked that the witness by whose oath the execution of an instrument is proven, when the person executing the instrument was not previously known to the officer, must himself be known to the notary. This is implied by the requirement that the officer shall certify that such person is a credible witness. When these necessary facts do not exist, the notary is expressly prohibited from taking the acknowledgment at all. When the notary does not obey this statute, he should expect to be held liable; and, I wish to repeat, these requirements are of great importance to the business world, and not at all too exacting. *Bank v. Murfey*, 68 Cal. 453, 9 Pac. 843, is not in conflict with these views. Murfey took the acknowledgment to a deed of one who personated the true owner, and signed his name to the instrument. The deed did not run to the impostor by his true name, but was taken by him to the president of the bank, and an application was made for a loan. The impostor then assumed the name of the fictitious grantee named in the forged deed. The president of the bank, after getting an abstract of the title, caused a note and mortgage to be prepared, and they were signed by the impostor in the bank, and were there acknowledged before a bank clerk, who was a notary. This acknowledgment was taken and certified by the employé of the bank, by the express direction of the bank president, who made the loan for the bank. The present case would have resembled that had Joost taken the impostor to the notary, and requested him to acknowledge and certify to the execution of the deed, upon the mere introduction to him by Joost. Such introduction would not have justified the officer, or

have constituted a defense to a suit by a grantee of Joost; but, by the rule announced in that case, Joost would, under the circumstances supposed, have been guilty of contributory negligence. There is no ground for such a contention here. Fisher, a real-estate broker, knowing that Joost was desirous of purchasing land in the "Homestead Tract," informed him of the opportunity, and upon being furnished the deed certified by Craig, as notary, he paid his money. Even had Fisher been the agent of Joost, there is nothing to show that he had any reason to doubt the truthfulness of the certificate. It does not appear, as it did in the *Oakland Case*, that Fisher knew that the certificate falsely stated that the officer knew that the person making the acknowledgment was the person described in the instrument. Had this statement in the certificate been true, there could have been no imposition.

It is argued that the judgment of nonsuit should be affirmed, because it was not proven that some person known to the notary as Charles A. Anderson did not appear before the notary and make the acknowledgment. Had such been the fact, it would not have been enough. The person might be known to him as Charles A. Anderson, though introduced to him. The certificate states, in effect, that the notary knew him to be Charles A. Anderson, and the person described in the instrument, to wit, Charles A. Anderson, of Redwood City.

The nonsuit was expressly granted because of supposed negligence on the part of Joost. As already stated, this implies that the court was satisfied that the certificate was false, and there was some evidence tending to establish such fact. It was shown that Charles A. Anderson, of Redwood City, did not execute the deed, and did not appear before the notary, and the signature was forged by Keon, who had and exhibited the deed before the acknowledgment was made. Keon furnished the deed to Fisher, and received the money. This was a fact peculiarly within the knowledge of the defendant notary, and which, in the nature of things, it would be difficult for plaintiff to prove. Under such circumstances, slight evidence is sufficient to shift the burden of proof. *People v. Lundin*, 120 Cal. 308, 52 Pac. 807. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

(131 Cal. 511)

PEOPLE v. JOHNSON. (Cr. 626.)

(Supreme Court of California. Feb. 9, 1901.)

CRIMINAL LAW—INTENT TO COMMIT RAPE—EVIDENCE—INSTRUCTIONS—WITNESSES—IMPEACHMENT.

1. Defendant enticed a girl aged 12 years into his room, unbuttoned her clothes, put her on the bed, unbuttoned his own clothes, exposing his private parts, and touched and fondled the private parts of the girl. He tried to have in-

tercourse with her, but did not, because of her refusal. *Held*, that a verdict of guilty of assault with intent to commit rape was justified, since, she being under 16 years of age and incapable of consenting, if he had in fact had sexual intercourse with her it would have been rape, and the intent with which he committed the assault must be supposed to be such as would ordinarily accompany such acts.

2. The court refused defendant's request to charge that, in order to find him guilty of an assault with intent to commit rape, the assault must have been made with the intent to perpetrate the crime of rape at all events, and if he voluntarily abandoned the attempt, if any there was, they must find him not guilty. *Held*, that the request was correctly refused, as the crime was complete when the assault was made with the intent to rape, and defendant could not purge himself of the crime he had committed by ceasing to continue the attempt.

3. On trial of defendant for assault with intent to commit rape, the fact that the district attorney was permitted to read certain questions and answers to two little girls, while on the witness stand, from their testimony given on the preliminary examination of the defendant before the magistrate, over defendant's objection that the prosecution was trying to impeach their own witnesses, was not prejudicial error, since the girls were the only material witnesses against him, and he would have been benefited by any weakening of their testimony.

Temple, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Frank H. Dunne, Judge.

Charles Nells Johnson was convicted of assault with intent to commit rape, and appeals. Affirmed.

John S. Partridge, for appellant. They L. Ford, Atty. Gen., for the People.

COOPER, C. The defendant was charged in the information of the crime of an assault with intent to commit rape, and upon trial was convicted. He appeals from the judgment and order denying his motion for a new trial.

1. It is contended that the evidence fails to show that defendant made the assault with the intent to commit rape, but that his intention was to gratify an unnatural desire, which is not a crime under the statute. The evidence shows that the defendant enticed two little girls (one aged 12 years, the age of the other not appearing in the record) into his room, unbuttoned the clothes of the 12 year old girl, put her on the bed, unbuttoned his own clothes, and exposed his private parts, and touched and fondled the private parts of the little girl in a manner too shocking and disgusting to be repeated in an opinion of this court. The child upon whom the defendant performed in the unnatural and disgusting manner before stated testified that defendant did not try to enter or touch her person with his private parts, but could have done so; that he wanted to have intercourse with her, but did not. The other little girl testified to substantially the same thing, and in addition stated that defendant wanted to and tried to have sexual intercourse with the 12 year

old girl who had submitted to his unnatural and disgusting desires, but that she would not let him. This is the substance of the testimony, and we think the jury were justified in finding the intention of the defendant to be as alleged in the information. The defendant assaulted the child. Being under 16 years of age, she was incapable of consenting, and therefore the assault was in law without her consent. If he had in fact had sexual intercourse with her, he would have been guilty of rape. As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant. The facts that defendant unbuttoned his trousers, that he took out his private parts, that he wanted to have sexual intercourse, but the child refused, were sufficient to justify the jury in drawing the logical, rational conclusion that defendant's object was to have sexual intercourse with the child. Whether he desisted because he had satisfied his morbid, depraved passions in the manner described in the evidence, or because he was afraid of an outcry from the child, or because of his impotence, are all matters of conjecture. We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire. We must suppose that his acts were done with the purpose and desire that would ordinarily characterize the acts of an individual of the male sex when such acts were done with one of the female sex. That a man would entice a little girl into his room, lock the door, put her on the bed, undress her, and fondle her for the purpose of gratifying an unnatural desire, and not for the purpose of having sexual intercourse, is possible, but not at all probable. The intent of a person cannot be proven by direct and positive evidence. It is a question of fact, to be proven, like any other fact, by acts, conduct, and circumstances. *People v. Landman*, 103 Cal. 581, 37 Pac. 518. It was the peculiar province of the jury to find the intent. *People v. Swalm*, 80 Cal. 49, 22 Pac. 67. If the facts proven were such that the jury might reasonably infer the intent to be as found by them, we would not be justified in disturbing the finding. We cannot say, as a matter of law, that the jury was not justified in finding the intent as alleged from the acts of defendant, and the circumstances under which they were committed.

2. It is claimed that the court erred in refusing to give the following instruction requested by defendant: "In order to find a defendant guilty of an assault with intent to commit rape, the assault must have been made with intent to perpetrate the crime of

rape at all events. If you find that defendant voluntarily abandoned the attempt, if any there was, you must find him not guilty." We are not given the benefit of counsel's views as to why the refusal was error, and we think the court correctly refused the instruction. The instruction, with the exception of the latter sentence, is substantially given in other parts of the charge. We do not think the latter sentence states a correct proposition of law. If the defendant made an assault as charged in the information, with the intent to commit rape, the offense was complete. He could not afterwards purge himself of the crime he had committed by ceasing to continue the attempt. If he had not ceased from some cause or other, the crime of rape would have been committed. The statute has made the attempt a crime. If defendant made the attempt he is guilty of the crime as charged. We agree with the following portion of the opinion of the supreme court of Michigan, in *People v. Courier*, 70 Mich. 368, 44 N. W. 572: "In cases of this kind it is not necessary that it should be shown, as in rape, that the accused intended to gratify his passion at all events. If he intended to have sexual intercourse with the child, and took steps looking towards such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his intent if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an assault with intent to commit the crime charged in the information." The contention of counsel for appellant is that, although defendant made the assault and attempted to commit rape upon the child, he is not guilty of assault with attempt because he of his own volition ceased the attempt. If the father of the child had approached defendant while engaged in the attempt, and defendant of his own volition ceased the attempt, he would not be guilty, if the requested instruction is law.

3. The district attorney was permitted, under defendant's objection, to read certain questions and answers to the little girls while on the witness stand, from their written testimony given on the preliminary examination of defendant before the magistrate. Defendant objected upon the sole ground that the prosecution was trying to impeach their own witnesses. The mere fact that the prosecution tried to impeach these witnesses could not have injured appellant, for they were the only material witnesses against him, and he would have been benefited by any weakening of their testimony. And it is not true that, as an absolute proposition of law, parties may not impeach their own witnesses. They may sometimes do so, and especially when they are honestly surprised at adverse testimony given by witnesses whom they themselves have called. The usual objection to a party asking his own witness if he had not made statements contrary to his testimony is that 'hereby hearsay evidence is pre-

sented to the jury. No such objection was made in the case at bar; but, if it had been, it would not have presented prejudicial error, even if error be conceded, for the former statements about which the girls were asked were substantially the same as their testimony at the trial. This disposes of all assignments of error argued by counsel. The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

I dissent: TEMPLE, J.

(31 Cal. 582)

CADY v. PURSER et al. (Sac. 735.)¹

(Supreme Court of California. Feb. 12, 1901.)
MORTGAGES—REGISTRATION—CONSTRUCTIVE
NOTICE—FORECLOSURE—ADVERSE TITLE
—JUDGMENT—CONCLUSIVENESS.

1. Subsequent purchasers are not chargeable with constructive notice of the contents of a recorded mortgage, under Civ. Code, § 1213, where it has not been transcribed into the proper book, though the mortgagor's title exists only by virtue of prescription.

2. The adverse title referred to in the principle that paramount and adverse titles are not proper subjects for adjudication in a suit to foreclose a mortgage is not limited to one which is adverse to the mortgagor's title, but includes a title that is adverse to that which the mortgagee brings before the court.

3. A purchaser at execution sale after the date of a mortgage which is void as to subsequent purchasers because improperly recorded acquires a title which is adverse to that of the mortgagee, and is not a necessary party to a foreclosure suit, but, if made a party, the judgment against him is not a bar to his assertion of superior title, where the court made no finding on the issue whether his or the mortgagee's title is superior, and merely decreed that "said foreclosure sale shall be without prejudice to any and all prior and paramount rights of defendants except the defendant mortgagor."

Department 1. Appeal from superior court, Lassen county; C. E. McLaughlin, Judge.

Action by Frank P. Cady against Edward T. Purser and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed.

Goodwin & Goodwin, for appellant. A. L. Shinn, for respondents.

HARRISON, J. Suit to quiet title. Each party to the action claims title to the land in controversy under the Eagle Lake Land & Irrigation Company, a corporation; the plaintiff by virtue of a sheriff's deed under two judgments rendered against the corporation, and the defendant by virtue of a sheriff's sale under a judgment foreclosing a mortgage executed by the corporation. Judgment was rendered in favor of the defendants, and plaintiff has appealed.

The plaintiff obtained a judgment against the corporation upon a money demand June 13, 1893, and at the sheriff's sale under an

¹ Rehearing denied March 15, 1901.

execution issued thereon purchased the lands described in the complaint herein on February 23, 1894, and the sheriff's certificate therefor was delivered to him and recorded March 5, 1894, and the deed thereon August 24, 1894. Charles Hartson obtained a judgment against the corporation July 14, 1893, and at the sheriff's sale under an execution issued thereon purchased the same lands, and received the sheriff's certificate therefor, which was recorded February 19, 1894. The sheriff's deed upon this certificate was executed to the plaintiff December 21, 1894, by virtue of an assignment of the certificate to him made by Hartson, March 20th. May 24, 1892, the corporation executed a mortgage upon the lands to the defendant Purser. This mortgage was filed for record in the office of the county recorder on November 22, 1892, and was recorded in Book A of Bills of Sale and Agreements. March 26, 1894, Purser commenced an action to foreclose this mortgage, making Cady and Hartson defendants therein. Judgment was thereafter rendered in this action for a sale of the mortgaged premises in satisfaction of Purser's claim, but declaring that "said foreclosure sale shall be without prejudice to any and all prior and paramount rights of the said defendants, except the defendant Eagle Lake Land & Irrigation Company." At the sale under this judgment Purser purchased the lands, and afterwards received a sheriff's deed therefor.

1. Under the foregoing facts it must be held that at the time the plaintiff and Hartson purchased the lands at the sheriff's sale they did not either of them have any notice of the mortgage from the corporation to Purser. Whether subsequent purchasers or mortgagees are charged with constructive notice of the contents of an instrument that has been filed for record in the recorder's office, notwithstanding such instrument is afterwards incorrectly or improperly copied into the books kept therefor, has been decided differently in different states; but it was held at an early day in this state, and must be regarded as a settled rule, that they have constructive notice of only such matters as appear from the instruments as copied into the proper books. In *Chamberlain v. Bell*, 7 Cal. 292, it was held that an instrument which was incorrectly transcribed by the recorder did not give constructive notice of its contents to a subsequent purchaser, but that such purchaser had the right to rely upon the instrument as it appeared upon the face of the record. In *Donald v. Beals*, 57 Cal. 399, the court said that, where there is a conflict between the actual record as it appears in the record book and the constructive record by the indorsement made upon the instrument at the time it was deposited for record, the latter must give way to the former. In *Watkins v. Wilhoit*, 104 Cal. 395, 38 Pac. 53, it was held that an assignment for the benefit of creditors was sufficiently recorded, so far as creditors are concerned, by a compliance

with section 1170, Civ. Code; but to be effective against subsequent purchasers or mortgagees, and so as to give them constructive notice, it must be recorded in accordance with the provisions of section 1213, Id. *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47, cited by the respondent, was an action against the sheriff for an unlawful seizure and sale of mortgaged property, contrary to section 2969, Civ. Code, and did not involve any question of the rights of a subsequent purchaser. It appeared that before the sale by the sheriff the mortgagee gave him actual notice of the existence of the mortgage, and the decision went upon the ground that he was thereby put upon inquiry. Having received actual notice of the mortgage, there was no place for the doctrine of constructive notice, and what the court said with reference to section 1170 was irrelevant. The principle upon which the rule rests is that as, under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or incumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book. *Neslin v. Wells*, 104 U. S. 428, 26 L. Ed. 802; *Terrell v. Andrew Co.*, 44 Mo. 309. For this purpose the recorder is the agent of such grantee, and the errors or omissions of the recorder in making such transcription are his errors or omissions in the same manner as are the errors of a sheriff in executing a writ, or of a clerk in recording an order or a judgment.

The provision in section 1170, Civ. Code, that "an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record," must be read in connection with the provisions of section 1213, that "every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees," and each must be construed with reference to the purposes for which it was enacted. Section 1170 is a part of article 2 of the chapter on recording transfers, which treats of the mode of recording, and designates the time at which the instrument shall be deemed to be recorded; while section 1213 is in article 4, which treats of the effect of recording, or the want thereof, and specifies the conditions under which such effect will be given to the instrument. For the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of

an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but, when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect,—as when his purpose is to give notice of his interest in real estate,—section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be “recorded as prescribed by law.” By this requirement, in order that constructive notice of the contents shall be given to subsequent purchasers and mortgagees, the legislature must have intended something in addition to depositing the instrument in the recorder's office for record, since that had already been provided for in section 1170. The word “recorded,” in ordinary usage, signifies copied or transcribed into some permanent book. In Anderson's Law Dictionary the term “recording” is defined “copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officer appointed therefor.” By section 124 of the county government act as it stood at the time of these transactions (St. 1891, p. 324), the recorder was required to “record separately in large and well-bound separate books” the several instruments there named; and section 130 provided that, when any instrument was deposited in his office for record, he “must record the same without delay.” By section 125 the recorder is required to keep indexes to the several instruments, among which are two indexes labeled respectively “Mortgagors of Real Property” and “Mortgagees of Real Property,” with the pages divided and so headed as to show the parties and date and place of record of each mortgage. In addition to this, section 1171, Civ. Code, provides: “Grants absolute in terms are to be recorded in one set of books, and mortgages in another.” These provisions of the statute fully indicate that an instrument is not “recorded as prescribed by law” until it has been transcribed into the proper book. The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments; and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If recorded in a different book from the one directed, it is to be regarded the same as if not recorded at all. In *Sawyer v. Adams*, 8 Vt. 172, where an instrument was copied into a book that had not been in use for recording purposes for many years, it was held that the book

was improper for that purpose, and that the instrument was not “duly recorded”; the court saying: “The act of the town clerk was as wholly inoperative as if he had written this deed on a slate, or copied it into his family record.” The same principle was declared in *Insurance Co. v. White*, 17 N. Y. 460. In *Gillig v. Maass*, 28 N. Y. 214, a mortgage recorded in a book of deeds was held not to be duly recorded, and therefore not to give constructive notice of its existence. There is no provision in the statutes of this state authorizing the recorder to transcribe any instrument in a book entitled “Bills of Sale and Agreements,” and the above provisions requiring him to record mortgages in separate books, and to keep indexes of such records, lead to the conclusion that the record of the mortgage to Purser was ineffective for giving constructive notice of its contents. It is immaterial that the title of the corporation did not appear of record in the recorder's office. The provisions of the recording act are not limited to titles which appear of record, but are applicable as well to those which exist by virtue of prescription. The possession of the land by the corporation at the time of the sheriff's sale was *prima facie* evidence of its title.

2. The rights acquired by the plaintiff under the sheriff's sale were not affected by the judgment in the action of Purser for the foreclosure of his mortgage, or by the sale under this judgment. By virtue of the provisions of section 1214, Civ. Code, the omission of Purser to have his mortgage properly recorded rendered it void as against the plaintiff. The plaintiff, purchasing at a sale under his own judgment, was a bona fide purchaser for value, and the certificate of sale was a conveyance by which an interest in the property was created, and, as it was immediately recorded, it had priority over the mortgage to Purser. *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680. There was no record of the Purser mortgage prior to the action for its foreclosure. It has been stated in several cases that the effect of a sale under a judgment in foreclosure is to transfer to the purchaser the title of the mortgagor as it existed at the date of the mortgage, and that in an action for its foreclosure the rights of defendants which were acquired subsequent to its date are extinguished by such sale; and it is contended by the respondents that, as the rights of the plaintiff herein were acquired subsequent to the execution of the Purser mortgage, and as he was a defendant in the suit for its foreclosure, his rights so acquired were extinguished by the sale under the judgment in that action. These expressions in reference to the effect of a sale under foreclosure were, however, but the general statement of a principle in which only the ordinary facts and the usual conduct of parties were to be considered, but are inapplicable in the consideration of an unusual state of facts or conduct, as where the mortgagee fails to

record his mortgage until after a third person has acquired an interest in the land. It would be a harsh rule of procedure to hold that the foreclosure of a mortgage which the statute had declared to be void would extinguish the interest of such third person. The principle is well settled that paramount and adverse titles are not proper subjects for adjudication in actions for the foreclosure of a mortgage. The adverse title here referred to is not limited to one which is adverse to the title which was in the mortgagor at the date of the mortgage, but includes a title that is adverse to that which the mortgagee brings before the court. A title may be paramount and superior to the title of the mortgagee, although acquired after the date of the mortgage, and if, after the execution of the mortgage, a purchaser from the mortgagor acquires a title which is superior to that of the mortgagee, that title is adverse to the mortgagee's title. The provision in section 1214, Civ. Code, by which the failure of the mortgagee to record his mortgage renders it "void" as against subsequent purchasers or mortgagees, deprives it of all consideration in reference to its date, and requires it to be treated as if it had been executed subsequent to the record of the subsequent purchaser. Being void as against him, neither its date nor its contents can be available to defeat his title. As against the plaintiff herein, the mortgage of Purser had no existence until the commencement of his action for its foreclosure. *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Emeric v. Alvarado*, 90 Cal. 468, 27 Pac. 356; *Duff v. Randall*, 116 Cal. 231, 48 Pac. 66. The title of the plaintiff being, therefore, adverse and superior to that held by Purser, the plaintiff was not a necessary party to the foreclosure, and, although he was made a party, the facts presented upon the record were insufficient to render the judgment against him a bar to his assertion therein of his superior title. The complaint simply alleged that he had, or claimed to have, some interest in the lands, but that such claim was "subsequent, subject, and subordinate to the lien of the plaintiff." In his answer thereto the plaintiff herein denied this allegation, and affirmatively alleged that his claim was not subsequent, subject, or subordinate to the plaintiff's lien. The court made no finding upon this issue, but merely found that the defendants claimed some interest in the premises, and in its judgment expressly decreed "that said foreclosure sale shall be without prejudice to any and all prior and paramount rights of the defendants, except the defendant Eagle Land & Irrigation Company." There was, therefore, no adjudication upon the issue whether the title of the plaintiff herein was subordinate to the claim of the mortgagee, and the plaintiff is, therefore, not estopped thereby from asserting in this action his claim of title to the lands purchased by him at the sheriff's sale. *Beronio v. Lumber Co.* (Cal.) 61 Pac. 958. As we

have seen that his title thereby acquired is superior to that derived under the mortgage, the provision in the decree foreclosing all persons having liens subsequent to the lien of the plaintiff therein is inapplicable to the plaintiff herein, and the superior court erred in holding that the plaintiff herein has no title to the lands, and in rendering judgment in favor of the defendants. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(181 Cal. 527)

O'DONNELL v. MERGUIRE et al.
(S. F. 1,346.)

(Supreme Court of California. Feb. 11, 1901.)
EXECUTION—SIGNATURE BY FORMER CLERK—
VALIDITY.

Code Civ. Proc. § 682, provides that a writ of execution must be subscribed by the clerk of the court. *Held*, that an execution signed in print with the name of a former clerk of the court, and in writing by a deputy of the present clerk, was void, and sale thereunder conveyed no title.

Beatty, C. J., dissenting.

In bank. On rehearing. Opinion in department (60 Pac. 981) affirmed, and judgment of lower court reversed.

Reed & Nusbaumer, for appellant. Charles Wesley Reed, Roger Johnson, and King & Hornblower, for respondents.

PER CURIAM. Appeal from an order granting the defendant a new trial. The suit was brought to quiet title to lands described in the complaint. The defendant Reid claimed title in himself. Both parties deraigned title from one Thomas O'Donnell, the husband of plaintiff,—the plaintiff, by deed of conveyance of date July 14, 1891; the defendant Reid, by a sheriff's sale under an execution against Thomas O'Donnell. The defendants' case is based on the claim that the former conveyance was in fraud of creditors, and hence void as against the subsequent execution sale to him. The findings negatived the allegations of fraud, and found in favor of the plaintiff on the issue of title. The new trial was granted presumably upon the ground that the evidence was insufficient to justify the finding that the conveyance of O'Donnell to the plaintiff was not fraudulent as to creditors. But, as the conveyance is specifically found, the finding as to fraud can be material only upon the assumption of the validity of the subsequent sheriff's sale to the defendant. Otherwise, the plaintiff's ownership follows as a conclusion of law, from the conveyance to the plaintiff from O'Donnell, the common source of title, and the alleged fraud is immaterial.

The alleged writ of execution, under which defendants' title was deraigned, was regular in all respects, except that it was signed, "M. C. Haley, Clerk, by B. D. Dough-

erty, Deputy Clerk," and not by C. F. Curry, who was the clerk at the date of the alleged execution. Haley was a former clerk, and his signature, "M. C. Haley, Clerk," was in print, and it was admitted that Dougherty was the deputy of Curry, as he had been also of Haley. The question is thus presented whether the document in question was a valid execution, sufficient to confer power on the sheriff to sell and to convey the land. The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power (1 Freem. Ex'ns, § 63); and it is also settled that, if the writ be amendable, it will be accorded the same effect, with reference to acts done in execution of it, as if it had been amended (Id. § 71b; Hunt v. Loucks, 38 Cal. 374). The question, therefore, is whether the omission of the subscription of the clerk to the writ of execution, as required by section 682, Code Civ. Proc., can be amended. If so, it cannot be regarded as void; otherwise, it must be so regarded.

The question, we think, admits of an obvious answer. The power of amendment, however extensive it may be, is limited to the amendment of the writs of the court, which can be authenticated only, under provisions of the law similar to ours, by the subscription of the clerk. Without this there is nothing "which the judge can affirm" is an execution "issued upon the judgment produced." Hunt v. Loucks, 38 Cal. 375. Under the ancient practice, where the seal of the court was in the custody of a particular officer and sedulously guarded, and when seals were habitually used for the purpose of authenticating instruments, a seal alone may have been sufficient to authenticate an execution, as in fact was the case in the king's bench, though in the more modern court of common pleas the signature of the prothonotary was required. Tidd, Prac. 990, 1027. But in modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without the signature of the officer affixing it. Whether both seal and subscription of the clerk, as required by the Code, be essential, is a question about which the authorities differ (1 Freem. Ex'ns, § 70), and which it is unnecessary in this case to determine. But we are of the opinion that the seal by itself is insufficient, and that the subscription of the clerk is an essential part of the writ, without which there is no execution to be amended. On this point also there is some conflict in the authorities, which are discussed by the author in the work cited (1 Freem. Ex'ns, § 45); but the preponderance seems to be in favor of the conclusion we have reached (Huggins v. Ketchum, 4 Dev. & B. 414; Short v. State, 79 Ga. 550, 4 S. E. 852; Hernandez v. Drake, 81 Ill. 34; Wooters v. Joseph, 137 Ill. 113, 27 N. E. 80, 31

Am. St. Rep. 355; Dearborn Laundry Co. v. Chicago & A. R. Co., 55 Ill. App. 438; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614). The order granting a new trial must therefore be reversed; and it is so ordered.

I dissent: BEATTY, C. J.

(131 Cal. 566)

GRAY v. LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE.

(S. F. 1,755.)

(Supreme Court of California. Feb. 12, 1901.)

BUILDING CONTRACT—CHANGE IN SPECIFICATION—EXTRA WORK—LIABILITY—WRITTEN AGREEMENT—NECESSITY—AUTHORITY OF ARCHITECT—ARBITRATION—ISSUES.

1. Specifications for a building contract provided that no extra work should be allowed except on a written order from the architect, approved by the building committee, and that, on any alterations or changes, the character and valuation of the extra work should be agreed on in a writing signed by the owner or architect and the contractor. The contractor, on verbal instructions from the architect, and without the knowledge of defendants or their building committee, continued the foundation wall 18 inches higher than specified. *Held*, that defendants were not liable therefor as extra work.

2. Where specifications for a building provided that in case of dispute as to the value of extra work the matter should be submitted to arbitration before suit therefor, arbitration was a condition precedent to such action.

3. Where plaintiff claimed that the work sued on was included in the original contract, and defendant alleged it was extra work, the valuation of which had not been submitted to arbitration, as required by the specifications, the contention that there was no issue as to the value of the work cannot be sustained.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by H. N. Gray against La Societe Francaise de Bienfaisance Mutuelle. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Affirmed.

Fisher Ames, for appellant. A. Comte and Boyd & Field, for respondent.

COOPER, C. This action was brought to foreclose a contractor's lien for work and labor done and materials furnished in supplying all of the concrete and artificial stone work for the building of the defendant known as the "French Hospital" in the city and county of San Francisco. The case was tried before the court, and findings filed upon which judgment was entered for defendants. Plaintiff made a motion for a new trial, which was denied, and this appeal is from the order denying the motion.

It is claimed that the evidence is insufficient to sustain the findings in two important particulars, which we will discuss in the order as set forth in the briefs. On the 7th day of October, 1893, the plaintiff's assignor, a corporation, entered into a contract in writing with defendant corporation, by the terms of

which the said assignor of plaintiff agreed to furnish labor, tools, materials, and appliances, and perform and complete all the excavating, concrete artificial stone work, cementing, and other work as shown and described in the plans and specifications made by the architects and signed by the parties at the time of making the said contract; all for the sum of \$25,885. The work was performed, and the contract price paid as agreed upon. The contention here is not as to the amount to be paid under the contract, and which was paid thereunder, but is as to an item of \$1,684.50, which is particularly stated in finding 4 as follows, to wit: "That immediately after the execution of said written contract the said Gray Brothers' Artificial Stone Paving Company entered upon the performance thereof under said articles of agreement and specifications, and while they were so engaged in the early part of December, 1893, Wm. Mooser, one of the said architects, requested said corporation orally to carry up the concrete walls eighteen inches higher than called for by the original plans and specifications, and that said corporation subsequently complied with said request, and did carry up said concrete walls eighteen inches higher than called for by said plans and specifications, and in so doing put in 6,738 cubic feet of concrete wall, of the value of \$1,684.50." The court found, in effect, that this item was for extra work, and was not agreed to in writing, nor requested by defendant nor its building committee, and that for this reason plaintiff could not recover therefor. The main contention of appellant is that the item was for services performed under the original contract, and was not for extras, and that the work was done at the request of the architect of defendant, and that for this reason the defendant is responsible. The contention is mainly based upon the following clause in the specifications, which were a part of the contract, to wit: "If, in the opinion of architects, any particular place should require more cement or more thickness of floor or concrete than is called for, the contractor will have to do the same, and the cost of said work to be determined by the architects." We think, without regard to the question as to whether or not the contested item is for extras or was incurred under the authority of the contract and said quoted clause in the specifications, the defendant is not liable. Immediately following the clause quoted from the specifications, and as a part of the same sentence, is the following: "But no extra work shall be allowed except where a written order from architects is procured, approved by the building committee." The court found "that the request of the architect therefor was never approved by the building committee, nor was the cost or value thereof ever fixed, or agreed upon, or prearranged." This finding is supported by the evidence. It follows that, even if the original contract and the specification quoted authorized the carrying up of the con-

crete walls 18 inches higher, it could only be a charge against defendant when done under a written order from the architect, approved by the building committee. The defendant cannot be bound outside the terms of its contract. The plaintiff agreed that no extra work should be allowed except upon a written order from the architect approved by the building committee. It did not procure such order, and therefore must be held to the terms of its contract. The above is the correct interpretation of the specification, and was the true intent of the parties as shown by the other parts of the contract. It is provided in the eighth clause that, "should the owner or the architect at any time during the progress of the work request any alterations to or omissions from this contract or the plans or specifications, either of them shall be at liberty to do so only by written agreement." It is provided in the ninth clause: "The rule of practice to be observed in the fulfillment of the last foregoing paragraph [eight] shall be that, upon the demand of either the contractor, owner, or architect, the character and valuation of any or all changes, omissions, or extra work shall be agreed upon and fixed in writing, signed by the owner or architect and the contractor prior to execution." And in the specifications after the clause hereinbefore quoted in specification 5 it is provided: "And in all cases where any alterations or additions (if any) shall involve any increase of expenditure not included or provided for in the drawings, specifications, or contract, then authority in writing shall be necessary, and cost prearranged, before such work shall be undertaken. Neither will the same be paid for, nor any allowance be made in any respect thereof, unless the work in question shall have been executed under the authority of such written order, and said order be produced at the first settlement of extra account subsequent to the date thereof. Said written order to be given by architects, and approved by building committee." It thus appears that the parties over and over again bound themselves that no extras or extra work should be charged for unless agreed to in writing, as provided in the contract and specifications. There is no evidence of any agreement in writing as to the item in contest. There is no evidence that it was for work done by virtue of any change of plans approved by the building committee. Not only this, but the court finds "that neither the defendant, nor any of its officers, nor its board of trustees, nor its building committee, nor any member thereof, ever knew of said oral request of the architect, or that said extra work was being done, or had been done, until a considerable time subsequent to the doing of said extra work." This finding is supported by the evidence, and is entirely inconsistent with the contention of appellant's counsel that the defendant waived the provisions of the contract requiring all increases in expenditure to be in writing.

In *J. M. Griffith Co. v. City of Los Angeles* (Cal.) 54 Pac. 383, the plaintiff had contracted with the defendant for a fixed price to construct a certain sewer leading from the city of Los Angeles to the Pacific Ocean. After completing the contract, the plaintiff claimed an amount for extras in furnishing, at the request of the city engineer, who had charge of the work, a large number of steel bands for the pipe, in addition to those required in the specifications. The amount claimed for such extras was \$4,012. The contract provided, "No extras are to be allowed except upon change of route or plan," and in regard to changes in the plans it provided, "But the changes so made, with the price to be added to or deducted from the contract price, shall be agreed upon between the parties hereto and indorsed upon the contract," and, if not so indorsed, "then the original price shall be neither increased nor diminished." This court held that the amount so claimed could not be recovered, and in the opinion said: "The contract, however, was plain that no extras should be allowed except on change of route or plans, and, in case the engineer should change the plans, still no extra payment was provided for unless the changes so made, with the price to be added to or deducted from the contract price, 'shall be agreed upon between the parties hereto,' viz. the city and the contractors. If they could not agree on the price, then the engineer should fix the same. These provisions evidently mean that no changes of plan should become a part of the contract to be paid for by the city, unless it should agree thereto." We have no doubt of the correctness of the above rule. The defendant had the right to the protection given it by its contract, and the right to determine, through its building committee, in a regular manner, as to whether or not it desired to change its plans or increase the cost of the work for which it had contracted. The architect possessed only the power given him by the contract. He is nowhere given the right to change the contract or plans. If the architect could change the plans and specifications in material respects, of his own volition, then the contract would afford the defendant no protection. If he could raise the foundation 18 inches, and increase the cost \$1,700, he could indefinitely expand, increase, and change the building, until the cost would be doubled or trebled, and when completed the defendant would have a different building from that called for in its contract, and probably be bankrupt by the expense. We do not think such is the law. The agreement provided that, in case a dispute should arise between the parties respecting the valuation of any extra work, the disputed matter should be submitted to two competent persons who are experts in the business of building, and, in case these two cannot agree, they shall select a third person, an umpire, and the decision of the two shall be binding on all parties. The plaintiff alleged that, being unable to agree with de-

fendant on the value of the alleged extra work, the plaintiff's assignor proposed to defendant to arbitrate the same in the manner provided in the contract, and to that end offered to select upon its part an arbitrator, and requested the defendant to likewise select an arbitrator; but that defendant refused, and still refuses, to arbitrate. This was denied by the answer, and upon the issue so raised the court found: "That the said Gray Brothers' Artificial Stone Paving Company never at any time proposed to the defendant to arbitrate the value of said extra work and materials in the manner provided in said articles, and never offered to select, upon its part, an arbitrator, and never requested defendant to select an arbitrator to represent it for the purpose of making such arbitration. And the defendant never did in any way refuse to enter into any arbitration as to the value of said extra work. And no arbitration was in fact ever made or attempted as to the value of said extra work and materials." The evidence sustains this finding. This finding precludes any recovery by plaintiff. Where parties have agreed to an arbitration as a condition precedent in a contract of this character, they must arbitrate, or in good faith endeavor to do so, or show some good and sufficient excuse for not having done so, before they will be allowed to maintain an action. *Holmes v. Richet*, 56 Cal. 307; *Scammon v. Denio*, 72 Cal. 393, 14 Pac. 98. We do not think it can be said, in view of the pleadings, that there was no issue as to the value of the extras. Conceding that the question as to whether or not the disputed work was included in the contract is a matter for the court, and not subject to arbitration under the contract, it does not follow that the value of the work is not the subject of arbitration. If the court had found the work to be in addition to that originally called for and extras, it would still have to find the value in order for plaintiff to recover. The court could not find the value unless the plaintiff endeavored to ascertain it in the method provided by the contract, or showed some valid reason for not having done so. We advise that the order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the above opinion, the order is affirmed.

(121 Cal. 530)

OWEN v. POMONA LAND & WATER CO.
(L. A. 637.)¹

(Supreme Court of California. Feb. 11, 1901.)

APPEAL — ASSIGNMENT OF ERRORS — SUFFICIENCY — VENDOR AND PURCHASER — RESCISION OF CONTRACT — WAIVER — DEFECTIVE TITLE — WATER RATE — IMPROVEMENTS.

1. Under a statute which requires that the specification of errors on appeal shall contain a statement of the particulars in which the evidence is insufficient, a statement that there is no evidence to justify a certain finding, or to prove or tending to prove a certain fact, is sufficient.

¹ Rehearing denied March 14, 1901.

2. In an action to rescind a contract to purchase land, and recover the purchase money paid, and increased value of the land by reason of improvements thereto, a finding of the amount of such increased value is sustained by proof that the value of the improvements amounts to such sum, since, though it does not necessarily follow that land is enhanced in value to the same amount as the value of the improvements, the inference is one the court may fairly draw, in the absence of other evidence.

3. The finding that a vendee of land, going into possession and making valuable improvements under a contract to purchase, may recover the value of such improvements on a rescission of the contract, cannot be reviewed by the supreme court on an appeal from an order denying a new trial, since on such appeal the court can review only specification of insufficiency of evidence to support the findings and of errors of law occurring at the trial, while such finding is simply a conclusion of law.

4. Defendant contracted to convey to plaintiff certain land which it had purchased from a railway company which held a patent therefor from the United States. Plaintiff paid part of the price, went into possession, and improved the land. When balance of purchase price was due, plaintiff tendered the same, and demanded a conveyance. After the contract was made, the United States supreme court held patents similar to the one for this land invalid, and defendant promised that it would make the necessary proofs as soon as the land office was ready to receive them, and would procure a patent direct from the United States, under Act March 3, 1887 (24 Stat. 557, § 4), which provides that where lands erroneously patented to a railway company have been sold to citizens of the United States, purchasing in good faith, patents should issue direct to such purchasers on proof of such facts. Plaintiff relied on this promise, and continued in possession two years longer, when he renewed his tender, and commenced suit for rescission, and to recover purchase price paid and value of improvements. The land office had not been ready to receive proofs under section 4, and hence defendant had not been able to obtain title. *Held*, that while plaintiff was entitled to rescind on defendant's inability to procure and convey title at the time fixed by the contract, he having then accepted defendant's promise to acquire title and continued in possession, he could not thereafter rescind on that ground until defendant had had reasonable time and opportunity to comply with its promise.

5. Defendant contracted to convey to plaintiff certain land and shares in an irrigation company, which entitled him to a certain amount of water. Plaintiff paid part of the price, took possession, and improved the land. The irrigation ditches were fed by artesian wells, which at the time the contract was made, and for five years thereafter, furnished as much water as represented, but partially failed the following season. *Held*, that such failure of the wells did not authorize a rescission of the contract, since, if there was a failure of this part of the consideration, the failure was through no fault of the defendant.

6. Plaintiff contracted to purchase certain land and shares of stock in an irrigation company. The stock was sold with the land, under a rule apportioning 10 shares to each acre. By the terms of the contract, plaintiff, in consideration of the right to occupy the land pending the fulfillment of the contract, agreed to pay and discharge all water rates that might be levied on the premises. The artesian wells which supplied the water for the irrigating company failed, and an assessment was levied on the stock for means to increase the supply of water. *Held*, that the assessment was a water rate assessed on the premises, within the

meaning of the contract, for which plaintiff was liable.

In bank. Judgment in department (61 Pac. 472), affirming judgment of lower court, reversed.

BEATTY, C. J. This is an action by the vendee of certain land, and of certain shares of stock in an irrigation company, to cancel the contract, and to recover various sums paid to the vendor, and also the value of improvements placed upon the land. The suit is based upon an alleged rescission of the contract of sale, for failure of title, and failure of the irrigation company to furnish the quantity of water required for irrigation. The defendant by answer contested the right and the fact of rescission, and by cross bill sought a specific enforcement of the contract. The cause was tried by the court, and findings made, upon which judgment was entered in favor of the plaintiff. The defendant appealed from the judgment, and also from an order denying its motion for a new trial, but, the appeal from the judgment having been dismissed for failure to file the transcript in time, there is nothing left to be considered except such matters as can be reviewed upon an appeal from the order, i. e. specifications of insufficiency of evidence to support the findings and of errors of law occurring at the trial.

A preliminary statement of the principal facts of the case will be of assistance in the discussion of these questions: The land which the defendant covenanted to convey is part of a certain section, No. 15, in San Bernardino county, for which the officers of the land department of the United States had issued a patent to the Southern Pacific Railroad Company in 1879. That company sold it to Wicks, who assigned his contract to defendant, who, upon compliance with its terms, received a conveyance in due form from the railroad company. These conveyances and contracts, being duly recorded in San Bernardino county, showed an apparently perfect title in the defendant, but in fact its title was not perfect for the following reasons: This section 15 was a part of the lands included in the provisions of the act of congress of July 27, 1866, purporting to grant them to the Atlantic & Pacific Railroad Company in aid of the construction of its road. It was also within the description of lands granted to the Southern Pacific Railroad Company for similar purposes by the act of congress of March 3, 1871. The Southern Pacific Railroad Company completed its road according to the conditions of its grant, but the Atlantic & Pacific Railroad Company never built that part of its road west of the Colorado river, where the two lines intersected, and the officers of the land department, acting upon their construction of the law, issued patents to the Southern Pacific Railroad Company for lands within the common limits of the two grants. Subsequently,

in 1886, congress passed an act forfeiting the lands granted to the Atlantic & Pacific Railroad Company for breach of the conditions of the grant, and thereafter proceedings were instituted on the part of the United States to vacate the patents so issued, upon the ground that their issuance was unauthorized. Proceedings of this character were pending in January, 1891, when the contract between these parties was entered into. It does not clearly appear that the patent covering this particular section 15 had been assailed at that time, but actions had been commenced to cancel similar patents for lands similarly situated, and to one of those actions the defendant here was a party. In other words, it had actual knowledge that its title to one parcel of land was assailed upon grounds which equally affected the title to the land which is here involved. But the litigation, so far as it had progressed, had resulted in favor of the defendant's title; that is to say, the decision of the United States circuit court, where the suits were commenced, had sustained the action of the officers of the land department in the issuance of the patents, holding that the Southern Pacific Railroad Company had earned and become entitled to all the lands within the common limits of the two grants. *U. S. v. Southern Pac. R. Co.* (C. C.) 45 Fed. 596; *Id.*, 46 Fed. 683. Besides, congress had in 1887 passed a curative act saving the rights of citizens who had bona fide purchased from the patentees lands erroneously patented, as these were, and providing that, upon proof of their citizenship and bona fides, patents should be issued to them without further payment. The plaintiff had no actual knowledge of these matters affecting the title in January, 1891, when he contracted for this land. In an application to purchase, which preceded the contract, plaintiff had stipulated for a certificate of title, and the defendant furnished a certificate made by a reputable title and abstract company, showing that its title was perfect, as in fact it was, so far as appeared by the records of San Bernardino county, which contained no reference to any action by the United States to cancel the patent issued to the Southern Pacific Railroad Company. It is one of the grievances of the plaintiff that the pendency of that litigation, known to the defendant, but unknown to him, and undisclosed by the county records, was not brought to his attention prior to the making of the contract.

The terms of the contract were, in brief, that plaintiff was to pay \$1,000 cash, \$1,000 January 14, 1893, and \$1,000 January 14, 1894, with interest on the deferred payments, and to have immediate possession. Defendant was to convey by deed of grant, bargain, and sale certain described lots in said section 15, containing 20.32 acres of land, "together with two hundred and three and $\frac{2}{10}$ (203.2) shares of the stock of the Del Monte Irrigation Company, representing two and $\frac{2}{1000}$ (2.032) inches of water un-

der four (4) inch pressure, said stock to be delivered by the party of the first part and accepted by the party of the second part subject to the by-laws of the said Del Monte Irrigation Company." In pursuance of this contract the plaintiff made the cash payment of \$1,000, and entered into possession of the land, which he proceeded to improve by the erection of buildings and the planting of fruit trees. He made no further payments of purchase money under the contract, but paid a portion of the accruing interest, and paid all the taxes.

In December, 1892, the supreme court of the United States decided the cases entitled *U. S. v. Colton Marble & Lime Co.* and *U. S. v. Southern Pac. R. Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and also two other cases, entitled *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091. These were appeals from the circuit court in several cases involving different phases of the litigation concerning the patents which had been issued to the Southern Pacific Railroad Company for lands within the limits of the grant to the Atlantic & Pacific Railroad Company, and by the judgment of the supreme court the decrees of the circuit court were reversed, and the causes remanded, with directions to enter decrees in favor of the United States vacating and canceling the patents. These decisions were brought to the attention of the plaintiff in the early part of the year 1893, and he then learned for the first time that the title to the lands contracted for was not in the defendant. From that time forward, however, he had actual and full knowledge of all the facts and of the law affecting defendant's rights in said lands, and his own rights under the contract of purchase. He did not, during the year 1893, take any steps looking to a rescission of his contract. In fact, it appears that he was at that time satisfied, as a lawyer, that, although the title was not then in the defendant, it was, nevertheless, practically certain that under the provisions of the act of 1887, above referred to, a new patent for the land would be issued direct to the defendant upon proof of its purchase from the railroad company upon the faith of the invalid patent of 1879. There is uncontradicted evidence that he so advised a client who consulted him professionally as to the title of defendant to another subdivision of the same section of land prior to the month of April, 1893. In January, 1894, when the final payment under his contract fell due, plaintiff made a formal offer to complete the payment upon conveyance of a good title to the land and water stock. But he knew at the time he made this offer that its condition could not be complied with, and his only object seems to have been to demonstrate his readiness to perform when defendant was able to perform on its part. The result of this offer and the ensuing discussion of the defect in the title

to the land was a promise and assurance on the part of the defendant that it would make the necessary proofs as soon as the land office was ready to receive them, and would procure a patent direct from the United States under the act of 1887. Resting upon this promise, plaintiff remained in possession of the land, cultivating and caring for the fruit trees he had planted, until the summer of 1896.

During the whole period of his occupancy of the land, down to and including the irrigation season of 1895, the plaintiff received from the Del Monte Irrigation Company the full quantity of water mentioned in his contract; but in the year 1896, owing to the failure of the artesian wells which constituted its source of supply, the irrigation company was not able to furnish to its stockholders quite one-fourth of the quantity of water represented by its stock; that is to say, there were 21,000 shares of stock issued, and in order to supply 1 inch of water of every 100 shares it required a flow of 210 inches from its wells, which in August, 1896, were yielding only about 40 inches, to which something seems to have been added by pumping. In order to secure a better supply of water, the irrigation company levied an assessment of 8 cents a share on its stock, and the defendant notified the plaintiff that he must pay the assessment on the 203.2 shares which it had contracted to him or be deprived of water for irrigation. He refused to pay the assessment, and at this juncture, on August 5, and again on August 19, 1896, renewed his demand for a deed of conveyance of the land and his offer to perform on his part. This, however, like his first offer, was merely formal; for he knew that the defendant had not yet received a patent, and he had no intention of accepting its deed or parting with the money which he tendered. The defendant being unable to comply with the conditions of his offer, he gave notice that he rescinded the contract, and offered to reconvey everything he had received, and to restore the possession of the land, upon condition that the defendant would refund the moneys paid in pursuance of the contract, and compensate him for the value of his improvements, with interest. His offer being declined, plaintiff commenced this action in August, 1896, which resulted in a judgment in his favor for the amount of his payments under the contract, and the value of his improvements, fixed at the sum of \$6,250, together with interest and costs. The whole amount of the judgment was declared to be a lien upon the land and water stock, which were ordered sold, and the proceeds applied upon the judgment, with judgment over for any deficiency, etc.

On this appeal of the defendant from the order overruling its motion for a new trial, we have to consider only the assignments of error in the rulings of the superior court at the trial, and the specifications of insufficiency of the evidence to justify the findings.

With regard to these specifications the respondent makes the objection that they are not sufficient in substance or proper in form, and to this point cites the case of *De Molera v. Martin*, 120 Cal. 545, 52 Pac. 823. But the decision in that case has no application to the specifications here, which are as exact and detailed as they could be made in pointing out the particular findings and parts of findings which it is claimed the evidence does not justify. The language of many of these specifications is: "There is no evidence to justify;" "there is no evidence to prove or tending to prove," etc.; and it seems to be claimed that this is not a compliance with the statute, which requires a statement of the particulars in which the evidence is insufficient. This objection is too refined. If there is no evidence to support a finding, it is certainly proper to say so, and even where there is slight, but insufficient, evidence to support a particular finding, every purpose of the law is answered by a specification that there is no evidence.

It is first objected that there is no evidence to justify the finding to the effect that the defendant corporation, before the execution of the application and contract, as an inducement to plaintiff to purchase the land and water stock, represented that it had a perfect title to the land, and that the right to a perpetual flow of one inch of water to each ten acres of land was sold therewith. We think the evidence fully sustains this finding. The representations were made, but they were honestly made. The officers and agents of the corporation had every reason to believe at the date of the contract that its title to the land was perfect. It had been sustained by the decision of the circuit court, and even if that decision was erroneous, as was afterwards decided by the supreme court, the equitable claim of the defendant to the land was protected by the act of congress of 1887. As to the water, all that was represented was true, as the defendant could see for himself. There was then an ample supply of water, and continued to be for five years after the date of the contract, when for the first time the artesian wells which were the source of supply began to fail. If there was any assertion or prediction by the defendant's agents that the wells would always yield as abundantly as they were then yielding, this was but an expression of opinion upon a matter as to which plaintiff was as fully informed as they were. What effect this finding is to have will be further considered, but the finding itself cannot be set aside for lack of evidence to support it.

There is also evidence sufficient to justify that portion of the fifth finding wherein it is found that the plaintiff had no knowledge of the title to said lands or the amount of water represented by said stock, except as he was informed of the same by the defendant, and that the purchase was induced by the representations. The plaintiff testifies to these facts, and his evidence is

sufficient to sustain the findings. Indeed, the argument of appellant in support of his specification against this finding is not that the plaintiff had actual knowledge as to the title and water when he entered into the contract, but that his ignorance was inexcusable. It is true, as contended by appellant, that all the information it had as to its title was contained in acts of congress and public records of the courts and land department, and that the plaintiff, by exploring these sources of information, might have learned all that it knew; but this is quite consistent with the fact found that he was actually ignorant of the state of the title, and relied upon the representations of the defendant. As to the water, his ignorance of the facts is of no consequence, since, as has been seen, no representations were made that were not true.

The seventh finding, as to the fact that plaintiff made all his improvements on the land before he had any actual knowledge of the defect in the title, is also supported by the evidence, and there is sufficient evidence to sustain the finding that the land was enhanced in value by plaintiff's improvements to the extent of \$6,250. The evidence was that the improvements, consisting of dwelling, outhouses, flume, and fruit trees, all suitable to the character of the premises, had been appraised at that sum by appraisers agreed upon by the parties, and, while it is true that it does not necessarily follow that the value of the land was enhanced in the same amount as the value of the improvements, the inference was one which, in the absence of other evidence, the court might fairly draw. The evidence, in other words, was sufficient *prima facie* to sustain the conclusion. A further objection made by appellant to this finding is that the evidence which supports it was absolutely inadmissible, not only because it was irrelevant, but because the plaintiff was not entitled to recover the value of the improvements. It has been said by this court in one or two cases that the vendee of land going into possession under his contract of purchase, and upon representations of the vendor that he has the title, may, upon failure of the title, recover the value of improvements made *bona fide* while in possession. *Gates v. McLean*, 70 Cal. 50, 11 Pac. 489; *Worley v. Nethercott*, 91 Cal. 517, 27 Pac. 767. It is contended that the expressions upon this point in those cases were mere dicta, and it may be doubted whether the doctrine is authoritatively settled in this state; but in this case we cannot decide the question, and it would be a waste of time to consider it. It was purely and simply a conclusion of law that the plaintiff was entitled to recover the value of his improvements, and upon this appeal the conclusions of law are not reviewable.

The ninth finding is to the effect that the plaintiff has regularly paid all taxes, as-

sessments, and water rates that have been levied or assessed upon said land and improvements for the period of five years from the execution of the contract, etc. This finding, according to its literal terms, is fully supported by the evidence; but more than five years elapsed after the execution of the contract before the levying of the assessment on the water stock sold to plaintiff along with the land, and defendant claims that the refusal of plaintiff to pay that assessment was a breach of his contract. This contention the superior court disposed of in its conclusions of law, where it was held that plaintiff was not liable under his contract for that assessment. Whether this conclusion was correct may call for further consideration, but the finding here in question has no reference to that assessment, and as to other taxes, etc., it is correct.

The tenth and eleventh findings of fact set forth the chain of defendant's title to the land, and the latter concludes as follows: "That defendant's (Pomona Land and Water Company's) only right or title to said lands is that derived under the chain of title above set forth, considered in connection with such remedial legislation as may be found in any act of congress applicable to the said chain of title; that by reason of the facts last hereinbefore set forth, as to the defective character of the title attempted to be conveyed to plaintiff, plaintiff has been greatly damaged." No part of these findings is called in question, except the last sentence above quoted, which embodies the conclusion that, by reason of the facts recited, the plaintiff has been greatly damaged. As to this the respondent contends that it is a misplaced conclusion of law, and cannot be reviewed on this appeal; but we agree with the appellant that it embraces a finding upon a vital issue of fact, *viz.* whether there was such a defect in the title as justified the plaintiff in rescinding the contract of sale at the time and under the circumstances of the alleged rescission. The finding was material in no other aspect, and in that aspect it was material; for it could not be established either as a conclusion of fact or of law that the contract had been rescinded for failure of title to the land without a finding that the title was so defective that the plaintiff could not be required to accept it. As to this matter, it may be conceded that the title which the defendant had on the 14th of January, 1894,—the date at which its conveyance was due,—was not such a title as the plaintiff was bound to accept. The defect, it is true, was curable under the act of 1887; but it had not been cured, and the defendant never, down to the trial of the action, had been able to cure it under that act, for the reason, apparently, that the land office would not receive its proofs of citizenship and *bona fide* purchase until the patent to the railroad

company had been vacated, and the suit to vacate the patent was still undecided. If, therefore, the plaintiff had elected to rescind at that time, his right so to do would probably have been clear. But he did not elect to rescind at that time. Instead of rescinding, he accepted the promise of the defendant to cure the defect in its title, and rested upon it for two years and a half before taking any further action. For this, of course, he was in no wise to blame. He had a right to accept and rely upon the promise of defendant to perfect its title, and in the meantime to hold his right of rescission in reserve, to be exercised when, after a reasonable opportunity so to do, the defendant had failed or refused to redeem its promise; for while it is true that the right to rescind must be exercised promptly and is lost by delay, it is equally true that it does not lie in the mouth of a delinquent party to object to a delay which has been granted at his instance in order to enable him to perform an agreement which he is unable to perform at the time stipulated. On the other hand, it seems to follow that when, in consequence of some promise of the delinquent party, rescission has been delayed beyond the proper time, the right to rescind will not be revived until a reasonable opportunity has been afforded for compliance with such promise, unless it is by its terms to be performed within a certain time. And so the real question to be decided in this connection, and the main question in the case, is whether the defendant did unreasonably delay the proceedings to perfect its title.

The actual delay was no doubt unusual in the matter of perfecting a title, but whether it was unreasonable or injurious to the plaintiff depends upon the ability of the defendant to proceed, and the situation in which the plaintiff was left pending the delay. As to this it seems to be conceded that the defendant was prevented from making its proofs under the act of 1887 by a regulation of the land department that such proofs would not be received in any case until the patent to the railroad company had been canceled, and the patent embracing this particular land had not been canceled at the date of the alleged rescission. As to the terms of the regulation respecting the time of making these proofs, there is no direct evidence in the record, but, since the act of congress authorized the department to make rules on the subject, we must take judicial notice of such rules as were made, and, since the statement of counsel for appellant as to the substance of the regulation is not controverted by the respondent, we assume the fact to be as above stated. The defendant, therefore, not being a party to the suit involving the patent to this section, and having no power to expedite a decision,—if, indeed, any person could have brought the litigation to an earlier conclusion,—cannot be blamed for failing to procure

a patent under the act of 1887, prior to the attempted rescission. But another and a more liberal act of congress was passed in March, 1896, under which, as plaintiff contends, the defendant might have proceeded without delay to get its patent, and he justifies his determination to rescind in August, 1896, upon the ground that the defendant had taken no steps under the later act. It does not appear, however, that either of the parties was advised at that time that the obtaining of a patent in this case could be hastened by a proceeding under the new law, and there is no evidence of any request or suggestion from the plaintiff that the defendant should take any different course from that previously agreed upon, viz. that it should keep track of the proceeding in court, and make its proofs, under the act of 1887, as soon as notice should be given that the land office was ready to receive them. We think that, if plaintiff desired a different or more expeditious procedure, he should have notified defendant, and given it a reasonable opportunity to conform to his wishes, before declaring a rescission of the contract on this ground. As to any injury to plaintiff occasioned by the delay, the record is silent. There is no evidence that he was damaged in any way. He was living upon the land. He was practically certain of securing the title in due course of proceedings under the law, and secure against any disturbance of his possession meanwhile. It is true, as suggested, that he might not have been able to sell the property so readily as he would have been if the title had been perfected; but there is no evidence that he desired to sell, and in a case of this complexion, in which the incidents of rescission have been complicated by the taking of possession and the making of improvements, we think something more is required to justify the course taken by plaintiff than the mere speculative injury involved in the surmise that the state of the title might have prevented a sale if he had desired to sell. Our conclusion upon this point is that the defect in the title to the land was not such a damage to plaintiff as to justify a rescission at the time plaintiff undertook to exercise the right, and that the finding of such damage is not sustained by the evidence.

As this finding is the principal basis of the conclusions and decree of the superior court, it is perhaps not strictly necessary that we should notice other points discussed by counsel, but we will briefly state our conclusions upon one or two propositions affecting the rights of the parties.

We think there is no foundation for any charge of fraudulent representations inducing the execution of this contract. The representations as to the water were true, and that respecting the title was based upon a state of facts which at the time fully justified the claim of a perfect title. Besides, if the plaintiff intended to rely upon misrepresentation as to the title, he should have re-

scinded as soon as he discovered the fact, and, since he did not then rescind, he waived the right to do so to the same extent at least that he waived his right to rescind for the actual defect of title of which he complains. Whether or not, in the final adjustment of this controversy, it may be held that the plaintiff can claim or recoup damages for any actual failure of the supply of water which his stock purported to represent,—a point as to which we express no opinion,—it is certain that the failure which occurred was not a cause for rescission. If this part of the consideration for plaintiff's obligation failed in any degree, the failure was due to no fault of the defendant, and so was not a ground of rescission. Civ. Code, § 1689, subd. 2.

As to the assessment levied upon the stock of the Del Monte Irrigation Company in August, 1896, we think, by a fair construction of the contract, it was payable by the plaintiff. He agreed, in consideration of the right to occupy the land pending the fulfillment of the contract, to "pay and discharge all taxes, assessments, and water rates" that might be levied or assessed "on the premises." The stock was sold with the land under a rule apportioning 10 shares of stock to each acre of land, and they were so inseparably related under the contract that an assessment upon the stock to carry out the purposes of the irrigation company was, within the meaning of the contract, a water rate assessed upon the premises. The order denying a new trial is reversed.

We concur: McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

(131 Cal. 561)

EATON v. NORRIS et al. (Sac. 699.)

(Supreme Court of California. Feb. 12, 1901.)
PUBLIC MINERAL LAND—LOCATION—MARKING
BOUNDARY ON GROUND.

Two adjoining mining claims were each marked at the corners by four stakes about a foot and a half long, flattened on two sides, and driven into the ground about four inches; two stakes being at the ends of the dividing line common to both claims; some stakes being in the brush, and others in the open ground. In the middle of the dividing line was a tree blazed on both sides, on one of which the notices of location were posted, describing the claims by courses and distances, running from the tree to a stake, and from stake to stake to point of beginning. The ledge on each claim had been sufficiently developed to show its existence and direction. *Held*, that the location sufficiently complied with Rev. St. U. S. tit. 32, c. 6, § 2324, requiring that a location must be distinctly marked on the ground, so that its boundaries can be readily traced.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by J. R. Eaton against T. R. Norris and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Warren & Taylor, for appellants. Gillis & Tapscott, for respondent.

SMITH, C. An appeal from a judgment against the defendants and from an order denying a new trial. The suit was to quiet title to two mining claims particularly described, and known as the Luella quartz-mining claim and the Extension of the same. The former claim was located January 1, 1896, by the plaintiff; the latter by his wife, who conveyed to him prior to the beginning of the suit, he conveying to her an undivided half of his original claim. The defendants claim under a later location, of date January 15, 1898; and their location, being subsequent to the act of March 27, 1897, "prescribing the manner of locating mining claims" (St. 1897, p. 214), must depend for its validity on compliance with the provisions of that act, with which the court found they failed to comply. As conclusions of law the court found that the defendants' location was void, and that the plaintiff, being in possession, was entitled to judgment against them as mere trespassers. It is now urged by the appellants that their location was valid, and the findings to the contrary unsupported by the evidence. But the first question to be determined is as to the validity of the plaintiff's location; for, if this was valid, the claims were not open to location by the defendants. The plaintiff's locations, being anterior to the act of March 27, 1897, and there being in this case no local usage or customs, must be governed, with regard to their validity, exclusively by the provisions of chapter 6 of title 32 of the Revised Statutes of the United States, and especially by those of section 2324 (Rev. St. p. 426); the sole requirement of which is that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." The court finds specifically how the locations were in fact marked on the ground, but does not find in words that the marks found were such that the boundaries could "be readily traced"; and it is objected that, in the absence of such a finding, the judgment cannot be sustained. It is, no doubt, true that the ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or—to use the language of the statute—of such a character that the boundaries can be readily traced; and that it is for the jury, or court sitting as a jury, to determine whether this has been effected. 1 Lindl. Mines, p. 483, § 373; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594; Anderson v. Black, 70 Cal. 230, 11 Pac. 700. But where specific facts are found, "from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as the finding of the ultimate fact." Hence, if the marks of location as found by the court are of such a character that it is evident that the boundaries can be readily traced, the finding will be sufficient; and in such a case, if there be, in addition to the special findings, a general finding to the contrary, the findings will be set aside as conflicting,—as was

in fact done in a case involving the validity of mining locations, where it was found that "said locations were not distinctly marked on the ground, so that their boundaries could be readily traced." *Howeth v. Sullenger*, 113 Cal. 549, 45 Pac. 841. The question to be considered, therefore, is whether in this case the marking of the location as found was sufficient. And in considering this question it will be observed we are not confined to the monuments placed at the corners of the claim at the inception of the location for the purpose of marking it, but may consider also all other objects placed on the ground, either then or subsequently, prior to the defendants' location, either for the purpose of serving as monuments or otherwise; for all that the statute requires is that the claims be marked distinctly on the ground, without regard to the mode.

The two claims of the plaintiff, it appears from the findings, adjoin each other; the Extension being north of the Luella claim. They were each marked at the corners by four oak stakes, about a foot and a half in length, flattened on two sides, and driven into the ground four or five inches; two of the stakes being at the ends of the dividing line, and common to both claims. Some of the stakes were in the brush, others in the open ground. In the middle of the dividing line was an oak tree, blazed by the plaintiff on two sides, on which the notices of location were posted. In these the two claims were described respectively by courses and distances, running from the tree to a stake, and from stake to stake to the point of beginning. The quartz ledge had been previously discovered, and work had been done in developing it on both claims. The plaintiff also opened up and uncovered the ledge a considerable distance from the tree each way. Subsequently the ledge was further developed by three different cuts sunk deep in the rock, aggregating together over 80 feet in length. A house was built on the Luella claim, near the common boundary of the two claims, in which the plaintiff's men were living. This, I think, was sufficient, under the most stringent construction of the law (*Southern Cross Gold & Silver Min. Co. v. Europe Min. Co.*, 15 Nev. 383); and, indeed, the case seems to come directly within the authority of *Howeth v. Sullenger*, 113 Cal. 548, 45 Pac. 841, cited *supra*. Stakes driven in the ground are, in the absence of convenient natural objects, the most common means of marking a tract of land, and "the most certain means of identification." *Hammer v. Milling Co.*, 130 U. S. 299, 9 Sup. Ct. 531, 32 L. Ed. 907; 1 *Lindl. Mines*, p. 483, § 373. It may be that the marking of the claim by substantial stakes at four corners will not be of itself sufficient (*Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594), but here it is found that some of the stakes were in the open ground, and, as the ledge had been

sufficiently developed to show its existence and direction, the boundaries of the claim could be readily traced from these. Both claims were also marked by the blazed oak, and from that alone the boundaries as given in the notice could be readily traced. The posted notices, it is said, cannot be substituted for the marking, but they "may be an aid in determining the situs of the monuments." 1 *Lindl. Mines*, p. 483, § 373. They therefore constitute a part of the marking, as does every other object placed on the ground for the purpose of marking it or otherwise, if it in fact does help to mark it. It may, indeed, on account of its temporary nature, be, in general, of minor significance; but this is not so where the location is followed by the actual and continued working of the claim. *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 7 Sawy. 110, 11 Fed. 666. I think, therefore, that the plaintiff's location was good, and the findings sufficient.

This conclusion is also, in some degree, supported by other findings of the court, which are "that defendants were knowing to the above facts, and recognized the existence of said claims, but claimed that a sufficient amount of assessment work had not been performed by the plaintiff"; and that one of them "had been watching the plaintiff during the summer of 1897, to see if he did the required amount of assessment work on his claims." It appears, therefore, that the location was at least sufficient to satisfy the defendants, who alone are adversely interested, and that it thus effected the full purpose contemplated by the act. I advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; GRAY, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(131 Cal. 547)

KERN COUNTY v. FAY et al. (L. A. 795.)
(Supreme Court of California. Feb. 12, 1901.)

PLEADING—DEMURRER—STIPULATED FACTS—
DISTRICT ATTORNEY'S FEES—STATUTES.

1. Where a complaint alleges substantially the same facts as are later contained in a stipulation of facts of the parties on which judgment was rendered, a demurrer to the complaint was properly overruled.

2. Under St. 1893, p. 346, § 197, providing that the district attorney of K. county shall receive, as compensation for his services, a fixed annual salary; and section 216, prescribing that such salary shall be in full compensation for all services of every kind rendered by him as such officer,—such attorney, holding office from 1895 to 1899, was not entitled to the fee of \$10 for each suit of foreclosure against delinquent purchasers of school lands, authorized by Pol. Code, § 3553, passed in 1873, in addition to his salary, since the money was collected by him in his official capacity.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by the county of Kern against Alvin Fay and others. From a judgment in favor of the plaintiff, defendants appeal. Affirmed.

Alvin Fay, for appellants. J. W. Ahern and S. C. Smith, for respondent.

VAN DYKE, J. The defendant Fay was the district attorney of Kern county from the first Monday of January, 1895, to the first Monday of January, 1899, and the other defendants were sureties on his official bond, as required by law. The action is to recover the sum of \$630, moneys alleged to have been collected by the defendant Fay as such district attorney, and to have been unlawfully retained by him. After a demurrer of the defendant Fay to the complaint had been overruled, he filed an answer containing a general denial of the allegations in plaintiff's complaint. For the purpose of the trial, the facts were stipulated and findings waived. The appeal is taken from the judgment entered in favor of the plaintiff on said stipulated facts. Two questions are presented by appellants on the appeal: First, it is contended that the court erred in overruling the demurrer to the complaint; second, that the evidence in said cause is insufficient to justify the decision rendered. As the complaint sets forth and alleges substantially the same facts as contained in the stipulation of the parties, the demurrer was properly overruled, if the stipulated facts are sufficient to sustain the judgment. Really, therefore, there is only one question presented, and that is whether the defendant Fay is entitled to retain the money collected by him in his official capacity as district attorney. The money in question was collected and received by defendant Fay as district attorney of Kern county, as costs taxed in suits to the number of 63 brought in the superior court of Kern county for the foreclosure of certificates of purchase of state school lands situate in said county. The register of the state land office furnished said Fay a statement embracing school lands in Kern county sold by the state upon which payments were then due and had not been paid. The said delinquents failing to make payment, said actions of foreclosure were commenced and prosecuted, and decrees rendered annulling the certificates of purchase of said lands and for costs. Said defendant thereupon presented a claim to the state board of examiners, which was allowed, in the sum of \$4,053.04, costs and expenses incurred in the prosecution of said suits. This sum included an allowance as attorney's fee of \$10 in each of said actions, amounting, as stated, to \$630, which said defendant failed and refused to turn over with the other costs and expenses so collected.

In retaining the money in question so collected, the appellant Fay relies upon section 3553 of the Political Code, which reads as fol-

lows: "The district attorney is entitled to receive ten dollars for each suit brought, to be taxed as costs." This section is found in the article of said Code entitled "Proceedings against Delinquent Purchasers." Sections 3546-3556. The Codes went into effect the 1st of January, 1873. Some of the sections in the article in question have been amended since, but such amendments do not affect the question under consideration. In the earlier history of the state, it seems to have been the policy of the law to compensate county officials mostly, and in many cases entirely, by fees collected for the work performed. Sheriffs collected and kept the mileage earned in civil cases, and the counties paid them mileage in criminal cases. County clerks collected and retained fees for each instrument filed, each notice given, and each record or copy made. The same was true of recorders, auditors, and to some extent district attorneys. By the constitution of 1879 it was intended to make an entire change in the mode of compensating such officers for their services, and to abolish the fee system. The legislature is required by general uniform laws to provide for the election and appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other officers as public convenience may require. "It shall regulate the compensation of all such officers, in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession." Const. art. 11, § 5. To carry out this mandate of the constitution, the legislature, in 1883, passed a county government act. St. 1883, p. 209. This act revised the whole subject of the duties of county officers, and provides for classifying the different counties by population for the purpose of regulating compensation. Generally speaking, the manner of compensating officers is completely changed. Fees collected go to the treasury, and officers get flat salaries. It contains some 40-odd classes. The opening paragraph of each section, at the beginning of each class, reads something like this: "In counties of the — class the county officers shall receive as compensation for their services required by law, or by virtue of their office, the following salaries, to wit." Several county government acts have been passed since the first, in 1883. Defendant Fay was acting as district attorney under the act passed in 1893. St. 1893, p. 346. This contains a classification of counties, as did the former acts on the same subject, and the county of Kern belongs to the thirty-fifth class. "In counties of the thirty-fifth class, the county officers shall receive as compensation for the services required of them by law the following salaries, to wit." Section 197.

Then follows a list of the county officers of said class, with their respective salaries, and to the district attorneys a salary of \$2,000 per annum. Section 216 reads: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers, or ex officio officers; their deputies, and assistants, unless in this act otherwise provided."

As to the office of district attorney, it is nowhere otherwise provided in said act. On the other hand, in the section defining the duties of the district attorney, it is declared that he must "on the first Monday of each month file, with the auditor, an account, verified by his oath, of all moneys received by him in his official capacity during the preceding month, and at the same time pay them over to the county treasurer." County Government Act 1893, § 136 (St. 1893, p. 380). It would seem quite clear that under the provisions of the county government act of 1893 the district attorney is not permitted to retain for his own use any moneys collected by him in his official capacity; that the salary prescribed by said act is intended to compensate said officer in full for all services rendered by him. Changing the rule for compensating the district attorney so that he may not retain any fees collected to his own use does not necessarily repeal section 3553 of the Political Code in reference to the costs, including an attorney's fee, collectible in suits of the character that were prosecuted in this case. It would be immaterial, however, whether that section were repealed or not. The money in this case was collected by appellant Fay in his official capacity as district attorney, and he cannot now be heard to say that it was paid to him illegally, and that he therefore has a right to retain it. *People v. Hamilton*, 103 Cal. 488, 37 Pac. 627; *McKee v. Monterey Co.*, 51 Cal. 275; *People v. Bunker*, 70 Cal. 212, 11 Pac. 703. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(19 Okl. 747)

BAYLESS v. McFARLAND.

(Supreme Court of Oklahoma. Jan. 9, 1901.)
REPLEVIN—AFFIDAVIT—AMENDMENT—CONDITIONS—DISMISSAL.

Where, after the granting of a new trial, a party asks leave of court to amend the affidavit in replevin, and leave is granted by the court on condition (1) that the same be made within 10 days, and (2) that the plaintiff pay all costs in this action to this date within 10 days, the conditions only apply to the right to amend; and, if the party fails to comply with the conditions, he only forfeits his right to amend, and in such event the pleadings in the case remain precisely in the same condition they were before the leave to amend was granted; and, if such pleadings properly present a case, the court should hear and determine the same on the merits, and it is error for the court to make an order dismissing the

case for a failure to comply with the conditions attached to the leave to amend.

(Syllabus by the Court.)

Error from district court, Kay county; before Justice Bayard T. Hainer.

Action by Florence Bayless against Robert McFarland. Judgment for defendant, and plaintiff brings error. Reversed.

This was an action of replevin, commenced on February 3, 1898, by the plaintiff in error against the defendant in error, before a justice of the peace in Owen township, Kay county, Okla., by filing in said court an affidavit in replevin for the recovery of certain calves therein described, and by the filing in said justice's court of a certain replevin bond, which was approved by the said justice, whereupon the said justice issued a replevin writ, which was served upon the defendant, and the defendant then gave a forthcoming bond, as required by statute, and retained said property in his possession; and afterwards, on the 4th day of February, 1898, the defendant executed and delivered to the constable a redelivery bond, as provided by statute. Afterwards, to wit, on February 7, 1898, the defendant came into court, and moved the court to dismiss the cause on the grounds that the replevin affidavit was not according to statute, which motion was by the court overruled. Afterwards, to wit, on the said 7th day of February, 1898, the defendant filed his answer to plaintiff's petition, admitting that the plaintiff is the owner of said property, but alleging in himself a superior lien by reason of the fact that such calves were found trespassing upon defendant's premises, and that he took them up as estrays, and holds a lien superior to that of plaintiff for expense of taking up and keeping in the sum of \$5, and damages of trespassing and to fencing \$2, and for posting six notices \$1.80, making a total of \$8.80; and prays judgment for same. On the same day plaintiff asked leave of court to file amended replevin affidavit, which was by the court denied; and plaintiff also asked leave of the court to file a bill of particulars, which was denied by the court. Testimony was then taken in the case, and the court rendered judgment in favor of the plaintiff, from which judgment the defendant appealed to the district court, and filed his bond and the transcript of the proceedings in justice's court with the clerk of the district court. On the 2d day of February, 1898, being one of the regular days of the February term of the district court, defendant came into court, and filed his motion to dismiss the action for the reasons: (1) That no bill of particulars was filed at the commencement of this action; and (2) that there was no allegation of demand having been made on defendant prior to the issuing of summons; and (3) that no affidavit of replevin was filed prior to the issuing of summons,—which motion was overruled by the court, to which defendant excepts. Leave was then given plaintiff to amend affidavit in

replevin and bill of particulars. Leave was then given defendant to answer instanter. Trial was set before a jury, March 8, 1898. On February 25, 1898, defendant filed his answer to amended bill of particulars of plaintiff. Said answer (1) denied all the allegations of said bill of particulars; (2) set up a counterclaim of \$12 for damages for the trespass of said calves and for the expense of taking up and keeping the same, and asked judgment against plaintiff for this amount. On September 5, 1898, defendant filed motion to dismiss because no affidavit was made and filed before summons was issued; and on September 6, 1898, the court sustained said motion, and dismissed said cause; to which plaintiff excepted. On September 9, 1898, plaintiff filed a motion for a new trial, which motion was by the court sustained, and a new trial granted. Thereupon the plaintiff asked leave to amend his affidavit in replevin, which leave was granted by the court on the following conditions: "(1) That the same be made within 10 days from this 4th day of November, 1898; and (2) that the plaintiff pay all costs in this action to this date within 10 days, and it is ordered plaintiff's case stand continued; to which defendant objects and excepts." On February 20, 1899, being one of the regular days of the February term, 1899, of the district court of Kay county, this cause coming on to be heard on the regular call of the trial docket, the court made the following order: "It being shown to the court that the plaintiff has failed to comply with the order of the court heretofore, on, to wit, the 4th day of November, 1898, made in this cause, the court finds plaintiff's cause should be dismissed;" and thereupon the court dismissed the case at the cost of the plaintiff; to which order of dismissal and taxing of the costs to plaintiff, plaintiff objected and excepted, and brings the case here for review.

Tetrick & Rose, for plaintiff in error.
James B. Diggs, for defendant in error.

IRWIN, J. (after stating the facts). In this case there were two assignments of error, but they may both very properly be considered as one, to wit: Was the order of the court dismissing the case for failure to comply with the conditions attached to the order allowing the plaintiff to amend the affidavit in replevin reversible error? Now, there can be no doubt that under our statute the court, in granting leave to amend any pleading in the case, has the right to impose any reasonable terms and conditions. In the case at bar the conditions imposed on the plaintiff were: (1) That the amendment should be made within 10 days; (2) that the plaintiff should pay all costs to date within 10 days,—both of which conditions, under ordinary circumstances, would be reasonable, and we see no reason why such terms should not be considered reasonable in this case. But these conditions apply only to plaintiff's right to

amend the affidavit in replevin; in other words, his right to amend was dependent upon this condition precedent, namely, that he should amend within 10 days. Now, what, by reasonable construction of the language of the order, would be the consequences in case of a failure on the part of the plaintiff to comply with these conditions? The answer must be that he would forfeit his right to amend. Now, the plaintiff, having failed to comply with these conditions, lost the benefit of the order of court allowing him to amend his affidavit in replevin. The result was that the pleadings in the case were left in precisely the same condition that they were before the leave to amend was granted. Now, what was the condition of the pleadings as they stood before the conditional leave to amend was granted? A new trial had been granted by the court unconditionally, and the case stood precisely as though no decision had been rendered in the case. Now, it might be said that, as the case was once dismissed by the court on the motion of the defendant for the reason that no affidavit was filed prior to the issuing of summons in the case, when the pleadings were restored in their original condition by defendant's failure to comply with the conditions attached to his leave to amend, the same order should be made, and the case again dismissed; but it will be observed that, to make such action proper, the record should show that the motion to dismiss on such grounds should have been renewed by the defendant. The fact that the court granted a new trial in the case without attaching any conditions thereto would indicate that there was, in his judgment, something wrong with the original decision. It is apparent, from an examination of the record, that the court did not dismiss the case on any motion of the defendant, or for any defects in plaintiff's pleadings; but solely upon the grounds that the plaintiff had failed to comply with the order of the court heretofore made in the case. This, we think, was error, for which the case should be reversed. For reasons heretofore given, this case is reversed, and remanded to the district court, with orders that the case be reinstated, and for such action as will carry out the idea expressed in this opinion. All the justices concurring, except Justice HAINER, who, having tried the case in the court below, took no part in this opinion.

(10 Okl. 595)

PERKINS v. TERRITORY.¹

(Supreme Court of Oklahoma. Sept. 5, 1900.)

CRIMINAL LAW—APPEAL—REVIEW—MURDER—INDICTMENT.

1. When the ruling of the trial court is upon matters resting within his discretion, and when

¹ Rehearing denied January 3, 1901.

the ruling calls for the exercise of sound discretion on the part of the trial judge, this court will not disturb the findings, unless it is apparent from the record that there has been a clear abuse of discretion.

2. If the charge in the indictment is substantially in the language of the statute, it is sufficient, and the language used should receive its common and ordinarily accepted meaning.

(Syllabus by the Court.)

Appeal from district court, Pottawatomie county; before Justice B. F. Burwell.

W. P. Perkins was convicted of murder, and brings error. Affirmed.

The plaintiff in error was indicted in the district court of Pottawatomie county on the 11th day of April, 1898, charged with the murder of one John Blackwell in Pottawatomie county on February 22, 1898. The plaintiff was arraigned on the 12th day of April, 1898, and he filed his demurrer thereto on April 5, 1899, and same was by the court overruled, and the plaintiff at the time excepted, and the court set the case down for trial on May 11, 1899. On May 12, 1899, plaintiff filed his motion for a continuance for the term on account of the absence of testimony, and the court overruled said application for a continuance for the term, but postponed the trial of same until May 18, 1899. On the 18th day of May, 1899, the case was called for trial, and over the objection of plaintiff the court placed the plaintiff on trial. The jury was examined and sworn, and the court, discovering that the plaintiff had not pleaded to the indictment, ordered a plea entered of not guilty, and had the jury resworn, overruled the plaintiff's second motion for a continuance, to which plaintiff excepted, and on May 27, 1899, the jury returned their verdict, finding the plaintiff guilty of manslaughter in the second degree. On August 1, 1899, the court overruled the plaintiff's motion for a new trial, to which plaintiff excepted, and sentenced the plaintiff to imprisonment in the territorial prison for a period of three years. The defendant below, plaintiff here, has appealed to this court.

G. A. Outcalt, L. G. Pitman, and B. B. Blakeney, for appellant. J. C. Strang, Atty. Gen., and Keaton & Kearful, for the Territory.

IRWIN, J. (after stating the facts). The first contention of plaintiff in error is that the court erred in putting the defendant on trial for the crime of murder, for the reason that the indictment did not charge murder under the statutes of Oklahoma, and that the court erred in excusing jurors on account of conscientious scruples against capital punishment, and in overruling defendant's motion for a new trial on the grounds stated above. And in support of this position the counsel for plaintiff in error cite the court to the cases of *Jewell v. Territory*, 4 Okl. 53, 43 Pac. 1075, and *Holt v. Territory*, 4 Okl. 76, 43 Pac. 1083, and a number of other authorities. We think an examination of these cases will show that they are not analogous to the case

at bar, and that the language used or the meaning expressed in the indictments in those cases are in no way similar to the indictment in the case under consideration. In the *Jewell Case* the conviction was had under the first count of the indictment, and the remarks of the court are confined to that count; and in passing we would say that, had the verdict been a general one of guilty, instead of "guilty as charged in the first count of the indictment," the decision of the supreme court would, in our judgment, have been different, as we are strongly of the opinion that in the *Jewell Case* the third count of the indictment contains a sufficient charge of murder under our statute; but, as the verdict of the jury was based upon the first count, and the reasoning of the supreme court in that case was confined to the first count, there is no necessity of our going into or discussing other parts of the indictment. The charging part of this count of that indictment is as follows: "Oliver P. Jewell, late of the county of * * *, on the * * *, with force and arms * * * in and upon the body of one James McGuinn, in the peace of the territory then and there being, feloniously, willfully, premeditatedly, and of his malice aforethought did make an assault, and that the said Oliver P. Jewell, a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol, he, the said Oliver P. Jewell, in his right hand then and there held, and then and there feloniously, willfully, premeditatedly, and of his malice aforethought did discharge and shoot off to, against, and upon the said James McGuinn." Then follows the statement that with the same intent, and deliberation and malice, the said Jewell did strike, penetrate, and wound the said McGuinn. Then follows the description of the wound inflicted, and the allegation that of said wound the said McGuinn did die. Now, it will be observed that nowhere is it alleged in words or substance that the assault was committed with the premeditated design to effect the death of the deceased, or of any other person, which, by the terms of our statute, is a material and necessary allegation in the definition of murder when alleged to have been committed under the circumstances described in this indictment. And, as the supreme court well says: "In fact, it is nowhere alleged that the shooting complained of was with any intent to effect death, except in so far as the same may be inferred from the words, 'willfully, premeditatedly, and with malice aforethought,' and these elements might all occur in an aggravated assault." This count of the indictment was, we think, very properly held bad by the court, as we think there was nothing in the contention of the attorney general that this count should be held good under the definition of murder contained in section 2088, Okl. St., which provides that homicide is murder when perpetrated by an act imminently dangerous to others. It seems to us this position is untenable, for the reason that

the defendant must be convicted, if at all, as charged in the indictment, and the indictment in this case contained no language which could be construed as a violation of this section of the statute; and in the case of *Holt v. Territory*, above cited, the court says: "The indictment, stripped of the verbiage, simply charges that William Holt did, of his deliberate and premeditated malice, with intent to kill, assault William Fowler, and that he did unlawfully and of his deliberate and premeditated malice shoot, strike, and wound William Fowler, by which the grand jury conclude that the defendant did kill and murder William Fowler, with his (William Holt's) deliberate and premeditated malice." And in deciding the case the court uses this language in pointing out the defects in the indictment: "It charges an assault with premeditated intent to kill, which, as we have said, is equivalent to charging premeditated design to effect death; but it does not charge that the shooting was done, or that the striking, penetrating, or mortal wounding, or the killing of William Fowler was done or accomplished, with the design or intent to effect his death or kill him." Now, a consideration of the language of the indictment in the case at bar will show that it is in no way a parallel case with the *Jewell* or the *Holt* Case, and that it does not come within the objections on which those cases were reversed. The indictment in the case at bar contains this language in the charging part of the indictment, in addition to setting forth the means whereby the murder was committed: "W. P. Perkins did purposely, unlawfully, feloniously, and with malice aforethought, and with the premeditated design to effect the death of one John Blackwell, kill and murder him, the said John Blackwell." And it seems to us that this language clearly and in unmistakable terms meets the objections raised by the court in the case of *Jewell v. Territory*, and all the other cases cited, and makes the indictment in the case at bar a sufficient charge of murder, and sustains the trial court in excusing jurors for the reason set forth, and was also a sufficient reason for overruling the motion for a new trial on that ground. *Polson v. State*, 137 Ind. 519, 35 N. E. 907.

Counsel for plaintiff in error next insist that the trial court erred in overruling his two motions for a continuance, but, as a postponement of the trial from May 12th to 18th was granted on the first one, which was based on the absence of a large number of witnesses, most of whom subsequently attended, it is clear that the court committed no error by its ruling thereon. The second application is based on the absence of only two witnesses, to wit, Robert Rutherford and John Finley. The testimony of the latter, as given by him at the preliminary examination, was read in evidence on behalf of the defendant. In his first application for a continuance defendant refers to Finley's testimony given at the preliminary, and asks that it be

made a part of said application, for the purpose of showing "the materiality and the nature and character of same." It follows, therefore, that no error can be predicated on the overruling of defendant's second application for a continuance, so far as same relates to the testimony of Finley. The only remaining question to be considered, so far as defendant's application for a continuance is concerned, is whether or not the lower court committed prejudicial error in overruling same as to Rutherford. The basis of defendant's claim in this regard is stated at top of page 7 in his brief as follows: "The plaintiff [defendant] could not take their depositions, because he had not been permitted to plead in said action until about five minutes before he was placed on his trial." The record fails to bear out defendant's statement that he was not permitted to enter his plea at an earlier date, but, on the contrary, shows that he purposely avoided entering same, and that, when finally called upon by the court to do so, he stood mute. As bearing upon this question, we call attention to the following additional facts: The indictment was returned against defendant on April 11, 1898, and he was arraigned and given 24 hours to plead on April 12, 1898. He filed a demurrer to the indictment on April 13, 1898. His demurrer was withdrawn, and a motion to quash filed, heard and overruled on April 5, 1899,—nearly a year after the returning of the indictment. His demurrer was considered, refiled, presented, and overruled on the same date. The case was then set for trial on May 12, 1899, a day of the same term of court. This gave defendant ample time to have entered his plea, served notice, and taken the deposition of Rutherford at Foster P. O., Ind. T., where he was then located, according to defendant's affidavit. Under the provisions of our Code of Criminal Procedure the court is required to have a defendant against whom an indictment has been returned arraigned and given an opportunity to plead thereto. Okl. St. § 5090 et seq. Such defendant then, or at a future time, to be fixed by the court, must either demur to the indictment or enter his plea. Id. § 5117. There is no provision of our statute requiring the court again to arraign a defendant after his demurrer has been overruled, but it then becomes the duty of the defendant to enter his plea. Whether or not the defendant could waive the formal entering of an oral plea raising an issue of fact so as to render valid a subsequent conviction is not presented, but we hold that, when such defendant has been arraigned, and has his written pleadings challenging the sufficiency of the indictment overruled in ample time for him to have taken the deposition of a witness residing without the territory before the day set for trial, he cannot be heard to claim that he was prejudiced by reason of his failure to procure such deposition. A part of the testimony which defendant alleges Rutherford would have given is admitted by the wit-

nesses for the territory, and all of it, except one point, is merely corroborative of what was testified to by other witnesses for defendant. The only material point upon which, according to defendant's said affidavits for continuance, Rutherford's testimony would have been different from that of defendant and his other witnesses, is as to where he and defendant had started to go when they left defendant's saloon. In each of said affidavits we find the following statement: "That soon afterwards the said defendant and said Rutherford left their place of business to go into the dance that was being carried on in the building immediately east and next to the place of business of defendant." Defendant's testimony relative to the same matter is in part as follows: "I came back in the house, and took Bob Rutherford,—took hold of him,—and says, 'Bob, let's go home.' Where were you going when you was going in that easterly direction? I was taking Bob Rutherford home, and trying to * * *." Thus it is seen that, if Rutherford had been produced as a witness, and had testified as defendant stated he would in both applications for continuance, his testimony would have been in direct conflict with that of defendant himself on what defendant's counsel now claim was a very material point. In fact, Rutherford's testimony thereon would have certainly corroborated that given by several witnesses for the territory. In view of all the foregoing facts it is manifest that the trial court committed no error in overruling said applications for a continuance. 4 Enc. Pl. & Prac. 8; *People v. Thompson*, 4 Cal. 239; *State v. Brooks*, 4 Wash. 328, 30 Pac. 147.

Counsel for defendant below next insists that the court erred in admitting certain testimony on behalf of the territory showing the threatening language and conduct of defendant and said Robert Rutherford towards the deceased during the evening just prior to the homicide, and while they were together in defendant's saloon. This objection is specially directed to a portion of the testimony of R. M. Cantrell, detailing certain statements and demonstrations of Rutherford while not in the immediate presence of defendant. As counsel well states, "The court admitted this testimony on the theory of a conspiracy." Counsel then proceed to make the following remarkable statement, in view of the testimony, to wit: "No attempt was ever made by the prosecution to establish a conspiracy, and the court, in his instructions to the jury, entirely ignored the conspiracy theory." Whether or not "the court, in his instructions, * * * ignored the conspiracy theory," has no bearing upon the question, which is: Did the testimony on behalf of the territory show, or tend to show, such a joint or common purpose on the part of the defendant and Rutherford to provoke a quarrel with deceased, and therein take his life, or do him some serious bodily harm, as to

make the statements and conduct of the latter while in the saloon of and in company with the former, although (perhaps) not in his immediate presence and hearing, competent evidence against said defendant? On this proposition we invite special attention to the following excerpts from the testimony: Thomas E. Berry: "Q. What did Mr. Perkins and Mr. Rutherford say there when you were talking to them? A. The substance of it was that somebody—some person from Lexington—had insulted parties there, especially Mr. Rutherford, and that he could not do that; that anybody that come to Avoca, and call one of our people a son of a bitch, or something like that, could not do it and get away doing well, or something of that kind. Now, that is the substance of it. That is as near as I can remember it at this time. The Court: I want to know who used that language. Who was it that said that? A. They were both talking. Sometimes one was talking. I think I would be safe to say that perhaps both of them used substantially the same words. Q. What did you see Mr. Perkins have while you were in there the second time, if anything? A. One time—I do not remember now—they was behind the bar talking. Q. Who were behind the bar? A. Mr. Perkins and this Rutherford. And the remark was made by Mr. Perkins that, 'If they don't think I am ready for them, I will just show you,' and he picked up two or three pistols under the bar, and held them up. I don't remember whether he laid them on the bar or just held them in his hands. I prevailed with him that he didn't need them, and he laid them back. I didn't see whether he put any of them in his pocket. Anyhow, they was laid down. Q. What else did you see them do in connection with the pistols? What did they say, if anything, with reference to going into the dance hall? A. The principal talk was, they were going into the room where they were dancing, and they were going to dance anyhow. Q. By the Court: Mr. Berry, what do you mean by 'they'? A. Mr. Perkins and Mr. Rutherford together. Q. You mean they both told that? A. They were both talking together, and I saw them get out their money. One party got out so much, and the other one said, 'I have got' so much, 'and we will go in there, and we will dance; and if anybody prevents us, or anything, there will be trouble,' and all those things. Q. Was there anything said with reference to what they would do if they were prevented? A. There was a great deal said. There was a remark made that, if certain things was done and said, they would better have a spade ready for morning,—something like that. Q. Who said that? A. At one time I heard Perkins make a remark of that kind. Q. Which time was it that you heard Mr. Perkins say that? A. I won't say which time,—whether it was the first time or the last time I was in there before this difficulty occurred. When he said

it, the remark was made with the qualifications that, if certain parties done so and so, they would better have these things ready." John H. Hatfield: "Q. What occurred in there? A. When I went in there, Mr. Perkins and Rutherford seemed to be mad. Q. What were they doing or saying to indicate that they were angry? A. They stated that no Lexington sons of bitches could come and run Avoca. If they did, they would need their spades sharpened in the morning. Q. Who said that? A. I don't know which one of them said it. I could not say positive which one said it. Q. Where were these two parties when you went back in there? A. I think Mr. Perkins was behind the bar, and I think Mr. Rutherford was in front of it. I am not certain. Q. How close together were they? A. Some two or three feet." R. M. Cantrell: "Q. State what you heard between Mr. Berry and these parties there. The Court: Between Berry and Perkins and Rutherford. Were they all together? A. They were. They was talking about the trouble. The reason they had no better gatherings, and such as that was, on account of the disturbances; and were pleading for peace. Q. What did you hear Mr. Perkins and Mr. Rutherford say? A. I don't remember only what Rutherford said. Rutherford said more than Perkins about it. Q. What did you hear Rutherford say in the presence of Perkins? A. Why, Rutherford said that the Lexington boys come down to run over Avoca; and him and Pate could clean them up, I believe, was the words Rutherford used. Q. Now, state the language he used. A. That is something like it, only with an oath. Q. What was the oath? That is what I want. A. Well, it was, 'Damn Lexington sons of bitches,' I believe, is the way that he said it,—the way Rutherford spoke it, I think. Q. Where was he and Perkins at that time? A. In the saloon there. Q. Behind the bar, or in front of it? A. They was in front of the bar. Q. Both of them? A. Yes, sir. Q. What were they doing? A. They were just in there talking. Q. What did you hear Perkins say, now? A. He said that they could not do it, I believe. Q. Said who couldn't? A. Lexington boys. Q. Couldn't do what? A. Couldn't run over Avoca."

The foregoing is but a small portion of the testimony contained in the record of a similar character, but is entirely sufficient, especially when considered in connection with the undisputed facts that the defendant and Rutherford left the saloon of the former together, and armed with deadly weapons, shortly before the homicide, to show, or at least is of such a character as to have a strong tendency to show, a plot or conspiracy on the part of the defendant and Rutherford to provoke a deadly quarrel with deceased and his companion, one Joe Stewart. "Slight evidence of collusion is all that is required." 2 Rice, Cr. Ev. p. 365, § 333; 1

Greenl. Ev. (13th Ed.) § 111; Whart. Ev. (3d Ed.) § 1205; State v. Nash, 7 Iowa, 347; McKee v. State (Ind. Sup.) 12 N. E. 510; Anarchists' Case (Ill. Sup.) 12 N. E. 865.

It is next contended that counsel for plaintiff in error was not allowed by the court to go into detail, in cross-examination of the witness Hatfield, touching his relationship and friendly relations with the deceased. The court below held "that an admission by a witness that he was a friend to deceased or unfriendly to defendant was the extent of the inquiry." We think an examination of the record will show that the trial court permitted the defendant's counsel to examine on this branch of the case to the full extent permissible, and we fail to find anything in the rulings of the court in this particular that could have in any way prejudiced the rights of the defendant. This was a subject largely in the discretion of the trial court, and, unless the records show an abuse of this discretion, this court will not interfere. Stewart v. Kindel (Colo. Sup.) 25 Pac. 990; 1 Thomp. Trials, § 458.

The next contention of counsel, based on his twentieth assignment of error, is wholly without merit. The fact that the witness John H. Hatfield failed, at the preliminary examination, to testify concerning a material matter which he detailed at the trial, cannot be shown to impeach him. Before such omission would have become material, it must have been shown that the witness was "under such circumstances that he was called upon as a matter either of duty or interest to state the whole truth in regard to such transactions," and then the question of whether or not such fact may be shown is almost entirely a discretionary matter with the court. 10 Enc. Pl. & Prac. 299; Hyden v. State, 31 Tex. Cr. R. 404, 20 S. W. 764; Stevens v. Blake (Kan. App.) 48 Pac. 888.

The next contention in behalf of the plaintiff in error is based on the twenty-fourth assignment. It is only necessary to say that, when the impeaching questions were propounded to Dr. Wilson, he was testifying as a witness for the defendant; that he admitted making the statements to which his attention was called in his testimony at the preliminary; and that, under the rule applicable to the question in this territory, it was not abuse of discretion for the court to admit in evidence these previous statements for the purpose of impeaching the witness. 10 Enc. Pl. & Prac. 318, 319; Johnson v. Leggett, 28 Kan. 590; State v. Sorter, 52 Kan. 531, 34 Pac. 1036.

The next contention of counsel for plaintiff in error is that the court erred in refusing to permit him to give in evidence the statements which he claims to have made just before he and Rutherford started out of the saloon. The court's ruling is to the effect that these declarations were incompetent, and is undoubtedly correct. However, defendant's counsel succeeded in getting

them before the jury, and no motion was made to have them withdrawn; hence, in any event, this ruling could not have been prejudicial. But, as the question presented thereby is one which counsel claims this court has decided contrary to the ruling of the trial court, we have thought best to give our views of its merits. Much of the confusion and apparent contradictions to be found in the decided cases upon this question is due to the failure of some of the courts to properly determine the *res gestæ* of the particular cases before them. Upon this question Dr. Greenleaf says: "These surrounding circumstances constituting parts of the *res gestæ* may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." 1 Greenl. Ev. § 108. After a somewhat careful investigation of the subject, we venture the statement that the *res gestæ* of an action comprehends only the facts or transactions which constitute the triable issues therein, and, unless a declaration is contemporaneous with one of these main issues, and is so related thereto as to illustrate and explain the same, it cannot properly be considered a part of the *res gestæ*. Thus, in the case at bar, the *res gestæ* was the shooting and killing of John Blackwell by defendant. The declarations which defendant offered—in fact produced—in evidence were neither contemporaneous with, nor in any special manner related to, this transaction. They were "declarations made some time before the act, and stand alone by themselves"; hence were not competent. 21 Am. & Eng. Enc. Law, 100. It is well and concisely stated in *Edmunds v. Curtis*, 8 Colo. 605, 9 Pac. 793, that: "The transactions out of which an action for damages arose being the running away of a hired horse driven at the time by the defendant's agent, whereby the horse, wagon, etc., the property of the plaintiff, were injured, the foundation of the action was the agent's negligence in connection with the accident, and the runaway and accident were the *res gestæ*." "The declarations of a party, to be admissible as a part of the *res gestæ*, must be contemporaneous with, or at least so connected with, the main fact in issue as to constitute a part of the transaction, and thus derive credit from the main fact or act itself, to explain or characterize which it is offered in evidence." *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880. See, also, *Barber's*

Adm'r v. Bennett, 62 Vt. 50, 19 Atl. 978; *State v. Walker (Me.)* 1 Atl. 357. There are some exceptions (more apparent than real) to the general rule stated in the foregoing cases. The most important of these may be classed as follows: (1) Declarations of a party as to the character of its possession of personal property while exercising such possession where the ownership of the property is the main issue. (2) Declarations of a party (especially to a physician) concerning his bodily or mental feelings, sufferings, etc., where his physical condition at the time is a material issue. (3) Declarations of a party in possession of property alleged to have been stolen, made at the time of his apprehension, and tending to explain his said possession, where such possession is urged as one of the principal criminating circumstances. This exception covers the point decided in *Mitchell v. Territory*, 7 Okl. 527, 54 Pac. 782. There are undoubtedly some instances where the declarations of a party not immediately connected with the main or triable issue may properly be admitted as a part of the *res gestæ*. For instance, if the defendant and deceased in the case at bar had been participants in one or more personal difficulties or quarrels prior to the homicide, and an issue had been raised as to who was the responsible party therein, then we concede that the declarations of either party during one of these encounters, explanatory of his conduct while engaged therein, would have been competent as a part of the *res gestæ*. This is all that was decided in *Mack v. State*, 48 Wis. 271, 4 N. W. 449, and is certainly as far as the rule should be extended in cases of this character. There was another strong reason why the statements of defendant in that case were held to be admissible, to wit: "The state having opened the door to admit what was said by the parties on this occasion for the purpose of prejudicing the cause of the accused, the court could not justly close it against the full and complete statement of all the details of the conversation attending it." See, also, in this connection, 21 Am. & Eng. Enc. Law, 111-113. As already seen, "no inflexible rule as to the length of the interval between the act charged against the accused and the act or declaration of the complaining party can be formulated." *Id.* 113. But trial courts should be careful never to admit such testimony unless clearly within the rule. "In very many instances this evidence trenches closely upon the forbidden field of hearsay, and its admission should be carefully guarded. Courts are very conservative with reference thereto. The disposition is not to extend the rule beyond the landmarks clearly pointed out by early adjudicated cases." *Edmunds v. Curtis* (Colo. Sup.) 9 Pac. 793. "This court has felt the necessity of confining this exception to the general law of evidence to very narrow limits, in order to ex-

clude hearsay, and to prevent parties from making evidence for themselves; and, since parties have been permitted to testify, there is, perhaps, an additional reason why great strictness should be used in admitting as evidence the declarations of a party in his own favor when made in the absence of the other party." *Pickering v. City of Cambridge (Mass.)* 10 N. E. 827. "Declarations are sometimes admissible in evidence as part of the transaction when they qualify or give character to it. These declarations did neither. The fact of ill health and impaired bodily strength was the material fact, and that could not be proved by the unsworn statement of the plaintiff. Hearsay evidence, as a rule, is excluded, and the declarations and statements of the parties or of third persons are not received except under peculiar circumstances, and as a necessity. Statements made out of court, and without the sanction of an oath, are dangerous as evidence, and the rights of suitors ought not to be put in peril by them. The instances are few in which declarations and unsworn statements made out of court have been permitted to be given in evidence as proof of the facts sought to be established. Statements and representations of a sick person of the nature, symptoms, and effects of his malady have been received as original evidence, and especially when made to a medical attendant to enable him to minister to the patient. They have been regarded as competent, and entitled to weight. * * * There is good reason for their admission when made to the attending physician or surgeon, as upon them, in connection with the manifestations and symptoms of injury or disease, the opinion of the expert is based, and the treatment governed. But in every other case the admission of testimony so exceptional as a departure from the established rules of evidence must be referred to the necessities of the case, and the inability of the party to give evidence of a higher and more satisfactory nature. The general rule is that the best evidence of which the fact is susceptible must be adduced, and secondary or inferior evidence will not be received so long as the higher and better evidence can be had. The plaintiff was a competent witness to prove the state of his health at the time he handled the bags of clover seed and performed the other labor mentioned, and it was not necessary to resort to other and inferior evidence; and, so long as his sworn statements were admissible, his unsworn declarations should not have been received. * * * But by the amendment of the Code in 1869 (section 398) there is no longer a necessity for giving in evidence the declarations of a party, if he is living, and able to be sworn and examined as a witness; and, the reason of the rule ceasing, the rule itself, adopted with reluctance, and followed doubtfully and cautiously, should cease." *Reed v. Rail-*

road Co., 45 N. Y. 574; *Stone v. Bird*, 16 Kan. 488. In the case at bar defendant was permitted without objection to state his purpose in leaving the saloon with Rutherford. He says, "I was taking Bob Rutherford home." Here we have defendant's sworn statement as to where he was going. Then, in the language of the New York case, his unsworn declarations should not have been received.

The next contention for plaintiff in error, based on his twenty-seventh and twenty-eighth assignments, is wholly without merit or foundation in fact. Whether or not testimony for the purpose of impeaching the witness Wright by showing that he made the statements attributed to him in the questions propounded should have been admitted is immaterial, as such was not offered. That a trial court may properly permit a cross-examination, even on collateral matters, "for the purpose of disparaging or discrediting a witness," is too well settled to need further comment here. 8 Enc. Pl. & Prac. 118. The question propounded to this witness containing a statement which he denied, and upon which impeaching evidence was introduced, reads as follows: "Q. I will ask you if you didn't on that occasion, while here, in the presence of Oak Berry and F. W. Brady, on this street,—on Broadway,—right opposite this court house, on the other side of the street, say, 'Well, boys, Blackwell is dead, and nothing we can do can help him; so let's do the best we can to get Pate Perkins out,' or 'Pate out of it,' or if you used that language in substance?" This impeaching testimony tended to show a corrupt purpose on the part of the witness Wright not only to unduly favor defendant himself, but to induce other witnesses to do so, and was, therefore, clearly competent. 10 Enc. Pl. & Prac. 297.

The next contention of counsel for plaintiff in error which we regard as at all worthy of attention is based on his thirty-ninth and fortieth assignments, claiming that the court erred in sustaining an objection to the questions stated on page 20 of his brief, which reads as follows: "Q. What relation, if any, did you know at that time that John Hatfield had with deceased, John Blackwell?" This question is clearly incompetent, because indefinite as to the character of the relation mentioned, and calling for a conclusion which might have been based on actual knowledge, hearsay, suspicion, or almost anything else. The fortieth assignment is based on the fact that the court on objection of counsel for the territory did not permit defendant to state why he refused to go into the street with Hatfield. We call attention to the following question and answer, which we think answers this contention: "Q. Now, why didn't you go out into the street when John Hatfield spoke to you? A. Well, I had heard these threats,—heard of them,—and I didn't care to get mixed up with anything." The

only ground for complaint which counsel has is that the court refused to permit the defendant to answer the same question again. Furthermore, as to the ruling complained of by counsel in his thirty-ninth assignment of error, we call attention to the fact that defendant was subsequently permitted by the court to answer substantially the same question: "Q. Did you, at that time, and prior to the homicide, know of the relations between John Hatfield and Blackwell? A. I did. Q. Did you know the relation of friendship existing between John Blackwell and John Hatfield at the time and prior to this homicide? A. I did."

We think we have noticed and given our views on all the assignments of error urged by counsel for plaintiff in error, which have been seriously presented to the court. Necessarily, when the assignments are as numerous as in the present case, to wit, 58, it would be practically impossible to devote much time to each within the space of an ordinary opinion; but we have endeavored to get a clear comprehension of the points raised, and to give our views in regard to the same, and on a careful examination of the entire case as presented by the record we fail to find any substantial error, or any reason why the case should be reversed; hence the decision of the lower court will be affirmed. All of the justices concurring, except BURWELL, J., who, having presided in the court below, took no part in this decision.

(10 Okl. 105)

ALLEN et al. v. REED et al.

(Supreme Court of Oklahoma. Feb. 8, 1901.)

MANDAMUS-APPEAL-RES JUDICATA-CHANGE OF COUNTY SEAT-CONSTITUTIONAL LAW-TERRITORIAL LEGISLATURE-POWERS OF CONGRESS.

1. Under the authority provided by section 6 of the organic act, passed May 2, 1890, by which a territorial government was provided by congress, that "the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States," it is held that it was the purpose of congress to leave to the inhabitants of the territory all the powers of self-government consistent with the supremacy and supervision of national authority, that full power was given to the legislature over all ordinary subjects of legislation, and the local legislature was intrusted with the enactment of the entire system of municipal law, subject to the right of congress to revise, alter, and revoke the same, including the authority to enact a general election law providing for the change of county seats.

2. What are "rightful subjects of legislation" is determined by a long acquiescence in repeated acts of legislation on particular matters, and such acquiescence has been taken as evidence that the topics treated by such respective acts of legislation were properly within legislative control, and such acts will not be set aside or treated as invalid because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. And the legislative department, when not restrained by constitutional provisions and a regard for the fundamental

rights of the citizen, as provided in the organic act, has the power to act upon everything within the range of civil government.

3. The territories have been organized upon the theory that all the powers of self-government consistent with the supremacy and supervision of national authority should be left to the inhabitants of the territories themselves, and that the legislative department, when not restrained by constitutional provisions and express statutory enactment of congress, has the right to act upon everything within the range of civil government, and the powers thus organized by the territorial legislature are, with these exceptions, as extensive as those exercised by any state legislature.

4. By the act of congress of July 30, 1886, congress prohibited the legislatures of the various territories from enacting local or special legislation with respect to "locating or changing county seats." This provision was not a restraint upon the power of the territorial legislature to enact general legislation upon the subject of "locating or changing county seats," and since the organic act of this territory, enacted on May 2, 1890, provided that the legislature might legislate "upon all rightful subjects of legislation," authority was given thereby to the territorial legislature to enact chapter 23 of the Statutes of Oklahoma, first enacted on December 25, 1890, authorizing the people, by election, to change their county seats. The provision made by congress in the same act, that "the county seats indicated by this act [seven in number, which were then organized] may be changed in such manner as the territorial legislature may provide," was not intended as a restriction upon the authority given to the territorial legislature to enact legislation touching the change of county seats, but was a revocation to that extent of the limitations imposed upon territorial legislatures by the act of congress of July 30, 1886, and was intended to facilitate the change of the county seats of those counties, if the people of the respective counties should consider it necessary, by legislative enactment, without the special restraint imposed upon the legislature by the said act of congress, if the people should, by their legislature, see fit to avail themselves of that method of changing the county seats; that is, by legislative enactment, otherwise than by a general election law, which the legislature was authorized to enact under the provision of the organic act that it might legislate "upon all rightful subjects of legislation."

5. A general election law was passed by the legislature of the territory, and took effect December 25, 1890. Thereafter, by congressional enactment and proclamation of the president, the counties of the Cherokee Outlet, including Grant county, in question, were opened for settlement on September 16, 1893. An act of congress provided that the secretary of the interior, and the president, by his proclamation, should provide such rules and regulations for the "settlement and occupation" of the territory as were necessary, and should "reserve one-half section of land in each county for county seat purposes." Held, that the reservation of one-half section of land for county-seat purposes was not intended by congress to defeat the operation of the territorial law providing for an election for the "changing of county seats," which had then been in effect nearly three years, but that, by the provision of the organic act (section 1), that "whenever the president shall make proclamation thereof said territory shall thereupon, and without further legislation, become a part of the territory of Oklahoma," the counties of the Cherokee Outlet became subject to the whole body of territorial law then in force, including chapter 23 of the Statutes of 1890, providing for elections to be held in the respective counties for change of county seats.

6. Section 3 of the organic act makes it the duty of the secretary of the territory to transmit copies of the laws enacted by the legislative assembly within 30 days after the end of each session thereof to the president, secretary of the interior, and congress, and the general election law for the change of county seats having become effective December 25, 1890, and the president, secretary of the interior, and congress having been informed thereof, under the law, by the secretary of the territory, within 30 days thereafter, and since congress has not disapproved of that act, it will be enforced here as having received the implied sanction of congress. It has been upon the statute book for nine years. The simple disapproval by congress at any time would have annulled it. It is a reasonable inference, therefore, that it was approved by that body. We must regard it as of effective and conclusive force.

7. The right of the people to vote upon the change of county seats is a most important one. It is not reasonable to suppose that congress meant to revoke it by implication. We cannot approve of the inference that the people would be deprived of this right, and that congress meant to exhaust the subject of legislating upon the location and change of county seats by an act of congress which provided for the "settlement and occupation" of the country, and by "reserving" a half section of land for county-seat purposes. The act of congress authorizing the legislature of the territory to legislate "upon all rightful subjects of legislation" and the general election laws of the territory for the change of county seats cannot be set aside because a doubt may be suggested as to the competency of the legislature to pass them, or their effect after they have been passed.

8. The original act of locating county seats in land opened by the general government for "settlement and occupation," by reserving a half section of land for county-seat purposes, does not cover or include the subject of changing county seats. While congress may act upon one of these topics so far as to provide the people with public land upon which they may make a location for a county seat, yet such legislation does not exclude or hamper the people from enacting legislation of a general character upon the subject of subsequently changing the county seat located by them upon "the half section of land reserved for county-seat purposes."

9. The election law for change of county seats provides that the ballot of the voter shall contain the name of the "town" which he votes for, and that the "town" finally selected shall be the point at which the county seat shall be located. The terms of the statute are not conformed to by the selection, by a number of electors, of a geographical point or location which is not a "town," and the board of election commissioners should not be required to place the name of such locality or geographical point upon the ballots in the election for county seat, under our election law for that purpose.

(Per McAtee, J., dissenting.)

Dissenting opinion.

For majority opinion, see 60 Pac. 782.

This was an application for a writ of mandamus, made on the 9th day of May, 1899, by the relators, citizens of Grant county, before the judge who presided below as a justice of the supreme court, then holding terms of the district court at Stillwater, in Payne county. The relief sought was to require the respondents, the board of election commissioners of Grant county, to place the name of Centerville on the official ballot, to be voted for as a location for the

county seat of that county at a special election to be held May 16, 1899. The application for the writ showed that a special election had been ordered by the respondents to be held in Grant county on the 16th day of May, 1899, to determine whether or not the location of the county seat of that county should be changed, and, if so, what location should be selected therefor, and that a board of election commissioners had been appointed to provide for said election, and were proceeding to receive and pass upon nominations for places to be voted for, and to prepare an official ballot to be voted thereat. It also appeared that on the 26th day of April, 1899, a petition had been filed in the office of the county clerk of said county, which was signed by 53 resident and legal voters of said county, designating the N. W. $\frac{1}{4}$ of section 30, township 27 N., of range 5 W., in Grant county, and naming such location "Centerville," as one of the places to be voted for for the location of the county seat of Grant county, and requesting that the board of election commissioners place the name of Centerville on the official ballot as a candidate to be voted for for said county-seat location. The application charged that the board of election commissioners refused to recognize the said petition, or give the location so designated a place on the official ballot, and the petitioners prayed that an order issue from the chief justice of the supreme court of the territory, commanding the board of election commissioners to place Centerville on the official ballot as a place to be voted for at which to locate said county seat. The order of the justice of the supreme court to whom the matter was presented refused the application, upon the ground that congress had already provided for the location of the county seat of Grant county, and had legislated upon the subject; that no authority existed in the legislature of the territory to pass any act authorizing any change in the location of the county seats in the Cherokee Outlet, of which Grant county is a part, of Oklahoma; that the general election law of the territory, passed in 1890, was in conflict with the act of congress authorizing the location of the county seat of Grant county, and was therefore void. It was said in the opinion and order that, "as it is an elementary principle that the extraordinary writ of mandamus will not issue unless the right to it is clear and undisputed, the application is denied."

McATEE, J. (after stating the facts). The case involves a consideration of the acts of congress under which the territory of Oklahoma has been organized, and of the purpose of congress, and the comprehensiveness of its legislation, in providing for the government of the territory. It was provided by the organic act (section 6), passed May 2, 1890, that "the legislative power of

the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil, no taxes shall be imposed on the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." The purpose and comprehensiveness of this provision was treated with considerable care by Chief Justice Chase in 1872, in the case of *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659, in which he took occasion to review to some extent the history of the legislation by which congress had up to that time organized the various territories which were in process of preparation for the condition of statehood, and the relative authority of territorial laws enacted subsequently to their organization as territories by the congressional enactment, and by the passage of the several organic acts under which these organizations were effected; and it was said in that case that "the theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by congress." He reviewed in the opinion the various ordinances adopted by congress providing for the government of the territories, beginning with that of 1787 for the Northwest Territory, in which "it provided for the appointment of the governor and three judges of the court, who are authorized to adopt, for the temporary government of the district, such laws of the original states as might be adapted to its circumstances." And speaking thereafter of the territories, up to the organization of the territory of Missouri, he said, speaking of the manner and purpose with which congress had theretofore acted, that "in all the territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all." He then went on to say that "in 1836 the territory of Wisconsin was organized under an act which seems to have received full consideration, and from which all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. Except those in the Kansas and Nebraska acts in relation to slavery, and some others growing out of local circumstances, they all contained the same provisions in regard to the legislature

and the legislative authority, and to the judiciary and the judicial authority, as the act organizing the territory of Utah. The language of the section conferring the legislative authority in each of these acts is this: 'The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents.'" And it was said in *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966, by the supreme court of the United States, that, "as a general thing, subject to the general scheme of local government chalked out by the organic act and such provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke, at its discretion. The powers thus exercised by the territorial legislatures are entirely as extensive as those exercised by any state legislature." Sixteen years later the supreme court of the United States, by Justice Field, in the case of *Maynard v. Hill*, 125 U. S. 204, 8 Sup. Ct. 723, 31 L. Ed. 664, said that "what were 'rightful subjects of legislation,' when these acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred, under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. * * * It will be found from the history of legislation that while a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil

government. *Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future."

The supreme court of the United States having thus declared that a long acquiescence in repeated acts of legislation upon particular matters was sufficient, evidence that those matters were generally considered by the people as properly within legislative control, and since it will be admitted, without argument or citation of example, that legislation and the enactment of election laws by legislatures, through the common practice of the various states of the Union in enacting such laws, which have been approved by the people through their representatives, is a rightful subject of legislation, and since the supreme court had also expressly declared that "it has ever been the theory upon which the territories have been organized that all the powers of self-government, consistent with the supremacy and supervision of national authority, should be left to the inhabitants of the territories themselves," and that "the legislative department, when not restrained by constitutional provisions and the fundamental rights of the citizen, has acted upon everything within the range of civil government," and that "the powers thus exercised by the territorial legislatures are entirely as extensive as those exercised by any state legislature," it was but natural and to be expected that the people of the territories would, looking to their own comfort and to their own rights in the matter, enact legislation which should provide, in their best judgment, for the location of county seats to suit their own convenience, and such has been the common practice in the territories. When the territory of Wyoming was organized, it embraced within its territorial limits, as one county, all the territory which was, by an act of the territorial legislature, subsequently divided into three separate counties. The supreme court of the United States, in the case of *Laramie County Com'rs v. Albany County Com'rs*, 92 U. S. 307, 23 L. Ed. 552, in 1876, sanctioned this legislative act of the territory of Wyoming, Judge Clifford delivering the opinion of the court, and saying that "corporations of the kind [counties] are properly denominated 'public corporations,' for the reason that they are but parts of the machinery employed in carrying on the affairs of the state, and it is well-settled law that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand. 2 Kent, Comm. (12th Ed.) 305; *Ang. & A. Corp.* (10th Ed.) § 31; *McKim v. Odom*, 3 Bland. 407; *City of St. Louis v. Allen*, 13 Mo. 400; *Trustees v. Tatman*, 13

Ill. 27; *Inhabitants of North Yarmouth v. Skillings*, 45 Me. 141. Such corporations are composed of all the inhabitants of the territory included in the political organization, and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. 1 Greenl. Ev. (12th Ed.) § 331. Corporate rights and privileges are usually possessed by such corporations, and it is equally true that they are subject to legal obligations and duties, and that they are under the entire control of the legislature, from which all their powers are derived. * * * Institutions of the kind, whether called counties or towns, are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislatures of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. * * * Opposition is sometimes manifested, but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure. * * * Political subdivisions of the kind are always subject to the general laws of the state. * * * Such corporations are the mere creatures of the legislative will, and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the state, deriving their existence from the legislature. Their officers are nothing more than local agents of the state, and their powers may be revoked or enlarged, and their acts may be set aside or confirmed, at the pleasure of the paramount authority, so long as private rights are not thereby violated. *Russel v. Reed*, 27 Pa. St. 170. Civil and geographical division of the state into counties, townships, and cities, said Thompson, C. J., had its origin in the necessities and convenience of the people; but this does not withdraw these municipal divisions from the supervision and control by the state in matters of internal government. * * * There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity. * * * Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Ex-

amples illustrative of these suggestions may easily be imagined."

And again, the legislature of the territory of Montana, acting under a provision of the organic act of that territory, providing that they might legislate upon "all rightful subjects of legislation," passed an act in 1883 "authorizing the citizens of Jefferson county to vote upon the question of removing the county seat of said county from Radersburg to Boulder City," and providing for the election. The validity of the election was sustained by the supreme court of that territory, under the election law of the territory, the court saying that, "If there is a fair vote and an honest count, the qualified voters must not be disfranchised, by having the election declared void, because the officers conducting the same were not duly sworn or chosen, or were not qualified for the office or for any technical irregularity"; and that "the great question is whether the voice of the majority has been honestly and fairly expressed;" and "the question is, was there a fair vote and an honest count?" *Wells v. Taylor* (Mont.) 3 Pac. 255.

The legislature of the territory of Arizona enacted a law, which was approved February 25, 1885, in which it was provided that "the qualified voters of Mohave county should at the next general election designate by ballot the locality for the county seat of said county." The act was sustained by the supreme court of that territory, the court saying that: "One question we must dispose of at the threshold. It has been urged with great force and ability that the law authorizing the election is invalid, in that it attempts to delegate legislative powers to the voters of Mohave county. The location of a county seat should be determined by the people of a county. Their interests and convenience should alone be consulted. So, in most of the states, laws have been enacted by which a vote of the people should determine the question. No case has been cited that decides such laws to be invalid. They have been acquiesced in by the courts and the lawmakers too long now to question their validity." *Territory v. Board of Sup'rs of Mohave Co.*, 12 Pac. 730; citing *Calaveras Co. v. Brockway*, 30 Cal. 326; *State v. Stearns*, 11 Neb. 104, 7 N. W. 743; *Boren v. Smith*, 47 Ill. 482.

The legislature of the territory of Wyoming having enacted a law to divide one county into three, which was special and local legislation, and the supreme court of the United States having ratified and sanctioned this act, and the legislature of the territory of Montana having, in 1883, passed an act authorizing the citizens of Jefferson county to vote upon the question of removing the county seat of said county from Radersburg to Boulder City, which was special and local legislation, and the legislature of the territory of Arizona having in February, 1885, enacted that the qualified voters of Mohave county should be authorized to hold a similar

election to determine the locality for the county seat of said county, and this legislation having been approved in one instance by the supreme court of the United States and in the other two instances by the supreme courts of those territories as lawful, under the organic act of those territories, providing that the legislative power of the territory should "extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States," congress thereafter, on the 30th day of July, 1886, put an end to such special and local legislation by enacting that "the legislatures of the territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Locating or changing county seats * * *" (24 Stat. 170); and thereby conceding, so far as congress could concede, without another express declaration upon the subject, that while the legislatures of the territories should be prohibited thenceforth from enacting a special election law for any particular county of the territory, and should be prohibited from legislation locating the county seat of any particular county, it would no further than that interfere with the interests and convenience of the people in passing a general election law with respect to the location of county seats of the territories, which the legislatures of the territories had theretofore uniformly conceded to have the power to enact under the provision that "the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States."

Such was the law as contained in the organic acts of the territories generally, including Montana and Arizona, the legislative acts thereunder by the legislatures of those territories, enacting local and special legislation concerning the removal of county seats, the construction of their supreme courts upon it, and the provisions made by congress, in which, while it carefully provided that the legislatures of the territories of the United States "should not pass local or special laws * * * locating or changing county seats," it refrained from an enactment which would have prohibited the legislatures of the territories from passing general election laws, but permitted the right to pass those laws to remain in the territorial legislatures, where they had been, by the uniform construction of the territorial courts and the supreme court of the United States, conceded to be, and thereupon congress passed the organic act for this territory (May 2, 1890; Stat. 1893, p. 38, § 1), in which it was provided that "whenever the interest of the Cherokee Indians in the land known as the 'Cherokee Outlet' shall have been extinguished and the president shall make proclamation thereof, said Outlet shall thereupon and without further legislation become a part of the territory of Okla-

homa." And by section 4: "That for the purpose of facilitating the organization of a temporary government in the territory of Oklahoma, seven counties are hereby established therein, to be known, until after the first election in the territory, as the 'First County,' the 'Second County,' the 'Third County,' the 'Fourth County,' the 'Fifth County,' and the 'Sixth County,' the boundaries of which shall be fixed by the governor of the territory until otherwise provided by the legislative assembly thereof. The county seat of the First county shall be at Guthrie. The county seat of the Second county shall be at Oklahoma City. The county seat of the Third county shall be at Norman. The county seat of the Fourth county shall be at El Reno. The county seat of the Fifth county shall be at Kingfisher City. The Sixth county seat shall be at Stillwater. The Seventh county shall embrace all that portion of the territory lying west of the one hundredth meridian, known as the 'Public Land Strip,' the county seat of which shall be at Beaver: provided, that the county seats indicated by this act may be changed in such manner as the territorial legislature may provide."

The portion of Oklahoma then existing as opened and settled country, and provided for by the second paragraph of section 4 of the organic act, had been opened on the 22d day of April, 1890, without the preceding provident provision of an organic act or of any legislation organizing a territorial government. The act, as it will be seen, provided that the counties and their county seats were located "for the purpose of facilitating the organization of a territorial government," and for that purpose it was provided that the county seats "shall be at the special points respectively named in the statute," and that "the county seats located by this act may be changed in such manner as the territorial legislature may provide." In the enactment of this legislation it was apparently conceded by the congress that the statute of July 30, 1886, which provided that the legislature of the territories should not thereafter pass local or special laws "locating or changing county seats," might be found to be inconvenient, and not adapted to the exigencies existing in the part of Oklahoma then being provided for, since no body of laws had theretofore been provided for the people, and that the territorial legislature should be left free concerning the county seats named, and the provision was then made that "the county seats located by this act may be changed in such manner as the territorial legislature may provide"; that is, that, with respect to the seven counties therein provided for, they should not be hindered or hampered by the act of July 30, 1886, by which it was provided that the legislatures of the territories "shall not pass local or special laws" "locating or changing county seats," and that the territorial legislature should be left entirely free and unrestricted by the act of 1886, and

should change such county seats in such manner, by either "local or special" legislation, as the territorial legislature might see fit to provide. The provision thus made was a provision of enlargement, not as a substitute for, or in lieu of, or in revocation of, that provision of the organic act which provides that the territorial legislature might legislate upon "all rightful subjects of legislation," or of the general election law for the change of county seats, which was not enacted until afterwards, but providing that, inasmuch as that general power was already conceded by the decisions of the courts and the legislation of congress, and inasmuch as a new condition was here presented in which congress was dividing the territory already settled into counties whose boundaries were thereafter to be ascertained, and was at the same time undertaking to say where the county seats thus established "shall be," and that inasmuch as the people, and the legislature, acting in their behalf, might be hampered by so much special legislation with respect to the boundaries of the counties and the fixing of their county seats, that the territorial legislature should in that particular instance be set free from limitations provided in the statute of July 30, 1886, by which a general restriction had been imposed upon all territorial legislatures, by which they were prohibited from enacting "local or special" laws in the matter of "locating or changing county seats." And congress, by the enactment of that provision, did not undertake to concede to the territorial legislature a power to legislate by providing a general election law providing for the removal of county seats by an election to be held by the people of the counties of Oklahoma, since that power was conceded to them by the previous decisions of the courts and by the legislation of congress. But congress did then undertake to provide, and did provide, that the territorial legislature should not in any manner be restricted by the prohibition contained in the act of July 30, 1886, against special or local legislation against changing county seats, but, for that time and for those seven counties, "that the county seats indicated by this act may be changed in such manner as the territorial legislature may provide."

Such being the condition of the law, the territorial legislature, at its first session, enacted chapter 22 of the Statutes of 1890, entitled "County Seats," providing for the manner and means of "locating and relocating county seats." It provided upon what conditions the board of county commissioners, "at any called or special or regular session," were authorized to call an election for the purpose of locating or changing the county seat of any county in Oklahoma. This act took effect December 25, 1890, and remained the law, and, except as slightly amended by the legislative assembly at the session of 1893, is now the law, of this territory, and is now embodied in chapter 23 of

the Statutes of 1893. It is provided by section 3 of the organic act, among other things, as a part of the duties of the secretary of the territory, that "he shall transmit one copy of the laws and the journal of the legislative assembly within thirty days after the end of each session thereof, to the president of the United States and to the secretary of the interior, and at the same time two copies of the laws and journals of the legislative assembly to the speaker of the house of representatives and the president of the senate, for the use of congress. * * * " The organic act was passed May 2, 1890. The general election law, enacted by the territorial legislature, became a law on the 25th day of December, 1890, and in pursuance of the third section of the organic act, and for the information of the president, the secretary of the interior, and congress, the copies of the general election law had, undoubtedly, been transmitted to them, as provided by the organic act, by the secretary of the territory. And in this condition of the law, it having been conceded by the supreme court of the United States, as has been said, that such corporations as these counties are composed of all the inhabitants of the territory included in the political organization; that the attribute of individuality is conferred on the entire mass of such residents, and may be modified or taken away, at the mere will of the legislature, according to its own views of public convenience, and that they are under the entire control of the legislature, from which all their powers are derived, and that it is everywhere acknowledged that the legislature possesses the power to divide the counties at their pleasure, and that political subdivisions of this kind are always subject to the general laws of the state; that the theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and, as declared by the supreme court of Arizona, that the location of a county seat should be determined by the people of a county, their interests and convenience alone consulted, and that such laws had been too long acquiesced in by courts and the lawmakers to now question their validity; and in view of the legislation which congress had enacted on July 30, 1886, to check the practice in the territorial legislatures of legislating locally and specially touching the location and change of county seats, and in view, again, of its own legislation, by which it had undertaken to suspend the operation of the act of July 30, 1886, for the benefit of the seven counties first located in Oklahoma, of which the county seats had been located, and to provide that, with respect to those counties, the territorial legislature should not be hampered, but might change them in such manner as it should see fit to provide, it

thereupon came on to enact further provisions for the opening of the Cherokee Outlet, and more than two years after the enactment of the general election law of Oklahoma it provided, on March 3d, for opening the Cherokee Outlet (section 10, pp. 71, 72, St. 1893), that "the president of the United States is hereby authorized * * * by proclamation to open to settlement any or all of the lands not allotted or reserved, * * * and also subject to the provisions of the act of congress, approved May 2, 1890 [the organic act], entitled 'An act to provide a temporary government for the territory of Oklahoma.' * * * The secretary of the interior was, under the direction of the president, directed to prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the president, which shall be issued at least, twenty days before the time fixed for the opening of said lands." And it also enacted (St. Okl. 1893, p. 73, § 14) that "before any of the aforesaid lands are opened to settlement it shall be the duty of the secretary of the interior to divide the same into counties, which shall contain as near as possible not less than five hundred square miles in each county. In establishing said county lines the secretary is hereby authorized to extend the lines of the counties already located so as to make the area of said counties equal, as near as may be, to the area of the counties provided for in this act: * * * provided, further, that as soon as the county lines are designated by the secretary he shall reserve not to exceed one-half section of land in each county, to be located for county-seat purposes, to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, and all reservations for county seats shall be specified in any order or proclamation which the president shall make for the opening of the lands to settlement."

Under the provisions of this act, which authorized the secretary of the interior, under the direction of the president, to prescribe rules and regulations "for the occupation and settlement" of the lands, of the Cherokee Strip, the secretary reserved half sections of land "located for county-seat purposes" in each of the several counties into which the Cherokee Outlet was then divided. It will be observed that when the first opening of Oklahoma occurred, and the seven counties were opened and occupied for settlement, on the 22d day of April, 1890, congress did not provide any laws or organization for such counties. It had not made any reservation of lands for county-seat purposes, so that in the seven counties of which it was composed, and which were established by section 4 of the organic act, no land was reserved at all for public purposes. All of the land included in each of

said counties into which the territory was thereby divided had been appropriated to private use, and congress, when it undertook to legislate and to fix the county seats by the act of May 2, 1890, upon land which had then theretofore been opened and completely occupied more than a year before, said in express terms at what point the county seat of each of the said respective counties "shall be"; but, by the proviso annexed to the act (section 4 of the organic act), the people were not only left at liberty to have a general election law, under section 6 of the organic act, providing that "the legislative power of the territory shall extend to all rightful subjects of legislation," as the same had been uniformly interpreted by the courts and by the congress itself in the act of July 30, 1886, but, in order that absolute freedom might be given upon the subject, it also made that special provision for the particular case then in hand, notwithstanding the general legislation and restriction of the act of July 30, 1886, that "the legislatures of the territories * * * shall not pass local or special laws * * * locating or changing county seats." The people and their legislature were thus left wholly at liberty on the subject, and when, afterwards, the general election law, contained in chapter 33 of the Statutes of 1890, was enacted, which is now still in existence in chapter 33 of the Statutes of 1893, providing upon what terms and conditions, and under what circumstances, the people of the respective counties of the territory might proceed thereunder, and more than two years thereafter congress provided for the opening of the Cherokee Outlet, by the act of March 3, 1893, as hereinbefore stated, it did not fix county seats for the respective counties, nor say where the county seats should respectively be, nor undertake to establish them at all; but, acting wholly for the benefit of the people and for their convenience alone, and in pursuance of the statute which authorized the secretary of the interior to prescribe rules and regulations, under the direction of the president, for the "occupation and settlement" of the lands of the Cherokee Outlet, the reservations authorized by the act "to be located for county-seat purposes" were made. The act was one solely for the convenience and benefit of the people. It was a reservation to be accepted if the people of the respective counties saw fit, or to be refused if they saw fit, or to be accepted, and afterwards abandoned, if they deemed it to their best interests, acting under that legislation for the changing of the location of county seats which had been passed by the legislature of Oklahoma two years before, and of which congress had full notice, as provided under section 3 of the organic act, and according to the terms of the organic act itself, by section 1: "Whenever * * * the president shall make proclamation there-

of, said Outlet shall thereupon and without further legislation, become a part of the territory of Oklahoma." And the Cherokee Outlet and its lands became, by such opening, and by the provision herein last before recited, "a part of the territory of Oklahoma," subject to all its laws, by the express enactment of congress, among which laws was the law for the changing of the location of county seats, contained in chapter 22 of the Statutes of the territory of 1890. It is too late now to argue that the election law enacted by the territorial legislature was not, from the time of its enactment, of valid and effective force. Adequate provision was made by the organic act, by which congress had full information at the time of its enactment of the general county-seat election law of 1890. Congress took no notice of it, did not annul or disapprove it, but permitted it to stand as proper and approved legislation, and we must, therefore, regard it as of final, effective, and conclusive force.

The same proposition has been asserted by the circuit court of the United States for Oregon in *Kle v. U. S.* (C. C.) 27 Fed. 351, in which it is said that "the fact that congress has never disallowed or disapproved the act, * * * and has not legislated directly on the subject, goes far to establish its validity as not inconsistent with the organic act." Upon a similar objection to a territorial statute it was said by Chief Justice Chase in *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659, that: "In the first place, we observe that the law has received the implied sanction of congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws on or before the 1st of the next December in each year. The simple disapproval by congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body." The general election law for the change of the location of county seats having been fully approved December 25, 1890, and not up to this time having been revoked or disapproved by congress, and a period of nine years having elapsed, we have the express affirmation of the supreme court of the United States, by its chief justice, that "it is no unreasonable inference, therefore, that it [this election law] was approved by that body." The conclusion of Chief Justice Chase that, if the act passed by the legislature of the territory, which had remained upon the statute book for a period of 12 years without any disapproval by congress, the reasonable inference was that it was approved by that body, is in harmony with all that has been said on the subject before by either the supreme courts

of Arizona and Montana, which we have cited, the supreme court of the United States, as it has spoken in *Laramie County Com'rs v. Albany County Com'rs*, 92 U. S. 307, 23 L. Ed. 552, and in the voice of congress itself, speaking in the act of July 30, 1886, by which it expressly prohibited the territorial legislatures from enacting special and local laws for the location or change of county seats, and in which it left undisturbed the right to fix such county seats by a general act, under the authority given that the "legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States" and with the organic act, by which congress undertook especially to provide that the legislature of the territory itself should not be hampered in providing with reference to the county seats of the first seven counties, which were organized by section 4 of the organic act, but should be left free, to be changed "as the territorial legislature may provide." The position of the lower court was that: "When congress provided for the location of the county seat of Grant county without giving authority to change it, the right of the legislature to authorize such change ceased. The organic act defining the powers of the legislative assembly, and the act of congress authorizing the location of the county seats in the Cherokee Strip, must be construed together. The later act modifies the former, and the legislature can pass no law authorizing any change in the location of such county seats until permitted to do so by congress. The act of the territorial legislature (that is, the act of December 25, 1890) under which the special election for May 16th is attempted to be held is, in my judgment, as at present advised, in conflict with the act of congress authorizing the location of the county seat of Grant county, and is, therefore, void." We understand the proposition to be that, congress having authorized the secretary of the interior to make rules and regulations for the "settlement and occupation" of the Outlet, and such "reservations for county seats" having been made and included in the order and proclamation of the president, this legislation by congress upon that subject was complete, and that it excluded and destroyed the power of the enactment upon the matter of changing county seats, made by the legislature under the authority given to it by the organic act to legislate upon "all rightful subjects of legislation." We cannot agree with this contention. The effect of it, if upheld, would be to supersede the provisions of the act providing for the mere "settlement and occupation" of the country and the "reservations for county-seat purposes," which were manifestly made in the interest of, and for the benefit of, the people, and in order that they might not

be excluded from having some location upon which to place the county seats and transact the public business, and to infer therefrom the complete revocation and extinction of all those powers which had been granted to all territories in the past, and which they had been conceded by the courts and congress to have; that is, of choosing for themselves touching the change of county seats. It would result in a repeal of statutes by inference, and against the right of the people to vote upon this most important subject. If it had been the intention of congress to repeal the enactment of former years, and to revoke the legislation of the territory of 1890,—the general election law for the removal of county seats,—it could readily have done so in explicit terms and by express statutory revocation, and it would undoubtedly have done so. And this is the reasonable inference, rather than that inference which would deprive the people of the right to vote upon a subject which concerns the people of the counties so much, and the congress of the United States and the rest of the country not at all.

The reasonable view to take of this provision is that congress meant to give, by the proviso authorizing the territorial legislature to relocate the county seats of the first seven counties of Oklahoma, a special authority to the legislature to act by local or special legislation in the premises, and that, when it provided for the reservations of half sections of land in each of the counties to be located in the Cherokee Strip, it was a special provision for that occasion only, and in order that the people might not be without a reservation or portion of the public land upon which the public business might be transacted; and that it was not intended as a restriction of the general powers of the legislature to legislate "upon all rightful subjects of legislation," and of the general power thereunder, uniformly conceded by the courts and by the later legislation of congress itself in the act of July 30, 1886, to enact a general election law providing for the removal of county seats. It will not do to undertake to upset the long-settled policy of the government of the United States in providing for the government of its territories, settled in the terms which we have herein repeatedly specified for a period of more than 60 years, by which the people in all counties of all the territories have been permitted to choose for themselves or by the local and special legislation of other various territories up to July 30, 1886, concerning the removal of other county seats, and now to infer that congress meant to repeal this whole policy, persisted in for so many years, and legislated into the organic acts of so many territories, simply because the secretary of the interior and the president were authorized to open the Chero-

kee Outlet for "occupation and settlement," and to "reserve" half sections of land therefor. It has been repeatedly held that, when congress confers an authority upon the legislative assembly of a territory, and in pursuance of this power laws are enacted for the government of the people thereof, such enactment must be respected and upheld, unless clearly in conflict with some higher law (*Innis v. Bolton* [Idaho] 17 Pac. 264); and that "such acts are not to be set aside or treated as invalid because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them" (*Maynard v. Hill*, 125 U. S. 204, 8 Sup. Ct. 723, 31 L. Ed. 654); and that "the theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority" (*Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659). And it was said by the supreme court of Massachusetts, by the greatest of its chief justices, Shaw, then presiding, that the uniform rule, well established, was "never to declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt" (*Wellington Case*, 16 Pick. 95); a rule which was adopted by the supreme court of the United States in *Ogden v. Saunders*. And that: "If I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the law is presumed beyond all reasonable doubt." 12 Wheat. 213, 6 L. Ed. 606. And our experience with the rule in criminal proceedings will adequately inform us touching the force and weight of reasoning which must produce a conclusion "beyond all reasonable doubt"; and that is the rule which we must follow if we now undertake to set aside the acts of our territorial legislature in authorizing, as it did, the act for the change of county seats.

A question somewhat analogous has arisen in the bigamy cases in Idaho. Congress provided by the act of March 22, 1882, with respect to all the territories (section 8), "that no polygamist, bigamist, or person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or ap-

pointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States." Thereafter the territorial legislature of Idaho, in 1885, undertook to and did enact what was known as the "Test Oath Statute," requiring a person offering his vote at an election, if required, to swear: "That you are not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization; that you do not, either publicly or privately, or in any manner whatever, teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy or any other crime defined by law either as a religious duty or otherwise; that you regard the constitution of the United States, and the laws thereof, and of this territory, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization or association to the contrary notwithstanding; * * * so help you God." The validity of the territorial statute was contested in the case, and, it having been argued that, inasmuch as congress had, by the act of March 22, 1882, legislated upon the subject, it had exhausted the subject, and that the territorial legislature had no further power to act in the matter, inasmuch as the territorial statutes treating of the same matter conflicted with the congressional enactment. The supreme court of the territory, in *Innis v. Bolton* (Idaho) 17 Pac. 264, said that: "Counsel contends that by this act congress undertook to legislate upon the whole subject of disfranchisements growing out of polygamy, bigamy, and unlawful cohabitation, and therefore by implication withdrew or revoked the former grant of legislative power to the territories. We are unable to find anything in the act itself to warrant this conclusion. The act created additional disqualifications, and it is to that extent, we think, to be regarded as an amendment to the organic law. Repeal by implication is not favored, and we cannot believe it was the intention of congress to take away the power over this subject delegated by section 1860 of the Revised Statutes, but think the intention was only to ingraft or place another limitation upon that power. This view seems more in consonance with the policy heretofore pursued by the general government towards the territories. It is true that the congress has the paramount right, and may directly legislate for the government of any territory, and may directly repeal or abrogate any act of the territorial legislature. But it is also true that when congress confers power upon the legislative assembly of a territory, and in pursuance of this power laws are enacted for the government of the people thereof, such enactments must be respected and upheld, unless clearly

in conflict with some higher law. The act of March 22, 1882, disfranchises bigamists, polygamists, and those who are guilty of unlawful cohabitation, and disqualifies them from holding office. Section 2 of our statute contains substantially the same provision as to this class of persons, and then further disqualifies all who counsel, advise, aid, and abet in the commission of these offenses. Section 16 of the statute [hereinbefore quoted] establishes the mode by which the disqualifications fixed by the former section and by the act of congress may be ascertained and determined. We see no reason why the legislature, under the delegation of power, could not do this, and therefore conclude the power was concurrent, and, so far as this question is concerned, that these acts may stand together." The same question again arose in *Wooley v. Watkins* (Idaho) 22 Pac. 102. The court there said that: "This theory of interpretation is, in effect, that congress, by the act referred to, repealed those provisions of the organic act above recited, which confer power upon the territorial legislature to prescribe the qualifications and disabilities of voters of the territory. This view may commend itself for ingenuity, but cannot be regarded as sound. It is not a correct construction of the statutes referred to. If congress intended that act to have any such effect, it would have so declared by express terms, and would not have left its intention to inference. Repeal by inference or implication is not favored in the law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. *Board of Sup'rs of Wood Co. v. Lackawanna Coal & Iron Co.*, 93 U. S. 619, 23 L. Ed. 989; *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770. A careful reading and comparison of the provisions of the act of congress of March 22, 1882, and those of the act of the territorial assembly of February 3, 1885, which bear upon this subject, fail to develop such a clear and irreconcilable conflict between them as bring them within the rule above stated, but, on the contrary, plainly show that the power conferred by congress upon the territorial assembly to prescribe the qualifications and disabilities of voters in the territory is not absolute and exclusive of the power of congress to legislate upon the same subject, but is concurrent, and must be exercised subject to the constitutional limitations and restrictions imposed by congress in the organic act." Further discussing the question of the limitations of the organic act upon the question of suffrage, that court says: "An act of congress is not an act of a territorial legislature, and vice versa. Each may act upon the same subject from its own standpoint, and the acts of each may be valid. In such case their powers are clearly concurrent. But in the act of 1882 the act of congress does not cover, nor profess to cover, the same ground as the act of the territory. It does not deal with

memberships in any organization as a qualification to vote. The one subject is not even germane to the other; or, if it has a remote relation, as is contended, congress did not choose to enter on the ground covered by the territorial legislature. The counsel cites, in addition to the Edmunds act, *Houston v. Moore*, 5 Wheat. 22-24, 5 L. Ed. 19, *Prigg v. Com.*, 16 Pet. 618, 10 L. Ed. 1090, *Passenger Cases*, 7 How. 400, 12 L. Ed. 702, and elementary authorities. All the cases cited involve the relation between the several state governments and the United States. In them it is a question of which sovereignty has the power to dispute. Congress exercises power delegated by the states. If the former have those powers, the latter, except in exceptional cases, does not possess them. No such relations of antagonism exist between congress and territories. The will of congress and that of territorial legislatures are not two distinct wills, within the holding of some of those cases, but are for certain purposes (of which the act in question is one) one and the same will. While, in their operation, they are distinct, there is the relation of superior and inferior in all territorial affairs, and the superior may prohibit or nullify the acts of the inferior. Until it does so, the acts of the inferior are as valid, within its province, as the acts of the superior. If it were true (although it is not true) that section 8 of the Edmunds act covered the whole ground of section 501, and that each was intended as a punishment for the same offense, under the authority cited by the appellant (*Houston v. Moore*, 5 Wheat. 23, 5 L. Ed. 19) it would seem that the combined acts would be only concurrent, and that both would be valid. See, also, *Innis v. Bolton* (Idaho) 17 Pac. 264. But it is not necessary to go to the extent indicated in that case, as the two acts do not cover the same ground. After a careful consideration of this case, we do not find the act of the territorial legislature in conflict with any provisions of the federal constitution, or with any act of congress. The ruling and the judgment of the court below must be affirmed." The same principle of construction was under discussion in the territory of Montana in the case of *Sperling v. Calfee*, 19 Pac. 207. It was there said that: "Counsel for appellants contend in their brief and in their argument that this judgment is void upon its face, having been entered by the clerk upon default in vacation; that he thereby performed a judicial act, which, under the organic act, he could not do. The organic act names the courts of the territory, and, to a limited extent, defines their jurisdiction; but the rules of procedure in the courts thus established are left nearly or entirely to the different territorial legislatures. * * * Of course, in case of any difficulties arising out of this state of things, congress has it in its power at any time to establish such regulations, on this as well as on any other subject of legislation, as it shall deem ex-

pedient and proper. The fact that congress has never disallowed or disapproved the act conferring this power on the clerks of courts, and has not legislated directly on the subject, goes far to establish its validity as not inconsistent with the organic act. The statute under consideration was adopted from the Code of California, and the courts of that state have held, as far as we have discovered, that the power conferred by it on clerks of courts was ministerial and not judicial." The subject was discussed in *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637, Mr. Justice Field writing the opinion, in which it was said: "These limitations are the only ones placed upon the authority of territorial legislatures against granting the right of suffrage or of holding office. They have the power, therefore, to prescribe any reasonable qualifications of voters and for holding office not inconsistent with the above limitations. In our judgment, section 501 of the Revised Statutes of Idaho territory, which provides that 'no person under guardianship, non compos mentis or insane, nor any person convicted of treason, felony or bribery in this territory, or any other state or territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become a bigamist or polygamist, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor or trust, or profit within this territory,' is not open to any constitutional or legal objection. With the exception of persons under guardianship, or of unsound mind, it simply excludes from the privilege of voting, or of holding any office of honor, trust, or profit, those who have been convicted of certain offenses, and those who advocate a practical resistance to the laws of the territory, and justify and approve the commission of crimes forbidden by it. The second subdivision of section 504 of the Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the territory, is not open to any valid legal objection to which our attention has been called. The position that congress has, by its statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight. The statute of congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over

which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States. 22 Stat. 31, c. 47, § 8. This is a general law applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses, or over the means for their ascertainment and prevention. The cases in which the legislation of congress will supersede the legislation of a state or territory without specific provision to that effect are those in which the same matter is the subject of legislation by both. There the action of congress may well be considered as covering the entire ground. But here there is nothing of this kind. The act of congress does not touch upon teaching, advising, and counseling the practice of bigamy and polygamy,—that is, upon aiding and abetting in the commission of those crimes,—nor upon the mode adopted by means of the oath required for registration to prevent persons from being enabled by their votes to defeat the criminal laws of the country." It was said by Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162, that: "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Since, therefore, it has been abundantly settled that repeal by implication will not be favored, and since it is true that when congress confers the power upon the legislative assembly of a territory, and in pursuance of this power laws are enacted for the government of the people thereof, such enactment must be respected and upheld, unless clearly in conflict with some higher law, and there is some clear and irreconcilable conflict between the statutes, and unless the statute which is relied upon to found the inference or revocation be clear and full and unmistakable, and it has been the purpose of congress manifestly to prohibit and nullify the acts of the territorial legislature, the act of the legislature will stand, and an attempt at repeal by inference of the territorial act will be disapproved. And in view of the fact that congress has never disallowed or disapproved the act conferring this power on the

clerks of courts, and has not legislated directly on the subject, and that a decent respect is due to the wisdom, the integrity, and the patriotism of the legislative body by which the law has been passed to presume in favor of its validity until its violation of the law of congress is seen to be beyond all reasonable doubt, we cannot agree with this inference. But the citation of these authorities may, indeed, not be deemed necessary in view of the legislation of congress itself, since, in the act of July 30, 1886, in the provision to prohibit the passage of "local or special laws" in the territories, the prohibition upon this subject was against "locating or changing county seats." Congress itself in the enactment recognized the difference between the original location of a county seat and the changing of it afterwards, and deemed it necessary, in the attempt to forbid such legislation, to prohibit, not only legislation with reference to the "location" of county seats, but also in specific terms and other language forbids "special and local" legislation by the territorial legislatures, which should undertake to "change" them. And it may, therefore, be conclusively held that the authority of the secretary of the interior, which was exercised by him in opening the Cherokee Outlet, was merely to reserve 320 acres for county-seat purposes, and that congress did not even provide that the county seats should be upon those reservations, as it had provided in the organic act that the respective county seats of the seven counties therein provided for "shall be" at the respective county seats therein named, and that the act providing for the opening of the Cherokee Outlet, to wit, the act of March 3, 1893, following the spirit and terms of its own legislation, treated only of a provision of a half section of land to be made for the benefit of the people themselves, and "reserved" such half section therefor, and left the whole topic of "changing county seats" unmentioned, untreated of, and not legislated for, except by the act of July 30, 1886, by which "special and local" legislation on the subject of "change" of county seats was prohibited to the territorial legislatures. It has been said that "this is an ex parte hearing, without notice, and the writ should not issue unless the right is clear and unquestioned"; and that "the supreme court of Kansas, in the case of Conley v. Fleming, 14 Kan. 293, said, 'In the selection of a county seat the electors are not limited to existing cities and counties, but may choose a site for a new town, and locate the county seat thereon.'" The citation of authority is inapplicable. The statute which the supreme court of Kansas interpreted and applied in Conley v. Fleming (section 2), entitled "An act concerning the locating of county seats," which "took effect March 3, 1868," and which is section 1708 of the Compiled Laws of Kansas of 1885, provides: "That when the county seat of any county has been located by a vote of the electors of the county, the place to which it

is proposed to remove the county seat shall be designated in the petition, and the balloting at the election shall be for or against the removal of the county seat to the place so designated, and no election for the relocation of any such county seat shall be ordered or had within five years from the last preceding election touching the location or relocation of any such county seat. * * *

Upon this statute the supreme court of Kansas, in Conley v. Fleming, 14 Kan. 296, by Judge Brewer, said that: "The two remaining allegations of the petition may be considered together. The place declared the newly-chosen county seat is thus described in the proclamation of the result: 'Farmer City, situated as follows: 40 acres in S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Sec. 14; 30 acres off the S. W. qr. of the N. E. qr. of Sec. 14,—all in town 21, of range 23, in Linn county, Kansas.' Now, it is alleged that at the time of said election there was no such place as Farmer City, and no city, town, or village anywhere within the limits of said 'section 14'; and that at the first election some of the ballots counted as for this place contained the very words of the description in the proclamation, while others added on the word 'and' between the words 'Sec. 14' and '30 acres'; and that, classing these ballots as for separate places, neither of them stood first or second in the list of candidates. On the other hand, it is alleged that prior to the first election the place designated and known as Farmer City was selected upon actual view, and placed in nomination as one of the places to be voted for, by a convention of five delegates from each of the six townships, and that such selection was witnessed by two hundred or more persons from different parts of the county, and that the place so selected and named Farmer City became and was quite notorious, and at each of said elections was generally known and understood by the legal electors voting at said election. There seems to have been no dispute as to the facts thus alleged on the respective sides. If the majority of the electors of a county are unwilling to select any of the existing towns for the county seat, but prefer to choose a new place, and start a new town therefor, we know of nothing to prevent them from so doing. Each elector is to give 'the name of the place' for which he votes. This 'place' may be an incorporated city, a village, or an unoccupied quarter section; and, if a majority choose a tract of unimproved prairie, the courts have no power to interfere and set aside their selection. The wisdom of such a choice may be questioned, but the power to make it is beyond dispute. Again, if a given tract of land is known by a specific name, the use of that name is a sufficient description. If a certain definite seventy-acre tract was generally known as and by the name of 'Farmer City,' the use of that term in a ballot was a sufficient description, and the ballot was not vitiated by a mere imperfection in a further description therein of the land." It has been argued in this case that:

"There may be some question as to whether a board of election commissioners are authorized to act in an election of this kind, but, in any event, if acting, they cannot disregard any place petitioned for by the required number of electors. Their acts in this particular are not quasi judicial, nor are they required to exercise discretion. The act of placing the names on the ballot is ministerial. Of course, if a controversy should arise as to right of contesting candidates for the same place, no court would attempt to control the decision of the election commissioners as to which was the rightful claimant. Their decision in such matters is conclusive." But the reasoning of Judge Brewer does not fit the statute of Oklahoma which we must interpret and apply in this case. The statute which we must apply—section 1822 of an act providing for the manner and means of locating and relocating county seats (page 417, St. 1893)—reads as follows: "Sec. 1822.—At the election there shall be written or printed on the ballots to be voted in that county, the words 'For county seat,' naming the town desired to be voted for, as the voter may wish to vote, and if a majority of the votes cast at the first election be for any one point named, then that shall be the county seat of that county, and within ninety days after the day of election, the offices, furniture, books and records of the county shall be removed to the point so chosen, and the county seat there established. If, however, at such election no one town in the county receive a majority of all the votes cast, the county commissioners shall, when the election returns are canvassed, be bound to call another election within the county, to determine the location of the county seat at such election, and shall at such election give notice for twenty days before the time of voting, as before provided, and shall state the names of the two towns receiving the greatest number of votes at the last election, and at such second election the voters shall cast their ballot for one or the other of the two towns so named, and the town receiving the highest number of votes at the second election shall be the point chosen as the county seat, and the county seat shall be there established within ninety days after the vote is canvassed." The statute of Kansas referred to simply directed that "the balloting at the election shall be for or against a removal of the county seat to the place so designated"; and it was incumbent upon the supreme court of Kansas to enforce the writ of mandamus; while the board of county commissioners, who were the defendants, were acting in a ministerial capacity only, since the elector was, under the Kansas statute, only required to give the name of the "place" for which he voted; and it was properly said in the opinion of Judge Brewer that: "This 'place' may be an incorporated city, a village, or an unoccupied quarter section; and, if a majority choose a tract of unimproved prairie, the courts have no power to interfere, and set aside their selection.

The wisdom of such a choice may be questioned, but the power to make it is beyond dispute." It is plain that upon the facts of the Kansas case the application for the writ of mandamus was sustained solely upon the ground that the legislative enactment required upon the ballot not the name of a town, but of a "place," while the statute of Oklahoma provides that in the election for the removal of a county seat in Oklahoma the ballots shall contain the words "For county seat," naming the town desired to be voted for. And again: "If, however, at such election no one town in the county receive a majority of all the votes," a provision is made for a re-election, and the notice thereof "shall state the names of the two towns receiving the greatest number of votes at the last election, and at such second election the voters shall cast their ballot for one or the other of the two towns named, and the town receiving the highest number of votes at the second election shall be the point chosen as the county seat." If the supreme court of Kansas had had this statute to pass upon, it may well be presumed that they would have put into practical application and force the observation made in the case of *Conley v. Fleming* in referring to the provision that the county seat might be removed to a "place" other than an incorporated city or village, when it said, "The wisdom of such a choice may be questioned, but the power to make it is beyond dispute." To be sure, it is beyond dispute under the Kansas statute; neither is it open to dispute under the Oklahoma statute, since the statute explicitly provides that a "town" shall be named upon the ballot, and that upon a second election the voting shall be confined to the "two towns" receiving the greatest number of votes, and that of those "two towns" so named the town receiving the highest number of votes shall be the point chosen as the county seat. The case was heard upon the petition and the facts recited therein *ex parte*, and without notice. It does not pretend to state that any town was voted for. The application was "to compel the board of election commissioners to place the name of 'Centerville' on the official ballot," and a petition was filed, signed by a number of resident and legal voters of the county, naming the "N. W. qr. Sec. 30," etc., naming such "location" Centerville, as one of the places to be voted for. It is nowhere said or pretended in the application that Centerville was anything more than a "location" or a "place" designated as the "N. W. qr. of Sec. 30," etc., in Grant county. The application was not adequate, under our statute, which requires that none but "towns" shall be voted for as county seats at the election to be held under the statute in question.

I am authorized to say that IRWIN, J., joins in the reasoning of this dissenting opinion. We both concur in the result declared by the opinion of the court, while dissenting from the reasoning declared in it.

(38 Or. 508)

MITCHELL v. OREGON WOMEN'S FLAX-FIBER ASS'N.

(Supreme Court of Oregon. Feb. 25, 1901.)

LONG ACCOUNT—REFERENCE—RIGHT TO JURY TRIAL.

Hill's Ann. Laws, § 222, provides that a reference may be ordered when the trial of an issue of fact shall require the examination of a long account. *Held*, that where, under the pleadings, there were but three plain issues of fact involved, which could be readily understood by a jury, viz. the terms of the first contract, the length of time services were performed under the second, and whether the third had been performed, it was error to order a reference, since defendant was thereby deprived of his constitutional right to a trial by jury.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by W. E. Mitchell against the Oregon Women's Flax-Fiber Association. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover \$470.74 for labor and services performed by the plaintiff for the defendant corporation. The complaint alleges, in substance: (1) That between the 17th of March, 1897, and the 1st of April, 1898, the plaintiff performed 11 months' labor and services for the defendant, at its request, of the reasonable worth and value of \$40 per month, amounting in the aggregate to \$440, no part of which has been paid, except the sum of \$251.91. (2) That between the 1st of April and the 15th of September, 1898, the plaintiff, at the request of the defendant, performed work and labor for it for 5½ months, at an agreed salary of \$50 per month, and that the sum earned under such employment amounted in the aggregate to \$275, no part of which has been paid. And (3) that between the 29th of September and the 8th of October, 1898, the plaintiff, at the request of the defendant, performed services for it as follows: September 29, 1898, taking team to Fairfield, \$2; October 8, 1898, expenses to Portland, \$5.65. That such services and expenses were of the reasonable value of \$7.65, no part of which has been paid. The answer denies the allegations of the complaint, except as therein-after alleged, and, as a further and separate defense to the first cause of action, avers that the plaintiff agreed to work and do what little clerical labor the defendant might have for him to do between the 17th of March, 1897, and the 1st of April, 1898, under a special agreement that he should receive and accept in full satisfaction for his services whatever sum the defendant might feel able and willing to pay; that all the services rendered or performed by plaintiff for the defendant between the dates named were not reasonably worth more than \$150, which defendant paid him, and which is all that it is willing and able to pay for such services. In answer to the second cause of action, the defendant admits the employment of plaintiff during

1898 at an agreed salary of \$50 per month, but denies that he worked any longer period than five months, and alleges that it paid him under such contract \$101.91, and that there is now due thereon \$148.09, and no other or further sum. As to the third cause of action, the answer denies the item of \$2 for taking the team to Fairfield, but admits the item of \$5.65. The reply contains a specific denial of the new matter set up in the answer. When the cause was called for trial, the court, without any additional showing, stated that a trial of the issues of fact in the case required the examination of a long account, and on its own motion, and over the objection and exception of the defendant, referred it to a referee, with the usual direction in such cases; and thereupon, over the objection of the defendant, the evidence was taken before the referee so appointed. Upon the coming in of his report, the defendant moved to set it aside for the reason, among other things, that the trial of the cause did not require the examination of a long account on either side, and was therefore improperly referred. But the court refused to hear any argument on the motion, except as to the sufficiency of the evidence reported by the referee to support his findings and conclusions; and, counsel for defendant declining to proceed further, their motion to set aside the referee's report was overruled, and the plaintiff's motion to confirm allowed. From the judgment entered thereon the defendant appeals, assigning as error the ruling of the court ordering a compulsory reference of the case.

B. F. Bonhan and Carey F. Martin, for appellant. O. A. Condit, for respondent.

BEAN, C. J. (after stating the facts). The constitution (article 1, § 17) guarantees to every suitor in a civil action the right to a trial by a jury, of which right he cannot be deprived by the court on its own motion or that of his adversary, unless it affirmatively appears, with reasonable certainty, that the trial will require the examination of a long account on either side. Hill's Ann. Laws Or. § 222. Just how long an account must be, in order to justify a compulsory reference, has not been, and, in the nature of the case, cannot be, exactly determined. Mr. Cooper says: "That the account must be 'long' is conceded, but just how long it should be the courts have not decided. In fact, from the nature of the case, it is impossible exactly to determine how long the account should be; and, if it were, it would be impolitic and work injustice to lay down rigid rules on the subject." Coop. Ref. 15. Each case, therefore, depends upon its own facts; and, where there is a conflict in the evidence as to whether the issue involves the examination of such an account, the decision of the trial court will probably not be disturbed on appeal. *Welsh v. Darragh*, 52 N. Y. 590. But

an order directing a compulsory reference in a case where it is not authorized is not only appealable, but will be reversed and set aside by the appellate tribunal, because it denies to a suitor a substantial and constitutional right. Without reference in detail to the adjudged cases, in our opinion the true test by which to determine whether an action involves the examination of a long account, within the meaning of the statute, is correctly stated in *Spence v. Simis*, 137 N. Y. 616, 33 N. E. 554, as follows: "Facts must be disclosed, either by affidavit or upon the face of the pleadings, from which the conclusion can be fairly drawn that so many separate and distinct items of account will be litigated on the trial that a jury cannot keep the evidence in mind in regard to each of the items, and give it the proper weight and application when they retire to deliberate on their verdict." *Coop. Ref. 15 et seq.*; 20 Am. & Eng. Enc. Law, 676; *Feeter v. Arkenburgh*, 147 N. Y. 237, 41 N. E. 518; *Hedges v. Protestant Church*, 23 App. Div. 347, 48 N. Y. Supp. 154; *Hoar v. Wallace*, 24 App. Div. 161, 48 N. Y. Supp. 748; *McAleer v. Sinnott*, 30 App. Div. 318, 51 N. Y. Supp. 956. This doctrine proceeds upon the theory stated in *Cassidy v. McFarland*, 139 N. Y. 201, 207, 34 N. E. 803, that "trial by a referee is an exceptional mode of judicial procedure, and, when it is sought to coerce a suitor into a submission to it, the burden is upon the party applying for a reference to show by satisfactory proof that the case is within the excepted class. The rule is not different where the court upon its own motion undertakes to compel a reference." Applying these principles to the case in hand, it is apparent that it is not one in which the court could order a reference against the objection of a party thereto. There was no showing made outside of the pleadings, and they present substantially but three questions: (1) Did the plaintiff perform work and labor for the defendant during the years 1897 and 1898, for 11 months, of the reasonable value of \$40 a month, amounting to \$440, as alleged in the complaint, or was his employment for the same time at whatever compensation the defendant should be able and willing to pay, as alleged in the answer? The only issue between the parties on this cause of action is as to the contract under which the plaintiff was employed, and the amount of compensation he was to receive. There is no question of items or amounts, but as to the terms of a contract, solely. (2) Did the plaintiff during the year 1898 work for the defendant 5½ months, as alleged in the complaint, or only 5 months, as alleged in the answer? Upon this cause of action there is no controversy as to the terms of plaintiff's employment or the compensation he was to receive, but only as to the length of time he was employed. (3) Was the plaintiff authorized to incur the item of \$2 for taking the team to Fairfield, as set forth in the com-

plaint? These are all simple questions of fact, easily understood, and there could be no difficulty in an average jury fully bearing in mind and appreciating the evidence in relation thereto, and in determining the controversy between the parties intelligently. Under such circumstances, the defendant has a constitutional right to have the case tried by a jury, and because it was denied this right the judgment is reversed, and the cause remanded for a new trial.

(38 Or. 506)

SILVER v. LEE.

(Supreme Court of Oregon. Feb. 25, 1901.)

LANDS—EXECUTION SALE—EQUITABLE INTEREST—COURT OF EQUITY—JURISDICTION.

1. Where an insolvent debtor purchases land, and causes it to be conveyed directly to his wife, he has no interest therein which is subject to sale on execution against him, and the purchaser at such an execution sale acquires no title, since whatever interest the debtor had in the land can be reached only in equity.

2. Where plaintiff's only title to land depended on his adverse possession thereof, and defendant was in possession when the action in equity was brought to establish title and cancel a deed, the complaint will be dismissed, since, when the estate is legal in its nature, a court of equity will not assume jurisdiction of the suit of the owner to try title, unless he is in possession.

Appeal from circuit court, Columbia county; T. A. McBride, Judge.

Action by Joseph Silver against William C. Lee. From a judgment for plaintiff, defendant appeals. Reversed.

This is a suit for a decree establishing title in the plaintiff to a tract of land 100 feet square, in the town of Rainier, and for the cancellation of a deed thereto from one Mary Ann Watkins to the defendant. The facts are that on June 8, 1877, one George Watkins, while indebted to J. O. Hanthorn & Co., purchased the land in controversy, and caused it to be conveyed to his wife, Mary Ann Watkins. On the 20th of December, 1877, Hanthorn & Co. commenced an action at law against Watkins, and caused the property in controversy to be attached. Subsequently such proceedings were had in the action that a judgment was rendered in favor of the company, and the attached property was sold at sheriff's sale, and purchased by one Wadhams, who received a sheriff's deed therefor. At the time of the sheriff's sale Mrs. Watkins was residing upon the land, and continued to live there until the dwelling house was destroyed by fire, in January, 1890, since which time she has not occupied the premises. Soon thereafter, Wadhams made some arrangement with the plaintiff, who lives immediately adjoining, to look after the property for him, which the plaintiff continued to do until December 20, 1887. He then purchased Wadhams' right, title, and interest, and thereafter exercised acts of ownership, such as keeping the fences

in repair, planting out trees, cutting grass, and pasturing stock, until about June 4, 1892, when the defendant, who had in the meantime purchased from Mrs. Watkins, entered and took possession, and has since lived in the only house or building thereon, claiming actual possession of the entire tract. This suit was commenced May 2, 1896. The complaint, among other things, alleges that the property was conveyed to Mrs. Watkins at the request of her husband, for the purpose of defrauding his creditors, and especially Hanthorn & Co.; that Wadhams, the purchaser at the sheriff's sale, took possession of the property on or about the 26th of August, 1879, and continued to hold the same adversely until December 20, 1887, when he sold to the plaintiff; that the plaintiff immediately entered into the full and complete possession of all the premises, claiming to hold the same adversely to all the world, and continuously maintained such possession until June 4, 1892, "at which time the defendant procured from Mrs. Mary Ann Watkins a deed releasing and relinquishing any right she might have in said land to him, * * * since which time the defendant has been claiming, and is now claiming, some right or interest in and to said land, and since which time the defendant has forcibly entered onto a portion of said land, and has had possession thereof, and has refused, and still refuses, to vacate, and leave plaintiff undisturbed in his possession thereof." The answer denies the material allegations of the complaint, except that defendant procured a deed from Mrs. Watkins for the land in question, in pursuance of which he entered into and took possession, and, for an affirmative defense, avers that he is, and for years prior to the filing of the complaint was, the owner and in possession of all the property described in the complaint. The cause was tried before the court below upon the pleadings and testimony, and a decree rendered in favor of the plaintiff, adjudging that he is the owner of the legal and equitable title to the property, and directing that an execution issue commanding the sheriff to place him in the full and peaceable possession and enjoyment thereof. From this decree the defendant appeals.

S. O. Spencer, for appellant.

BEAN, C. J. (after stating the facts). It is settled law that, where the estate or interest in real property is legal in its nature, a court of equity will not assume jurisdiction at the suit of the owner to try and determine a dispute to the title, unless he is in possession, but will leave him to his remedy at law. In this case there are no special circumstances affording ground for equitable jurisdiction. The plaintiff's title, if any, is a legal one, founded upon adverse possession. The proceedings in the action of Hanthorn & Co. against Watkins gave the purchaser

no title to the property, either legal or equitable. Although Watkins purchased and paid for the land, and, it may be conceded, caused it to be conveyed to his wife for the purpose of defrauding his creditors, he had no interest therein to which the lien of a judgment could attach, or which could be sold under an execution. Where land is purchased and paid for by one person, but conveyed to another, a trust results in favor of the person who paid the price (*Parker v. Newitt*, 18 Or. 274, 23 Pac. 246; *Taylor v. Miles*, 19 Or. 550, 25 Pac. 143); but it is a mere equitable interest, and in this state cannot be seized or sold on execution (*Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229, 4 Pac. 332). Nor in such case can the title be reached by an execution against the cestui que trust, even if the conveyance was made for the express purpose of defrauding creditors. The property may, of course, be made to contribute to the payment of the debts of its real owner, but the remedy of the creditor is in equity, and not at law. Mr. Freeman says: "Where a debtor has fraudulently conveyed his property, it may be taken on execution against him, because, in favor of his creditors, he is still considered as the owner of the legal as well as of the equitable title. But when he has fraudulently bought property, and had the title taken in the name of another, the circumstances are different, though the object is the same. If the transfer were treated as void, the title would remain in the person of whom the purchase was made, and this would be of no advantage to the creditors. The transfer must therefore be treated as valid, and as transmitting the legal title to the person named in the deed. This legal title cannot be reached by the levy of an execution against the debtor, because he has never owned it. The creditors must therefore resort to equity, except in a few states, where statutes have been enacted to enable them to reach it at law." 1 *Freem. Ex'ns* (3d Ed.) § 136. See, also, 14 *Am. & Eng. Enc. Law* (2d Ed.) 313; *Walt, Fraud. Conv.* § 57; *Robertson v. Sayre*, 134 N. Y. 97, 31 N. E. 250; *In re Estes*, 6 *Savvy*. 459, *Fed. Cas. No.* 4,536.

It follows, therefore, that the plaintiff has no standing in equity, on the theory that he has an equitable title which he could not assert at law; for no title or interest whatever in the property was acquired by the sale under the judgment of Hanthorn & Co. His title, then, rests entirely upon adverse possession, and, before he can assert such a title in equity, he must be in possession of the property. *Coolidge v. Forward*, 11 Or. 118, 2 Pac. 292; *O'Hara v. Parker*, 27 Or. 156, 39 Pac. 1004. The complaint alleges, the court found, and the evidence shows conclusively that, at the time the suit was commenced, the defendant Lee was, and had been for some time, in possession of at least a portion of the premises, occupying the only

building thereon, and was asserting and claiming possession of the remainder. The plaintiff seeks to have his title to the entire tract quieted, but is admittedly not in possession of a considerable portion thereof, and is therefore as effectually barred from the relief sought as if entirely out of possession. It may be, under proper pleadings and evidence, that the court could, in a case of this character, ascertain what definite part of a tract of land, if any, a plaintiff is in possession of, and quiet his title thereto; but nothing of that sort was attempted by the pleadings and evidence in this case. We think, therefore, the court had no jurisdiction to determine the dispute between the parties by a proceeding in equity. The decree of the court below must therefore be reversed, and the complaint dismissed.

(7 Idaho, 481)

REYNOLDS et al. v. CORBUS.

(Supreme Court of Idaho. Feb. 7, 1901.)

APPEAL FROM PROBATE COURT—FILING AND SERVING NOTICE—CONTINUANCE—LEGAL DISCRETION.

1. Under the provisions of section 4838, Rev. St., which provides, among other things, that an appeal is taken from a probate or justice's court by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party, the order in which said acts are done *held* immaterial.

2. The granting or denial of a motion for a continuance is in the sound discretion of the court, and, unless it is shown that such discretion has been abused, the action of the court will not be disturbed.

(Syllabus by the Court.)

Appeal from district court, Ada county; George H. Stewart, Judge.

Action by J. A. Reynolds and others against Fred Corbus. On appeal from judgment for plaintiffs, the action was dismissed, and plaintiffs appeal. Affirmed.

John J. Blake, for appellants. Brown & Cahalan, for respondent.

SULLIVAN, J. This action was brought in the probate court of Ada county to recover \$426 damages for an alleged violation of a contract, and costs of suit. Judgment was rendered in favor of the plaintiffs for said sum. An appeal was taken from that judgment to the district court. The appeal was taken as follows: On the 2d day of May, 1900, the defendant served on the attorney for the plaintiffs a copy of the notice of appeal, and on the 3d day of May, 1900, the notice of appeal, with a proper undertaking on appeal, was filed in said probate court. Thereafter counsel for plaintiffs appeared in the district court and moved to dismiss the appeal on the ground that the court had no jurisdiction to hear the same, for the reason that no copy of the notice of appeal had been served on the plaintiffs, or either of them, or on their attorney. Said motion was opposed by the affidavit of counsel for

the defendant, which affidavit showed that a copy of the notice of appeal had been served on the date above stated. The court denied the motion to dismiss, and set the case for trial. Four days before the time set for trial, counsel for plaintiffs moved for a continuance. Said motion was denied, and the cause, coming on for trial, was dismissed for want of prosecution, from which judgment of dismissal this appeal was taken.

Two errors are assigned. The first is that the court erred in overruling the motion of the plaintiffs (who are appellants here) to dismiss said appeal on the ground that a copy of the notice of appeal had not been served. This contention arises over that part of section 4838, Rev. St., which provides as follows: "The appeal is taken by filing a notice of appeal with the justice, or judge, and serving a copy on the adverse party." It is contended by counsel for appellants that said provision of the statute requires the filing of the notice of appeal to precede the service of a copy, or that the act of filing and serving must be contemporaneous. It is also contended that the phraseology of the statute admits of but one interpretation, and that is that the filing must precede the service. In support of this contention counsel cites *Slocum v. Slocum*, 1 Idaho, 589, and several other authorities. In that case the court construed section 285 of the practice act of 1864. See 2 Ter. Sess. Laws, p. 134. To avoid the effect of that decision, said section was thereafter amended by adding thereto, among other things, the following: "The order of service is immaterial," etc. See section 4808, Rev. St. Said section, however, provides the manner or method of taking appeals from the district court to the supreme court, while the section under consideration provides the manner of taking appeals from the probate or justice's court to the district court; and it is contended that, as the provisions of said sections are substantially the same, they must be construed to mean the same. We are unable to agree with counsel in that contention. We think that construction most technical. The statute does not declare in specific terms the order in which the several acts required to be done in order to perfect an appeal must be done. Said section 4838 provides that an appeal may be taken to the district court within 30 days after the rendition of judgment, and that the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. Said provisions require two acts to be done, to wit, the filing of the notice and the service of a copy on the adverse party; but they do not declare which must be done first, unless they be construed to mean that the act first mentioned must be done first. This question was passed upon by our territorial supreme court in *Brewing Co. v. Gillman*, 2 Idaho, 180, 10 Pac. 32. While the exact question involved in the case at bar was

not one involved in that case, it was a similar one, and involved the same principle as that under consideration. In that case judgment was recovered on the 2d day of October, 1885, and on the 6th day of that month the defendants filed with the justice their notice of appeal and undertaking on appeal, and on the 15th day of said month served upon the plaintiff a copy of said notice of appeal. The action was transferred to the district court, and the plaintiff there moved to dismiss the appeal on the ground that the district court had not acquired jurisdiction of said suit, for the reason that no undertaking on appeal had been filed after the service of the notice of appeal. The district court denied said motion, and from said order the plaintiff appealed to the supreme court. In that case the court suggested that there was an essential difference between the provisions of the statute providing for appeal from the district to the supreme court and that providing for appeals from a justice or probate court. Under the latter the court says: "Three things are made indispensable,—the filing of the notice of appeal, the service of a copy of the same on the adverse party, and the filing of an undertaking; and all of these things must be done within thirty (30) days from the rendition of the judgment, and are jurisdictional. But the statute does not prescribe the order in which these several steps must be taken, * * * and we cannot think the order in which they were done is material." The court in that case held that the statute does not prescribe the order in which the steps necessary to perfect an appeal must be taken, and that the order in which said acts are done is immaterial. We think the construction placed upon said statute in that case is correct, and especially so when considered in the light of the provisions of section 4231, Rev. St., which is as follows: "Sec. 4231. The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect." No substantial right of the appellants is shown to have been affected by the manner of the service of the copy of notice of appeal. If the notice served was not an exact copy of the original, a comparison therewith would show that fact. It is not claimed that the copy of the notice served was not a true copy of the notice filed. The statute does not require that the filing be indorsed on the copy served. Counsel for appellants, in support of his contention, cites, among others, some decisions from the supreme court of California. All of said decisions prior to that of *People v. Ah Yute*, 56 Cal. 120, were rendered under the rule of strict construction which prevailed in that state prior to the adoption of section 4 of the Code of Civil Procedure of California, and are not applicable under the rule of liberal

construction that obtains in this state; nor in California, as shown by later decisions of the supreme court of that state, after the adoption of the above-cited section.

The order denying a continuance of the case on the application of appellants is assigned as error. As the granting of a continuance rests in the sound discretion of the court, his action therein will not be disturbed unless it appears that such discretion has been abused. Upon a careful examination of said application, we are not convinced that the court's ruling in said matter was arbitrary, or that there was any abuse of the sound discretion reposed in the court in denying said application. The judgment must be affirmed, and it is so ordered. Costs of this appeal are awarded to the respondent.

QUARLES, C. J., and STOCKSLAGER, J., concur.

(7 Idaho, 477)

CLEVELAND et ux. v. WESTERN LOAN & SAVINGS CO. et al.

(Supreme Court of Idaho. Feb. 5, 1901.)

MORTGAGE—SATISFACTION—ACTION BY MORTGAGOR—USURY.

1. A mortgage given to secure the payment of a usurious contract is satisfied by the payment of the principal debt, whereupon the mortgagor is entitled to satisfaction of such mortgage of record; and, upon failure of the mortgagee to so satisfy said mortgage of record, an action for such relief will lie, under the provisions of section 3364, Rev. St. Idaho.

2. A penalty provided by a statute which also provides how and when the penalty shall be enforced is enforceable only in the manner prescribed by the statute.

(Syllabus by the Court.)

Appeal from district court, Bannock county; J. C. Rich, Judge.

Action by Oel L. Cleveland and wife against the Western Loan & Savings Company and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. W. Eden and D. W. Standrod, for appellants. S. C. Winters, for respondents.

QUARLES, C. J. The plaintiffs (respondents here) executed to the defendant P. W. Madsen, as trustee for the defendant the Western Loan & Savings Company, a corporation, their certain promissory note of date January 29, 1895, promising to pay said trustee, for the use and benefit of said company, the sum of \$1,250, the principal of a loan made to plaintiffs by the defendants, to which interest coupon notes numbering from 1 to 80 were attached, falling due in consecutive order monthly, each of said interest coupon notes by its terms drawing interest from maturity at the rate of 12 per cent. per annum, to secure the payment of which notes, with the said attached coupons, the plaintiffs executed to said trustee, for the use and benefit of said cestui que trust, a mortgage upon certain real estate situate in the city of

Pocatello, county of Bannock, state of Idaho, fully described in the plaintiffs' complaint and in said mortgage, which is attached to the complaint as a part thereof. The plaintiffs made payments to defendants upon said note and coupons aggregating the sum of \$1,542.38, after which they refused to make other payments, and demanded that the defendants satisfy the said mortgage of record, which the defendants failing to do, plaintiffs commenced this action for the purpose of having said mortgage adjudged satisfied, and to restrain the defendants from asserting further claims to said mortgage, or the property therein mortgaged. For a second cause of action the complaint alleges that the plaintiffs executed to said trustee, for the use and benefit of the said cestui que trust, another note, for \$625, to secure which plaintiffs executed another mortgage to said trustee, for the use and benefit of said cestui que trust, upon the same real estate; that the only consideration given for said last note and mortgage was a premium bid for the said \$1,250 loan. This mortgage is also attached to said complaint as an exhibit thereto and part thereof. To the said complaint the defendants filed a general demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendants given time to answer, which they failed to do, whereupon the default of said defendants was duly entered, and judgment was rendered and entered in favor of the plaintiffs and against the defendants pursuant to the prayer of the complaint, from which judgment the defendants appeal.

The transaction was clearly usurious. The so-called premium was simply usurious interest. The coupons were in violation of sections 1265, 1266, Rev. St., providing, as they did, for compound interest. The plaintiffs had repaid the principal of the loan and more, and the debt for which said mortgages had been given was fully satisfied in law; the plaintiffs being entitled to no judgment upon said notes. Why should the defendants be permitted to hold said mortgages, thus clouding the title of the plaintiffs? The contention of the defendants here, and presumably in the lower court, is that, the plaintiffs having entered into a usurious contract, a court of equity will not, upon their application, relieve them in any manner from the operation or effect thereof. To sustain this contention, we are cited to a number of decisions in other jurisdictions. We do not regard the authorities cited as applicable to the case under consideration; for, as we see it, this is a matter purely of statutory regulation in this jurisdiction. Under our statutes it is not necessary to set up by plea the defense of usury, as is the case in most, if not all, of our sister states. The rights of the parties and the duty of the court are absolutely fixed by sections of our statutes cited supra. Under the admitted facts of this case and the provisions of

said statutes, the mortgage debt has been fully satisfied, and was when this action was commenced. By the provisions of section 3364, when a mortgage is satisfied it is the duty of the mortgagee to enter satisfaction thereof of record; and, if he fails so to do, an action lies in favor of the mortgagor to obtain the necessary relief. See *Portneuf Lodge v. Western Loan & Savings Co.* (Idaho) 59 Pac. 362. This action was authorized, and is conclusive of all the rights of the parties as to the mortgages and property in question. See *Trust Co. v. Hoffman* (Idaho) 49 Pac. 314; *Stevens v. Association* (Idaho) 51 Pac. 779, 986.

It is contended by the appellants (defendants) that this action defeats the payment of the penalty which the statute provides shall be adjudged against the borrower, in case of a usurious contract, in favor of the school fund. That is a matter over which we have no control. That penalty can be adjudged only in case of suit upon a usurious contract to enforce it. Penalties are only enforceable in the manner provided by law. The statute (section 1266) prescribes when it is to be adjudged against the debtor, and we are powerless to go beyond the statute. The judgment appealed from is affirmed. Costs of appeal awarded to respondents.

SULLIVAN and STOCKSLAGER, JJ., concur.

(23 Utah, 285)

WILD v. UNION PAC. R. CO.

(Supreme Court of Utah. Feb. 14, 1901.)

NONSUIT—MOTION—APPEAL—REVIEW—BILL OF EXCEPTIONS—ACTIONS AT LAW—WITNESSES—CREDIBILITY—APPELLATE COURT—POWERS—INSTRUCTIONS—GENERAL EXCEPTIONS.

1. A motion for nonsuit which is indefinite in its specifications cannot be considered.¹

2. Where a motion for a nonsuit is overruled, and thereafter plaintiff is allowed to introduce further testimony, and witnesses are examined and cross-examined at length, and the motion for nonsuit is not thereafter renewed, the question of the overruling of the motion for nonsuit cannot be reviewed on appeal.

3. Where a bill of exceptions does not comply with section 3264, Rev. St. 1896, and the abstract does not comply with rule 6 of this court, the court may affirm the judgment without regard to the bill of exceptions, and will hereafter do so, unless some fatal error not required to be shown by the bill of exceptions appears on the face of the record.

4. In actions at law the jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence; and under section 9, art. 8, Const., in cases at law the appellate court can only examine the evidence so far as may be necessary to determine the questions of law, and has nothing to do with the sufficiency of the evidence to justify the findings or judgment, unless there is no proof to support it.²

¹ *White v. Railway Co.*, 61 Pac. 568, 23 Utah, —; *Lewis v. Mining Co.*, 61 Pac. 860, 22 Utah, —; *Frank v. Mining Co.*, 56 Pac. 419, 19 Utah, 35; *McIntyre v. Mining Co.*, 60 Pac. 552, 20 Utah, 323.

² *Anderson v. Mining Co.*, 49 Pac. 126, 15 Utah, 22; *Nelson v. Railway Co.*, 49 Pac. 644, 15 Utah, 32; *Mangum v. Mining Co.*, 50 Pac. 834, 15 Utah, 534; *Linden v. Mining Co.*, 58 Pac. 356, 20 Utah, 134, 148.

5. General exceptions to instructions, each of which contains independent propositions, some of which are correct, cannot be considered.*

Bartch, J., dissenting.
(Syllabus by the Court.)

Appeal from district court, Second district; H. H. Rolapp, Judge.

Action by Francis Wild, by Matthew Wild, his guardian, against the Union Pacific Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Le Grand Young and A. W. Agee, for appellant. H. R. Macmillan, for respondent.

BASKIN, J. Francis Wild, an infant of the age of 12 years, by Matthew Wild, his guardian, instituted this suit to recover damages alleged to have been received by him through the negligence of the defendant. The answer denied the alleged negligence, and alleged that the injury complained of was caused by the negligence of the said Francis Wild and his willful misconduct while wrongfully trespassing on the grounds and track of the defendant. The jury returned a verdict in favor of the plaintiff for \$4,000, but the trial court overruled the defendant's motion for a new trial on condition that the plaintiff remit from the amount of said verdict all over the sum of \$2,500, which was accordingly done, and a judgment for the latter amount was rendered in favor of plaintiff, with costs. From this final judgment the defendant has taken this appeal.

After the plaintiff rested, the defendant made a motion for a nonsuit on the following grounds: "(1) That the evidence adduced by plaintiff does not sustain the allegations of the complaint, nor any of them; (2) that the evidence does not show any negligence on the part of the defendant either in the construction or maintenance of the crossing; and (3) it fails to show that the accident complained of was caused by the negligence, misconduct, omissions, or commissions of the defendant." After the motion was overruled the plaintiff was allowed to recall the witness Naylor, who was re-examined and recross-examined at great length; and counsel for defendant recalled Mrs. Wild, one of plaintiff's witnesses, and recross-examined her. After this additional testimony had been received, the motion for a nonsuit was not renewed. We cannot consider said motion: (1) Because it was too indefinite. *White v. Railway Co.* (Utah) 61 Pac. 568; *Lewis v. Mining Co.* (Utah) 61 Pac. 860; *McIntyre v. Mining Co.*, 20 Utah, 323, 60 Pac. 552; *Frank v. Mining Co.*, 19 Utah, 35, 56 Pac. 419. (2) Because the motion was not renewed after said additional testimony was given.

Upon the close of the testimony the defendant requested the court to instruct the jury to return a verdict for the defendant, and one of the grounds of the motion for a new trial

was the insufficiency of the evidence to justify the verdict. The bill of exceptions contains 608 pages of typewritten matter, and consists of the reporter's notes, the questions asked the witnesses and their answers, the side-bar conversations, and the remarks of the judge and counsel which occurred during the trial. In what purports to be the abstract, consisting of 171 pages, the bill of exceptions is presented in full. Such a bill does not conform to the requirements of section 3284, Rev. St. 1898. *People v. Getty*, 49 Cal. 581; *Caldwell v. Parks*, 50 Cal. 502. And what purports to be an abstract is not such as rule 6 (27 Pac. vii.) of this court requires. Under the precedent of *Caldwell v. Parks*, supra, we would be justified in affirming the judgment without regard to the bill of exceptions, and will do so in all cases hereafter appealed, unless some fatal error which is not required to be shown by the bill of exceptions appears upon the face of the record. In actions at law the jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence. *Haun v. Railway Co.* (Utah) 62 Pac. 908. And as said by Justice Bartch in *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980: "We can, therefore, in cases at law, under section 9 of article 8 of the constitution, examine the evidence only so far as may be necessary to determine the questions of law, and have nothing to do with the sufficiency of the evidence to justify the findings or judgment unless there is no proof to support it." *Anderson v. Mining Co.*, 15 Utah, 22, 49 Pac. 126; *Nelson v. Railway Co.*, 15 Utah, 325, 49 Pac. 644; *Mangum v. Mining Co.*, 15 Utah, 534, 50 Pac. 834; *Linden v. Mining Co.*, 20 Utah, 134, 148, 58 Pac. 355. The evidence introduced by the plaintiff tended to sustain his case, and the issues between the parties were therefore properly submitted to the jury; and their verdict, under the rule formerly established by the foregoing decisions, cannot be disturbed on the ground of the insufficiency of the evidence.

A general exception was taken to the second instruction, as also to the seventh. Each of these instructions contains independent propositions, some of which are undoubtedly correct. Such general exceptions, as has been frequently decided by this court, cannot be considered. *Pool v. Railway Co.*, 20 Utah, 210, 58 Pac. 326; *Scott v. Milling Co.*, 18 Utah, 486, 56 Pac. 305; *Wilson v. Mining Co.*, 16 Utah, 393, 52 Pac. 626; *Ganaway v. Association*, 17 Utah, 41, 53 Pac. 830.

The defendant introduced evidence showing that the plaintiff, on the morning of the day that the accident occurred, but some time previous thereto, had been climbing and riding upon the cars of defendant. The fifth instruction, to which objection is made, is as follows: "If you find from the evidence that the plaintiff was climbing the cars on the morning in question, but find that at the time he was injured he was not riding upon or climbing said cars, or attempting to do so, but was injured

* *Pool v. Railway Co.*, 58 Pac. 326, 20 Utah, 210; *Scott v. Milling Co.*, 56 Pac. 306, 18 Utah, 486; *Wilson v. Mining Co.*, 52 Pac. 626, 16 Utah, 393; *Ganaway v. Association*, 53 Pac. 830, 17 Utah, 41.

in the manner as testified to by plaintiff,—by getting his foot caught in said crossing,—then I charge you that the fact that plaintiff was riding upon or climbing said cars, or attempting to do so, before the accident occurred, does not affect his right to recover." This instruction was properly given.

The foregoing objections are the principal ones presented by the brief of appellant's counsel. The others are not of such importance as to require special notice and are untenable. It is ordered that the judgment of the court below be affirmed at the costs of the appellant.

MINER, C. J. After an examination, I find no error in the record of sufficient importance to justify a reversal of the case. I concur in the order affirming the judgment.

BARTCH, J., dissenting.

(23 Utah, 233)

ANDRUS v. BLAZZARD et al.

(Supreme Court of Utah. Feb. 4, 1901.)

CONTRACT BY GUARDIAN—PERSONAL LIABILITY—POWER OF GUARDIAN—POWER OF PROBATE COURTS—MORTGAGES—SALES OF REAL ESTATE—EXPENSES AND COMPENSATION OF GUARDIAN—ACCOUNTING—CONTRACT—MISTAKE AS TO LEGAL EFFECT—REFORMATION—PAROL EVIDENCE—PROBATE ORDERS—WHEN VOID—EVIDENCE—ACTION BY SUBSEQUENT HOLDER OF NOTE.

1. A guardian has no power to make a contract binding upon the ward or upon his estate, however beneficial to the ward the contract may be; and such contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account.

2. Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons unless expressly authorized to do so by law.

3. Under the provisions of section 4007, Rev. St. 1898, a guardian may only mortgage the real estate of his ward when necessary to provide for the suitable maintenance of the ward and his family.

4. Section 4008, Rev. St. 1898, makes it the duty of a guardian to pay all just debts of the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate; and section 4015 provides that, when a sale of the property of the ward is necessary to pay the debts and expenses of guardianship, the guardian may sell, upon the order of the court, the ward's real estate for that purpose.

5. Sections 4013, 4014, Rev. St. 1898, provide for the expenses and compensation of the guardian, and for the allowance of such items in his account.

6. Nowhere in the statutes is there a provision allowing the guardian to mortgage the real property of his ward for the purpose of paying debts, and the guardian who so acts binds himself, and not the ward.

7. When the facts are within the knowledge of both parties to a written contract, and the language used is such as they intended, a mistake as to the legal effect of the contract, or that its legal effect is different from that intended, is not available as a defense at law, and is not ground for a reformation of the contract in a court of equity, and cannot be shown by parol.

8. Inasmuch as the terms of the note in question were such as the parties intended to use, and their legal effect was to bind the guardian personally, parol evidence showing a different understanding was inadmissible.

9. An order of a probate court made without authority of the statute is void.

10. Inasmuch as parol evidence is not admissible to defeat the legal effect of a written contract the terms of which are such as the parties intended to use, such evidence, if the beneficiaries of the note in question had brought suit thereon, would not have been admissible over their objection, and is therefore not admissible in a suit by any subsequent owner and holder thereof for value.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by James Andrus against John Blazzard and others. Judgment for defendants, and plaintiff appeals. Reversed.

H. J. Dininny, for appellant. Bennett, Harkness, Howat, Sutherland & Van Cott, for appellees.

BASKIN, J. It appears that a promissory note, at the date thereof, was made in the following manner and form, to wit: "Salt Lake City, Utah, Aug. 19, 1893. Two years after date, we jointly and severally promise to pay Frank E. McGurrin, or order, at McCornick and Co.'s Banking House, in Salt Lake City, eleven hundred and fifty-four dollars, with interest thereon at the rate of eight per cent. per annum, payable quarterly at the said bank, for value received. If the interest be not paid as stipulated, the legal holder of this note may declare the principal due, and proceed by law to recover both principal and interest. James Blazzard, by Edward B. Critchlow, His Attorney in Fact. Thomas Blazzard, by J. L. Rawlins, His Attorney in Fact. John Blazzard, by Joseph H. Hurd, His General Guardian. Mariam Blazzard Steers." On the same date a mortgage on certain real estate was made and signed in the same manner as said note, to secure the payment of the same. This note and mortgage was, after the maturity of the note, assigned to plaintiff. The amended complaint contained three counts. The first was based upon the note and mortgage, and prayed that the mortgage be adjudged to be a valid and subsisting lien upon the interest of the said John Blazzard in the premises mortgaged, and that the same be sold to satisfy the plaintiff's debt, interest, costs, and attorney's fees; the second was on the note alone, and sought to charge the said John Blazzard and Joseph H. Hurd personally thereon; and the third was on the note alone, and sought to charge the said Joseph H. Hurd personally thereon, as one of the several obligees thereof. On motion of the said Joseph H. Hurd the first and second counts were stricken out on the ground that the ward was not bound by either the note or mortgage. Thereupon the said Joseph H. Hurd answered the third count, and, among other matters, alleged

that: "For a further and separate answer and defense, defendant alleges that on or about the 19th day of August, 1893, the probate court of Salt Lake county, Utah Territory, duly made an order in the matter of the estate and guardianship of John Blazzard, an incompetent person, authorizing, ordering, and directing this defendant, in the name and for the act and deed of the said John Blazzard, to execute said note, and, to secure the payment of the same, likewise, in the name and as and for the act and deed of the said John Blazzard, to secure said mortgage upon his undivided five twenty-eighths interest of, in, and to the real estate described in the mortgage; that in obedience to the said order of the said probate court, and not otherwise, this defendant signed to the said note and to the said mortgage the name of the said John Blazzard by himself as general guardian, upon the express and distinct understanding and agreement, however, that this defendant should not thereby be or become personally obligated or bound in any manner whatsoever by reason thereof, but that the same should, if legally sufficient and competent therefor, bind the estate of the said John Blazzard, and nothing more, which said understanding and agreement was then and there expressly brought to the attention of and assented to by the said McGurrin, and was also well known to and perfectly understood by the plaintiff at the time of the assignment of said note to him as alleged in the complaint. Defendants further allege that neither the said principal sum of \$1,154, nor any part thereof, was ever paid to or received by this defendant or the said John Blazzard, and that the said note and mortgage were directed by the said court to be given in the manner and form aforesaid for the purpose of paying the attorney's fees incurred by Mariam Blazzard Steers as guardian ad litem of the said John Blazzard in the prosecution of certain litigation in behalf of herself and others."

It appears from the evidence that previous to the execution of said note the said James Blazzard, Thomas Blazzard, John Blazzard, and Mariam Blazzard Steers were parties to five cases pending in the Third district court of the territory of Utah, and which were consolidated into one, in which were involved their titles to a certain estate; that in pursuance of the mandate of the supreme court of the territory the said district court awarded to each of the makers of said note and other parties to the action certain interests in the real estate involved, and ordered conveyances to be made in accordance with the decree, and that the said James Blazzard, Thomas Blazzard, John Blazzard, and Mariam Blazzard Steers, who were plaintiffs and interveners in said actions, pay to the defendants therein \$8,500; that the defendant in the pending case, Joseph Hurd, as the general guardian of the said John Blazzard, on the same day that said note was executed

filed in the probate court of Salt Lake county a petition setting out the foregoing facts, and in addition thereto the following, to wit: "That neither the plaintiffs nor interveners have any estate or money other than the land decreed to them, and, except as herein-after stated, are unable to comply with the decree requiring them to pay the money aforesaid. That \$1,000 which has been in the hands of the receiver had been paid. That it is necessary to raise by mortgage the sum of \$7,500 to comply with said decree. That in addition the sum of \$2,325.88 is required to pay Messrs. Rawlins & Critchlow and C. S. Varian, attorneys and counsel for plaintiffs, being the balance due them of the sum agreed by plaintiffs (John Blazzard, by his guardian ad litem, agreeing) to be paid. That the services of said counsel were contingent, of great value, and resulted in securing the property in lot six aforesaid, and that the compensation agreed upon was and is reasonable. That said property is not worth less than \$40,000. That plaintiffs and interveners have now an opportunity to procure a loan upon a mortgage on said property for the purposes aforesaid. That the amounts necessary to be raised, as estimated, are as follows: On the whole property, \$7,500; commissions, \$200; expenses of examining title, \$100; on $\frac{5}{7}$ interest of plaintiff, \$2,325.88. That all the parties in interest are now ready to complete the loans and perfect the title, and the deeds cannot be exchanged, nor the decree against the plaintiffs and lot 6 satisfied, until your petitioner is authorized with power in behalf of John Blazzard." That on the same day said probate court made and entered the following order: "Now, therefore, it is ordered, adjudged, and decreed that Joseph H. Hurd, guardian of the person and estate of John Blazzard, a person of unsound mind, be, and he is hereby, authorized, as guardian aforesaid, and for John Blazzard, to execute with the plaintiffs and interveners aforesaid a note or notes, and a mortgage or mortgages, of the premises in lot 6, block 69, hereinbefore described, to procure a loan or loans sufficient to pay the sums hereinbefore mentioned, upon such terms and for such time as may be reasonable, and to execute the conveyances hereinbefore and in said decree mentioned. And it is further ordered that the said guardian report his acts and doings in the premises to this court." On the same day the aforesaid note and the mortgage on said lot were executed. While the said McGurrin was named as the mortgagee and payee of the note, it is admitted that the real beneficiaries were Joseph L. Rawlins, E. B. Critchlow, and C. S. Varian, the attorneys of the said James Blazzard, Thomas Blazzard, John Blazzard, and Mariam Blazzard Steers, in the cases before mentioned, and the consideration of the note and mortgage was their services as such in said cases, and that the note and mortgage were

made to the said McGurrin as their trustee, and for their accommodation; that afterwards, and before the maturity of the note, the said McGurrin paid to said attorneys the full amount of said note, and became the legal holder and owner thereof; and that he, for a good and valuable consideration, subsequently and after maturity of the note transferred the same, and also the mortgage, to the plaintiff. In addition to the above facts the trial court found that at and before the time the said McGurrin purchased and became the owner of said note he understood that the said Hurd was not to be bound personally upon said note, and that the said Hurd, in obedience to said order of the probate court, and not otherwise, signed said note and mortgage with the name of John Blazzard, an incompetent person, by himself as general guardian. The principal question raised by the assignments of error is whether the defendant Joseph H. Hurd is personally liable to the plaintiff on said promissory note. The court below held that he was not, and dismissed the complaint.

It is stated in 15 Am. & Eng. Enc. Law (2d Ed.) 70, that "the prevailing doctrine is that a guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be, but that contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditures to the ward's estate in his account." This text is supported by a very large number of well-considered cases. *Thacher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58; *Rollins v. Marsh*, 128 Mass. 116; *Wallis v. Bardwell*, 126 Mass. 366; *Phelps v. Worcester*, 11 N. H. 51; *Hardy v. Bank*, 61 N. H. 34-39; *Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104; *Fessenden v. Jones*, 52 N. C. 14; *Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56; *Academy v. Augustini*, 55 Ala. 493, 495; *Kingsbury v. Powers*, 131 Ill. 182, 22 N. E. 479. The case of *Thacher v. Dinsmore*, supra, arose on the following agreed statement of facts: "The defendant, as guardian of A. L., signed the notes declared on in the first two counts, for just debts due from the said A. L. to the plaintiffs. At the time of signing them the defendant was guardian of the said A. L., an insane person, having been duly appointed to that office. After the notes were respectively payable, and before the commencement of this action, the defendant showing to the judge of probate that the said A. L. had recovered his reason and was of sane mind, the judge duly discharged him from said office of guardian." In the opinion, which was delivered by Chief Justice Parsons, it is said: "The question to be decided on the facts agreed in this case is whether the defendant is liable in this action. If any action is maintainable against any person, it must be the defendant; for the guardian of an insane person cannot make his ward liable to an ac-

tion as on his own contract by any promise which the guardian can make. * * * The defendant's description of himself in the notes as guardian cannot vary the form of the action; but it is for his own benefit,—that on payment of the notes he may not be precluded from charging the moneys paid to the account of his ward." This case is cited and followed in the foregoing cases, and in many others not mentioned. Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the persons or estates of such persons unless expressly authorized to do so by law. In this state the duties and powers of guardians of incompetent persons are fixed and limited by statutory provisions, as also the duties and powers of the courts. Section 4007, Rev. St., provides that, in case the income of the ward's estate is insufficient for the comfortable and suitable maintenance and support of the ward and his family, the guardian may sell, mortgage, or lease the real estate, upon obtaining an order of court therefor. Section 4008 makes it the duty of the guardian to pay all just debts of the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate; and section 4015 provides that, when a sale of the property of the ward is necessary to pay the debts and expenses of guardianship, the guardian may do so upon the order of the court. Section 4014 provides that every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable. Section 4013 provides for the allowance in the guardian's settlement for advancements made by him for the support or education of his ward. There is no provision in the statute authorizing the court to order the guardian to bind either the said John Blazzard personally or his estate by the note or mortgage in question. It was the duty of the defendant Hurd, as guardian, to pay the just debts of his ward out of the latter's estate, in the manner prescribed by the statute; and when he chose to do so in a different way than that prescribed by statute, and liquidated his ward's debt by the execution, as guardian, of a note and mortgage under an unauthorized and void order of the court procured at his instance, he, in the absence of any other controlling circumstances, bound himself as principal, and must look for reimbursement in the settlement of his accounts as guardian in the court which appointed him as such. From the nature of the relations of guardian and ward, the defendant Hurd could not be the agent of his ward, or act in any other capacity than principal. In making said note, because the foundation of an agency is the delegation by the principal of authority to the agent to act; and, as the ward was an incompetent person, he

could not delegate any authority to his guardian to bind him personally by any contract. Nor could the court, under the provisions of the statute, authorize the execution of either a note or mortgage by the guardian in payment of the ward's debt.

In the case of *Brown v. Eggleston*, 53 Conn. 110, 119, 2 Atl. 321, the court said: "It has been repeatedly decided in Massachusetts that a guardian has no power to bind the ward or his estate by his contract. *Thacher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58; *Wallis v. Bardwell*, 126 Mass. 366. Administrators and guardians in this respect are closely analogous to conservators. The powers and duties of a conservator are defined in a general way by statute: He 'shall have the charge of the person and estate of such incapable person.' 'The conservator shall manage all the estate of his ward, and apply the net income thereof, and, if necessary, any part of the personal estate, to support him and his family and to pay his debts, and may sue for, and collect all debts due to him.' The statute neither expressly nor impliedly authorizes the conservator to make contracts in the name of the ward, and the ward is legally incapable of making a contract. A conservator, unlike an overseer, acts independently of his ward, and in all his transactions he alone is the responsible party. He is not, however, bound to contract debts and pay them from his own estate. The law places in his hands ample means for supplying himself with funds to meet all his obligations. If he suffers loss personally, it must be through his own neglect. *Sabrina Main* being in fact and in law incapable of making a contract when the services were rendered, it is difficult to conceive how she or her estate can be held liable *ex contractu*." In the case of *Academy v. Augustini*, supra, the court quotes with approval the following from *Sanford v. Howard*, 29 Ala. 602: "The purchases of trustees, including executors, administrators, and guardians, when made in obedience to the duties of the trust, impose upon them a personal liability. The seller [or, we may insert, the person to whom a debt is contracted] must look to them for payment, and they must look to the trust estate for reimbursement.' This is everywhere, in this country, as well as in England, held to be the law; and appellant's counsel admit it." In *Hardy v. Bank*, supra, the court said: "In *Thacher v. Dinsmore*, 5 Mass. 299, it is held that a guardian signing a note as guardian cannot bind the estate of the ward. This doctrine was approved in *Forster v. Fuller*, 6 Mass. 58; the court there saying that, although the note states that he promises as guardian, yet he is personally bound. To the same effect are *Tenney v. Evans*, 14 N. H. 343; *Jones v. Brewer*, 1 Pick. 314; *Barnaby v. Barnaby*, 1 Pick. 221; *Bicknell v. Bicknell*, 111 Mass. 266; *Thompson v. Boardman*, 1 Vt. 367; *Daniel*, Neg. Inst. § 271; *Schouler*, Dom. Rel. 464; 1 Pars. Cont. 136. In *Phelps v. Worcester*, 11 N. H. 51, 53, the court say:

"The rule that the guardian, when he undertakes to act for the ward in contracts with others, should alone be liable, is sustained by the soundest reason. A different rule would subject the ward to numerous suits, the merits of which might be wholly unknown to him. In all expenditures arising under such contracts, the ward should be liable only to his guardian. He is then answerable to but one individual, and then only on a decree of court, on settlement of his guardianship account.'" In *Sperry v. Fanning*, 80 Ill. 375, the court quotes with approval the following from 1 Pars. Cont. 136: "A guardian cannot by his own contract bind the person or estate of his ward; but if he promise, on sufficient consideration, to pay the debt of his ward, he is personally bound by his promise, although he expressly promises as guardian. And it is a sufficient consideration if such promise discharges the debt of the ward, and a guardian who thus discharges the debt of his ward may lawfully indemnify himself out of the ward's estate." In the case of *Fessenden v. Jones*, 52 N. C. 14, the court said: "The guardian is charged with the duty of controlling and managing the person and property of the ward, and judging of the expenditures which may be needful for either, and he also is informed of the condition of the ward's resources. Hence the contract should be made with the guardian, and hence the guardian ought to be looked to for payment. To allow a departure from the above rule would, in the first place, have the effect to encourage in the youth of the country appeals from the judgments of their guardians, and, in the next, make the right to compensation on the part of the creditor depend upon a condition of things of which he had no means to judge, and therefore uncertain and precarious. * * * It will be seen from the foregoing considerations, a guardian is not in the condition of an ordinary agent or factor, and therefore the same legal relations, in all respects, do not subsist between them and those whom they respectively represent. The former represents one who has no legal capacity to contract for himself; the latter, one who is fully able to contract and bind, were he present. The former is substituted by the law, and stands in loco parentis. The latter is the appointee of his principal, and that principal can at any moment abrogate or modify his power. This want of analogies between the two in the sources and limits of their powers makes it obvious there can be no complete analogy between them as to liabilities or exemptions." In *Hunt v. Maldonado*, supra, the court said: "The action is to recover an attorney's fee for services rendered to the guardian of a minor in pursuance of a written contract. The action is against the minor. If the guardian made a valid contract with the attorney, he may be held liable; and if he pays it, and the probate court shall deem the expenditure reasonable and necessary to protect the interests of the ward, it may be allowed from the ward's es-

tate. But it is an expense incurred by the guardian in the performance of his duties, for which he is primarily liable." This language is quoted with approval in *Morse v. Hinckley*, 124 Cal. 158, 56 Pac. 896.

In the case at bar a just indebtedness of the ward to the attorneys heretofore mentioned has been paid, and it was the duty of the guardian to pay the same from the estate of his ward. He performed this duty by executing the note in question as guardian; and notwithstanding the form of the note, on the face of the same, and according to its legal effect, we think it is clear, under the authorities, that the guardian is personally bound, and must look to the estate of his ward in his settlement with the court for reimbursement. The court below, in the opinion rendered, and which appears in the record, evidently entertained the view that the note, unexplained by parol evidence, bound personally the guardian. In that opinion the trial judge said: "I think the words of the note sufficiently show that he signed as guardian, although he signed the name of John Blazzard by Joseph H. Hurd, guardian. I think it would charge him, under the rule, with personal liability, if in the hands of an innocent indorsee." Respondents' counsel, in their brief, state that it "may be admitted that ordinarily a guardian who makes a contract as guardian binds himself, and not his ward." In the case at bar Hurd acted in the capacity of guardian, as the way in which he signed the note shows. The ward being civilly dead, the execution of the note was the act of the guardian, and the note his own, and not the ward's.

It is, however, claimed by counsel for respondents that notwithstanding a guardian who makes a contract as such thereby binds himself, and not his ward, still the guardian may show by parol evidence, as was permitted by the court, over the objection of the plaintiff, to be done in this case, that the parties did not intend to bind the guardian personally. No parol agreement, in express terms, was made that the guardian should not be personally bound. The only evidence upon that subject was the statements of the guardian and C. S. Varian and E. B. Critchlow, two of the beneficiaries. The guardian, in answer to the question, "What occurred at the time the note was made?" said: "My recollection is not as clear as it might be, but, as I remember it, the papers were all prepared—a petition to the court for authority to execute this note and mortgage—authorizing and directing the execution of the note on account of the incompetent, and the signing and waiver of notice; that the court, having heard the testimony, made the order. My recollection is that the other papers were prepared at the same time, and I signed them. I remember distinctly Mr. Varian calling my attention to the manner in which it was necessary to sign in order to avoid personal liability in a matter of this kind, and suggested that it

be signed in the way it is." In the examination on this matter of C. S. Varian, the following occurred: "Q. Now, I will ask you, in taking that note of Mr. Hurd, whether you understood that he was not to be bound personally upon it. A. I certainly did. Q. I will ask you if there was any intention on your part to bind anybody except the person and estate of this incompetent person, by his signature to this note. A. There was not. Hurd was an entirely independent person, acting gratuitously as an act of courtesy. Q. In taking the note from Mr. Hurd, signed in this way, did you, or did you not, depend entirely upon the order of the probate court? A. Certainly." In the examination of Mr. E. B. Critchlow, he stated: "Q. I will ask you whether or not in taking the note you yourself understood that Mr. Hurd was in no manner personally responsible. A. I certainly did. Q. I will ask you to state whether or not Mr. Hurd was procured to act as guardian at the request of yourself, Mr. Rawlins, and Mr. Varian, who were interested in the note. A. He was. He had absolutely no interest in the matter at all until he was asked to come into it at our request to act as guardian for the incompetent person. Q. State whether or not he was asked to act as attorney or as guardian simply for your accommodation. A. I can hardly say that. I suppose the interest of the incompetent needed attention, and he was appointed in his interest as well. As to the execution of the note, he was acting in our interest entirely. It was for our accommodation. Q. One further question I will ask you,—whether or not it was understood by you that the order of the probate court did bind the estate of this incompetent person. A. That was a matter of investigation by Mr. Varian and myself. I can't say whether Mr. Rawlins participated in that or not, and we came to the conclusion—formed the judgment—that the guardian of an incompetent person might be authorized by the court, upon proper proceedings taken, to give this note and mortgage; and upon that it was our intention to bind the estate of the ward, and nobody else, by the signature of Mr. Hurd."

The guardian and beneficiaries of said note were fully aware of all the facts regarding the transaction. There was no mistake respecting the language of the note, but it was in the form and was executed in the manner intended. It is not claimed that there was any fraud or mistake of fact in the transaction. The substance of respondent's claim is that he and the beneficiaries did not intend the note, in legal effect, should bind the guardian personally. When the facts are within the knowledge of both parties to a written contract, and the language used is such as they intended, a mistake as to the legal effect of the contract, or that its legal effect is different from that intended, is not available as a defense at law, and is not

ground for a reformation of the contract in a court of equity, and cannot be shown by parol. *Brown v. Wiley*, 20 How. 442, 15 L. Ed. 965; *Martin v. Cole*, 104 U. S. 30-38, 28 L. Ed. 647; *Fawkner v. Wall-Paper Co.*, 88 Iowa, 169, 55 N. W. 200; *Bryan v. Duff* (Wash.) 40 Pac. 936; *McAninch v. Laughlin*, 13 Pa. St. 371; *Davis v. England*, 141 Mass. 587-590, 6 N. E. 731; *Oiler v. Gard*, 23 Ind. 212-218; *Kelly v. Turner*, 74 Ala. 513; *Farley v. Bryant*, 32 Me. 474-483; *Conner v. Clark*, 12 Cal. 163; *Renner v. President, etc.*, 9 Wheat. 581-587, 6 L. Ed. 166; *Moorman v. Collier*, 32 Iowa, 138. There are many other decisions in line with the foregoing cases, but they are too numerous for citation. In the case of *Brown v. Wiley*, supra, Justice Grier used this language: "When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule." In the case of *Renner v. President, etc.*, supra, the court said: "There is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." In the case of *Moorman v. Collier*, supra, the legal effect of the terms of a contract was different from what the parties supposed they were, and parol evidence of the mistake was excluded. In the case of *Fawkner v. Wall-Paper Co.*, 88 Iowa, 169, 55 N. W. 200, it was held that: "Whatever the law implies from the language used in a written contract is as much a part of the contract as that which is expressed therein; and if the contract, viewed in the light of what the law thus implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence." In the case of *Farley v. Bryant*, 32 Me. 483, the court said: "When it is alleged that certain words, letters, or figures have been inserted or omitted by mistake, the proof should establish the facts alleged. If there be a failure to do this, and the testimony shows that by a legal construction the deed may operate contrary to the expectations of the grantor, and convey land which he did not intend to convey, a court of equity would not be authorized to reform the deed; for conveyances are not to be reformed, and made to read in such manner as may best carry into effect the intentions of the parties as ascertained from parol testimony, when there is no satisfactory proof that they did not use the language which they intended to use." In the case of *McAninch v. Laughlin*, 13 Pa.

St. 371, the facts were within the knowledge of both parties, and the mistake was in the judgment they formed of the legal effect of them, but the court held that such a mistake was not a ground of relief. In the case of *Oiler v. Gard*, supra, this language is used: "It is not proved that the language or import of the note was not well understood, or that either was different from what was intended by the parties when it was written and signed. The testimony of Gard fails to show that there was anything omitted in the writings of the 15th of August and the 19th of October, 1857, which was, at the time of their execution, intended to be inserted. Gard understood the language and import of the papers, but he did not understand their legal effect. This was a mistake of law, unattended by such circumstances as would entitle him to relief in equity. A mistake or ignorance of the law forms no ground of relief from contracts fairly entered into, with full knowledge of the facts, under circumstances raising no presumption of fraud, imposition, or undue advantage taken." In the case of *Davis v. England*, 141 Mass. 587, 6 N. E. 731, the note was, in form, "I promise," etc., and was signed as follows: "W. H. England, Pres. & Treas. of Chelsea Iron-Foundry Co." The defendant offered evidence to show that the consideration of the note was the sale of a bill of goods which was delivered to the company, and that at the time and after the note was given it was understood, intended, and agreed by both parties that the note was the note of the company. The court admitted the evidence over objection thereto. In the opinion rendered, it was said: "The learned justice who presided in the superior court rightly ruled that the note sued on is the note of the defendant, and not of the Chelsea Iron-Foundry Company. Manufacturing Co. v. Fairbanks, 98 Mass. 101. But it was erroneous to admit oral testimony to show that at the time the note was given and afterwards it was understood and agreed by the parties that the note was the note of the Chelsea Iron-Foundry Company." In the case just cited, in legal effect, the note was the note of W. H. England, and not that of the company. In the case at bar the legal effect of the note in question was, as hereinbefore shown, the note of the guardian. In the case of *Conner v. Clark*, 12 Cal. 171, the court said: "Story, Prom. Notes, § 63, says: 'As to trustees, guardians, executors, and administrators, and other persons acting en autre droit, they are by law generally held personally liable on promissory notes, because they have no authority to bind, ex directo, the persons for whom or for whose benefit or for whose estate they act; and, hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility by using clear and explicit words to show that in-

vention, but in the absence of such words the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words "as executor" or "as administrator," he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate.' Story, Ag. 176, asserts the same doctrine. The question here is not, as the counsel for the appellant has ingeniously suggested, whether a principal can be bound on an unsealed contract where the writing intimates and notifies by general words the fact of agency, and parol evidence explanatory of the fact intimated is given. But here there is no doubt that the person signing as trustee was bound, but he wishes to prove that he was bound only in a certain way; that is, to pay out of a particular fund. It is not pretended that any one else was bound by this contract. No authority is shown in Clark to bind the beneficiaries in this trust by this note. In form and legal effect the note binds him to pay this amount; but he wishes to add to this note another term, namely, that he was only to pay it out of a certain fund, and this, he wishes to prove, was a contemporaneous parol agreement. But the rule is that the written contract is considered the definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties."

As the terms of the note in question were such as the parties intended to use, and their legal effect was to bind the guardian personally, the parol evidence showing a different understanding was inadmissible, and the objection of the plaintiff thereto should have been sustained. The order of the probate court, being made without authority of the statute, is void, and does not, therefore, shield the guardian from personal liability. *McCalley v. Wilburn*, 77 Ala. 549; *Whiteside v. Jennings*, 19 Ala. 784, 788; *Hudson v. Holmes' Ex'rs*, 23 Ala. 589; *Beal v. Harmon*, 38 Mo. 436-439; *Woerner, Guardianship*, 200, 219. It is elementary that a judgment or order of a court made without authority is void, and confers no rights on, and affords no protection to, persons acting in pursuance thereof. In the case of *McCalley v. Wilburn*, supra, the court said: "If his petition to the probate court had contained all the requisite jurisdictional allegations, and the order of the court based on the petition had been otherwise regular, it is very clear that the obligation given by the administrator would have been binding on him in his representative capacity, and he would not have been in any wise personally liable. Such is the express declaration of the statute. But this is the case only where the proceedings of the court are valid, so as to confer upon the administrator the legal authority to bind the estate by the execution of 'such note, bond, or bill.'

Code 1876, § 2432. It is obvious that an administrator cannot shield himself from personal liability, by refuge under an order which is absolutely void. The rule of law which governs his liability is analogous to that governing trustees and agents in general. Where he undertakes to bind the estate, and fails to do so for want of authority, he binds himself personally, and may be sued upon his contract individually. *Whiteside v. Jennings*, 19 Ala. 784. And in such cases it avails him nothing that he intended only to bind himself in his representative capacity."

It appears that McGurkin was made payee of the note only as an accommodation to the attorneys beneficially interested. How this could accommodate them, or what induced them to resort to this indirect method, was not inquired into. It does appear, however, from the face of the note, that two of the beneficiaries signed the same as guardians of their respective wards, who, it is claimed, it was intended should be bound by the note so signed. It also appears that McGurkin had no personal interest in the matter whatever, that he took no part in the negotiations, that the note at its execution was delivered to the beneficiaries, and that previous to the time McGurkin purchased the same, on December 5, 1893, it had not been in his possession. Nor does it appear that he was present at the execution of the note, or that he was advised that it was not intended to bind the guardian personally by the note. The defendant stated in his testimony that he remembered distinctly that he, Critchlow, and Varian were present at the execution of the note, and, to the best of his recollection, McGurkin was there also. On cross-examination he said: "I am not certain about McGurkin being present when I executed the note and mortgage. Am certain as to the others." McGurkin, being placed on the witness stand by the defendants, testified, in substance, that he bought the note from Mr. Varian for a valuable consideration; that neither at or prior to the time he purchased the same was anything said about his not looking to Hurd; that there was no understanding, expressed or implied, that he should not be liable on the note; that nothing was said about it at all; that at the time he saw the note and mortgage, and the manner in which it was signed, he took it for granted that when they signed their names in that way they had the authority; that he did not suppose Hurd was binding himself personally on the note, and understood that what he was getting was the note of John Blazzard, by Joseph H. Hurd, his guardian; that he took the note for what it was worth, and expected to hold Hurd if he had no authority to make the note, and had no understanding by which Hurd was not to be liable, but supposed he had authority to sign the note. It does not appear from the record that McGurkin had any knowledge that it was under-

stood by the interested parties that the guardian was not to be personally bound. Evidently McGurrian supposed that the legal effect of the note was to bind the ward, and not the guardian; but would the fact that he was mistaken in this deprive him of the rights of an innocent holder for value, and prevent him from enforcing the note according to its legal effect? It would not, and, this being so, the plaintiff, notwithstanding he became the owner of the note, for value, after its maturity, is not deprived of such right. As parol evidence is not admissible to defeat the legal effect of a written contract, the terms of which the parties intended to use if the beneficiaries of the note had brought suit to recover on the same, such evidence, to defeat the legal effect of the same, would not have been admissible over their objection, it follows that such evidence would not be admissible, over objection in a suit by any subsequent owner and holder of said note for value. The attorneys have received their fee, and the debt of the ward has been paid; and, if the guardian were not personally liable on the note, the holder of the same, for value, would have no remedy, for neither can he hold the ward or guardian on implied assumpsit, nor do we know of any other available remedy. The guardian, however, has a remedy. Under the provision of the statute, he has the right to credit himself in his accounts with any sum legitimately expended or advanced in the discharge of his duties, and to have the same satisfied out of the ward's estate.

It is alleged in the answer that the said James Blazzard and Mariam Blazzard Steers, two of the makers of said note, by separate deeds conveyed to the plaintiff certain real estate, and that there was deducted from the consideration of said deeds a sum equal to one-half of the amount of said note, and which was retained by plaintiff, who in consideration of such retention agreed to indemnify and save harmless the said James Blazzard and Mariam Blazzard Steers against and from all liability upon said note and the mortgage given to secure the same. The evidence shows that a portion of the consideration of said deeds was so retained, but the exact amount is not shown. Whenever the plaintiff became the owner of said note, whatever amounts were so deducted and retained should, as to him, be regarded and treated as payments on the note, and the guardian is only liable for the balance. It further appears from the testimony of E. B. Critchlow, before quoted, that the guardian was appointed at the request of the attorneys to whom the fee was due, and that "as to the execution of the note he was acting in [their] interest entirely. It was for [their] accommodation." In view of such action, and the other facts disclosed in the case, in connection with the lack of general authority of the guardian in the premises, the parties to the transaction, as against the

holder of the note, who paid a valuable and good consideration for the same, should not have been allowed to say that they intended to bind the ward only. It is ordered that the judgment be reversed, at respondents' costs, with directions to the lower court to grant a new trial.

BARTCH, J., concurs.

MINER, C. J. (dissenting). I do not concur in the opinion of my learned associate, Mr. Justice BASKIN. While it is true that ordinarily a guardian who makes a contract as such binds himself, and not his ward, yet there are exceptions to the rule that are quite as well settled as the rule itself. The guardian is held responsible where he has bought or contracted for the benefit of his ward, and the law implies an agreement on his part to pay, or where there was a written contract, entered into with apt words, to bind him personally. But the promise under consideration was made in the name of the principal, and as his contract, and not as the individual contract of Hurd. The makers and the payee understood, executed, and accepted the note as the note of the principal, and did not understand that Hurd was to be individually and personally bound as guardian. There are no apt words in the instrument that can be construed into a personal contract binding the guardian. The rule of law is well settled that an agent or trustee cannot be held upon a contract he assumes to execute for another unless there are apt words of personal obligation on the part of such agent or trustee written in the contract. In the present case the note did not contain a personal promise of the guardian to pay. It was not executed by Hurd as guardian, but by John Blazzard himself, by Hurd as general guardian. It was the note of John Blazzard, by his guardian, and not the note of the guardian. The note fails to bind the ward because of want of authority on the part of the guardian to execute it, and it also fails to bind the guardian because it does not contain apt words making it a personal obligation, and because the payee, with knowledge of the facts, relied upon the power of the guardian to make a binding contract for his ward; and therefore the mistake is one of law. While there is a conflict in the authorities on this subject, yet the general rule is as above stated. As to the first proposition, Mechem, Ag. § 550, says: "Where the promise is made in the name of the principal, and as his contract, the better opinion is that the agent cannot be held liable upon it, but only for the deceit or breach of warranty, even in the case of a written contract, where the assumed relation of agency appears upon the face of it. * * * The rule sometimes asserted, that whenever the agent fails to create a right of action against his principal upon the contract he makes him-

self liable thereon, cannot, therefore, be sustained as a general rule. The agent is only liable on the contract in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally." *Hall v. Crandall*, 29 Cal. 567; *Lander v. Castro*, 43 Cal. 497; *Johnson v. Smith*, 21 Conn. 627; *Mechem, Ag. § 550*. In a note to the latter citation many cases are reported sustaining the principle announced. As to the latter proposition above, see 1 Am. & Eng. Enc. Law (2d Ed.) 1127; *Michael v. Jones*, 84 Mo. 578; *Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 71 Mo. 62; *Taylor v. Shelton*, 30 Conn. 122; *Ogden v. Raymond*, 22 Conn. 379; *Mechem, Ag. § 546*.

I am also of the opinion that evidence was admissible to show the knowledge of the parties that the note was intended as the obligation of the principal, and not of the agent, and that it was given and accepted as such. There is some conflict of authority on this subject, but the weight thereof sustains the doctrine stated. The subject is fully discussed in *Mechem, Ag. § 441*, where the authorities are collected, and the author therein states that the weight of authority sustains the doctrine announced. See, also, 1 *Rand. Com. Paper*, § 147. The case of *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665, and *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326, also sustain the same doctrine. See, also, *Kean v. Davis*, 21 N. J. Law, 683; 2 *Notes on U. S. Reports*, p. 34; and *Mechem, Ag. § 288*. In my opinion, the judgment of the district court should be affirmed.

(23 Utah, 200)

In re CHRISTENSEN'S ESTATE.

(Supreme Court of Utah. Feb. 1, 1901.)

APPEAL—REMAND—LAW OF CASE.

Where an issue has been once determined by an appellate court, and the cause sent back for further proceedings in accordance with the appellate decision, evidence which tends only to raise the issue already determined by the appellate court is properly rejected.¹

(Syllabus by the Court.)

Appeal from district court, Seventh district; Jacob Johnson, Judge.

In the matter of the estate of Herman J. Christensen. From an order allowing the distributive share to the widow, Andrew H. Christensen and others appeal. Affirmed.

Ferdinand Erickson and Rawlins, Thurman, Hurd & Wedgwood, for appellants Zane & Rogers and W. D. Livingston, for respondents.

BARTCH, J. It appears from the record that Herman J. Christensen died intestate on June 26, 1897, and that on July 12th of

the same year an administrator of his estate was appointed by the district court of Sanpete county, sitting as a court of probate. Thereupon Hannah Christensen, by her guardian, presented to the court a petition alleging that she was the lawful wife of the deceased, and asking that an allowance be made to her as his widow. The administrator, by answer to the petition, denied that the petitioner was the wife of the intestate at the time of his death, and that she was his lawful widow. At the trial of the issue thus raised the court held that the petitioner was not the lawful widow of the deceased, and refused to make any allowance to her out of his estate. From that judgment she appealed, and this court, upon such appeal, reversed the judgment, and remanded the cause to the lower court, with directions "to recognize the petitioner as the lawful widow of the decedent, and to adjudicate the rights of the respective parties found to have an interest in his estate, and to make payment or distribution thereof according to law." The cause having been remanded to the district court, both the administrator and the appellants herein filed separate petitions, praying that final distribution be made, and the estate brought to a close. The administrator, in his petition, alleged that Hannah Christensen was the widow of the deceased, and, as such, was entitled to one-third of the estate. The appellants alleged that she claimed to be the widow of deceased, but was not such in fact, and was not entitled to any distributive share of the estate. At the hearing the court refused to admit testimony, offered by the appellants, for the purpose of proving that Hannah Christensen was divorced from the deceased by a decree of the probate court of Sanpete county on December 5, 1854, and entered a decree of distribution by which one-third of the residue of the estate was distributed to her as the widow of the intestate. On this appeal it is insisted by the appellants that the court erred in excluding the testimony offered referring to the alleged divorce. We see no error in the exclusion of such testimony. The question as to the validity of the alleged divorce was presented to and decided by this court upon the former appeal. The decree of divorce was then held void, Hannah Christensen was held to be the lawful wife of the deceased, and the court was ordered to make distribution of the estate accordingly. In *re Christensen*, 17 Utah, 412, 53 Pac. 1003. When, therefore, after the cause had been remanded with directions to the trial court to recognize the petitioner as the lawful widow of the deceased in the distribution of the estate, the appellants, in the subsequent proceedings, again offered substantially the same evidence, for the purpose of again trying the same issue which the appellate court had passed upon and determined, the evidence was properly rejected. The action of the trial court in the premises was strictly in ac-

¹ In *re Christensen*, 53 Pac. 1003, 17 Utah, 412.

cordance with the mandate of this court, and we find no reversible error in the record. The judgment is affirmed, with costs.

MINER, C. J., and BASKIN, J., concur.

(23 Utah, 152)

MARKS v. TAYLOR et al.¹

(Supreme Court of Utah. Jan. 12, 1901.)

PROCEDURE—EXAMINATION OF WITNESS—ACTION TO REFORM—MISTAKE—EVIDENCE—EQUITY PLEADING—COMPLAINT—SUFFICIENCY—ASSIGNMENT OF ERROR.

1. If, in reply to a question which might be answered by a conclusion of the witness, the witness states the facts instead of his conclusion, the other party is not injured, and no error committed.

2. In an action to reform a mortgage and sheriff's deed, when it appears from the evidence that one F. conducted the negotiations, procured the loan, and drew the note and mortgage for the defendants, although not directly authorized to do so by them, when they accepted the loan, and executed the note and mortgage, they ratified the acts of F., and were bound thereby as effectually as if they had in express terms authorized him to act as their agent, and whatever occurred between F. and the plaintiff in the negotiations which resulted in the loan and the execution of the note and mortgage was a part of the *res gestæ*, and therefore admissible in evidence.

3. Evidence that the person drawing a mortgage intended to include land other than that actually included is, in an action to reform the mortgage on the ground of mistake, material, and strong evidence of the alleged mistake.

4. A complaint in equity, which sets forth the negotiations for a loan from plaintiff to defendants, the consummation thereof, and alleges that by mistake the property promised as security was not all included in the mortgage, sufficiently states the cause of action for reformation.

5. In an action to reform a written instrument on the ground of mistake, a court of equity will not only reform the instrument in which the mistake occurred, but all subsequent instruments which have perpetuated such mistake, so as to administer a full measure of relief, avoid circuity of action, and promote justice.

6. Assignments of error upon the ground of insufficiency of the evidence, without stating the particulars in which the evidence is insufficient, as required by section 3284, Rev. St. 1898, cannot be considered.

7. Where, in an action to reform, the defendant in his answer does not disclaim title to any portion of the premises described in the complaint, and when sworn as a witness admits purchasing it, the proof that defendant owned the land sought to be included in the reformed deed is sufficient.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Anna Marks against Thomas E. Taylor and Emma L. Taylor. Judgment for plaintiff. Defendants appeal. Affirmed.

C. S. Patterson and Daniel Harrington, for appellants. Zane & Rogers, for respondent.

BASKIN, J. This is an action to reform a mortgage, and the sheriff's deed made to the purchaser upon the sale of the mortgaged

premises. It appears that a short time previous to August 24, 1894, Taylor Bros., who were in the loan and insurance business, and were brothers of Thomas E. Taylor, one of the defendants, applied to one Ernest M. Fowler, who was engaged in the business of procuring loans, to procure a loan for the said Thomas E. Taylor on the security of certain real estate in Salt Lake City; that the said Fowler then applied to the plaintiff, from whom he had previously procured loans, to make the loan requested by Taylor Bros.; that Taylor Bros., before the said Fowler applied to the plaintiff to make the loan, had shown him the real estate upon which the desired loan was proposed, and that the same was inclosed by an old fence and the walls of buildings thereon; that the said Fowler, before the loan was made, went with the plaintiff upon the ground, and pointed out the premises, and showed her the buildings thereon; that after the plaintiff was shown the premises she consented to make the desired loan of \$3,000, and the said Fowler thereupon drew up a note for the amount, and a mortgage to secure the same, but instead of including, as he intended, the premises pointed out to him by Taylor Bros., and by him to the plaintiff, by mistake and oversight only a portion of the premises so pointed out were included in the description. This note and mortgage was executed and delivered to the plaintiff upon the payment by her of the said sum of \$3,000. The plaintiff testified that at the time she loaned the money she supposed she was obtaining as security the property that Fowler pointed out to her, and would not have made the loan if she had known, or had any reason to believe, that the mortgage did not embrace the premises shown to her, and that she relied on Mr. Fowler and Taylor to see that she got what she bargained for. It further appears that Fowler was paid a commission by Taylor Bros.; that, upon default in the payment of the note being made, the mortgage was foreclosed, and the mortgaged premises were bid in by the plaintiff, and after the period of redemption had expired a deed to her of the premises was made by the sheriff, and she took possession of the same; that the plaintiff for a long time after the foreclosure sale and after the execution of the sheriff's deed was ignorant that the mortgage did not include all of the property pointed out to her; that afterwards the said Thomas E. Taylor made claim to the portion of the premises pointed out to the plaintiff, which by mistake and oversight was omitted from the description of the property in the mortgage, and began to tear down a building situated thereon, whereupon the plaintiff instituted this action.

The defendants do not deny the execution and delivery by them of said note and mortgage. The foregoing facts, in substance, were alleged in the complaint, and are embraced by the findings of fact of the trial

¹ Rehearing granted February 16, 1901.

court, and are fully sustained by the evidence. A decree was made and entered in the court below, as prayed for in the complaint, and from this decree this appeal is taken.

On the direct examination of Fowler, after he had stated that he had had something to do with the making of the loan, he was asked by plaintiff's counsel: "For whom were you acting in that direction?" To this question the defendants' counsel objected, on the ground that the question called for the conclusion of the witness. The objection was overruled, and the action of the court was excepted to, and is assigned as error. The witness, instead of answering the question directly, stated, without further objection, the facts relating to him hereinbefore set out, and, as these facts show for whom he acted, the appellants were in no wise injured.

The second assignment of error discussed in the brief of appellants is as follows: "That the court erred in overruling the motion of the defendants to exclude from the record all the testimony of the witness Ernest M. Fowler in regard to the conversation with the plaintiff, for the reason that no testimony was offered or introduced by the plaintiff which tended to show that the witness was the agent of the defendants." No reference is made in the brief either to the abstract or transcript where such a motion was made, and, after careful search in both, we have been unable to discover that such a motion was made. In the transcript, however, early in the examination of Fowler, a motion was made to strike out his testimony previously given, on the ground mentioned, but, after that motion had been overruled, he was examined and cross-examined, re-examined and recross-examined, at great length, and no motion was made to strike out his testimony given subsequent to the first motion. The trial court had not, therefore, passed upon any such motion as that upon which said assignment of error is based. However, as it appears from the evidence that Fowler conducted the negotiations, procured the loan, and drew the note and mortgage for the defendants, although not directly authorized to do so by the defendants, when they accepted the loan and executed the note and mortgage, they ratified Fowler's acts, and were bound thereby as effectually as if they had in express terms authorized him to act as their agent, and whatever occurred between Fowler and the plaintiff in the negotiations which resulted in the loan and the execution of the note and mortgage was a part of the res gestæ, and therefore admissible in evidence.

Counsel for the plaintiff asked Fowler the following question: "In drawing the mortgage, did you intend to have other property than that included in the mortgage?" To this question defendants' counsel objected, on the ground that it was immaterial, and assigns as error the overruling of this objection. Certainly, if Fowler intended to include in the mortgage the land claimed to

have been erroneously omitted, and which was pointed out by him to the plaintiff, that fact was strong evidence of the alleged mistake. The question was well calculated to elicit the facts, and was therefore proper.

The appellants also rely upon the following assignments of error: "That the court erred in overruling defendants' motion for nonsuit at the close of the plaintiff's testimony for the following reasons: (a) That the complaint failed to state a cause of action; (b) that the court had no jurisdiction to grant the relief prayed for; (c) that there was no sufficient evidence offered or introduced to show that the defendants were guilty of any false or fraudulent statements, or that the plaintiff was misled thereby; (d) that there was no sufficient evidence to prove that the plaintiff and the defendants, either through themselves or agents, were mutually mistaken in drawing the mortgage described in plaintiff's complaint; (e) that there was no sufficient evidence to prove that the plaintiff and the defendants, either through themselves or through their agents, mutually agreed upon any contract other than that contained in the mortgage; (f) that there was no evidence offered by the plaintiff to prove that any part of the property which the plaintiff sought to recover by a reformed decree was ever owned by the defendants; (g) that the evidence showed that the plaintiff had been negligent in not sooner discovering and asserting her alleged claim."

In regard to assignments "a" and "b," in the case of *Quivey v. Baker*, 37 Cal. 465, the scrivener, in drawing up a mortgage, made a mistake in the description of a lot which he intended to describe, by transposing the numbers of the block and range. The mortgage was afterwards foreclosed, and the mortgagee became the purchaser, and took possession. Afterwards, Quivey, who claimed under a chain of conveyances from the mortgagor, brought a suit of ejectment against the party in possession, who claimed under mesne conveyance from the mortgagee. The defendant set up as an equitable defense the mistake in the description of the mortgage. In the opinion rendered in the case, the court said: "But it is said the mortgage cannot now be reformed, because it has become merged in the judgment of foreclosure, and that it is not competent for a court of equity to reform the judgment and the sheriff's deed. We have been referred to no authorities in support of this proposition, and, on principles of reason and justice, we do not perceive why a court of equity may not reform mistakes in judgments or decrees in like manner as in written instruments. But it is said there was no mistake, either in the decree or sheriff's deed, which followed the description in the mortgage, and could not have done otherwise, and consequently there is no mistake to reform in either of them. As well might it be claimed that if there be a mistake in the first of a series of conveyances, which was carried out through all

the subsequent conveyances, the court could only correct the mistakes in the first deed, and that, in fact, there was no mistake in the subsequent deeds, which were correctly copied from the first, as they were intended to be. But a court of equity does not administer justice on these narrow principles. It will not only go back to the original error and reform it, but will administer complete justice, by correcting all subsequent mistakes which grew out of, and were superinduced by, the first. It would be a vain thing to reform the first and perpetuate the last by refusing to disturb it. The rule in equity is to do nothing in halves, but in proper cases to administer a full measure of relief, so as to avoid circuity of action and promote the ends of justice." *Donald v. Beals*, 57 Cal. 405. In the case of *Born v. Schrenkelsen*, 110 N. Y. 55, 59, 17 N. E. 339, the court said: "In such a case, if, by the mistake of the scrivener or by any other inadvertence, the writing does not express the agreement actually made, it may be reformed by the court. It is only where the action is to reform the agreement itself that it is required that it should be alleged in the pleading and proved on the trial that the mistake was mutual. Where there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected. *Pitcher v. Hennessey*, 48 N. Y. 415." In the case at bar the conditions upon which the loan was made were agreed upon by and between Fowler and the plaintiff, and the evidence shows beyond doubt that it was agreed that the loan should be secured by a mortgage upon the premises pointed out by Fowler to the plaintiff, and that Fowler, in drawing the mortgage, by mistake omitted part of the premises which it was intended should be included therein. In the case of *Smith v. Jordan*, 13 Minn. 264, 270 (Gil. 246), the court said that: "Whether the error in a written contract is the result of intentional or unintentional misstatements of the defendants is immaterial, for a court of equity has power to correct it as well in the former as in the latter case. * * * The charge here is that the agreement of the parties was not correctly reduced to writing; that the error is the result of fraud or mistake." In the case at bar the evidence clearly shows that the error in the mortgage resulted from mistake, and not from fraud. It is clear that the complaint stated a cause of action, and that the court below had jurisdiction to grant the relief prayed for.

Assignments "c," "d," and "e" we cannot consider, because the particulars in which the evidence is insufficient are not specified in the exceptions, as required by section 3284, Rev. St. 1898. *Van Pelt v. Park*, 18 Utah, 141, 55 Pac. 381.

In regard to assignment "f," the defendant Thomas E. Taylor testified as follows: "I obtained the title to the south 5 rods of this

ground several years after I obtained the title to the north 5 rods. In the beginning I owned 26¼ feet front and 5 rods deep only. My next purchase was the 4 by 5 rods in the rear, which would include all the ground described in plaintiff's complaint, except the entrance to the stairway." This defendant in his answer did not disclaim title to any portion of the premises described in the complaint.

Assignment "g" is not supported by the evidence.

There are several assignments based upon alleged insufficiency of the evidence to support certain parts of the findings. The particulars in which the evidence is insufficient in these respects are not specified. However, we are of the opinion that the findings are supported by the evidence.

There are some other assignments of minor importance, which it is not necessary to specifically pass upon. There is no reversible error appearing in the record. It is ordered that the judgment of the court below be affirmed, with costs.

MINER, C. J., and BARTCH, J., concur.

(23 Utah, 183)

ELLISON v. BARNES.

(Supreme Court of Utah, Jan. 10, 1901.)

ELECTIONS—MEMBERS OF LEGISLATURE—JURISDICTION—COURTS—TRIAL.

1. The provisions of Const. art. 6, § 10, making each house of the legislature the judge of the election and qualifications of its members, is an exclusive grant of power to each house, forbidden to be exercised by article 5, § 1, by any person in the exercise of powers belonging to a different department of the government, and the courts have no jurisdiction to try and determine contests for seats in the legislature.

2. Where the trial by a court of an election contest would be a vain and fruitless proceeding, and another trial by the state senate would be necessary to determine the rights of parties, the court will not assume jurisdiction for any purpose.

3. Under proper proceedings courts may determine all matters pertaining to the conduct of elections and the returns thereof, including the issuance of a certificate of election of a candidate elected to the office of legislator who has received a majority of legal votes, but through fraud has been deprived of the certificate showing his *prima facie* right to the office.

(Syllabus by the Court.)

Appeal from district court, Second district; before Justice H. H. Rolapp.

Action by Ephraim P. Ellison against J. G. M. Barnes. Judgment for defendant. Plaintiff appeals. Affirmed.

Pierce, Critchlow & Barrette, P. L. Williams, and D. H. Wenger, for appellant. J. H. Moyle and Rawlins, Thurman, Hurd & Wedgwood, for respondent.

BASKIN, J. This is an action contesting, under the provisions of chapter 9, p. 282, Rev. St. 1898, the election of the respondent to the

¹ See *Kimball v. City of Grantsville*, 57 Pac. 1, 19 Utah, 363, 45 L. R. A. 632.

office of state senator. A demurrer to the complaint was sustained on the ground that the court below had no jurisdiction to try and determine the same. Upon the demurrer being sustained, the appellant rested, and judgment dismissing the action was rendered. The only question, therefore, presented is whether the court below had jurisdiction. Section 914 of said chapter provides that "the election of any person to any public office * * * may be contested" on the grounds therein stated. Section 917 provides that the contestant "must, within forty days after the return day of the election, file with the clerk of the district court of the county within or for which such office is to be exercised a written statement setting forth specifically" the requirements therein mentioned, among which are the grounds of such contest. The appellant complied with all the requirements of said section. It appears that both the appellant and respondent were regularly nominated as candidates for the office of state senator in the Third senatorial district, and were voted for at the late general election. Upon the canvass of the votes by the canvassing board the board determined that the respondent had received one more vote than the appellant, and issued to the respondent a certificate of election. The appellant alleged that seven illegal votes were cast and counted for the respondent, and that certain legal votes cast for the appellant were rejected, and that a correct canvass of the votes would show that he was elected. Section 925 of said chapter provides that, "if in any such case it appears that a person other than the one returned has the highest number of legal votes, the court must declare such person elected." The canvassing board were not made parties to this action, and it is not sought to have a recanvass of the votes, but the only relief sought is a declaration by the court, as provided under the last section referred to, that the appellant has been elected. Such a declaration, if made, would be of no avail to the appellant; nor could any judgment rendered in the case in favor of the appellant be enforced, because under the provisions of the constitution the state senate has the exclusive jurisdiction to determine which of the parties was elected and entitled to a seat in that body. Const. art. 6, § 10, provides that "each house shall be the judge of the election and qualifications of its members." Article 5, § 1, provides that "the powers of the government of the state of Utah shall be divided into three distinct departments, the legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Article 1, § 26, provides that "the provisions of the constitution are mandatory and prohibitory, un-

less by express words they are declared otherwise." The powers conferred upon each house of the legislature under section 10, art. 6, are forbidden to be exercised, by article 5, § 1, by any person in the exercise of powers belonging to a different department of the government. Neither is it anywhere declared in the constitution that the power conferred upon each house to judge of the election and the qualifications of its members is otherwise than prohibitory in respect to the other departments. Chief Justice Bartch, in the opinion in the case of *Kimball v. City of Grantsville*, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628, said, "The apportionment of distinct power to one department of itself implies an inhibition against its exercise by either of the other departments." It therefore follows that that power is exclusively lodged in each house of the legislature, and the courts have no jurisdiction to try and determine contests for seats in the legislature.

It is conceded by counsel for the appellant that any decision which the court may make in this case would not bind the senate, but that it would still possess the right to try and finally determine which of the parties was elected and should be seated. Therefore a trial and determination by the court would not settle the rights of either of the parties, but another trial by the senate would be necessary to accomplish that end. A trial and determination of such cases by the court would be a vain and fruitless proceeding. Chapter 9 of the election law (page 282, Rev. St. 1898) does not, as claimed by the appellant, warrant the contest in question. In the case of *State v. Gilmore*, 20 Kan. 551, the court say: "An act which purported to grant to the district court power to remove from office must be construed as not embracing members of the legislature; or, if the language specifically names or necessarily includes them, then, as to them, the act is unconstitutional." Under constitutions containing provisions similar to section 10, art. 6, of our constitution, the views hereinbefore expressed are fully sustained by the authorities. The following is a quotation from the opinion of the court in the case of *Dalton v. State*, 43 Ohio St. 652, 680: "The jurisdiction of each house to decide upon the elections, returns, and qualification of its own members is supreme and exclusive. *Coolley*, Const. Lim. 133; *State v. Jarrett*, 17 Md. 309; *People v. Mahaney*, 13 Mich. 481. No court of the state has, nor is it possible under our present constitution to clothe any court of the state with, the power to decide upon the validity of the returns of the election of any candidate for either house, or to decide him elected or defeated." It was held in the case of *People v. Mahaney*, in an opinion delivered by Judge Cooley (13 Mich. 481), that the constitution of Michigan, providing that each house shall judge of the qualifications, elections, and returns of its members, confers upon each house powers of a judicial nature,

in the exercise of which its decision is conclusive, and not subject to review by the courts; and in his Constitutional Limitations (page 207) he says that: "When only the legislative power is delegated to one department, and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional, because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise. And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government." And on page 568 he says that: "In determining questions concerning contested seats, the house will exercise judicial power, but generally in accordance with a course of practice which has sprung from precedents in similar cases; and no other authority is at liberty to interfere." And on page 192 he says: "The legislative and judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions, and cannot, directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it." *Wheeler v. Board*, 94 Mich. 448, 53 N. W. 914. It is held in the case of *Bingham v. Jewett*, 66 N. H. 382, 29 Atl. 694, that "the power of the 'judge of returns,' which the constitution has vested in the house, cannot be transferred to the court by the house or the legislature." In the case of *People v. Metzker*, 47 Cal. 524, the court said: "The eighth section of article 4 of the constitution, relating to the legislative department of the state government, is as follows: 'Each house shall choose its own officers, and judge of the qualifications, elections, and returns of its own members.' The words of the constitution and of the statute, being identical, should receive the same construction. It is settled beyond controversy that those words of the constitution confer upon each house the exclusive power to judge of and determine the qualifications, elections, and returns of its own members; and it follows that the common council of a city, to which that section of the act is applicable, possesses the like exclusive authority to judge of and determine the qualifications, elections, and returns of its own members." In *Palme, Elect.* § 972, it is stated that: "The jurisdiction of the house of representatives in contested election cases does not depend upon the presence or absence of any of the requisites prescribed by the statute for

the notice of contest. No statutory provision can impair or enlarge the jurisdiction of the house in such cases. In this regard the house is above all statute law. It stands upon the constitution itself. No act of congress can add to, subtract from, or modify that jurisdiction. From the foundation of the government it has exercised the jurisdiction under the federal constitution. It exercised the jurisdiction on the petition of a claimant of the contested seat, or of citizens not claimants, long before any statute providing for a notice of contest was enacted. Each house of representatives, during its entire term, has an absolute and indefeasible right to judge of the elections, returns, and qualifications of its members, not only of those who occupy contested seats, but of all its members without exception." And in section 811 it is stated that "the constitutional provision that contested elections for the office of governor shall be determined by both houses of the general assembly in such manner as is, or may hereafter be, prescribed by law, constitutes the general assembly a judicial tribunal, with the exclusive jurisdiction of such contests." And in section 811 it is said: "The power to adjudicate contested election cases in any or all departments is to be exercised by that tribunal on which it is conferred by the constitution." 1 Kent, Comm. 235; *Story, Const.* §§ 832, 833; *Black, Const. Law*, p. 263, § 102. In the case of *People v. Hall*, 80 N. Y. 117-122, it is aptly stated that: "Though the constitution confers upon specified courts general judicial powers, there are certain powers of a judicial nature, which, by the express terms of the same instrument, are given to the legislative body, and among them this which we are considering. All powers are then in the hold of the people. They are about to distribute these powers among the bodies which they at the same time create. When it is said, on such occasion, to either house of the legislature, 'You are to be the judge of the election of the members to your body,' there is a specific conferment of this particular power; and when it is said at the same time to the judicial body, 'You are to have general jurisdiction in law and equity,' though the conferment of power is general, there is, by force of the concurrent action, excepted from the general grant the specific authority definitely bestowed with the same breath upon another body. In such case it may well be that a form of words in the instrument that clearly makes a gift of judicial power to one co-ordinate body should be construed as reserving the particular power thus bestowed from the general conferment of judicial power by the same instrument, at the same time, upon another co-ordinate body. The power thus given to the houses of the legislature is a judicial power, and each house acts in a judicial capacity when it exerts it. The express vesting of the judicial power in a particular case so closely and vitally affecting the body to whom that power is given takes it out of the general judicial power,

which is at the same time, in pursuance of a general plan that has regard in each part to every other part, bestowed upon another body; both bodies being cotemporaneous in origin, and equal in dignity, degree, and proposed duration." The senate, under the provisions of the constitution, has the exclusive jurisdiction to try, determine, and declare which of the parties to this action has been legally elected. It is ordered that the judgment of the court below be affirmed, at appellant's costs.

MINER, C. J., and BARTCH, J. (concurring in the judgment). It appears from the face of the petition herein that this action was brought to try the right of the petitioner to hold the office of state senator, and not for the purpose of determining to whom the certificate of election should be issued by the board of canvassers. We therefore concur in the judgment on the ground that the courts are not the proper tribunals to determine the title to the office of a member of the legislature, although, in our opinion, the courts, where proper proceedings are instituted against proper parties, have jurisdiction to determine all matters pertaining to the conduct of elections, and to the returns thereof, including the issuance of a certificate of election to every person, candidate for office of legislator as well as for any other office, who, at any election, has received a majority of the legal votes cast for such office, and who has, through fraud or other improper or unlawful means, been deprived of a certificate of election showing his prima facie right to the office. It will be noticed that our constitutional provision, in article 6, § 10, differs from those of other state constitutions referred to, in that the word "returns" is omitted. See citations of Mr. Justice BASKIN in his opinion. *O'Ferrall v. Colby*, 2 Minn. 180 (Gil. 148); *People v. Hillard*, 20 Ill. 413; *Rosenthal v. Board* (Kan. Sup.) 32 Pac. 129, 19 L. R. A. 157.

(23 Utah, 120)

GORRINGE v. READ.

(Supreme Court of Utah. Jan. 7, 1901.)

UNLAWFUL TRANSACTIONS—EQUITY—DURESS—RIGHTS OF PARTY EXERTING IMPROPER INFLUENCE—USE OF CRIMINAL PROCESS—CONTRACT INDUCED BY THREAT—IMPRISONMENT OF RELATIVE—EVIDENCE—ACTION TO CANCEL DEED—PRIMA FACIE CASE—NON-SUIT.

1. A court of equity, acting on the maxim, "In pari delicto potior est conditio defendentis et possidentis," will not interpose to aid parties who are concerned in unlawful transactions or agreements; but where public policy requires relief to be given, and when the parties, though in delicto, are not in pari delicto, the maxim does not apply.

2. The very existence of a contract requires that the minds of the parties meet, and that it be executed freely and voluntarily by all contracting parties; and, when one of the parties acts under constraint, induced by the other, and signs the instrument without voluntary assent to it, the party who exerted the improper influence can take no advantage of the contract.

3. One who makes use of the criminal process of the court for the purpose of overcoming the will of another to secure an advantage to himself is not in a position to obtain and hold the fruits of a contract, whether executed or executory, so obtained, on the ground that both parties were in pari delicto, and that in equity the court will leave them where it finds them.

4. The rule is that in relation to husband or wife or parent and child each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment.

5. Where, in an action to set aside and cancel a deed, plaintiff shows that a deed was executed by her without consideration other than an agreement not to prosecute her husband for an alleged crime, and under threats of prosecution and punishment if she did not sign it, a sufficient case is made to put defendant on his defense, and a motion for a nonsuit should be denied.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

This is an action in equity to set aside and cancel a deed to certain real estate situate in Ogden City, and to have the plaintiff adjudged to be the lawful owner of the premises. In the complaint it was alleged, among other things, that on October 21, 1899, the plaintiff executed and delivered to the defendant the deed in question; that she was the owner of the property conveyed, the same being her homestead, of the value of \$1,200; that the deed purports to have been executed in consideration of the payment of \$800 by defendant to plaintiff, but that the conveyance was wholly without consideration, and was executed by her while she was under duress, which was caused by threats made by the defendant and his brother, J. G. Read, acting for him, to imprison plaintiff's husband in the penitentiary, and plaintiff believing that they could and would cause her husband to be prosecuted and imprisoned on the charge of grand larceny; that, having been so put in fear by defendant's threats, and for no other reason whatever, plaintiff executed and delivered the deed; and that such threats were made to her by defendant and his brother with the intention and for the purpose of cheating and defrauding plaintiff out of said realty. It appears from the testimony that at the time of the transaction complained of the defendant and J. G. Read belonged to the firm of Read Bros., of Ogden, who, it seems, were conducting a harness store, and that Joseph Gorringer, the husband of the plaintiff, had been in their employ for about 15 years. He commenced purloining their goods early in the spring of 1899, and was arrested therefor on October 27th of the same year. The largest amount of goods he had ever stolen at any one time was worth two dollars. He admitted the thefts, but what the exact value of all the stolen property was does not appear. There is evidence to the effect that after the arrest the goods were returned. The witness

Joseph Gorringer on this point testified: "I returned to them more than I ever took, and paid them for more than I ever took, not counting any property. They got back everything, and more." The evidence does not show that the plaintiff was aware of the pilferings while they were being made, but she was informed of them before she executed the deed. She was in front of defendant's shop when the arrest was made, and her husband then told her he had done wrong. She then, according to her testimony, met the defendant, and, crying, asked him to help her husband. He said he would leave it to J. G. Read, his brother. She then wanted to see her husband at the jail before going home, was taken there, had a conversation with him, and was then taken home by J. G. Read. As to what was said on the way, the plaintiff testified: "On the way home I was crying, and pleading with him, and asking him to let him off on account of the children; and he says: 'Mrs. Gorringer, this is a pretty serious case. It's a penitentiary case. Do you know that?' And he says, 'Well, it is,' and I was crying, and asking him to let him off, and he says, 'Well, have you any money in the house?' I says, 'No, sir; we haven't \$5.00;' and then he says, 'What property do you own in your name?' I told him all I had was the little home on Twenty-Fifth street. He says: 'I will run up there, and have a look at that place, and, if it suits me, we will make it up all right.'" The next morning he, according to her story, told her "to sign it over" to him, and he would "fix it up," and she said, "If it is to keep my husband out of the penitentiary, I will come down and sign it." She thereupon went down, and executed a deed to the property; but it seems something was wrong about it, and Read wanted another, but she did not go to execute it at the time requested,—about 3 o'clock. What occurred then with respect to the deed is, in the language of the witness, as follows: "He came up about 4 o'clock, and said: 'Mrs. Gorringer, you never came down and signed that deed.' I says: 'No, sir. You did not keep your promise to my husband, and I don't like to sign away all I have. You must consider I have six children to take care of.' He says: 'You will have to come down and sign that deed, or I will go and make out a complaint of grand larceny.' This was about 4 p. m. on Monday. He said if I wasn't down at half past 9 the next morning he would change the complaint to grand larceny, and send my husband to the penitentiary for from one and a half to five years. I says, 'Oh, if it is that, I will come, rather than have him sent to the penitentiary.' He said this to me many times. It frightened me. I was frightened. I was just crazy. I hardly knew whether I was willing or not. I couldn't sleep nights. I would walk the floor, and look out of the window. I could just imagine I could see

the officers coming after him. I have never been well since. No one was present when these threats were made except my husband and Read. That was on Monday evening. I saw J. G. Read at the court house next morning at 9:30. We stepped into the recording office, and he had the papers written up, and I signed my name, and the recorder said to J. G. Read, 'What name?' and he said, 'W. S. Read.' I had no talk with Read after coming out of the recorder's office. Read said that if I ever brought any trouble, or went and told any friend of it, he would still hold it over him; he could still send him to the penitentiary after that. This was after the deed was signed. I never got anything for that property." That threats were made, and that the plaintiff was excited and frightened, is also indicated by the testimony of other witnesses. It appears the property cost her over \$1,000. The husband was charged with stealing \$3 or \$4 worth of leather, and finally pleaded guilty to petit larceny. J. G. Read was present, and asked to have the case dismissed, but a fine of \$25 was imposed. Read told the witness Halverson that the "goods had been returned," and that "they were perfectly satisfied," and "wanted to get the penalty as light as possible." At the close of the plaintiff's testimony, the court, on motion, granted a nonsuit on the ground that none of the material allegations of the complaint were sustained; that the plaintiff admitted that she executed the deed for the purpose of compounding a felony; and that she was, therefore, in *pari delicto* with the grantee in the deed. Judgment was entered accordingly, and from that judgment this appeal was taken.

A. J. Weber and Thos. Maloney, for appellant. Richards & Allison, for respondent.

Upon the facts being stated as above, BARTCH, C. J., delivered the opinion of the court.

The appellant insists that the court erred in sustaining the motion for nonsuit, and that it is against public policy, good morals, and conscience to permit a transaction which is the result of duress to stand. It is urged that, even if the parties were in *pari delicto*, the appellant is comparatively the more innocent, and that in furtherance of justice and sound public policy she ought to be granted full affirmative relief. The respondent maintains that the appellant is not entitled to the interposition of a court of equity; that affirmative aid should be refused, and the parties to the illegal transaction left by the court where it found them; that the same principle controls whether the illegality is merely *malum prohibitum*, being in contravention of statute, or *malum in se*, as being contrary to public policy or good morals; and that contracts only which are made under fear of unlawful imprisonment can be

avoided for duress. We are aware that some cases tend to support the contention of the respondent. Among them are *Harmon v. Harmon*, 61 Me. 227; *Knapp v. Hyde*, 60 Barb. 80; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Allison v. Hess*, 28 Iowa, 388; *Landa v. Obert*, 45 Tex. 539. Such seems to be the trend of some of the earlier decisions, but the more recent adjudications, in cases like the one at bar, support the contention of the appellant. It appears formerly to have been the rule that the imprisonment must have been unlawful, or, if lawful, undue force must have been used, or the party made to endure unnecessary privation, to avoid which and to obtain his liberty he made the contract; while the mere fact of imprisonment was not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party was in proper custody under the regular process of a court of competent jurisdiction. Again, the earlier cases made some fine and subtle distinctions in regard to the character of the threats which procured the execution of the contract; but as civilization has advanced the law has tended much more strongly than it formerly did to overthrow everything which is built on violence or fraud, and now, as a rule, all contracts procured by threats or imprisonment and the fear of injury to life, limb, or property may be avoided on the ground of duress, whether on the part of the person to whom the promise or obligation is made or on that of his agent. The reason of this is obvious, for in such case there is nothing but the form of a contract without the substance; and, wanting the voluntary assent of the party to be bound by it, the law will refuse to uphold it. 2 Warr. Vend. 864. It is no doubt true, as a general proposition, that a court of equity, acting on the maxim, "*In pari delicto potior est conditio defendentis et possidentis*," will not interpose to aid parties who are concerned in unlawful transactions or agreements; but where public policy requires relief to be given, and when the parties, though in delicto, are not in *pari delicto*,—as when, at the time of the transaction, the complainant was under undue influence, hardship, or oppression, or great inequality of condition or age existed, and acted involuntarily,—the maxim does not apply. 1 Story, Eq. Jur. §§ 288, 300. The reason is that in such cases the public interests and justice require relief to be given, even though the complaint be by one who is *particeps criminis*. And in this class of cases a court of equity may grant relief, not only by canceling an instrument, or setting aside an agreement or other transaction, but also, in a proper case, by compelling money paid under it to be refunded. All contracts and transactions *contra bonos mores* are unlawful and void in equity, and, with a very few exceptions, at common law. This is so as to agreements or transactions, executed or executory, en-

tered into upon the consideration of the compounding of a felony, the forbearance to prosecute for a crime, abandonment of a pending criminal prosecution, or which directly or indirectly control or prevent the due administration of justice. When the object is to stifle a criminal prosecution, such an agreement or transaction is void, and, although the parties are in *pari delicto*, equity may grant relief when the public good demands it. "Even where the contracting parties are in *pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted include the class of contracts which are intrinsically contrary to public policy,—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts in which, from their particular circumstances, incidents, and collateral motives of public policy require relief." 2 Pom. Eq. Jur. 941, 936. In the case at bar, from the evidence, which, for the purpose of deciding the correctness of the judgment of nonsuit, we must assume to be true, it appears that the complainant received no consideration for the property which she conveyed by deed to the defendant. Her husband admitted that he had committed the crime of larceny, and the defendant, or his agent, after the arrest of the husband, explained to her that it was a serious case, a "penitentiary offense," and then, when implored by her to help her husband for the sake of herself and children, and to save them from want and disgrace, the defendant left the matter to his agent. She was then asked whether she had any property or money, and, upon replying that she owned the real estate in question herein, was told that, if she would execute a deed to the defendant for that property, they would make matters all right. Expressing her unwillingness to do this, she was given the choice to sign the deed or have her husband sent "to the penitentiary for from one and a half to five years." Frightened, and believing that her husband could be imprisoned in the penitentiary, and that her execution of the deed would save herself and family from want and disgrace, she consented to and did execute and deliver the instrument of conveyance.

Without further reference in detail, a fair result of the evidence, if it is in fact true,

shows that the deed was executed and delivered under the influence felt by the grantor and exercised by the grantee, and that the result of the discovery of the criminal act, for which the wife was not liable, and the fear of the criminal prosecution and imprisonment of her husband were used by the defendant, or his agent, to induce her to execute and deliver the deed. The evidence thus shows an attempt to gain an advantage or benefit from an influence improperly exerted, and indicates the use of the criminal process of a court for private and personal ends. The important question of law here involved, therefore, is whether one who has discovered the commission of a crime, and has caused the arrest of the perpetrator, and who, by threats of prosecution and imprisonment, has overcome the will of the wife of the perpetrator, and induced her to execute a deed which she would not have willingly executed and delivered, can hold the property so conveyed, if the wife afterwards attempts to avoid the deed and have it canceled on the ground of duress. It has sometimes been held that threats of unlawful imprisonment only can constitute duress, and some of the definitions of duress per minas are perhaps not broad enough to include threats of lawful imprisonment, but at present the rule has a broader application. "It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his, but another's, imposed on him through fear, which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily." *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525. The very existence of a contract requires that the minds of the parties meet, and that it be executed freely and voluntarily by all the contracting parties. If, then, in a case like the one shown by the evidence herein, one of the parties acts under constraint, induced by the other, and signs the instrument without voluntary assent to it, the party who exerted the improper influence can take no advantage of the contract. The real question in such case is not whether the threats relied upon as constituting duress were of lawful or unlawful imprisonment, but whether they were of imprisonment which would be unlawful respecting the conduct of him who threatened and sought to obtain a contract by use of the threats. Such imprisonment, resulting from the execution of threats made for the purpose of securing a contract or a conveyance of property, may be lawful with respect to the public or public au-

thorities, but unlawful with respect to him who thus, for his own private benefit, made use of the criminal process of the court provided for the prosecution of crime and the protection of the public. One who, under circumstances as now disclosed in this case, makes use of the criminal process of the court for the purpose of overcoming the will of another to secure an advantage to himself, is not in a position to obtain and hold the fruits of a contract, whether executed or executory, so obtained, on the ground that both parties were in *pari delicto*, and that in equity the court will leave them where it finds them. Under the weight of recent authority, at least, such parties, under such circumstances, cannot be looked upon as equally at fault, although they are both guilty of a wrong. The inequality of their situation, the one exacting a deed to property which the other is compelled to execute and deliver against her will in order to save her husband from imprisonment in the penitentiary and herself and children from disgrace and ruin, taints the transaction, and renders voidable the instrument obtained under the influence of her fears. This is so because she was not acting as a free agent. The evidence does not show that the conveyance was the result of her own volition, but of that of another; in reality not her contract, but another's; and in such case there is no reason why she should be held bound by the instrument. If, as indicated by the evidence now before us, her main and inspiring purpose was the release of her husband from the consequences of his crime, and to preserve the standing of herself and family in society; if such was the consideration operating in her mind when she signed the deed,—a court will not be justified in upholding the transaction.

In *Williams v. Bayley*, L. R. 1 H. L. 200, a son carried to bankers of whom he and his father were both customers certain promissory notes with his father's name upon them as indorser. The indorsements were forgeries. The forgery was afterwards discovered. The son did not deny it. The bankers insisted, though without any direct threat of prosecution or imprisonment, on a settlement, to which the father was to be a party. At a meeting at which all the parties, including the father, were present, the banker's solicitor said it was "a serious matter," and the father's solicitor added, "a case of transportation for life." Finally the father executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him. Lord Westbury, holding the agreement invalid, in the course of his opinion said: "It is perfectly clear that they did not pretend that the father was liable. What remained, then, as a motive for the father? The only motive to induce him to adopt the debt was the hope that by so doing he would relieve his son from the inevitable conse-

quences of his crime. The question, therefore, my lords, is whether a father, appealed to under such circumstances to take upon himself an amount of civil liability, with the knowledge that, unless, he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation." *Benedict v. Roone*, 106 Mich. 378, 64 N. W. 193, is a case in many respects quite similar to the one at bar. There the husband of the complainant embezzled funds of his employers. The husband's conduct was disclosed to the wife by the employers' attorney, who advised her that it constituted a criminal offense; and on the same day she was informed by one of the employers that he must have security or the money, or, "There are the papers," and "I shall go on with the proceedings." Thereupon the wife executed a mortgage to the employers upon her individual property for the amount of her husband's defalcation. In affirming a decree setting aside the mortgage as having been procured by duress and undue influence, Mr. Justice Grant, delivering the opinion of the court, said: "If the court were to be governed alone by the words used to her by them, the position of the defendants might be sustained; but we cannot ignore the conclusion that the conduct of her husband was suddenly disclosed to her; that she understood that he had committed a crime; and that the papers referred to by Mr. Weir as lying upon the table were prepared as the basis of a criminal prosecution. We think it clear that she gave the mortgage under an implied threat of criminal prosecution. If they so meant it, and she so understood it, and for that reason gave the mortgage, it was obtained by duress and undue influence, just as certainly as though an express threat had been made." So, in *Giddings v. Bank*, 104 Iowa, 676, 74 N. W. 21, it was said: "Where the fears or affections of a wife are worked upon through threats made against her husband, and she is induced thereby against her will to convey her property to secure his debt, there is duress as to her, even though the debt was valid, and the threat of lawful prosecution for a crime that had in fact been committed by the husband." In *Adams v.*

Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, it was said: "The rule is firmly established that in relation to husband and wife or parent and child each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment." 6 Am. & Eng. Enc. Law, 416, 417; 10 Am. & Eng. Enc. Law, 324-327; 2 Pom. Eq. Jur. par. 942; 1 Story, Eq. Jur. §§ 239, 300; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Town of Sharon v. Gager*, 46 Conn. 189; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Heaton v. Bank*, 59 Kan. 281, 52 Pac. 876; *Foley v. Greene*, 14 R. I. 618; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Hargreaves v. Korcek*, 44 Neb. 660, 62 N. W. 1086; *Davis v. Insurance Co.*, 8 Ch. Div. 469; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803; *Osborne v. Williams*, 18 Ves. 379; *Gohegan v. Leach*, 24 Iowa, 509; *Beindorff v. Kaufman*, 41 Neb. 824, 60 N. W. 101; *Harris v. Carmody*, 131 Mass. 51; *McMahon v. Smith*, 47 Conn. 221; *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360); *Machine Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727; *Eadie v. Slimmon*, 26 N. Y. 9; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8; *Holman v. Johnson*, 1 Cowp. 341; *Haynes v. Rudd*, 30 Hun. 237; *Claridge v. Hoare*, 14 Ves. 59. We are of the opinion that the plaintiff's testimony is of such a character as to require the defendant to put in his defense, and that the court erred in granting the motion for and entering the judgment of nonsuit. The case must be reversed, with costs, and the cause remanded, with instructions to the court below to set aside the judgment of nonsuit, and proceed in accordance herewith. It is so ordered.

BASKIN, J., concurs.

MINER, J. (concurring). It is not absolutely clear from the testimony that plaintiff participated in the crime of stealing from the store of the defendant, although it is apparent that she endeavored to conceal the crime after its discovery. It also appears that when the officers were seeking for the stolen property at her house she told her husband, "Now, Joe, be sure and not give up that stuff you bought at Salt Lake." The officers found 19 bags of stolen harness material in a room in plaintiff's house which was kept locked. Only these goods so found were returned to the defendant, although the husband had been pilfering from the store for eight months, and the estimated loss claimed was \$800. The plaintiff gave testimony tending to show that she executed the deed under duress, and by means of threats to prosecute her husband and send him to the penitentiary if she did not execute it. Under these circumstances I concur in the judgment of reversal, and in granting a new trial.

(23 Utah, 103)

AUERBACH v. SALT LAKE COUNTY.

(Supreme Court of Utah. Jan. 7, 1901.)

LIABILITY OF COUNTY—ACTION ON COUNTY WARRANTS—EVIDENCE—RESCISSION OF CONTRACT—LIABILITY ON WARRANT—DELIVERY OF GOODS—EQUITIES OF WARRANT HOLDERS—CLAIM AGAINST COUNTY—PRESENTMENT BEFORE SUIT.

1. A county court or board of county commissioners being wholly a creature of statute, when the statute is not strictly pursued the acts of such court or board are void and without force or effect; but it does not follow that under no circumstances can a liability be created when the statute is not in all respects pursued, or when some members of the court or board are guilty of fraud with reference to some part of a transaction.

2. In an action on a county warrant defended against on the ground of fraud and failure of consideration in its inception, the minutes of the court, showing the proceedings at the time the warrant was authorized, and a bond received by the court to insure the delivery of the goods, in payment for which the warrant was issued, are properly admitted in evidence, as tending to throw light on the entire transaction.

3. A county, although having the power to rescind and refuse to pay a contract created for it in fraud, cannot be permitted, after it has had sufficient opportunity to rescind and has not done so, to retain the goods, and at the same time refuse to pay the fair market value therefor to the innocent holder of a warrant.

4. In the absence of rescission, the liability of the county became complete, for the claim represented by the warrant (it being the first one issued), the moment goods had been delivered and accepted, of the fair market value of the face of the warrant; and it being admitted that goods of a greater value than the face of the warrant were delivered, accepted, and ever since used, the maxim, "*Qui prior est tempore potior est jure*," controls; and holders of subsequent warrants must be presumed to have had notice of the prior claims for which the warrant in dispute was issued, as the facts in relation thereto were matters of record. And this even though the equities between all the holders are equal.¹

5. There being no statute in this state which expressly prohibits the bringing of an action on a claim against a county before a duly itemized and verified statement has been presented to the board of county commissioners, an objection that the complaint does not allege the presentation and rejection of such a claim, being raised for the first time in this court, cannot avail the defendant. Such an objection (being simply in abatement of the action), to have effect, must be urged by proper plea or in some other appropriate manner in the trial court, or it will be regarded as waived.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Samuel H. Auerbach against Salt Lake county. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action to recover \$15,000,—a sum represented by a county warrant drawn in favor of A. H. Andrews & Co., and by that company sold and transferred to the firm of F. Auerbach & Bro., of which firm the plaintiff is the surviving partner, and engaged in winding up the affairs of the co-partnership.

¹ Board of Education of Salt Lake City v. Salt Lake Pressed-Brick Co., 44 Pac. 709, 13 Utah, 211.

The complaint has two counts. The first, in substance, alleges that the warrant was issued June 19, 1894, pursuant to a contract previously made between Andrews & Co. and the county of Salt Lake for the sale to the county of furniture for the city and county building; that the warrant was a partial payment for said furniture, which was delivered, and was of much greater value than the amount of the warrant; that the warrant was duly transferred to Auerbach & Bro., was presented for payment and registered by the county treasurer, and payment refused, although ever since November 10, 1896, there have been sufficient funds in the treasury for and applicable to the payment of the warrant; and that the same still remains wholly unpaid. The second count alleges that on June 19, 1894, the county court of Salt Lake county made a contract with Andrews & Co. for the purchase from them of furniture to the value of \$15,000; that defendant, in payment of the furniture, issued the warrant sued on; that the furniture was delivered under the contract, and was received and accepted by the county, and was of greater value than \$15,000. The allegations respecting the transfer of the warrant, its presentation for payment, registration, refusal of payment, funds in treasury, and the amount being unpaid, are the same as in the first count. The defendant's answer admits the execution and delivery of the warrant, its purchase by the plaintiff, its presentation, registration, and nonpayment, but denies the making of the contract for the purchase of the furniture, and that its delivery was pursuant to valid contracts between the county and Andrews & Co. As an affirmative defense it is, in substance, alleged that in 1894 the three selectmen of Salt Lake county and the probate judge constituted the county court; that prior to March 6th of that year the selectmen entered into a criminal conspiracy with A. H. Andrews & Co., a Chicago furniture house, acting through their agent, Martin Hayken, to defraud Salt Lake county by contracting to buy from said Andrews & Co. large quantities of furniture and fixtures for the county's part of the joint city and county building at prices corruptly enhanced with the knowledge of the selectmen, and fixed by Hayken at such sums that the whole amount charged was more than double the actual market value of the goods; that the selectmen were to be paid by Andrews & Co. 25 per cent. of the gross amount of the contracts; that pursuant to this conspiracy the three selectmen on March 6, 1894, signed a contract for the purchase by the county from Andrews & Co. of furniture, in quantity, kind, and prices specified and described in the contract and an accompanying schedule, at a stipulated price of \$34,000 in county warrants; that this furniture was for the various county offices; that subsequently, on May 7, 1894, the same parties signed a

similar contract and schedule for the purchase from Andrews & Co. of other furniture for the court rooms, district clerk's office, jury rooms, etc., at the price of \$20,-973.85, in county warrants; that these contracts were signed in Hayken's rooms at the Knutsford Hotel, and neither was authorized by the county court, nor in any way referred to in its minutes, excepting in an indemnity bond of June 19, 1894; that the first contract was filed with the county clerk March 21, and the second on December 20, 1894, two days before the selectmen went out of office; that no bids were received or competition invited for the supplying of this furniture; that, in pursuance of the agreement for bribery, money was paid by Andrews & Co., through Hayken, to Joseph R. Morris, one of the selectmen, in various sums, aggregating \$5,000; that Andrews & Co. between July 25 and December 31, 1894, delivered to the county and set up in the county building a large quantity of furniture and fixtures, but its total actual market value was only \$27,000; that the county court in 1894 (the three selectmen participating) issued warrants to Andrews & Co. in the sums of \$54,973.85, the total price named in the contracts; that the warrant sued on, issued June 15th, for \$15,000, was the first of the series; that all of the warrants were issued as part of one corrupt and fraudulent transaction, and in pursuance of the bribery conspiracy, and were received by Andrews & Co. fraudulently and with full knowledge of all the facts; and that all of them have been transferred by Andrews & Co. to different parties. The defendant's counterclaim sets up substantially the same facts as the answer, and prays judgment that the defendant be entitled to deduct from any judgment that plaintiff may recover the sum of \$7,640, being such proportion of the damages suffered by reason of the fraud (which damages were alleged to be \$28,000) as plaintiff's warrant of \$15,000 bore to the sum total of warrants issued. By way of answer to the counterclaim, after denying all its material allegations, plaintiff alleged that on June 19, 1894, after the contracts had been entered into, Andrews & Co. had completed and were ready to deliver to the county a portion of the furniture largely in excess of \$15,000 in value, but the county was not ready to receive it, by reason of the unfinished condition of the building; that Andrews & Co. desired a partial payment on their contracts, and at a regular meeting of the county court, at which the probate judge and the three selectmen were present, a resolution was adopted which authorized the issuance to Andrews & Co. of the warrant of \$15,000, as the first payment on the contracts, upon certain terms and conditions, as is averred, independently and outside of any of the terms or specifications of the said contracts, and upon the delivery to the county clerk of an indemnity bond executed by

Andrews & Co. and three sureties, in which they guaranteed to the county the performance by Andrews & Co. of their part of the contract of March 6th, to the value of \$15,000 in the specifications or schedules thereof; that the warrant sued on was thereupon issued and delivered to Andrews & Co. under the resolution, and was purchased for \$14,700 by Auerbach & Bro. in good faith, and relying upon the proceedings of the court and the execution and delivery of the bond; that the furniture was subsequently delivered to and accepted and used by the county, and never has been returned or offered to Andrews & Co.; that the counterclaim was barred by the statute of limitations; that the county court on June 21, 1895, passed a resolution repudiating the furniture warrants, and later, on September 8, 1895, rescinded the resolution, relying upon which plaintiff took no steps to collect his warrant from the insolvent estate of Andrews & Co. upon their failure in October, 1895; that 50 per cent. of its claims could have been recovered from such insolvent estate; that defendant was estopped because it had not set up facts showing failure of consideration in its original answer to plaintiff's complaint, filed immediately after the action was brought, by reason of which plaintiff had been delayed and had lost an opportunity to procure testimony, etc.; and that, because of the laches of the defendant in alleging failure of consideration, the plaintiff is unable to fully meet such allegations, on account of the death of witnesses who were familiar with the facts.

The cause was tried before the court without a jury. From the evidence, the court, in substance, and so far as material here, found that the selectmen and the probate judge constituted the county court; that the selectmen, without authority from the county court, and without advertising for or receiving bids for the furniture, made the contracts of March and May with Hayken, acting for A. H. Andrews & Co.; that the contracts were the result of a previous corrupt agreement entered into by some of the selectmen in consideration of a bribe to be paid them; that the bribe was paid; that this payment influenced the action and conduct of some of the selectmen in the making of the contracts and the acceptance of the furniture delivered thereunder; that on June 19, 1894, the county court, at a regular meeting, all members being present, passed a resolution, by unanimous vote, authorizing the issuing of the warrant sued on, upon the filing by Andrews & Co. of an indemnity bond; that such bond was filed; that when the warrant was issued no furniture had been delivered, and no itemized claim had been filed as provided by statute; that the warrant in question was issued pursuant to the resolution of June 17th, and was the first one issued in payment of the furniture, and presented for payment and registration, and

that Auerbach & Bro. paid \$14,700 for the warrant, and bought with knowledge of the facts, but in ignorance of the bribery and fraud, and the plaintiff is now the owner and holder of the warrant; that Andrews & Co. delivered the furniture and set it up in the city and county building between July and December, 1894; that it was worth \$27,000, and no more; that the warrants issued in payment therefor were by Andrews & Co. sold and transferred to divers parties; that the selectmen referred to went out of office January 1, 1895, and were succeeded by others who had reason to believe that the contracts were void by reason of fraud and bribery, and became convinced by February 15, 1895, that they were fraudulent and void, and at that time determined to contest the payment of the warrants, but also elected to retain and use the furniture; that on June 22, 1895, they passed a resolution repudiating all the warrants, as void, and directing the county treasurer not to pay them, but at no time offered to return the furniture or pay its value, or pay to plaintiff \$14,700 paid by his firm to Andrews & Co. for the warrant. These findings of fact seem to be supported by the proof. As conclusions of law the court found that all the warrants are void; that the county was not liable thereon; that the defendant's counterclaim for damages should be dismissed; that it was the duty of the county, on discovering the fraud, to have returned or offered to return the furniture, or have paid its value to Andrews & Co., or plaintiff as the assignee of Andrews & Co., if the county elected to retain it; that Auerbach & Bro. by buying the warrants became the equitable assignees of any claim that Andrews & Co. might have to recover from the county the fair value of the furniture, to the extent of \$14,700, the price paid for the warrant; and, being first in time in acquisition of such a claim, Auerbach & Bro. were first in right, and were entitled to recover \$14,700, with interest from February 15, 1895, at the legal rate. Judgment was rendered accordingly, and this appeal challenges its correctness.

Graham F. Putnam, Ray Van Cott, and W. T. Gunter, for appellant. Booth, Lee & Ritchie and Dickson, Ellis & Ellis, for respondent.

Having stated the case as above, BARTCH, C. J., delivered the opinion of the court.

The appellant insists that error was committed in rendering this judgment; that, when the court found that the warrant in dispute was void, it followed that the judgment must be for the defendant; that the only way a county can be made liable at all is expressly by contract made and liability created in the manner prescribed by statute; and that no liability as to a county can be implied. It is true the county court was wholly a creature of statute, and that,

as a general proposition, the acts of such a court and of a board of county commissioners are void and without force or effect when the statute is not pursued. This is so well settled as to need no citation of authorities. It does not follow, however, that under no circumstances can a liability be created when the statute is not in all respects pursued, or when some of the members of the county court are guilty of fraud with reference to some part of a transaction. Conceding that the contracts of March and May, tainted not only with the most reprehensible but with criminal conduct and acts of some members of the county court, were void, still it is not a necessary sequence that by subsequent proceedings and acts of that court, of which some of the members were acting in good faith, and were innocent of the fraud and corruption in relation to the furniture, the same subject-matter of the fraudulent transaction, a liability on the part of the county could not be created in favor of an innocent holder of a warrant. We apprehend that the creation of such a liability by the court was possible notwithstanding the fraudulent contracts, to which some of the members of the court were parties, and it therefore becomes important to look into the subsequent proceedings and acts of the county officers. From the evidence it appears that at a meeting of the county court held on June 19, 1894, at which all the members were present, a resolution was adopted which reads: "Resolved, that the county clerk be, and he is hereby, directed to draw a warrant in favor of A. H. Andrews & Co., of Chicago, for the sum of \$15,000, and deliver the same to M. Hayken, as agent of said A. H. Andrews & Co., upon the execution and delivery to said clerk of the indemnity bond duly signed by the said A. H. Andrews & Co., as principal, and by Frank Knox, E. W. Duncan, and G. S. Holmes, as sureties, and upon the filing by the said clerk of the documentary authority of said Hayken to sign said bond on behalf of said A. H. Andrews & Co." In accordance with this resolution the undertaking therein mentioned was filed, and in the obligatory part thereof it was stated: "Now, therefore, if the said A. H. Andrews & Company shall at their own expense and risk transport to and deliver in the said building the said furniture, fittings, and appliances mentioned and specified in the said contract, to the value of \$15,000, in the specifications or schedules therein referred to, and set up the same in said building as required in said contract as soon as they or their agent shall be notified so to do by the architect of said building or the county court of said county, and shall in all respects perform all the things in said contract required and stipulated to be by them performed, to the value of \$15,000, then this obligation shall be void; otherwise, to remain in full force and effect." Notwithstanding the fact that the minutes of the court showing the pas-

sage of this resolution and the bond were introduced in evidence over the objections of the appellant, we are of the opinion that under the pleadings they were properly admitted, as tending to throw light on the whole transaction, and to show what steps were taken to secure the delivery of the furniture, which the evidence shows had been completed and was ready for shipment. Whether this action of the county court and the compliance therewith by Andrews & Co. created a valid contract, and whether it authorized the issuance of the warrant, or whether the warrant issued in pursuance thereof is absolutely void, are questions which, from the view we have taken of the case, we do not deem important or necessary to decide. It is doubtless true, and may be admitted, that the appellant could have rescinded all these transactions relating to the purchase of the furniture,—the last one included,—because the resolution and bond refer to the former fraudulent contracts, but it has not seen fit to do so. On the contrary, it received and accepted the furniture pursuant to the contract of June 19th, had it set up in the city and county building, and ever since has used and exercised ownership over the same, and has never attempted to rescind the contract, or returned or offered to return the furniture, or paid or offered to pay to Andrews & Co. or Auerbach & Bro. or the plaintiff, who must be regarded as the equitable assignee of Andrews & Co. to the extent of the amount paid for the warrant, any part of the actual value of the furniture, although in its counterclaim the defendant admits that the actual market value of the furniture was \$27,000, and simply asks for a deduction from the amount of plaintiff's claim of \$7,640, thereby admitting that the balance of the \$15,000, at least, was due the plaintiff. Even after the change in the personnel of the county court, when the same was composed of members none of whom were parties to the corrupt contracts of March and May, and after they had discovered the fraud, no effort whatever was made to rescind the contracts, or to return the goods, or to pay the actual value therefor. Under such circumstances the defendant cannot be permitted to retain and use the goods, and at the same time refuse to pay the fair market value therefor to an innocent holder of a warrant.

In *Argenti v. City of San Francisco*, 16 Cal. 256, Mr. Justice Cope, delivering the opinion of the court, said: "From an examination of the authorities, it is evident that the doctrine contended for by the counsel for the city cannot be maintained. The theory is that a municipal corporation can only be bound by a contract to which it has expressly assented, and that such a corporation is exempt from the operation of the rules which relate to and govern the contracts and liabilities of individuals. We readily admit that the powers of a corpora-

tion are derived solely from the act creating it, and that, as a general rule, these powers must be exercised in the particular mode pointed out by the charter. It does not follow, however, that even a want of authority is in all cases a sufficient test of the exemption of a corporation from liability in matters of contract." In the same case Mr. Chief Justice Field, concurring in the judgment announced by the court, said: "If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it,—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not in fact make any promise on the subject, but the law, which always intends justice, implies one, and her liability thus arising is said to be a liability on an implied contract; and it is no answer to a claim resting upon a contract of this nature to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of \$50,000 prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. It would indeed be a reproach to the law if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness. In reference to money or other property, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury or been appropriated by her, and, when it is property other than money, it must have been used by her or be under her control." 1 Dill. Mun. Corp. (4th Ed.) §§ 460, 461; *McClure v. Jefferson*, 85 Wis. 208, 54 S. W. 777.

The deduction above referred to was doubtless asked on the theory that there are other warrant holders, and that the plaintiff should share a proportionate loss occasioned by the fraudulent excess charged for the furniture, as per the contracts of March and May. The answer to this is that it is admitted that the warrant in dispute was the first one issued for any of the furniture, the first presented for payment, and the first one registered. In the absence of a rescission of the contract, the liability of the county became complete, for the claim represented by the warrant, the moment furniture had been delivered and accepted of the fair market value of \$15,000; and, as we have seen, it is admitted that \$27,000 worth was delivered, accepted, and ever since used by the county. All the holders of subsequent warrants must therefore be presumed to have had notice of

the prior claims for which the warrant in dispute was issued, as the facts in relation thereto were matters of record. Under these circumstances the maxim, "*Qui prior est tempore potior est jure*," controls. This is so even though the equities between all the holders are equal. 2 Pom. Eq. Jur. §§ 693, 695; Board of Education of Salt Lake City v. Salt Lake Pressed-Brick Co., 13 Utah, 211, 44 Pac. 709; Price v. The Elmbank (D. C.) 72 Fed. 610; In re Gillespie (D. C.) 15 Fed. 734; In re Mahaska Coal Co. (Iowa) 64 N. W. 405; Shirk v. Pulaski Co., 4 Dill. 209, Fed. Cas. No. 12,794.

The appellant further contends that, even if the respondent is entitled to recover the reasonable value of the goods, he cannot recover in this action, because the complaint fails to allege that a claim duly itemized and verified had been presented to the county court or board of county commissioners, and by them rejected, before suit was instituted. This point, as appears, was made for the first time in the appellate court, and therefore cannot avail the appellant; there being no statute in this state which expressly prohibits the bringing of an action on any claim before it has been so presented and acted upon. Such an objection simply goes in abatement of the action, and, to have effect, must be urged by proper plea or in some appropriate manner in the trial court, or the objection will be regarded as waived. In *Jacquish v. Town of Ithaca*, 36 Wis. 108, where a similar question was raised, Mr. Justice Lyon, speaking for the court, said: "Without deciding whether the claim should have been presented for audit to the town board before an action upon it can be maintained, it is sufficient for the purposes of the case to say that this objection, which is made for the first time in this court, comes too late to be available to the defendant. Conceding the objection, if taken at the proper time, to be a valid one, it only goes in abatement of the action, and should have been made on the trial, either by motion for a nonsuit or in some other appropriate manner." Gould, Pl. c. 5, p. 284; *Brown v. Railroad Co.*, 12 N. Y. 486. We are of the opinion that in the second count of the complaint the allegations, in the absence of any special plea attacking their sufficiency, cannot be successfully assailed after judgment.

Nor do we think the appellant's objection to the allowance of interest from February, 1895, is well taken. The trial court found that the members of the county court "commenced an investigation, with the result that as early as February 15, 1895," they "became convinced" that the contracts were fraudulent and void, and determined to contest the payment of the warrants issued thereunder, and "also elected to retain the furniture"; and we cannot say that there is no proof to support such finding, and therefore cannot disturb it. Nor, under these circumstances,

can we interfere with the allowance of interest from that date.

Other questions have been presented, but, from the view we have taken of the case, further discussion is not deemed important. We find no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

METROPOLITAN NAT. BANK v. REPUBLICAN VAL. BANK.

(Court of Appeals of Kansas, Northern Department, C. D. July 18, 1899.)

WRIT OF ERROR—DISMISSAL—WANT OF PARTIES.

Where a receiver of a bank was discharged after a demurrer was sustained to petition to have a preferred claim declared a trust fund in his hands, a petition in error to reverse the order sustaining the demurrer, to which the general creditors of the bank are not parties, will be dismissed.

Error from district court, Cloud county.

Petition by the Metropolitan National Bank against the Republican Valley Bank, F. H. Butler, receiver. From an order sustaining a demurrer to the petition, plaintiff brings error. Dismissed.

C. W. Vandermark, for plaintiff in error. Pulsifer & Alexander, for defendant in error.

PER CURIAM. This is a proceeding brought by the Metropolitan National Bank, by petition in error and transcript of the record, for the purpose of reversing an order of the court sustaining a demurrer to its petition. The record shows that the Metropolitan National Bank filed its motion or petition for a preferred claim in the sum of \$638.72, in a case then pending in the district court of Cloud county, entitled "*The State of Kansas ex rel., etc., versus the Republican Valley Bank, Defendant*," and asking that the same be declared a trust fund in the hands of the receiver, and that he be directed to pay the same, with interest. The receiver filed his demurrer thereto on the grounds (1) that it did not show facts to justify the relief or order prayed for; (2) that on its face it showed the claim for preference was barred by the statute of limitations,—which demurrer was sustained. The Metropolitan National Bank excepted to the order of the court, and prosecute this proceeding to reverse the same. The receiver, on the same day, made a report of his proceedings, showing that he had in his hands for distribution to the general creditors \$817.75, whose claims aggregated \$27,067.27. He also asked for his final discharge as such receiver. The court made an order for the disposition of the funds and for the discharge of the receiver.

There is an attempt made by the plaintiff in error to show that the receiver was by order of court, continued for certain purposes,

but of this fact there is no competent evidence. F. H. Butler, the receiver, was discharged from his trust by order of court, on January 31, 1898, and the only parties in interest since are the general creditors of the Republican Valley Bank, who are not made parties to this proceeding. It is apparent from the record that the only parties interested in the funds sought to be appropriated by the plaintiff in error are the creditors of the Republican Valley Bank. The proceeding must be dismissed, for the reason that these creditors are not made parties.

(131 Cal. 610)

HOLT v. HOLT et al. (L. A. 943.)

(Supreme Court of California. Feb. 19, 1901.)
PARTITION OF REAL PROPERTY—INTERLOCUTORY DECREE—FINAL ORDER—APPEAL AND ERROR.

1. Under Code Civ. Proc. § 963, providing that an appeal may be taken to the supreme court from an interlocutory judgment in an action for partition which determines the interests of the parties; and *Id.* § 956, declaring that on appeal from a judgment the court may review any intermediate decision which involves the merits or necessarily affects the judgment, except a decision from which an appeal might have been taken,—on an appeal from a final order in an action for partition, taken more than six months after the entry of an interlocutory decree therein, the court cannot consider the sufficiency of the complaint, or order overruling a demurrer thereto, since those matters were concluded by the interlocutory decree, and could have been considered on an appeal therefrom.

2. Where, on an appeal from a final order in an action for partition of real property, no objection is urged to the only matters determined by such order, the order should be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William W. Holt against Frances M. Holt and others. From an order confirming the sale of the common property, and fixing the amount of the attorney's and referee's fees, the defendant Frances M. Holt appeals. Affirmed.

Hester & Ladd, for appellant. Chas. L. Batcheller and E. E. Bacon, for respondents.

GRAY, C. This is an action in partition in which the complaint alleges that the plaintiff, Holt, and the defendant Frances M. Holt, are tenants in common, each having an estate of inheritance to the extent of one undivided half of the whole of the fee in a certain described lot in the city of Los Angeles, and that defendant Frances Bacon has a mortgage lien on the said interest of Frances M. Holt to the extent of \$500, besides interest. The action was commenced January 6, 1899, a general demurrer to the complaint was overruled, an answer filed, and a trial had, followed by an interlocutory decree of partition made on May 25, 1899, and filed on the 27th of the same month. This decree adjudicated and determined the rights and interests of the

several parties to the suit in the lot in question, found that a partition could not be had without great prejudice to the owners, and ordered that a sale be made by the referees named in the decree, and the proceeds thereof be applied by said referees (1) to the payment of the general costs, including cost of abstract and attorney's fees; (2) to payment of costs of references and sale therein; (3) that the residue be paid to the several parties to the suit, the specific part that each should receive being fully stated in the decree. The court in this decree specially reserved its finding and order as to the amount of attorney's fees to be allowed until the making of its final decree. Subsequently a sale was made under this decree to the respondent Frank Jackson, and thereafter an order confirming said sale was duly made by the court, and filed on the 6th day of January, 1900. In this order the attorney's fees were fixed at \$100, and referee's fees at \$30. This appeal is from the last-mentioned order, which is referred to in the notice of appeal as "the final judgment and decree therein entered in the said superior court on the 6th day of January, 1900." The notice of appeal was filed and the appeal taken on April 20, 1900, more than 60 days after the entry of the order appealed from, and more than 6 months after the entry of the said interlocutory decree.

The only reasons urged for a reversal on this appeal are: (1) The complaint does not state sufficient facts, and the demurrer to it should have been sustained; (2) the court failed to find, upon the issue tendered in appellant's answer, as to her right to a homestead upon the said property. These questions cannot be considered upon this appeal.

The objection urged against the complaint is that it fails to set forth specifically and particularly the origin, nature, and extent of the interests of the several parties in the property described in the complaint. The nature and extent of the several interests were set forth in the complaint, and if the complaint was not sufficiently specific in the respects stated, and the court had improperly overruled the demurrer, such action could be reviewed only on appeal from the interlocutory decree of partition; for that decree is a final judgment, certainly, as to all questions determined in it (*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607); and whether the order here appealed from be treated as an order made after final judgment, or as itself a final judgment, it is plain that the decree of partition cannot be reviewed, because an appeal might have been taken from such decree (Code Civ. Proc. § 963), and any intermediate decision that might have been appealed from cannot be reviewed on this appeal (*Id.* § 956). For reasons apparent from the foregoing argument, we are also precluded from here reviewing or deciding anything as to the issue concerning the homestead.

This appeal cannot be treated as taken from the decree of partition, for the notice of appeal was filed after the time limited by stat-

ute for taking such an appeal. In the interlocutory decree of partition the question of attorney's fee was specially reserved for future consideration, and that matter was for the first time adjudicated in the order here appealed from. We may therefore treat such order as a final judgment as to the attorney's fee, at least, and in that view of the matter, as nothing is urged against said fee, we think the judgment appealed from should be affirmed, and so advise.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(131 Cal. 581)

In re YOELL. (S. F. 1,883.)

(Supreme Court of California. Feb. 18, 1901.)

INSOLVENCY—DISCHARGE—JURISDICTION—
GENERAL APPEARANCE.

Where a creditor has appeared generally in the insolvency proceedings, filed its claim, and voluntarily or in response to some notice appeared and opposed the application of the insolvent for her discharge, it should not be heard to object to the jurisdiction of the court on the ground that certain affidavits of publication of notices throughout the proceedings were insufficient to show that the court acquired jurisdiction.

Department 2. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Application of Emily C. Yoell, an insolvent, for a discharge. From an order granting her discharge, a creditor appeals. Affirmed.

Jackson Hatch, for appellant. D. W. Burchard, for respondent.

HENSHAW, J. Emily C. Yoell petitioned for and obtained her discharge in insolvency. Written opposition to her discharge was filed by certain creditors who had proved their debts, upon the sole ground that the insolvent had concealed a part of her estate. At the hearing no testimony was offered in support of this ground of opposition, but the attorney for one of the contesting creditors opposed the discharge upon the ground of lack of jurisdiction in the court, for that certain affidavits proving publication of notices throughout the proceedings were insufficient to show that the court had acquired jurisdiction. But this particular creditor here appealing appeared in the insolvency proceedings, filed its claim in due and proper form, and later, either voluntarily or in response to some notice, again appeared and filed its written opposition to the granting of the insolvent's petition for discharge. In all this no objection was taken or suggested as to any deficiency in the notices. Having thus made its general appearance and become an actor in the insolvency proceedings, we think it may not now be heard to urge this ground in opposition. *Pomeroy v. Gregory*, 66 Cal.

63 P.—58.

572, 6 Pac. 492; *In re Clarke*, 125 Cal. 392, 58 Pac. 22. In the latter case the insolvent in a proceeding in involuntary insolvency, having appeared, demurred to the petition, and filed an answer upon which issues of fact were raised and tried, was held to have submitted himself to the jurisdiction of the court, and could not thereafter be heard to complain that he was improperly brought before it by insufficient citation. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(131 Cal. 575)

MARTIN v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 2,243.)¹

(Supreme Court of California. Feb. 15, 1901.)

APPEAL—LACHES—DISMISSAL.

The dismissal of an action on the ground of laches in the prosecution thereof will not be disturbed on appeal, where no abuse of discretion is shown.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Eleanor Martin, administratrix, etc., against the city and county of San Francisco. From a judgment for defendant dismissing the action, plaintiff appeals. Affirmed.

S. W. & E. B. Holladay and D. P. Belknap, for appellant. Franklin K. Lane, City Atty., for respondent.

PER CURIAM. The action involves the title to a tract of land in San Francisco held by the defendant for public purposes. The complaint was filed in 1872, and the answer thereto was filed in 1873. In December, 1875, upon the petition of the plaintiff, the cause was removed to the United States circuit court, and in October, 1887, was remanded to the superior court of the city and county of San Francisco. No further steps therein were taken by either party to the action until June 28, 1899, when a motion was made on behalf of the defendant to dismiss the same upon the ground of laches and want of prosecution on the part of the plaintiff. The motion came on for hearing August 18th, at which time certain affidavits and other documentary evidence in support thereof were read, and, after argument by counsel, the court made its order granting the motion, and thereupon entered judgment dismissing the action. From this judgment the plaintiff has taken the present appeal, and in support thereof urges that the dismissal of the action was without the authority of the court. The authority of the superior court to dismiss an action, on the ground of laches on the part of the plaintiff in prosecuting the same, has been frequently exercised, and, unless it is made to appear that there was a gross abuse of discretion

¹ Rehearing denied March 15, 1901.

in making such dismissal, its action will not be disturbed in this court. The matter was very fully considered in *People v. Jefferds*, 126 Cal. 296, 58 Pac. 704, and more recently in *Nicol v. City & County of San Francisco* (Cal.) 62 Pac. 513. Upon the authority of these cases, the judgment herein is affirmed.

(131 Cal. 615)

BAKER v. BORELLO et al. (Sac. 871.)
(Supreme Court of California. Feb. 19, 1901.)
PRACTICE AND PLEADING—MODIFYING INSTRUCTIONS—BILL OF EXCEPTIONS—AMENDMENT—JURISDICTION.

1. Where the court modified an instruction requested by the defendants before giving it to the jury, but did not import therein any error prejudicial to the defendants, the defendants could not object to it.

2. Code Civ. Proc. § 473, providing that the court, in its discretion, may allow an amendment to any pleading or proceeding, does not authorize the superior court to amend a bill of exceptions which had been settled and used on a motion for a new trial before an appeal had been taken from the order denying the motion, since after appeal the court was deprived of jurisdiction, and could not change the record on which it acted in denying the motion.

Department 2. Appeal from superior court, Merced county; E. R. Rector, Judge.

Action by Joshua Baker against F. M. Borello and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. W. Knox and P. F. Dunne, for appellants. J. F. McSwain, J. F. Peck, F. G. Ostrander, and F. W. Henderson, for respondent.

BEATTY, C. J. The defendants in this case appeal from an order denying a new trial. The respondent makes a preliminary motion to correct the record of the proceedings in the superior court. The facts are that the defendants, in support of their application for a new trial, served a draft of their proposed bill of exceptions, which showed that the trial judge of his own motion had given a certain instruction, numbered 18, to the giving of which they had duly excepted. The proposed bill also contained a special assignment of error upon the giving of instruction numbered 18. In this particular the bill of exceptions was settled and allowed by the trial judge, Hon. J. K. Law, in substance as proposed by defendants, and was filed April 27, 1900. The motion for a new trial was submitted to Judge Minor on June 28th and denied on July 2d. Defendants appealed July 14th, filed the transcript in this court August 22d, and on October 11th filed and served their brief, in which they presented their assignment of error upon the giving of said instruction. The attention of the respondent seems then to have been drawn for the first time to this feature of the bill of exceptions, and soon afterwards, and within six months from the settlement of the bill, he com-

menced proceedings to amend the record so as to make it appear that the instruction of which the appellants are complaining was really given at their request, and not volunteered by the court. After considerable delay, occasioned by a change of incumbents in the office of superior judge, an order was made by Judge Rector on January 15, 1901, correcting the bill substantially in accordance with the motion of the respondent; that is to say, it appears from the order of Judge Rector that the defendants presented the instruction to Judge Law—the trial judge—with a request that it be given, but it was not given in precisely the form in which it was requested. Before giving it, Judge Law struck out one or two words, and altered one sentence slightly, but without changing its meaning or effect. The only tendency of the alterations made by him was to make the instruction somewhat less open to the objection now urged against it than it was as originally requested by the defendants. Because of this modification of the instruction by the court before giving it, the appellants contend, in opposition to this motion,—that the statement contained in the bill of exceptions as proposed was true,—that the instruction given was not the instruction they asked, but an instruction volunteered by the court; and upon this point they cite *Morgan v. Peet*, 32 Ill. 281, where it was decided that the party asking an instruction may except to the giving of such instruction with an addition which is prejudicial to him, and is not law. I should not doubt the correctness of that decision, but it does not fit this case. This bill of exceptions, as corrected, shows that defendants asked a certain instruction, and that the court gave it in a slightly modified form. Their right to object to it therefore depends upon whether the changes made by the trial judge imported into it some new and distinct error prejudicial to them, as in the Illinois case. We cannot see that any such change was wrought in the instruction, but if there was, they have their exception to the modification, and that matter could be considered when the appeal is heard upon its merits. In the meantime the action of the trial court in modifying, before giving, the instruction, is no obstacle to making the record speak the exact truth. We are brought, then, to the question whether it was competent for the superior court to correct this bill of exceptions after the entry of the order denying a new trial, and an appeal to this court, and the filing of the record here. This bill of exceptions being the basis of the motion for a new trial, and the record upon which the order overruling that motion rests, can it be changed without first setting aside that order, and can that order be set aside by the superior court after it has been appealed to this court? We have no doubt that a bill of exceptions or statement which has been settled after appeal

taken may be corrected by a proper proceeding under section 473, Code Civ. Proc., commenced, as this was, within six months after the settlement, for in such cases the superior court is empowered to settle the bill or statement—i. e. to complete the record—after, and for the purposes of, the appeal. *Flynn v. Cottle*, 47 Cal. 520; *Sprigg v. Barber*, 118 Cal. 592, 50 Pac. 682; *In re Lamb's Estate*, 95 Cal. 408, 30 Pac. 568. But a bill of exceptions, prepared and settled beforehand, to be used in support of a motion for a new trial, after the denial of the motion and an appeal therefrom presents a different question. We are of the opinion that in such case the record cannot be amended, and this for reasons which, though technical, are nevertheless conclusive. The appeal deprives the superior court of jurisdiction to set aside its order denying the new trial, and while that order is in force the record upon which it is based cannot be changed, and this court must review the order upon the same record upon which it was made. *Hayne*, New Trial & App. § 160, and cases cited. It has been held—and, we have no doubt, correctly held—that, where a new trial has been granted by an order improvidently or prematurely made before the record was properly settled and certified, this court, upon reversal of the order, may remand the cause for further and orderly proceedings upon the motion (*Morris v. De Celis*, 41 Cal. 331; *Thomas v. Sullivan*, 11 Nev. 280); but this rule of practice does not meet the exigencies of this case. What was said obiter in *Grand Grove U. A. O. D. v. Garibaldi Grove No. 71*, U. A. O. D. (Cal.) 62 Pac. 486, cannot be applied as a universal rule, but only to those cases in which the power of amendment has not been lost. The motion to amend is denied.

We concur: MCFARLAND, J.; HENSHAW, J.

(131 Cal. 582)

MERRILL v. PACIFIC TRANSFER CO.

(S. F. 1,453.)

(Supreme Court of California. Feb. 16, 1901.)

CARRIERS—RECEIPT FOR GOODS—LIMITATION OF LIABILITY—KNOWLEDGE OF TERMS—STATUTES—INSTRUCTIONS—NEGLIGENCE—PROVINCE OF JURY—PLEADING—ALLEGATION OF DAMAGES.

1. Where the complaint in an action against a transportation company for the loss of a trunk alleged that defendant lost the trunk, and set forth its value, and that defendant had refused to pay the same, and defendant set up a special contract limiting its liability, and offered to submit to a judgment for a certain sum, an objection after verdict that the complaint was insufficient, in that it failed to allege damages, was without merit.

2. Civ. Code, § 2176, declares that a passenger or consignee, by accepting a contract for carriage, with knowledge of its terms, assents to any limitation of liability stated therein; and section 19 declares that every person who has notice of circumstances sufficient to put a prudent man upon inquiry has constructive no-

tice, where by prosecuting inquiry he might have learned them. *Held* that, in an action for the loss of a trunk, it was error to refuse to charge that if, when a receipt which limited the carrier's liability was delivered to plaintiff, the circumstances were such that a prudent man would have read the limitation as to liability, then he had notice thereof, and that it would not excuse him to say that he did not read the notice of limitation.

3. Where, in an action for the loss of a trunk, the court erroneously refused to charge that it was for the jury to say whether plaintiff had constructive knowledge of the limitation of liability contained in a receipt given him, such error was not harmless, on the ground that the evidence showed gross negligence on the part of the carrier, from which it cannot be exempt from liability under Civ. Code, § 2175; the question of gross negligence not having been submitted to the jury.

4. In an action against a transportation company for the loss of a trunk, it was error to admit testimony as to expenditures by plaintiff for wearing apparel, as leading the jury to consider such expenditures outside of the value of the contents of the trunk.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Action by Charles Merrill against the Pacific Transfer Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. P. Langhorne, for appellant. Samuel Knight, for respondent.

HENSHAW, J. This action is brought by plaintiff, assignee of his wife, to recover from the defendant, a common carrier, damages for its failure to deliver a trunk and its contents. In its answer defendant denied that the loss of the trunk was occasioned through its negligence, and further, as a special defense, pleaded a contract for the carriage of the trunk by which the limitation of liability for its loss was \$100, and offered to allow plaintiff to take judgment for \$100 in compensation for his injury. The case was tried before the court and a jury, and a verdict rendered in plaintiff's favor for \$950. Defendant's motion for a new trial was denied, and from the judgment and from the order so denying its motion it prosecutes this appeal.

The point was made in the lower court upon the motion for a new trial, and is pressed in this court, that the complaint was not sufficient to sustain the judgment, in that it fails to allege that plaintiff has sustained damages. But, however inartificially it may have been drawn in this respect, that pleading sufficiently charges the failure of defendant to deliver the trunk in accordance with its contract, and avers that by its gross negligence and that of its servants it lost the trunk, sets forth the reasonable value of the trunk and of its contents, pleads that defendant, though requested to pay the value of the same, has refused to do so, and prays judgment in the sum of \$950. Defendant by its answer treated this as a sufficient pleading, made denial of the material allegations,

set up the special contract, and offered, as has been said, to permit plaintiff to take judgment in the sum of \$100. The case throughout was tried upon the theory that issue was joined upon these matters, and that the pleadings sufficiently declared upon the issues. It is too late, after verdict found and judgment rendered, to raise the point. *Horn v. Hamilton*, 89 Cal. 276, 26 Pac. 833. There was not here an absence of a material averment. It was the case of a material averment defectively pleaded, and, while the point might have been well taken upon special demurrer, we think the objection may not now be heard. *City and County of San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Thompson v. De Kum (Or.)* 52 Pac. 517.

The undisputed facts disclosed at the trial were that Mr. Merrill, coming to San Francisco, delivered to the agent of the defendant transfer company certain brass baggage checks or tokens, with the understanding that the baggage called for by them was to be delivered at his house in San Francisco. The agent in return gave to Mr. Merrill a paper upon which, with printed matter, were written the check numbers, the name and address of Mr. Merrill, and the signature of the agent. This paper, over the signature of the agent, contained the following: "Read following conditions of this contract. This company will not become liable for loss of or injury to merchandise, money, or jewelry contained in baggage in any event, nor for an amount exceeding one hundred dollars upon any trunk and contents, or twenty-five dollars upon any valise or package and contents, unless specially agreed for in writing. If these conditions are not acceptable, notify agent, otherwise the party accepting this contract of carriage is bound thereby." The plaintiff, receiving the receipt, read the address to see if it was correct, and read the penciled memoranda. He read nothing else upon it. He was familiar with the usual method of the transportation company, had traveled a good deal, and had always been in the habit of giving his checks to and taking a receipt from the agent of the transportation company. It was light enough to read. There was time enough for him to have read the printed portion, but he could not with certainty have done so without using his eyeglasses. He did not, however, think to read it or attempt to read it. He put the receipt in his pocket. He does not recollect that he ever read the printed portion of any receipt. He read the printed portion of this one only after the trunk was lost. He did not know that there were conditions on the receipt. He regarded it merely as a receipt,—as the only thing he had to connect him with his baggage. He paid the price usually charged, which was 50 cents for each trunk. The trunk, with other parcels of baggage, was sent by

the company in one of its wagons for delivery after nightfall. There was only one man in charge of the wagon. He, of necessity, in delivering baggage was compelled to leave his wagon standing in the street, unwatched and unattended. On returning to it after making delivery of a piece of baggage, he observed that the trunk had been stolen. He delivered the other parcels at the Merrill residence, stating that this particular trunk had been overlooked and would be delivered later. He did not announce the theft, fearing that he would be detained and delayed, and thus prevented from catching a certain train to which he was under orders to deliver baggage.

Appellant complains of certain instructions given and refused by the court. Section 2176 of the Civil Code provides that "a passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same." Defendant proposed an instruction as follows: "In regard to the so-called receipt given by defendant's agent to Mr. John F. Merrill, acting for Mrs. Merrill, it is claimed by plaintiff that it was received by Mr. John F. Merrill without notice of its terms or of the limitation of liability printed thereon. Now, in regard to what constitutes notice, I instruct you that notice may be either actual or constructive. Notice is actual when it consists in express information of a fact, and constructive when imputed by law. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact. Accordingly, if you find that when the receipt in question was delivered by defendant's agents to Mr. John F. Merrill, acting for Mrs. Merrill, the circumstances of which Mr. Merrill had actual notice were such that a prudent man could and would have read the limitation as to liability in said receipt, then I instruct you that in law Mr. John F. Merrill, as agent of Mrs. Merrill, had due notice of such limitation of defendant's liability, and that it is no excuse of Mr. John F. Merrill to say that he did not then read said limitation of liability, if he had free opportunity to do so." This instruction was refused; the court basing its refusal upon its construction of section 2176 of the Civil Code, which it held to mean that

the passenger must have actual knowledge of the terms of the alleged contract, or his acceptance of it did not bind him. It is observed that the instruction is framed upon the theory that if Mr. Merrill, by all the circumstances of the case, was put upon notice of the terms of the contract, he was, in accepting it, bound by them.

Coming to the law of the matter, section 18 of the Civil Code provides that notice is actual which consists of express information of a fact, and constructive which is imputed by law; and section 19, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting inquiry he might have learned such fact. Mr. Merrill denied that he had actual knowledge of the limited liability clause of the contract. If actual knowledge alone would bind him, as was the theory of the trial court, the instruction was properly refused. The question is new in this state, but in New York, where it has frequently arisen, it has been uniformly held that the determination whether, under all the circumstances, the passenger was chargeable with knowledge under the doctrine of notice, actual or constructive, was for the jury, and that it is not sufficient for the passenger to disclaim actual knowledge. Thus, in *Madan v. Sherard*, 73 N. Y. 335, it is said: "The fact that the receipt was printed in large type, and could be easily read; that it was received in the daytime, or when there was sufficient light to enable the traveler to read it; that he was acquainted with the methods of the business,—these and other facts may be shown, not as conclusive against a recovery, but as bearing upon the ultimate fact to be proven, that the plaintiff when he accepted the receipt knew of its limitations, or that it contained special terms for the carriage of the property." So, again, in *Kirkland v. Dinsmore*, 62 N. Y. 171, it is said: "He [the passenger] cannot escape from the terms of a contract, in the absence of fraud or imposition, because he negligently omitted to read it; and, when the other party has a right to infer his assent, he will be precluded from denying it to the other's injury. The plaintiff is, we think, in that position. The contract was one which the parties might lawfully make. The defendant had a right to infer from the plaintiff's acceptance of the receipt without dissent that he assented to its terms. Now, after a loss has occurred, it is too late to object that he is not bound. If he had objected at the time, the defendant would have been entitled to exact as a condition of carrying the parcel a compensation equivalent to the risk of insurers. The circumstances imposed upon the plaintiff a duty to read the receipt." Such, without further multiplying citation or quotation, is the true principle. Objection is made by respondent that "knowledge" is not synonymous with

"notice," and this is certainly true to the extent, at least, that the two words are not always interchangeable in meaning. "Notice," in one sense, means the legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge. One having knowledge that he is a defendant in a suit is not bound to appear until there has been brought home to him the legal instrumentality of knowledge, a proper notice. But, upon the other hand, where the Code speaks of actual and constructive notice, it means no more than that under the indicated circumstances a man is legally chargeable with knowledge. It is too narrow a view of section 2176 of the Civil Code, therefore, to hold that the passenger can be charged with the conditions of the contract only by a showing of his actual knowledge of them. The knowledge itself may be imputed to him by conduct. The instruction in question was therefore improperly refused; for it was with the jury to say whether, under all the circumstances as disclosed by the evidence, Mr. Merrill had the actual or constructive notice or knowledge contemplated by the law.

But respondent makes further answer that even if the court erred in its theory of the law of the case, and consequently in its refusal to give the offered instruction, the error was harmless, because the evidence conclusively shows that the defendant was guilty of gross negligence, and that, therefore, even if the passenger had knowledge of the limiting clause of the contract, it would not exempt the defendant in this case from the full measure of his liability for loss, because of the fact that the loss was occasioned by its own gross negligence. In this, reliance is had upon section 2175 of the Civil Code, to the effect that a common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of himself or his servants. Such, unquestionably, is the law of this state. *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302. But the question whether or not the common carrier was guilty of gross negligence was in the first instance one for the jury to pass upon, under proper instructions from the court; and this court may not be asked to usurp this function of the jury, and thus decide a question which has never been submitted to them.

It appears, therefore, that a new trial in this case must be ordered. In contemplation of such new trial only one further point demands consideration. The evidence offered and admitted in reference to the expenditure by Mrs. Merrill of the sum of \$300 for wearing apparel should have been excluded. It could not have tended to enlighten the jury as to the actual damage which was suffered by the loss of the trunk, and it might well have tended to confuse them and mislead them into the belief that her expenditures in replacing wearing apparel, apart from and

outside of the value of the contents of the trunk, were to be considered by them in assessing damages. The judgment and order are therefore reversed.

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 572)

RECLAMATION DIST. NO. 556 v. THISBY.
(Sac. 720.)

SAME v. THISBY et al.

(Supreme Court of California. Feb. 15, 1901.)

NEW TRIAL—MOTION—NOTICE OF INTENTION
—SUFFICIENCY—PREMATURE NOTICE—
TRIAL BY COURT—APPEAL.

1. Code Civ. Proc. § 659, declares that a notice of intention to move for a new trial shall be filed within 10 days after notice of the decision of the court, when the action is tried without a jury, and within the same time after verdict when tried by a jury. *Held*, that where special issues submitted to a jury formed only a portion of the controversy, and the remaining issues were tried by the court, and on its findings of fact, together with the answers of the jury, the judgment was rendered, a notice of intention filed before the decision of the court, but within 10 days after the answers of the jury, was premature, as the action was one tried by the court.

2. Where, on an appeal from an order denying a motion for a new trial, the bill of exceptions showed that the notice of intention to move for a new trial was insufficient, in that it was prematurely filed, a statement in the bill that appellants had served and filed notices of their intention to move for a new trial within the time allowed by law did not cure the defect, such statement being but a legal conclusion.

3. While the notice of intention to move for a new trial forms no part of the record on appeal from an order denying a motion for a new trial, yet where the bill of exceptions shows that the notice of intention was insufficient, and it does not appear that respondent has waived such objection by accepting service of either the notice of intention or of the proposed statement and bill of exceptions, or that it suggested any amendment thereto, or was present at the settlement, the order would be affirmed.

Appeal from superior court, Sacramento county; Joseph W. Hughes, Judge.

Actions by reclamation district No. 556 against Mrs. R. Thisby and others. From orders denying motions for a new trial, defendants appeal. Affirmed.

Hiram W. Johnson, Grove L. Johnson, and Johnson, Linforth & Whitaker, for appellants. M. S. Wahrhaftag and A. L. Shinn, for respondent.

HARRISON, J. The plaintiff seeks by these actions to condemn a right of way over a strip of land belonging to the defendants for the purpose of constructing thereon a levee and canal. The two actions were tried together as a single cause, and have been presented here in a single record, and upon the same argument. Certain issues were submitted to a jury, and its verdict thereon adopted by the court, and additional findings were made upon other issues. Upon these findings the court rendered judgment in favor

of the plaintiff, and afterwards denied the defendants' motions for a new trial. From these orders the defendants have appealed. No appeal has been taken from the judgments.

The sufficiency of the complaint or of the findings to support the judgment, or the right of the plaintiff to maintain the actions, cannot be considered upon an appeal from the orders denying a new trial. *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186. The respondent contends that the order of the superior court must be sustained upon the ground that it was without jurisdiction to entertain the motion for a new trial, inasmuch as no proper notice of an intention to make such motion had been given. Although certain special issues were submitted to a jury, these issues formed only a portion of the controversy between the parties to the actions, and the remaining issues were tried by the court, and findings of fact made by it thereon, upon which, together with the answers of the jury to the questions submitted to them, the court rendered its judgment in favor of the plaintiff. The "actions" were, therefore, tried by the court, and, under section 659, Code Civ. Proc., until the court had rendered its decision, it was not competent for either party to give notice of its intention to move for a new trial. The notices of intention to move for a new trial were given and filed November 1, 1897, while the decision by the court was not made until April 21, 1898. These notices were within 10 days after the jury had given their answers to the special issues submitted to them, but, as the "actions" were not tried by a jury, the notices were premature, and gave to the court no power to act upon the motion which should thereafter be made under the notices. *Bates v. Gage*, 49 Cal. 126; *Bell v. Marsh*, 80 Cal. 411, 22 Pac. 170. No judgment could have been rendered in the case at the time the jury rendered its verdict, and the trial of the action was not concluded until the court had rendered its "decision" upon all of the issues submitted to it. "A case has not been tried until all the issues have been disposed of, and there has been no decision until the court has passed upon the facts, and drawn its conclusions of law therefrom." *Bell v. Marsh*, supra; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211. The rule of procedure for causes tried by the court is the same whether they are cases in equity or actions at law. *Hastings v. Hastings*, 31 Cal. 95.

The notice of intention to move for a new trial does not form part of the record on appeal, and need not be incorporated in the statement therefor (*Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706); and it has been held, for the purpose of sustaining the action of the court below, that, where the record is silent upon the subject, it will be assumed that the notice was given within the proper time (*Patrick v. Morse*, 64 Cal. 462, 2 Pac. 49); yet

If the notice is in fact set forth in the statement or bill of exceptions, and it appears therefrom that it was either insufficient or not given within the proper time, it then becomes necessary for the appellant to have it appear by the record that this defect was overcome or waived. There is nothing in the record herein from which it can be held that the respondent waived this objection to hearing the motion for a new trial, and it may be assumed, in support of the order, that it was made in consideration of the fact that the proper notice had not been given. The statement in the bill of exceptions that the appellants served and filed the notices of their intention to move for a new trial "within the time allowed by law" is but a legal conclusion, and is overcome by the fact that the date of such service and filing is itself given in the bill of exceptions. It does not appear that the respondent accepted service of either the notice of intention, or of the proposed statement and bill of exceptions, or that it suggested any amendments thereto, or was present at the settlement. See *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(121 Cal. 577)

PEOPLE v. HILTEL (Cr. 686.)

(Supreme Court of California. Feb. 15, 1901.)

ARSON — JURISDICTION — INDORSING COMPLAINT AS FILED — EVIDENCE — FIRING ADJACENT BUILDING — TRIAL — INSTRUCTIONS — DEFINITIONS — WEIGHT OF TESTIMONY — PROOF.

1. Under Pen. Code, § 811, providing that, where an information of the commission of a public offense is laid before a magistrate, he must examine the informant and any witness he may produce, etc., the omission of a magistrate to indorse on a complaint for arson the fact that such complaint was filed did not deprive the magistrate of jurisdiction of the case.

2. A dwelling and two outhouses were destroyed by fire, which was first seen breaking through the roof of one of the latter, which had been locked a short time before, and the key thereof hid in the dwelling. When the first neighbor arrived, defendant was coming from behind one of the outhouses. The fire in the dwelling was then breaking through an interior partition. Defendant made no effort to extinguish the flames till after neighbors arrived, and no cry of help or of fire had been heard. Defendant, whose wife owned the house, was the only one seen around when the fire broke out. He had been greatly excited shortly before, and was very angry at his wife, who intended getting a divorce. Defendant testified that he had lain on the bed about 8 o'clock, was soon asleep, and was awakened by the outhouse fire, but said nothing about the fire in the dwelling. The fire was discovered shortly after 8 o'clock, and had then been burning for some time. *Held*, that the evidence warranted a conviction of arson against the defendant.

3. Where a dwelling and two outhouses were so close together that the burning of one must have resulted in the destruction of the others, it was competent in a prosecution for burning the dwelling to show that the three buildings were fired simultaneously.

4. Where the court instructed the jury that, though they could not find the defendant guilty of arson for burning a wine cellar which he was not charged with burning, still if they found that he set fire to the wine cellar willfully and maliciously, beyond a reasonable doubt, and that it was so close to the dwelling that the burning of the former must necessarily cause and did cause the dwelling to take fire and be consumed, this would constitute arson, there was no error.

5. Where the trial court, in a prosecution for arson, was not requested to define circumstantial evidence to the jury, it was not error to omit to do so.

6. A requested instruction, in a prosecution for arson, that the jury should give the same weight to defendant's testimony as they would give to that of any other witness, was properly refused.

7. A requested instruction, in a prosecution for arson, that intent was a material ingredient in every crime, and must be proved by positive evidence, was properly refused.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

John Hiltel was convicted of arson, and he appeals. Affirmed.

E. L. Webber, C. H. Beerstecher, and Weber & Rutherford, for appellant. Tiley L. Ford, Atty. Gen., for the People.

CHIPMAN, C. Defendant was convicted on an information charging him with the crime of arson. He appeals from the judgment and from an order denying his motion for a new trial.

1. When brought into court to plead, defendant moved to set aside the information on the ground that no complaint was ever filed against him, and that the warrant of arrest was issued without authority of law, and the magistrate had no authority to inquire into the charge laid in the information. It was admitted that a complaint was made and sworn to before a justice of the peace, who certified to the fact in the usual way; that the justice entered in his docket the fact that the complaint was filed; thereafter he issued the warrant of arrest, and defendant appeared in person and by counsel, and the complaint was read to him, whereupon he said he was ready to proceed with the hearing, and the hearing was had, witnesses being sworn for the people, and defendant was held to answer, the order being indorsed on the back of the complaint. There was no indorsement showing that the complaint was filed, and it is urged that this omission left the magistrate without jurisdiction, and was fatal to any proceedings by the trial court. The provisions of the Penal Code are found in chapter 4, and in section 811 the duties of the magistrate are pointed out. It is nowhere required that the complaint shall be marked "Filed," although the magistrate should so mark it for purposes of identification, if for no other reason. In the case here there is no question as to the identity of the complaint, and that defendant had it read to him, and was committed upon it after due

hearing. The jurisdiction of the magistrate did not depend upon his having first marked the complaint "Filed." It was sworn to before him, and was entered "Filed" in his docket, was left with him, and upon it he issued the warrant of arrest. This was sufficient to give him jurisdiction.

2. Defendant contends that the evidence did not support the verdict. There is evidence that defendant and his wife lived unhappily together; that he was given to drink, and abused his wife to such extent as to make her life with him insupportable, and proceedings for divorce had either been commenced by her or were in contemplation. Some years prior to the alleged arson there had been a separation, and defendant conveyed to his wife property he owned in the country, about two miles from Callstoga, he retaining certain saloon property in the town. On the 12th of June, 1900, the family resided on this country property, and consisted of defendant, his wife, son, and daughter, the children being both over age. A few days previous to the above date defendant had so ill treated his wife as to compel her to go to a near neighbor's for shelter and protection. Towards evening of the 12th defendant went in search of his wife. He first called at John Maunder's, one-half mile from defendant's home, about 7 o'clock. Maunder testified: "He wanted to know if his wife was there. I told him 'No,' and he said she had not been home for three days. I said I didn't know anything about it. Well, he says, 'My God,' he says, 'I mean to fix this business before to-morrow night.' He was angry, and very excited. That was about three-quarters of an hour before the fire. * * * He said further that they had done him out of \$2,500 within the last three weeks. I said: 'How is that? What is that?' Well, he says, 'Out of all the machinery and cooperage.'" He next went to M. S. Boland's, about one-quarter of a mile from defendant's home, where his wife had taken refuge. Boland testified that when he came there he was very mad, accused Boland of improper relations with defendant's wife, and applied opprobrious epithets to Boland, whereupon the latter compelled him to leave the premises. Boland testified that defendant "was very excited and angry; comparatively sober." This was between 7 and 8 o'clock. Defendant then returned to his own place. Defendant's son testified that he and his sister left their father at their house to go to a party at some neighbor's about 20 minutes before 8 o'clock. The son testified that he spoke with his father just before leaving, and that his father was very much excited, and called him and his mother and Boland vile names. In the rear of the dwelling, and about 12 or 15 feet distant, was a frame structure called the "wine cellar," in which was stored some machinery, the cooperage referred to by defendant, some wine, fruit, and other articles. A tank house stood

about 33 feet from the dwelling. All three buildings were constructed of wood, and in the tank house was a stove and some family supplies. When the son left to attend the party, he locked the front door of the dwelling house, leaving the door in the rear open, and defendant was then in the dwelling. He also locked the side door of the wine cellar, having first bolted on the inside the only other door leading into the building, and hid the key in the dwelling. The door of the tank house was left unfastened. The son testified that his father told him "several times that we never would make no wine in those cooperage, and he knew my mother was going to have a separation—that is, a divorce—before long." Witness Bennett lived about 70 rods from defendant's place. He passed defendant's house in a wagon about 8 o'clock the evening of the 12th, and saw a light in the tank house, but nowhere else. On reaching his home, and while unhitching his horses, his attention was attracted by a bright light in the direction of defendant's house, and, looking, discovered that fire was breaking through the roof of the wine cellar. It was, he thought, about 15 minutes past 8 o'clock. He ran to defendant's place. He heard no noise coming from the Hiltel premises. When he first got there he ran close to the house, and a dog came out at him. That was the first noise he heard. He went to the tank house to find a hose, and get some water to put out the fire. He testified: "I couldn't find any buckets, and directly Mr. Hiltel stepped out from behind the tank house, and I got some cans and threw three or four cans of water onto the shed adjoining onto the house near the cellar." Defendant was fully dressed, except his coat was off. Witness went into the tank house, and also into the kitchen and dining room. These buildings he describes as full of smoke. In the dwelling a fire was breaking through one of the interior partitions, tending to show that it could not have started from the wine cellar fire, and so were the indications as to the fire in the tank house. Several neighbors came soon after Bennett arrived, and, while there is some difference in their testimony, the result of the evidence was that all three buildings seem to have been fired by some one or more persons nearly simultaneously. Some of the witnesses were of the opinion that the dwelling was destroyed by the fire communicated from the wine cellar; others saw the fire in the dwelling before the outside caught from the cellar, and testified that it was not put out, and would have destroyed the house. The evidence was that up to the time the first neighbor arrived defendant had made no effort to extinguish the flames in any of the buildings, and none of the neighbors heard any cry of fire or for help. After they arrived, defendant assisted in removing articles from the house. Defendant testified in his own behalf. His statement was that he took his coat off and

laid down on the bed about 8 o'clock, and soon fell asleep, and was awakened by the light shining from the tank fire through the window of his bedroom. He made no explanation of the fire issuing from the partition in the house, and which had filled it with smoke by the time Bennett arrived. It is highly improbable that a stranger to the premises could have set fire to all three houses in the interior of each in so short a time without attracting defendant's attention. All the neighbors agree that the fire occurred shortly after 8 o'clock, and, as it must have burned some minutes before attracting their attention, it would follow that the fire must have originated before defendant says he laid down and slept. Without stating other evidence tending to support the verdict, we think enough appeared to warrant the jury in fixing the guilt upon defendant.

3. The testimony as to Mrs. Hiltel being the owner of the premises on which the fire occurred was admissible. The land was fully identified as the same as that conveyed to defendant by deed, and by him deeded to his wife. It was competent to show what the wine cellar contained, and to show that the cellar and the tank house and dwelling were apparently fired simultaneously, although the information charged defendant with burning the dwelling, and did not include the other two buildings. There was evidence tending to show that the dwelling would inevitably have been destroyed from the fire in the cellar, and likewise the tank house. They were so close to each other that the burning of any one would warrant the belief that all would inevitably perish, especially as there were no appliances to extinguish the fire, and the distance from the neighbors would make it out of the question for them to reach the scene in time to be of much, if any, avail.

The court—properly, we think—instructed the jury that, while they could not find the defendant guilty of arson for burning the wine cellar, inasmuch as he was not charged with having caused the burning of this particular building, still if they should find from the evidence, beyond any reasonable doubt, that he set fire to the wine cellar willfully and maliciously, and that it “was situate so close to the building alleged in the information as having been burned by defendant, as that the burning of said wine cellar necessarily caused, and did then and there cause, the flames from said wine cellar to be communicated to said house charged * * * as having been burned by defendant, and that said fire was thus communicated from said wine cellar to said alleged house alleged to have been burned, and then and there caused said house to take fire and be consumed, this would constitute a burning within the meaning of the law of the crime of arson.” We discover no error in this instruction.

The court instructed the jury as to what constituted direct or positive evidence, and that there is another kind of evidence called

circumstantial. The court did not undertake to define this latter kind of evidence, but the court said that it “is where it is sought to convict a person by a chain of circumstances which are sufficient in themselves to establish the guilt of the party to the satisfaction of the jury beyond all reasonable doubt. Both of these classes of testimony are proper, and upon either the jury may convict, providing they are sufficient to satisfy their minds beyond all reasonable doubt of the guilt of the party.” It is complained that the instruction “left the jury to judge for themselves” as to what constituted circumstantial evidence. It would have been proper enough for the court to give to the jury a definition of circumstantial evidence, but it was not error to fail to do so. The court was not asked to define this class of evidence.

Defendant asked, and was refused, certain instructions, and now urges error for such refusal. We find here no ground for reversal. He asked, for example, that the jury be told that they should give the same weight to defendant's testimony as they would give to any other witness; that intent is a material ingredient in every crime, and must be proved by positive evidence, etc. Neither of these instructions correctly stated the law. The other instructions were to the effect that the defendant could not be convicted if the jury should find from the evidence that the dwelling caught fire from the burning of the wine cellar or tank building. But the court—we think, correctly—instructed the jury on this phase of the case, and did not err in refusing the instruction asked by defendant. The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(131 Cal. 597)

BANK OF UKIAH v. REED et ux.
(S. F. 1,543.)

(Supreme Court of California. Feb. 18, 1901.)

MORTGAGES—FORECLOSURE—REAL AND PERSONAL PROPERTY—ORDER OF SALE—APPEAL—REVIEW—PRESUMPTIONS—HARMLESS ERROR—DEFICIENCY JUDGMENT—PLEADING—CONTRACT TO PAY TAXES—CONSTITUTIONAL LAW—EXONERATION FROM INTEREST—AFFIRMATIVE DEFENSE.

1. On foreclosure of mortgages, plaintiff asked that each of two separate parcels of land subject thereto, and each of two species of personality, one of which was subject thereto, and the other pledged to secure the mortgage notes, should be sold separately, but without designating any particular order for the sale. To sell all of the property as an entirety was impracticable. To determine what order was best, the court took testimony, and directed sales of the personality first; the sale of the pledged personality taking precedence. No objection was taken to the form of the decree, nor appeal taken therefrom till after the sales,

which resulted in a deficiency judgment. Appellants did not bring up the evidence, nor show that they were injured. *Held*, that there was no error, since the court would have been justified in following by analogy the requirements of Code Civ. Proc. § 682, cl. 1, for the terms of an ordinary writ of execution, warranting a like order of sale, and, moreover, the presumption on appeal was in favor of its validity, and it was incumbent on defendants to show error, and that they were injured.

2. Bank stock was assigned to secure notes also secured by two separate mortgages covering both real and personal property, and in an action on the notes and to foreclose the mortgages the counsel fees for the foreclosure were included in the aggregate sum, which was declared to be a lien on the property given to secure the notes, and the bank stock was directed to be sold before the other property. *Held*, that an objection that the direction caused the proceeds of such stock to be applied to counsel fees, no portion of which was a lien thereon, was unfounded, and that it was immaterial to defendant, since the stock was security for the entire debt, and, the entire property being insufficient to satisfy the judgment, defendants were not injured thereby.

3. On foreclosure of two separate mortgages, an omission to make counsel fees allowed for the foreclosure of each a specific lien on the property described in that mortgage is only a technical error, which does not invalidate the sale of all the mortgaged property; the proceeds being insufficient to satisfy the judgment.

4. That a portion of property included in mortgages was not included in the judgment on foreclosure thereof is no ground for reversal, though the mortgagors are entitled to have all of the mortgaged property sold before there can be any personal liability, since such portion was thereby freed from the mortgage lien, and if the judgment was not satisfied by the sale a reversal was unnecessary, as the mortgagors' rights could be fully preserved by modifying the judgment by striking out all liability for the deficiency, and plaintiff's voluntary satisfaction of the deficiency judgment had the same result.

5. An averment in a complaint on the foreclosure of mortgages that they provide "that the plaintiff may pay all taxes, liens, or assessments upon the said property, and that the same shall be repaid with interest thereon at the rate of one per cent. per month," falls short of showing a contract by which the mortgagor is obligated to pay any taxes on the money loaned or on the mortgages given therefor, and which is for that reason null and void, under Const. art. 13, § 5; the exoneration from liability to pay interest being an affirmative defense.

6. Defendants to a mortgage foreclosure cannot complain that a franchise, sale of which is forbidden by statute, but which was included in the mortgage, was directed to be sold, since if such property were sold no title would pass, and they could sustain no harm therefrom.

Department 1. Appeal from superior court, Mendocino county; S. K. Dougherty, Judge.

Action by the Bank of Ukiah against John S. Reed and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Heller & Powers (James L. Robison, of counsel), for appellants. J. A. Cooper, for respondent.

HARRISON, J. Action in foreclosure. The appellant John S. Reed executed to the plaintiff July 23, 1892, his promissory note for \$15,491, and at the same time, to secure its payment, executed a mortgage upon certain real estate in Mendocino county, known

as the "Reed Ranch." December 5, 1893, he executed to the plaintiff another promissory note, for \$4,702, together with a mortgage for securing its payment upon the property described in his former mortgage, and at the same time transferred and assigned to the plaintiff certain shares of stock in the Bank of Ukiah as additional security for the payment of both of his said promissory notes. April 2, 1894, as further security for the payment of said notes, he executed a mortgage upon certain other real property in the county of Mendocino, and also a chattel mortgage upon certain sheep held by him in that county. The present action is brought to recover judgment for the amount of the promissory notes, and that the above property be sold in satisfaction thereof. The appellant Anna M. Reed is the wife of the mortgagor, and is made a defendant under the averment that she claims some interest in the property. John S. Reed demurred to the complaint, and thereafter withdrew his demurrer and consented that his default be entered. Anna M. Reed filed a consent that default be taken against her, stating also that she declined to further answer or appear in the action. Their defaults were thereupon entered by order of the court, and on September 18, 1897, judgment against them was entered in favor of the plaintiff, determining the amount due to it, and directing a sale of the property described in the complaint. In its judgment the court directed that the bank stock should be sold first, and the other personal property next, and thereafter the real estate in two specific parcels, as therein designated. Under the order of sale issued thereon, as appears from the briefs filed in behalf of the respective parties, and also from copies of the records of the superior court filed herein, the property described in the judgment was sold for less than the amount found due to the plaintiff, and a deficiency judgment entered against the mortgagor. This deficiency judgment was afterwards voluntarily satisfied by the plaintiff. After the sale had been made and the return thereon filed by the sheriff, viz. March 18, 1898, the present appeal was taken, and is presented here upon the judgment roll, without any bill of exceptions.

1. The court did not err in directing the order in which the property should be sold. The appellant had mortgaged to the plaintiff two separate parcels of real estate and two distinct species of personal property. The plaintiff had asked in its complaint that the lands respectively described in each of the two mortgages thereof should be sold in one lot or parcel, and that each of the two species of personal property should be sold separately in one lot or parcel. No particular order for the sale of these particular pieces was designated or requested therein, and the court was not required to follow the order in which the parcels had been enumerated by the pleader or set forth in the

complaint; nor were there any equities of third persons to be considered in determining the order in which the sale should be made. It would have been impracticable, if not inequitable, to direct all the property to be sold as an entirety. In the absence of any showing upon the subject the court would have been justified in following by analogy the requirements of the statute (Code Civ. Proc. § 682, cl. 1) for the terms of an ordinary writ of execution, and directing that the personal property be sold before resorting to the real estate. Acting as a court of equity, it was proper for it to direct the property to be sold in such order as would be for the best interests of the parties to the action; and it appears from the judgment that the court took testimony for that purpose, and found therefrom that it was for the best interests of all parties that the property should be sold in the order therein directed, for the reason that it would sell to better advantage and bring a better price by being sold in that order. This provision in the judgment is not erroneous as a matter of law, nor is there any presumption against its validity. If, as claimed by appellants, it is erroneous as a matter of fact, it was incumbent upon them to cause such error to appear. If there was any ground upon which the court could have given this direction, it must be assumed that such ground was shown to it. The appellants have not brought up the evidence, nor do they show that they have been in any respect injured. In *Cord v. Southwell*, 15 Wis. 211, it was held that the court might in its judgment direct the order in which the mortgaged premises should be sold, without any foundation being laid therefor in the pleadings, and might determine this order upon facts shown at the hearing, and that, if such directions were erroneous, it was incumbent upon the defendant to show that to be so. The same principle is sustained in *Macomb v. Prentiss*, 57 Mich. 225, 23 N. W. 788; *Gregory v. Campbell*, 16 How. Prac. 417; *Wilts. Mortg. Forec.* § 491; *Ping. Chat. Mortg.* § 1918; *Jones, Mortg.* § 1618; *Hopkins v. Wiard*, 72 Cal. 202, 13 Pac. 687. *Carmichael v. McGillivray*, 57 Cal. 8, cited by appellants, does not present a different rule. In that case the plaintiff asked for the "usual decree" in foreclosure suits, and as its conclusion of law the court held that the plaintiff have judgment "as prayed for in the complaint." Instead of following this direction, the judgment directed that the ditch be sold before the sale of the mining claims. Upon the appeal therefrom it was made to appear to the supreme court by an affidavit to that effect that this provision of the judgment was inequitable and would work an injustice to the mortgagors. The judgment was reversed upon the ground that the decree was a departure from the "usual form," and was not warranted by the "finding of the court." See, also, *Broder v.*

Conklin, 98 Cal. 363, 33 Pac. 211. In the present case no objection to the form of the decree, or attempt to modify its terms, was made to the superior court, nor was the appeal therefrom taken until after the property had been sold in accordance with its terms; nor has it been made to appear here that the defendants have been in any respect injured, or that a greater sum of money would have been received if the sale had been made in any other way than that directed by the court.

2. The court allowed to the plaintiff \$800 as counsel fees for the foreclosure of the mortgages upon the real estate and the sheep, and this amount was included in the aggregate sum which was declared to be a lien upon the property given as security for the payment of the notes. It is urged by the appellants that the effect of directing that the bank stock be sold before the sale of the other property was to cause the proceeds of such sale to be applied to the payment of these counsel fees, whereas it appears from the findings that no portion of the counsel fees was a lien thereon. This objection is, however, specious rather than real. The bank stock was a security for the entire indebtedness upon the promissory notes, as much as was the other property; and it was immaterial to the defendants whether the bank stock or the other property should be sold first, so long as the sale of the entire property would be insufficient to satisfy the judgment. Unless the bank stock should sell for the entire amount of the judgment, exclusive of the counsel fees, the defendants would not have been injured by having it sold first. As the proceeds of the entire property were insufficient to satisfy the judgment, the defendants have suffered no injury by reason of the order in which the sale was directed. If the judgment had directed that the other property be first sold, and that, after paying to the plaintiff the counsel fees, if the balance of its proceeds should be insufficient to satisfy the judgment the bank stock be then sold, the position of the appellants would be the same as it would under the decree first rendered. For the same reasons the omission to make the counsel fees allowed for the foreclosure of each of the several mortgages a specific lien upon the property described in that mortgage was only technical error.

3. The mortgage, as alleged in the complaint, included as a portion of the mortgaged property the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 27, T. 22; but the judgment does not declare that this parcel is subject to the lien, nor does it contain a direction for its sale. The appellants urge that the court thereby erred, and that, inasmuch as they have the right to have all of the mortgaged property sold before there can be any personal liability, the judgment must be reversed. The error of the court, if any error there was, was its omission to include this parcel with the lands

subject to the lien. It could properly direct the sale of only that property which it had found to be so subject. It is highly probable that the omission results from a mistake of the scrivener in describing the property, either in the complaint or in the judgment. The same omission or mistake is found in the prayer of the complaint, which enumerates the property that the plaintiff asks to have sold, and the judgment follows the terms of this prayer. But, even if the parcel were included in the mortgages, the failure of the plaintiff to have it included in the judgment would merely have the effect to free it from the lien of the mortgage, as well as from a sale in satisfaction of the judgment. *Mascarel v. Raffour*, 51 Cal. 242; *Ould v. Stoddard*, 54 Cal. 613; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542. If the judgment is satisfied by the sale of a portion of the mortgaged premises, the mortgagor will hold the omitted portion discharged of all lien. If the judgment is not satisfied by the sale, a reversal of the judgment is not necessary, but the rights of the mortgagor are fully preserved by directing that the judgment be modified by striking out all liability for the deficiency. In the present case the same result has been obtained by the plaintiff's voluntary satisfaction of the deficiency judgment.

4. It is further objected that the court was not authorized to make any portion of the taxes paid by the plaintiff upon the real estate included in the mortgage a lien upon the other property given as security for the indebtedness. It is a sufficient answer to this objection that it does not appear that the judgment includes any amount for the payment of taxes. It is not specifically declared therein that any portion of its amount is for taxes paid by the plaintiff, nor does it appear from a comparison of its amount with a computation of the indebtedness claimed in the complaint that any amount paid for taxes is included therein.

5. The claim that the provision in the mortgages for the payment of taxes takes away all liability for the payment of interest upon the indebtedness is not sustained by the record. The mortgages themselves are not set forth in the complaint, but it is averred that they provide "that the plaintiff may pay all taxes, liens, or assessments upon the said property, and that the same shall be repaid with interest thereon at the rate of one per cent. per month." Section 5 of article 13 of the constitution declares that every contract by which a debtor is obligated to pay any tax or assessment "on money loaned or on any mortgage, deed of trust, or other lien," shall, as to the interest specified therein, be null and void. The above averment falls far short of showing a contract by which the mortgagor is obligated to pay any taxes upon the money loaned or upon the mortgages given therefor. This exoner-

ation from liability is an affirmative defense which must be established on the part of the defendant. There is no substantial difference between the averment herein and the provision in the mortgage considered in *Marye v. Hart*, 76 Cal. 291, 18 Pac. 325, which it was held did not have the effect claimed by the appellants herein.

6. It is next contended that the court erred in directing a sale of the franchise of the Ukiah Gas Works, for the reason that such franchise is not the subject of a sale under execution. As the appellants included this mortgage in their mortgage to the plaintiff, it might well be held that they are estopped from questioning plaintiff's right to a judgment for its sale in the foreclosure of that mortgage; but if, as claimed by them, a transfer of the franchise, either by way of mortgage or by judicial sale, is forbidden by statute, no title would pass by the sale, and the appellants can sustain no harm therefrom. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(131 Cal. 605)

MCLEOD v. BARNUM. (S. F. 1,555.)

(Supreme Court of California. Feb. 18, 1901.)

MORTGAGES — CHATTEL MORTGAGES — STATUTES — VALIDITY — PROPERTY SUBJECT TO MORTGAGE — CONTRACTS — SALES — RETENTION OF GOODS OF VENDEE — RESCISSION — EVIDENCE — HARMLESS ERROR.

1. A mortgage of a leasehold interest in land, with the improvements thereon, which the lessee had a right to remove at the expiration of the term, on certain conditions, was a mortgage of an interest in real estate, and hence valid, under Civ. Code, § 2947, declaring that any interest in real estate capable of being transferred may be mortgaged.

2. The amendment of 1895 to Civ. Code, § 2955, placing after the words "mortgages may be made on the following personal property" the words "and none other," does not render a mortgage on personal property not enumerated invalid as between the parties; no rights of third parties being involved.

3. A vendee holding possession of the property purchased may not set up in defense to an action for the price that the vendor's title was defective.

4. Where, in an action for the price of property sold, a letter written by defendant to a former owner of the property was not shown to have been lost, but a witness was permitted to state that the letter was an offer by defendant to purchase the property for a greater sum than she had contracted to pay plaintiff, the error was harmless, since the testimony was immaterial.

5. Where the loss of a letter written by defendant was not shown, but its recipient testified as to its contents without objection by defendant, and the witness was cross-examined as to the contents, defendant could not object to the subsequent testimony of another witness as to the contents on the ground that the loss had not been shown; such witness giving the contents substantially the same as the recipient.

6. Where, in an action for the price of property sold, defendant contended the seller's title to have been defective, it was not error to permit plaintiff to introduce a bill of sale which formed a link in her chain of title.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Angus McLeod against Amelia D. Barnum. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Crandall & Bull, for appellant. Hepburn Wilkins, for respondent.

PER CURIAM. Appeal from judgment and order denying a new trial. On the 13th day of March, 1896, one Helen M. Atwater was the owner and in the possession of a certain lot in Tiburon, Marin county, and a lease thereof for the term of 11 years from the 15th day of February, 1896, at a monthly rental of \$15 per month, with a two-story frame building thereon, known as the "El Dorado Hotel," together with the furniture, bar, and bar fixtures, and other personal property in and connected with said hotel. By the terms of the lease the lessee was given the right to remove all improvements then on the said lot, or that might be thereafter placed thereon, at the termination thereof, upon complying with the conditions therein named. On said day the defendant purchased of said Helen M. Atwater the lease, improvements on the leased premises, furniture in the hotel, bedding, cooking utensils, bar, and bar fixtures, wines, liquors, and other personal property in and about the hotel, for the sum of \$1,950. As part of the purchase price for all of the aforesaid property, the defendant executed to plaintiff the promissory note set forth in the complaint for the sum of \$500, and at the same time executed and delivered to plaintiff a mortgage, which mortgage recited that the mortgagor mortgaged "that certain lot, piece, or parcel of land [describing lot], and including the building and improvements on said land known as the 'El Dorado Hotel,' * * * and all the interest of the mortgagor in said land; * * * the said interest being a leasehold interest under that certain lease from Israel Kashaw to Helen M. Atwater dated the 17th day of February, 1896." The plaintiff acted as the agent for said Helen M. Atwater in taking said note and mortgage. After the said sale and the execution of the said note and mortgage the defendant went into possession of the said leased premises and personal property. The said promissory note has not been paid, nor the interest thereon. The court filed findings, and by its judgment and decree directed a sale of the mortgaged premises to satisfy the judgment.

It is contended that the mortgage was of personal property, and of personal property not enumerated in Civ. Code, § 2955, and for that reason void even between the parties. The mortgage was of an interest in real estate, and therefore within the provision of section 2947 of the Civil Code. If the property mortgaged were personal property, the mortgage would be valid as between the parties. *Bank v. Moore*, 106 Cal. 673, 39 Pac.

1071; *Bank v. Gibson*, 109 Cal. 197, 41 Pac. 1008; *Tomlinson v. Ayres*, 117 Cal. 572, 49 Pac. 717. It is said that by the amendment of 1895 to Civ. Code, § 2955, after the words "mortgages may be made upon the following personal property," the words "and none other" were added, and that since the amendment a mortgage of personal property not enumerated is absolutely void even between the parties. We do not think such is the law. Neither do we think the legislature intended any such consequence. It would require very plain and imperative language to convince us that the legislature intended to prevent parties from making a mortgage upon any personal property, as between themselves, where the rights of no third parties are involved. In section 2957 it is provided that a mortgage, unless accompanied by the affidavit required by the statute, and acknowledged and recorded, is void as to creditors and subsequent purchasers and incumbrancers for value. But the mortgage is, without the affidavit or acknowledgment, good between the parties. A law that would prohibit competent parties from making a valid contract, as between themselves, where no rights of third parties intervene and no public policy is violated, would be a very serious infringement of the right of making contracts.

The defendant in her answer alleged that the title to the property is and was defective, and that she has never been given a good and valid title to the said property. The court found, in finding 1, that defendant did receive a good title to the property. The different steps or links in the chain of title are very fully and minutely set out. Defendant's counsel have devoted several pages of their brief in attempting to show that the different and independent parts of this finding are not supported by the evidence. It is unnecessary to examine the specifications as to the insufficiency of the evidence to sustain the finding, for the reason that the court found—and the finding is sustained by the evidence—that defendant "ever since the 13th day of March, 1896, held and retained, and now holds and retains, the possession of all the said property, and has ever since said day had the use and profits thereof." The law will not allow a vendee to obtain possession of property under a contract of sale, and while in possession to defend against an action for the purchase money upon the ground of the title being defective. *Peabody v. Phelps*, 9 Cal. 213; *Hicks v. Lovell*, 64 Cal. 18, 27 Pac. 942; *Gross v. Kierski*, 41 Cal. 112. In this case the plaintiff seeks to foreclose upon the property mortgaged, and defendant seeks to retain possession and prevent the foreclosure upon the ground that the title of the vendor was and is defective. If the title could be tried in this way, and should be found defective, the defendant might retain possession forever, without paying the amount she agreed to pay, or restoring the plaintiff

to his former rights. The court found "that the said cross complainant never rescinded or offered to rescind with said Helen M. Atwater the purchase which was made by the said cross complainant of the said hotel and leasehold interest and personal property described in the said cross complaint, or the contract which was made between the said cross complainant and the said Helen M. Atwater with relation thereto, and that the said cross complainant never returned or offered to return to the said Helen M. Atwater any of the property mentioned and described in the said cross complaint." This finding is not challenged. In view of the finding that defendant has remained and is in possession of the property, and that she has made no attempt at rescission, and that she has not paid the note, it becomes unnecessary to discuss all the criticisms of findings made in appellant's brief. The material findings are supported by the evidence, and it would serve no useful purpose to discuss the evidence as to those which are immaterial.

The witness Cochrane, while on the stand, was permitted, under defendant's objection, to state the contents of a letter written by defendant to one Mrs. Delcroix; and it is now urged that such ruling was prejudicial error. The principal objection to the contents of the letter being given in evidence was that the loss of the letter had not been proven. The witness testified that in the letter defendant offered Mrs. Delcroix \$3,500 for the property,—\$1,200 cash, and the balance in installments of \$500 every six months. We regard the evidence as immaterial, and therefore harmless. But, if it were material, appellant is not in a position here to avail herself of the error. The witness Delcroix was permitted to testify without objection to the contents of the letter in her direct examination. She gave the contents substantially as given by Cochrane. Appellant's counsel fully cross-examined her as to the letter and its contents. There is no contradiction of the evidence of either of these witnesses as to such contents. The appellant, therefore, did not object to the evidence as to the contents of the letter when such evidence was first offered. Not only this, but she fully interrogated the witness as to such contents. She will not now be allowed to say that it was error for the subsequent witness to be questioned concerning the contents of the letter. If the objection had been sustained, the record would still contain the evidence of Mrs. Delcroix as to the contents of the letter.

A bill of sale of the property from Jane Delcroix to James W. Cochrane was offered in evidence. To this defendant objected upon the ground that it was immaterial, irrelevant, and incompetent. The admission of the bill of sale is now claimed to be error. Defendant had denied the title of plaintiff to the property, and alleged that the title was defective. This bill of sale was a link in the chain of title, and made apparently necessary

by the defense interposed by defendant. The defendant objected to the title as being defective, and objected to all proof offered by plaintiff to show that it was not defective. It would be trifling with justice to say such ruling was error.

We have examined the other assignments of error, but they require no special notice. We find no error that would justify a reversal of the case. The judgment and order are affirmed.

(25 Mont. 197)

NOLAN v. MONTANA CENT. RY. CO.
(Supreme Court of Montana. Feb. 25, 1901.)
MASTER AND SERVANT—INJURY TO SERVANT—APPLIANCES—EVIDENCE—VERDICT—DIRECTION—APPEAL—REVERSAL—DIRECTION OF JUDGMENT ON REMAND.

1. An employé was struck and injured by a cable attached at one end to a locomotive, and at the other to a plow then being used to unload cars of dirt at a curve. The cable slipped over a small stake in a socket on the edge of a car on the outside of the curve, behind which it was placed by plaintiff's fellow servants to prevent the plow being pulled off the car on the inside of the curve. There was a groove in the socket holding the stake, in which the cable was usually placed when unloading dirt at a curve. There was no evidence that a block and tackle would have been safer than the groove, which means was reasonably safe. *Held*, that the evidence did not support a verdict that the employé was injured by the employer's neglect to provide and use a block and tackle to guide such cable.

2. Where the trial court erred in denying a motion to direct a verdict for defendant, the court on appeal could not direct judgment for the defendant, since they could not know what exceptions, if any, were taken by the respondent to the trial court's rulings on the evidence offered.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Timothy Nolan against the Montana Central Railway Company. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Reversed.

A. J. Shores and L. Parker Veazey, for appellant. Stanton & Leehey, Geo. Haldorn, and Clayberg & Gunn, for respondent.

MILBURN, J. This is an appeal from the judgment and an order denying a motion for a new trial rendered and made by the district court of the Second judicial district, by which judgment the plaintiff recovers from the defendant for injuries alleged to have resulted from his being struck upon the head by a wire cable attached to a locomotive at one end, and to a dirt plow at the other; said plow being used for scraping dirt from a train of flat cars which stood upon a curve on the railway track of the defendant. The plaintiff alleges in his complaint that the injury was caused by the defendant carelessly and negligently failing to provide and use a block and tackle at said curve to draw said plow or scraper along a certain car which was being unloaded, but

instead thereof using a wire cable attached to the locomotive; the cable being held on the car by a wooden peg or pin, which, being insufficient, allowed the cable to slip over the top thereof, the cable striking the plaintiff; he then and there being near the car, on the inner side of the curve, assisting in the work of repairing the roadbed of the railway. The only negligence charged is as above stated. The evidence in the case shows that plaintiff was struck by the cable; that, at the time he was struck, the cable, being attached to the said plow and locomotive, was thrown over a certain wooden stake, 4x4x18 inches, which was set in an iron socket or pocket on the outside of the curve on the edge of a certain flat car in front of the car on which the plow rested, it being necessary to hold the cable on that side of the train in order to prevent the plow from being pulled off from the side of the train on the inside of the curve; that the cable was so placed over the wooden stake by fellow servants of the plaintiff; that the cars of the defendant used on this occasion had all attached to them, on each side, iron pockets, in which wooden stakes of the said dimensions were placed; that each pocket was fastened to the car by an iron bolt or clasp, and that just below the bolt on each pocket was a groove, into which it was a practice to place the cable when unloading dirt on a curve; that the stake used as aforesaid was one of those above mentioned; that on the occasion referred to the cable slipped over the said stake, and, going rapidly across the train to the inside of the curve, struck the plaintiff; that the cable could have easily been placed in two or more of the grooves, thereby rendering the operation of unloading dirt much safer; and that the wooden stakes were placed on each side of each car, about five feet apart, for the purpose of preventing the said plow or scraper from going over the side of the train.

The defendant assigns as error the court's denial of its motion for a nonsuit, and the court's refusal to instruct the jury to find for the defendant at the close of the evidence, and states as one of the grounds of motion for new trial the insufficiency of the evidence to justify the verdict. The employé who seeks to recover for injuries claimed to have been received through negligence for which his employer is liable must establish that negligence by proof. It appears that the accident in this case was the result of the insufficiency of the means used by the plaintiff's fellow servants. We are of the opinion that the charge of negligence on the part of the defendant, in not furnishing a block and tackle, is not supported by the evidence. It does not appear that the grooves were not sufficient and reasonably safe appliances. There was not any evidence tending to show that a block and tackle was a safer or more suitable appli-

ance for the purpose of holding the cable than the grooves, which, upon the undisputed evidence, were reasonably safe means. Whether, as to his servant, the master must, at his peril, provide the safer appliance, when it is known to him, is a question which is not here presented, and as to it we do not express any opinion.

A motion for a nonsuit was made after the plaintiff had rested, and said motion was denied. The defendant introduced proof, and then moved the court to instruct the jury to return a verdict for the defendant, which motion was denied. The defendant assigns error in denying each motion, and prays this court to reverse the court below and direct judgment for the defendant. The court below erred in denying the motions, respectively; but we cannot order judgment for the defendant, as we have no means of knowing what, if any, exceptions were taken by respondent in the court below to the rulings of the court on the evidence offered. The only exceptions properly included in a transcript on appeal are those of appellant. We have no means of anticipating what evidence, if any, the respondent may offer on a new trial. *O'Rourke v. Schultz*, 23 Mont. 285, 58 Pac. 712; *Westheimer v. Goodkind*, 24 Mont. 90, 60 Pac. 817.

The verdict is not supported by the evidence, in that there is no evidence to show that the defendant company was negligent, as claimed by respondent, in not furnishing a block and tackle. The judgment and order denying a new trial are reversed, and the cause is remanded. Reversed and remanded.

BRANTLY, C. J., and PIGOTT, J., concur.

(25 Mont. 89)

HEINZE et al. v. KLEINSCHMIDT et al.
(Supreme Court of Montana. Feb. 25, 1901.)
MINING—TENANTS IN COMMON—PARTITION—
RECEIVER.

Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.

Appeal from district court, Silverbow county; William Clancy, Judge.

Action by F. Augustus Heinze and another against Carl Kleinschmidt, administrator of the estate of John D. Allport, deceased, and others. From an order appointing a receiver, certain defendants appeal. Reversed.

On January 22, 1900, the plaintiffs began their action in the district court of the Second judicial district to obtain a decree of sale for the purpose of partition of the Minnie Healy (patented) lode claim, situate in Silverbow county. The complaint alleges that defendant Kleinschmidt is the adminis-

trator of the estate of John D. Allport, who died in October, 1895, and that the other defendants, except Miles Finlen, are his heirs at law, each being entitled to an undivided one-fifth interest in intestate's estate, subject to the possession of the said Kleinschmidt for the purposes of administration; that at the time of his death said Allport was seised in fee and was in possession of an undivided one-fourth interest in the Minnie Healy claim, the same being now in the possession of the defendant Kleinschmidt under his trust; that plaintiff Heinze is seised in fee and in possession of an undivided five-eighths, and the Johnstown Mining Company of an undivided one-eighth, interest therein; that plaintiff Heinze is also the equitable owner of an additional one-twentieth of the said claim, which is the interest therein inherited by defendant Caroline V. Kelley as heir of said Allport; that defendant Finlen asserts an interest in the claim, and particularly title to the interests belonging to plaintiffs, but without any foundation in fact therefor; that the said Kelley, aided and abetted by Finlen, heretofore presented to the district court of the Fifth district (the same court which granted letters of administration to Kleinschmidt) a certain paper purporting to be the last will of John D. Allport, and devising the whole estate to said Kelley, and proposed the same for probate, but that said court, upon a hearing, had declared the same a forgery; that before the bringing of the present action said Kelley had entered into an agreement with Finlen by which she had bound herself to convey to him all her interest in the claim; that Finlen had thereafter, for a valuable consideration, assigned to plaintiff Heinze his rights thus acquired from Kelley, but that Kelley, with notice of Heinze's rights under his assignment from Finlen, had conveyed her interest by deed to Finlen, who took and holds the same as trustee for Heinze, subject to the payment to Finlen of \$3,000, the amount he paid Kelley therefor, which said Heinze is ready and willing to pay; that notwithstanding these facts Finlen claims this interest as his own; that Finlen, by reason of his contract with Kelley, pretends and claims to have some right or interest in the other undivided four-twentieths of the Minnie Healy claim, which belonged to John D. Allport at the time of his death, but that such claim is without foundation in fact; that, aside from the claims of Finlen thus made, the rights of all parties are free from adverse claims of incumbrances of any kind or character; and that the property, being valuable almost solely by reason of the copper ores deposited therein, cannot be partitioned otherwise than by a sale and distribution of the proceeds among the parties entitled. The court is asked to determine the rights of the parties and decree the sale.

On January 30th thereafter the plaintiffs filed their verified petition in this cause, asking for the appointment of a receiver

pending the final hearing, alleging as grounds for relief the following: That the defendants Kleinschmidt, as administrator of Allport, and Mary E. Miller, having entered into the possession of the whole of the Minnie Healy claim and the workings therein, are now, and for a long time past have been, extracting, removing, and converting to their own use the ores therein, excluding the plaintiffs therefrom and refusing to render them any account; that said defendants assert the right to occupy and possess the whole of the claim and to extract the ores therefrom, and that they will refuse to render the plaintiffs any account thereof, or to pay over to them any part of the proceeds thereof; that plaintiffs are entitled to receive their proportion of the net values of all ores which may have been or which shall hereafter be taken from the claim by said defendants, and, but for the facts hereafter alleged, would be entitled to join with them in working the claim upon payment of their share of the expenses of mining, or to receive upon the dump their proportion of the ores taken out; that the defendant Miles Finlen, in order to harass and annoy plaintiffs, and to cast a cloud upon their title to the Minnie Healy claim by fraudulent and false adverse claims thereto, and to prevent them from having the use of their property and from developing the same by mining and extracting the ores therefrom, theretofore began an action in the district court of the Second district wherein he falsely and fraudulently asserted that he had an interest in said claim and had been in possession thereof, and that the plaintiffs forcibly and without his consent had ousted and ejected him therefrom and had taken possession thereof, and that they would mine and extract the ores therefrom and convert them to their own use in violation of his rights; that in said action, by reason of said false and fraudulent pretensions and claims on his part, he procured said court to issue an injunction against the plaintiffs restraining them from doing any mining upon the property or removing ores therefrom; that said action is pending and undetermined, and cannot be tried for a long time to come; that, after the procuring of said injunction as alleged, the said Finlen, for the purpose of further annoying plaintiffs and obstructing them in their enjoyment of their rights, began an action in said district court against John Devlin, Marian Devlin, and Mary E. Reilly, who for a long time prior thereto had been the owners of an undivided three-fourths interest of the Minnie Healy claim, as the predecessors of the plaintiffs, and falsely and fraudulently claimed to be entitled to a conveyance from them of their interests; that said action was thereafter transferred to the United States circuit court of the Ninth circuit, district of Montana, and that plaintiffs, having intervened therein, have set up their rights and

asked to have their title quieted; that said proceeding is pending, and cannot be heard and determined for a long time to come; that the effect of the injunction so procured as aforesaid is not only to prevent the plaintiffs from working the Minnie Healy claim, but also to prevent them from receiving from their co-tenants in possession, the said Kleinschmidt and Miller, their proportion of the ores extracted from the property by them, or of the net value of the same; that said defendants, by reason of the pendency of the said injunction, will not and cannot account to the plaintiffs for the value of any of the ores extracted, and cannot and will not deliver to them upon the dump their proportion thereof; that the cost and expense of maintaining the claim in idleness during the determination of the various suits aforesaid, as well as the present action, will be about \$500 per month; that the claim contains bodies of valuable ore, which can be readily mined and extracted, and that it is to the best interest of all of the owners or parties interested therein to have the same extracted and to have mining operations conducted therein, to the end that it may be properly preserved and developed, and its value thereby increased; and that unless the ores are so mined and disposed of, and the proceeds preserved, the owners of the said claim, and particularly the plaintiffs, may suffer great loss, by reason of the probable decline in the price of copper pending the litigation over the title,—the injunction bond required of said Finlen not being sufficient to protect the plaintiffs from probable loss.

The petition further alleges that there is a certain vein, bearing copper, gold, and silver, which has its top or apex within the boundaries of the said Minnie Healy lode claim, and which on its dip or incline departs from the perpendicular in its downward course to the north; that the development so far upon said vein indicates that it passes beyond the side lines of the Minnie Healy claim and enters into the Piccolo and Gambetta lode claims beneath the surface; that these latter claims are immediately north of the Minnie Healy claim, and are owned by the Boston & Montana Consolidated Copper & Silver Mining Company, which for a long time has been mining and extracting ores therefrom by means of underground workings; that plaintiffs are informed that the said Boston & Montana Consolidated Copper & Silver Mining Company is now engaged in carrying away and converting to its own use large quantities of ores from the said vein belonging to the Minnie Healy claim; that to prove the identity and continuity of the said vein from its apex in the Minnie Healy claim into the workings of the Piccolo and Gambetta claims will require a large amount of development work and entail a large outlay of money; that heretofore defendant Miles Finlen commenced an action in the district court of the Second district for an in-

junction to restrain the said Boston & Montana Company from mining and carrying away any of the ores from said vein; that said defendant, before obtaining an injunction, however, desisted from prosecuting said suit, and permitted said Boston & Montana Company to continue its mining operations on the vein, without further developing the same from the apex downward to prove that it belongs to the Minnie Healy claim, thus acquiescing in said trespass; that the injunction obtained by Finlen against the plaintiffs as alleged was designed to prevent them from prosecuting the work necessary to make such proofs, notwithstanding said Finlen believes that said vein has its apex in the Minnie Healy claim and the said corporation is trespassing thereon; that plaintiffs believe that the vein belongs to the Minnie Healy claim; that the ores which can now be mined therefrom have a value in excess of \$100,000, and that if this fact can be shown it will establish a value for the claim of several hundred thousand dollars; that it is to the interest of all the parties to have this work done at once, to the end that an injunction be obtained to restrain further trespasses; that it is also to the interest of all parties that the ores in the claim be extracted, and that their proceeds, so far as necessary, be devoted to this development work, to the keeping of the property in repair, to the prosecution of any suits necessary to restrain the said trespass or any other trespass, and to have the balance preserved for the parties entitled under the decree of partition when finally made.

Upon the filing of this petition an order to show cause was issued and set for hearing on February 5th. At that time the plaintiffs presented their evidence. The defendants Finlen and Kelley did not appear; both being absent from the state, and neither having been served with summons or notice of the hearing. The other defendants entered their appearances by counsel without service of process, but made no resistance to the petition. The matter was then submitted, but, no decision having previously been rendered, the defendants Kelley and Finlen entered their appearances by counsel on February 17th and asked to be heard. Leave was granted. Thereupon they answered by counsel, denying the material averments in the complaint and petition, including all allegations as to wrongdoing on their part, and introduced evidence controverting them. Thereupon the court, after consideration, made an order appointing one E. H. Wilson as receiver, with power to take possession of all the interests in the Minnie Healy claim to which the plaintiffs assert ownership, including the Kelley interest, and to enter into all the workings and ore bodies therein with the administrator of Allport and the heirs other than Kelley; to operate the mine in all portions not in possession of the administrator and the Allport heirs; to have reduced

all ores extracted to expend the proceeds in keeping the mine in repair; to do development work sufficient to demonstrate the ownership of the veins being worked in the Gambetta and Piccolo claims, which plaintiffs believe have their apex in the Minnie Healy claim; to demand and receive from the heirs of Allport and the administrator accountings for any mining operations conducted by them in any of the workings of the claim; and to prosecute any actions necessary in his judgment to protect the property from depredations by any person pending the litigation. The receiver is expressly directed to extract only so much ore as may be necessary to pay expenses and to accomplish the duties assigned him in the order. The defendants Kelley and Finlen have appealed.

Wm. Scallon, T. J. Walsh, and J. K. Macdonald, for appellants. McHatton & Cotter, for appellees.

BRANTLY, C. J. (after stating the facts). The only question presented to this court is whether the evidence submitted to the court below was sufficient to authorize the order of appointment. A determination of this question requires an examination of the evidence tending to support the averments in the petition. We have set forth in the statement particularly the contents of the complaint and petition, for the reason that they were treated at the hearing as affidavits, and so far as they tend to establish any material fact they are considered as a part of the evidence.

Though there is evidence tending to show that a controversy exists between Finlen and the Allport heirs other than Kelley touching the present ownership of the Allport interest, and growing out of the contest over the probate of the alleged will of Allport, it is admitted in the pleadings that Allport died intestate, and that the defendants other than Finlen are his heirs at law. We shall therefore assume, for the purpose of this investigation, that each of them, except Kelley, is now the owner of an undivided one-twentieth of the property in controversy. Kelley has no interest in the property, nor in this controversy, except so far as she may be bound under her agreements with Finlen, as appear hereafter, to prosecute to a successful issue the probate of the alleged will, and thus make good to him her title to the entire Allport interest. At the time this hearing was had, the will had been declared a forgery, as alleged in the petition. It is admitted, however, that a motion for a new trial was pending, and that the controversy as to the ownership of this interest is still undetermined. It appears that at the death of Allport, in 1895, John Devlin, Marian Devlin, and Mary E. Reilly were tenants in common with him in the property, owning the other three-fourths. It further appears that Finlen now holds the legal title to a one-

twentieth interest by deed from Kelley dated May 22, 1899, executed in pursuance of an agreement contained in a prior lease dated October 16, 1896, by which she bound herself, upon certain conditions, to convey to Finlen the entire Allport interest. The deed just mentioned also conveys to Finlen any interest Kelley may acquire under any decree which may be rendered in the proceedings looking to the probate of the alleged Allport will. It is shown that Finlen on October 16, 1896, became a lessee of the interests of John and Marian Devlin and Mary E. Reilly, with the right of purchase upon compliance with the terms of the leases on or before February 3, 1900. The conditions of this lease and the one from Kelley were the same. There is no controversy but that the conditions contained in these leases have been fully complied with in all respects. It further appears that the Devlins and Mary E. Reilly subsequent to the making of the leases to Finlen conveyed their interests to the plaintiffs,—five-eighths directly to Heinze on June 3, 1899, and one-eighth to the Johnstown Mining Company through mesne conveyances, dated, respectively, November 12, 1898, and May 18, 1899. The plaintiffs claim that Heinze made a verbal agreement with Finlen on November 21, 1898, which was subsequently executed, whereby Finlen bound himself to transfer and set over to Heinze his rights under the leases from Kelley, the Devlins, and Reilly, and that the plaintiffs are therefore properly vested with the title to the Devlin and Reilly interests, and that Heinze is entitled to the Kelley interest. This is disputed by Finlen, who has a suit pending in the United States circuit court against the Devlins and Reilly, and also plaintiff Heinze, who has intervened therein, to compel a conveyance to him according to the terms of the lease. This defendant has also a suit in the district court of Silverbow county against the plaintiffs, in which he seeks to eject them from the Minnie Healy claim. In this suit an injunction was issued restraining the plaintiffs from working the property pending a trial. These are the suits referred to in the petition as being founded upon fraudulent claims; they having been brought, it is alleged, to harass and annoy plaintiffs and to prevent them from the enjoyment of their property, and for no other purpose.

The situation of the title is, therefore, such that, if Finlen should succeed in his suits now pending, the plaintiffs would have no interest in the Minnie Healy claim. The partition decreed in this case, if any at all, would then be between him and the Allport heirs other than Kelley, subject to the administration. If the Allport will should finally be admitted to probate, the whole property would belong to Finlen. If the plaintiffs should succeed in these suits, they would be tenants in common with the Allport heirs, except Kelley, or, if the will should be es-

tablished, the owners of the entire property. With the merits of these controversies we have nothing to do on this appeal. At present we are concerned only with the fact of their existence, and the purposes and motives actuating Finlen in connection with them. As to the charges of bad faith and wrongdoing on the part of Finlen in the bringing of these suits, and his sinister purposes therein towards the rights of the plaintiffs, there is nothing in the evidence to support them, beyond the fact that these suits have been brought and are now pending. There is nothing to show that he brought them in bad faith, or that he has any other purpose therein than to have his rights declared. If he thought at the time they were brought that he was entitled to conveyances from the Devlins and Rellly, and that the plaintiffs were invading his rights, it was entirely proper for him to seek appropriate redress from all of them. Nothing else appearing, a presumption of good faith and proper motive must be indulged in his favor. Moreover, the fact that the district court issued an injunction in connection with the ejectment suit, and after a hearing thereon, justifies the inference that that court was of the opinion that the plaintiffs are probably wrong in their claims. They had an opportunity on that hearing to show that the claims of Finlen are fraudulent and without foundation, as well as that the motives prompting him are malicious, yet it seems they did not avail themselves of this opportunity. That Finlen brought suit to restrain alleged trespasses upon the Minnie Healy claim by a third party through the workings in the Gambetta and Piccolo claims, and did not prosecute it vigorously, furnishes in itself no ground for the charge that he is acquiescing in wrongs to plaintiffs by such third parties. He was and is under no obligations to plaintiffs to press this suit. He may have desisted because of an apprehension that he could not succeed, or because he became satisfied that he was wrong, or because he made some satisfactory arrangement with the corporation about compensation. In any event, it comes with ill grace from the plaintiffs to insist that any obligation rests upon him in this connection, while they deny that he has any interest in the property; there being nothing in their way, until they procured the appointment of the receiver in this case, to prevent them from bringing and prosecuting any suit necessary to protect their own rights. If they had the requisite information, the obligation rested upon them to protect the rights which they now assert, and not upon Finlen. They were in possession at the time they began this suit. With the knowledge of the facts touching trespasses, which their charges against Finlen imply that they had at the time, they could easily have invoked successfully the preventive power of the court, even without additional exploration.

Passing now to an examination of the charges of wrongdoing on the part of the administrator and Mary E. Miller, we notice first that they entered their appearances in this case without service of process; and, though accused of ousting the plaintiffs from possession, and refusing to render any account of their alleged operations, they made no attempt to justify or deny the charges. They thus impliedly, at least, confessed the truth of them. Finlen and Kelley undertook to show that no real ground for the allegations in this connection existed, and that these two defendants, in collusion with plaintiffs, had attempted to bring about a situation upon which the court would be justified in taking charge of the property.

The facts are: On January 8, 1900, the administrator applied to the district court having jurisdiction over the estate for permission to engage in mining the Minnie Healy claim. This application was denied. After that time, and until this suit was instituted, plaintiff Heinze and he had various consultations about engaging in operations there, though Heinze was then enjoined from doing so. On January 22d this suit was brought, the plaintiffs then being in possession. On January 23d Heinze formally delivered possession to the administrator, including a large amount of supplies belonging to the plaintiffs, with the machinery used by them in operating the property prior to the Finlen injunction. Just previous to that time Heinze had told the administrator that he (the administrator) could operate the mine if he chose to do so, provided the ore taken out should be shipped to Heinze. P. E. Mahoney, the night watchman in charge of the machinery at the mine, remained there just as before, as did also Sullivan, the day watchman. The former was sworn as a witness. He testified that he had never been hired by Kleinschmidt, but always, even up to the time of the hearing, took his orders and expected his pay from Heinze. Heinze was his boss. He thought Sullivan was employed in the same way as himself, their duties being the same. His business was to keep up fires and keep things from freezing. Very little, if any, work was done after January 22d or 23d; and he saw no ore taken from the mine, except one wagon load which he caught a man stealing. No ore was hoisted from the mine after the date last mentioned. Some men were passing in and out, and some work was done; there being not more than a dozen men employed. Kleinschmidt and his foreman were there now and then; but Mary E. Miller was never there, and no one was there to represent her. Other evidence showed that she had not been in the state for several months. One Halford made affidavit on February 5th that Kleinschmidt and Mary E. Miller had been in exclusive possession of the mine and operating it since about January 25th, and had "shipped certain ore." Plaintiff Heinze made an affidavit that he had theretofore

caused demand to be made upon Kleinschmidt and Miller for a statement of their operations, but none had been made. A mining engineer in the employ of plaintiffs also made an affidavit that on February 3d he had made an application for an inspection of the mine, but had been refused admission by "the representatives of the working defendants, though they knew that the application was on behalf of plaintiffs." These statements were all made under oath, in face of the fact that Mary E. Miller was not in the state at the time the alleged operations were carried on and the demands made, and without any showing that she had any one in the state to represent her in any enterprise whatever. It may not pass unnoticed, either, that the application for the inspection was made on the 5th day after the petition was filed in this case, and that no time is fixed at which the statement of the operations was demanded. The same may be said as to the amount of the ore Halford saw shipped, and the date of the shipment. His affidavit is silent on these points. An officer into whose hands some papers had been put for service upon Kleinschmidt and his alleged foreman, one Kane, went to the Healy mine on February 1st. He then found the day watchman engaged in the same kind of duties as those performed by the night watchman, but no mining operations were going on; nor did he afterwards find any one engaged at work there, though often there until February 16th. We have patiently examined the whole record, and the affidavit of Halford is the sole bit of evidence, apart from the general averments made in the petition, which was verified by Heinze, tending to show an ouster by Kleinschmidt. There is nothing whatever to show any wrong on the part of Miller. The evidence is well-nigh conclusive that no mining was going on at any time after February 1st, and that neither Kleinschmidt nor any one representing him was at the mine after that time. The statement by Heinze that an account of the operations was demanded, and that none was rendered, is of no significance, in view of the fact that it does not appear when such demand was made, nor whether any opportunity was allowed for compliance by the administrator, so that the presumption might be indulged that the administrator was unwilling to comply. Heinze was sworn and examined fully at the hearing. His silence in connection with this matter is significant,—especially so in view of the fact that the mining operations, if any, conducted by the administrator extended over a period of only seven days. The petition herein was filed just seven days after the administrator was put in possession by plaintiffs. It does not appear that he shipped any ore, or, if he did, that he did not ship it to Heinze himself, in pursuance of the understanding had at the time possession was delivered to him. The refusal of the application of the engineer, of February

3d, is also insignificant, and does not tend to show the truth of any statement contained in the petition, since it conclusively appears aliunde that Miller was not in the state, had never been in possession in person or by agent, and had never taken a pound of ore from the property, and since it also appears that Kleinschmidt was then out of the state, and that no one was at the mine, other than a watchman ostensibly in the employ of Heinze, or nobody, and whose only task was to keep watch of things and prevent the machinery from freezing up. True, it appears that the names of Sullivan and Mahoney, the watchmen, were not on plaintiff Heinze's pay roll after January 22d. It is a remarkable fact, however, that they remained there after Kleinschmidt went into possession, but were never hired by him, and looked to Heinze for their orders and their pay. The only conclusion possible from these facts is that the plaintiffs and the administrator joined hands to create a colorable ground for the appointment of a receiver through whom they could have the property mined, notwithstanding the injunction procured by Finlen to preserve it intact until he could establish his rights, and the proceeds expended in development work, which might or might not add to the value of it, or might or might not protect it from trespasses. And this in face of the fact that the plaintiffs, notwithstanding the injunction, were at liberty to bring as many suits as they chose to restrain these alleged trespasses. The plaintiffs well knew that, though these suits were pending against them, they furnished no ground for asking a court of equity to take the property out of their hands and relieve them from the burden of caring for it; they well knew that in order to bring this about it was necessary to be in a position in which they could complain of wrong on the part of some one who claimed to be a co-tenant; and hence this suit upon a merely colorable ouster on the part of the administrator, who seems to have been not averse to aiding them in their design. So far as this feature of the case is concerned, there were no facts before the court to warrant the order. The court was misled to make it by the specious but unfounded and unsupported complaints of the plaintiffs by which they sought to bring themselves within the principles which move a court of equity in such cases to grant the extraordinary relief demanded. The administrator having gone into possession (if, indeed, he was in possession) by consent of the plaintiffs, with the understanding that he was at liberty to engage in mining, nothing short of a showing of a clear ouster and refusal to account, coupled with a want of financial ability to answer in a suit for this purpose, would probably justify a court in taking the property from his hands through the agency of a receiver. He was not imperiling the interests of the estate in any way. Whatever he did in his mining oper-

ations he did at his own risk (In re Rose's Estate, 80 Cal. 168, 22 Pac. 86), and that he was claiming to act as administrator in no wise affects the situation.

The allegations upon the subject of a probable fall in the price of copper pending the litigation do not merit serious consideration. They are hardly susceptible of proof. And it cannot be urged seriously that a court of equity should be moved to the exercise of its extraordinary powers by conclusions founded upon speculations upon the probable condition of supply and demand as to a particular commodity in the markets of the world.

Touching the outlay necessary to preserve the property while idle a more serious question arises. The proof in this connection, however, is not satisfactory. On the one hand, it appears that there is a hoisting plant, with necessary machinery, on the claim, and that it is necessary to keep watchmen to look after it and the claim, at a cost of about \$500 per month. It also appears—incidentally, however—that the machinery probably belongs to the Montana Ore-Purchasing Company, a corporation with which plaintiffs are associated. On January 23d the hoisting plant was delivered to the administrator under an arrangement with the plaintiff Heinze, the particulars of which are not shown. Whether its use there as a means of ingress and egress is necessary to the preservation of the openings in the property, or whether these openings are in such a condition that they need care and attention, is not shown. If, from their nature and condition, they do not require attention and outlay, then the expenses incident to the employment of watchmen would under no circumstances be a proper charge upon the property. On the other hand, Finlen has not at any time attempted to interfere with the possession of the plaintiffs or the administrator, except to enforce his rights by suit; and there is nothing in the evidence to furnish any reason why either Heinze or the administrator, who seem to have joined forces against Finlen, should not retain possession and care for the property, with a right to recover of Finlen the amount expended for this purpose if they succeed in establishing their rights against him. Surely the plaintiffs have ample protection against any loss to them under the injunction bond given by Finlen in the ejectment suit. If this bond is not sufficient in amount, as plaintiffs charge, the district court, upon proper application, would readily exact a sufficient one.

That a court of equity has power in cases like the present to appoint a receiver is well settled. But in any case where an appointment is sought there must be shown a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss. *Smith*, Rec. §§ 15, 317, and cases cited; *High*, Rec. §§ 606, 607. The duties of a

court, however, in the exercise of this power are exceedingly delicate, and should be exercised with great caution, lest in the effort to protect the subject of the litigation the property would be illegally taken from one rightfully in possession, and his rights and interests be sacrificed without any redress whatever. *Id.* Taking charge of property in the exercise of this power is somewhat analogous to the levying of an execution in limine, and subjecting the property to expenses and charges pending litigation, and to this extent consuming it entirely; hence the power should never be used unless it be reasonably clear that no injury will result to the parties whose rights are for the time being invaded. As between tenants in common, as stated in the text of *Mr. Smith*, at section 317, *supra*, the grounds of appointment usually are: "(a) Where one tenant is in possession, and excludes his co-tenant from participation in the possession or income; (b) where the tenant in possession is insolvent and refuses to account to his co-tenant; (c) where one tenant refuses to join his co-tenant in the execution of necessary leases for the property owned in common, or interferes in the collection of rents with the tenants in possession; (d) where the court can see from the showing made that the appointment of a receiver is required in order to properly protect the interests of parties." The case at bar does not come within any of these rules, nor has any case been cited by counsel wherein a different rule has been applied. It seems that it would be entirely inequitable to allow plaintiffs to surrender the property here involved into the possession of the court merely because its care involves considerable expense. Under the presumptions usually indulged in favor of the legal title, the plaintiffs, Finlen, and the Allport heirs, except Kelley, are, for the purposes of this appeal, tenants in common. Under section 592 of the Code of Civil Procedure, fixing the status of such estates, and as construed with reference to mining claims in *Anaconda Copper-Min. Co. v. Butte & Boston Min. Co.*, 17 Mont. 519, 43 Pac. 924; *Mining Co. v. Esler*, 18 Mont. 174, 44 Pac. 523; *Connole v. Mining Co.*, 20 Mont. 523, 52 Pac. 263; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; and *Butte & Boston Consol. Min. Co. v. Montana Ore-Purchasing Co.*, 25 Mont. —, 63 Pac. 825,—each of these parties has the right to have the property stand as it is until it is finally partitioned. It would therefore require a much clearer showing than is here made to justify a court in invading this right, and mining the property through a receiver, for any purpose.

We feel impelled to call attention to the condition of the record filed on this appeal. It contains many pages of matter entirely impertinent and useless, which has served only to add materially to the labor involved in this investigation. On the hear-

ing in the trial court many court files were introduced in part, the particular part being designated. Instead of incorporating into the record on appeal only the material parts of these files, they were copied in full. Hereafter the party offending in this particular will be subject to the payment of costs. The order appealed from is reversed, and the cause is remanded. Reversed and remanded.

PIGOTT, J., concurs. MILBURN, J., not having heard the argument, takes no part in this decision.

(9 Wyo. 297)

SHERLOCK v. LEIGHTON.

(Supreme Court of Wyoming, Feb. 28, 1901.)

MINES—ADVERSE CLAIMANT—CITIZENSHIP—FAILURE TO PROVE—APPEAL.

Where an adverse claimant to a mining claim did not object at the trial to the failure of the applicant to prove citizenship, such objection cannot be raised for the first time on appeal.

On rehearing. Denied.

For former opinion, see 63 Pac. 580.

POTTER, C. J. Counsel for defendant in error has filed a petition for rehearing, and asks a reconsideration of the effect of the failure of plaintiff in error, defendant below, who was an applicant for patent to a mining claim, to prove that he was a citizen. We held that, while such want of proof would warrant a judgment against him, it did not authorize a judgment in favor of the adverse claimant. 63 Pac. 580. In arriving at that conclusion several authorities were cited to the effect: First, that proof of citizenship, in an adverse suit, is required only to enable a party to recover a judgment in his own favor; and, second, that the absence of such proof may prevent a recovery by the one party, but does not operate to authorize a judgment, for that reason alone, in favor of his adversary. We quoted from Lindley on Mines that author's statement of the result of the decisions upon the question, and, among other matters so quoted, was this: "The alienage of the original locator would not avail the subsequent locator so as to permit the court to award the claim to him for that reason, but the latter would be enabled, through the patent proceedings, which are the equivalents of 'inquest of office' to have alienage established, and thus clear the records." Referring to the remarks of Mr. Lindley, counsel for defendant in error construes the same to mean that the party opposing an alien locator must do something more than prove the alienage; and that the "something more" would be done if he proved his own qualifications, and every act of his own location in compliance with law. In view of the authorities discussed in this connection by Mr. Lindley, we think that counsel's contention as to the author's statement may be

open to serious question. In *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 562, it was held that, although the objection of alienage was properly interposed in the adverse suit, the naturalization of the alien applicant for patent before judgment cured the infirmity. Hence, while, as Mr. Lindley asserts, a citizen may peaceably relocate a claim over that of a prior alien locator, and thus qualify himself as an adverse claimant, his relocation would be of no avail should the alien afterwards, and prior to judgment in an adverse suit, become a citizen by naturalization. In *Laws of Mines and Mining*, by Barringer & Adams, it is said at page 203, referring evidently to the case of *Billings v. Smelting Co.*, 3 C. C. A. 69, 52 Fed. 250, that, if the principle laid down in that case prevails, the result will be that ground located by an alien cannot be relocated until he has been deprived of his title by some act of the government, which ordinarily will not occur until there has been an application for a patent, and it becomes necessary for him to establish his right either as applicant or adverse claimant. We are inclined still to the view that the observations of Mr. Lindley quoted in our former opinion as to relocation by a citizen of ground claimed by an alien were intended to show that a citizen could, by such relocation, obtain a standing as adverse claimant in order to have alienage established, rather than that thereby he could secure a right to an affirmative judgment awarding the property to him for that reason in the suit brought to adverse the right of the alien to a patent. It seems to us that the language used is not susceptible of any other reasonable construction. Moreover, is that not in line with the principle laid down in *Manuel v. Wulff*, supra? In that case the court applies to mining claims the settled rule that, until alienage has been adjudged, an alien may take and hold land by purchase. And a purchase by an alien of a mining claim was held good where naturalization occurred anterior to judgment in the adverse suit, it being held that the act of naturalization took effect by relation.

It might be interesting to continue a discussion of this question, but it is unnecessary, as there was no allegation or proof of alienage in this case. It may be that, as counsel suggests, we are mistaken as to the effect of alienage of the applicant for patent in an adverse suit, and that he is correct in his contention that in such suit, when alienage of the applicant is shown, the adverse claimant, upon establishing his act of location and his own qualification, would become entitled to a judgment awarding the property to him. While we have believed that the authorities lead to a contrary conclusion, and that Mr. Lindley so avers, we are not prepared beyond all question to assert that counsel is not correct in the position maintained by him. Were that the question at issue here, we

would give to it a more exhaustive consideration to ascertain to our complete satisfaction whether or not we had heretofore erroneously stated the result of the authorities upon that matter. The adverse claimant in the case at bar did not allege alienage on the part of the applicant for patent, nor did he prove it, or attempt to do so. So far as the citizenship of the applicant is concerned, upon the record in this case it merely stands as unproven by him. The facts in the case, as we have held, show a prior location of the ground by the applicant (plaintiff in error) or his grantors, and that the same had not been forfeited by failure to perform the annual labor required by law. It was practically conceded on the trial that plaintiff held the disputed ground under a location earlier in point of time than that of defendant in error, but that fact was sought to be obviated by an allegation and attempted proof of forfeiture. Now, the original location, and the performance of annual labor upon the Cleveland lode having been held sufficient to comply with the law as to those matters, what right had defendant in error to make a location upon the ground at all? He was the plaintiff in the suit, as adverse claimant. Did he prove every essential act of location, as his counsel strenuously maintains? It is true, he did prove that he went upon the premises, staked it off, called it the "Dewey Mine," and performed some work upon it. But from the testimony it appeared that the claim was already covered by the existing location of another party. By what right, therefore, did the adverse claimant make his alleged location? Was it because the prior locator or the one claiming thereunder was an alien? If so, the fact of such alienage has not been established. Counsel concedes that in an adverse suit both parties are actors, and that each must establish his claim against not only his adversary, but the government as well, and that neither party can rely upon the weakness of his adversary's case. It is well settled that, when neither party has proven title, they are both left without right to a patent; and it follows that, if no evidence of title should be given by either party, the case would have to be dismissed. In this suit the defendant in error was plaintiff. He did not show that Sherlock was an alien. When the latter came to put in his evidence, he omitted, probably through inadvertence, to show his citizenship. But that falls short of proof that he is an alien. Notwithstanding the absence of proof upon the question, Sherlock may in fact be a citizen. Hence we say that defendant in error did not show his right to locate the Dewey lode upon Cleveland ground. The record nowhere discloses that an objection on the ground of the failure of plaintiff in error to prove citizenship was taken at the trial. It was held in *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669, that in an action of this kind such an ob-

jection cannot be taken in the appellate court for the first time, and the court said: "The objection to the want of proof of that fact [citizenship], if taken below, might have been met at once, if, indeed, the plaintiffs are citizens. The rule is general that an objection which might have been thus met must be taken at the trial, or it will be considered as waived, except as to matters going to the jurisdiction of the court." We had intended to refer to this case in the previous opinion. For the reasons aforesaid, a rehearing will be denied.

CORN and KNIGHT, JJ., concur.

(9 Wyo. 322)

KELLEY v. RHOADS.

(Supreme Court of Wyoming. Feb. 28, 1901.)

TAXATION—LIVE STOCK—GRAZING—SITUS—LIABILITY TO TAXATION—TRANSPORTATION—INTENTION OF OWNER—INTERSTATE COMMERCE.

1. Plaintiff drove sheep into the state, and in eight weeks took them a distance of 500 miles to a railroad station. As they traveled they grazed over an area of a quarter of a mile wide, and were taken through inclosed pastures and the public domain, without following any public highway. Plaintiff testified that it was his intention to ship the sheep at the station. Stations could have been reached on the same railway by a shorter route without entering the state. *Held*, that a finding that plaintiff brought the sheep into the state for the purpose of grazing was supported by the evidence.

2. Laws 1895, c. 61, § 1, provides that all live stock brought into the state for the purpose of being grazed shall be taxed for the fiscal year during which it shall have been brought into the state. *Held*, that where sheep were driven 500 miles across the state within a period of eight weeks, without following any public highway, and allowing them to graze in inclosed pastures and on the public domain as they were driven, they were liable to taxation in this state, though the owner testified that he was transporting them to another state, since they acquired a situs in this state for the purpose of taxation.

3. Where sheep were driven across the state a distance of 500 miles in a period of eight weeks, and allowed to graze in inclosed pastures and on the public domain as they traveled, a tax on them in Wyoming was not void as an interference with interstate commerce, though plaintiff testified that he was transporting them on foot to another state.

Error to district court, Laramie county; Richard H. Scott, Judge.

Action by John Kelley against Oliver F. Rhoads. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Van Orsdel & Burdick, for plaintiff in error. H. Waldo Moore, Co. Atty., for defendant in error.

POTTER, C. J. The sole question in this case is whether certain sheep of plaintiff in error had obtained a situs in this state for the purposes of taxation. On October 29, 1895, the defendant in error, as assessor for the county of Laramie, collected from plaintiff in error the sum of \$250 as taxes upon

a herd of sheep, consisting of about 10,000 head, belonging to the plaintiff in error, and then in the county of Laramie, in this state. Alleging the tax to have been illegally collected, plaintiff in error brought this suit in the district court to recover the amount so collected from him. The tax complained of was assessed and collected by authority of the provisions of chapter 61, Laws 1895. That act is set out in full in our opinion in this case when the same was before us on reserved questions, and its validity upheld. 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594. The cause was submitted to the district court upon an agreed statement of facts. Judgment was rendered for defendant, and plaintiff now brings the case here on error, assigning as error that the judgment is not sustained by the evidence and is contrary to law. The contention of the plaintiff in error is that the property taxed was the subject of interstate commerce, being in transit across this state from Utah to Nebraska, and as such was not taxable under the laws of this state. It is insisted that the facts show that the sheep were not brought into this state to be grazed, but were merely in transit on hoof through the state, and that their maintenance by grazing while so engaged was but an incident of their transportation. When the case was here before, conceiving that the question whether or not the sheep were brought into the state for the purpose of being grazed was a mixed one of law and fact, we did not decide it, deeming a decision upon a question of fact improper upon reserved questions. We did, however, in our opinion, mention the considerations which should control a determination of the fact, if in controversy, whether in a particular case sheep were brought here for grazing purposes, although in transit through the state. We then said: "We do not dispute the proposition that an owner of live stock, if not otherwise disobedient to the law, and is observant of the police regulations of the state, has the right to transport them to market by driving on foot, as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing, and feeding them upon the natural grasses which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation. To determine the existence or nonexistence of such a joint purpose, all the facts must be considered,—the course taken; the character of the territory grazed upon; the time employed; the subsequent method of intended shipment; the ordinary facilities for transportation by other means; the place selected for the commencement of the journey by rail, if that is in contemplation; possibly,

the time of the year, and the eventual purpose of their shipment; the character of the live stock, and the manner in which said stock is customarily kept, maintained, and grown; and, in general, every competent fact which will tend to explain the purpose in view."

The statement of facts, so far as material to this question, is as follows: "Plaintiff at all times mentioned in the petition herein was the owner of the sheep mentioned in said petition, and that said sheep on or about the 29th day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and transporting said sheep through the state of Wyoming from the then territory of Utah, to the state of Nebraska. In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain, and in other instances through pastures inclosed by fences. While being driven from the western boundary of the state to Pine Bluffs Station they were maintained by grazing along the route of travel. It was a fact, and defendant had knowledge of the fact and was notified by plaintiff's agent, that said herd of sheep was being driven across the state of Wyoming to Pine Bluffs Station for the purpose of shipment, and that the same were not brought into the state for the purpose of being maintained permanently therein. The time consumed in driving said sheep from the western boundary of the state of Wyoming to Pine Bluffs Station, in Laramie county, was from six to eight weeks, and by the route followed the distance traveled was about five hundred miles. That for the purpose of shipping said sheep it was not necessary that they should be driven into the state of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the state of Wyoming."

As was said in our former opinion, it is well settled that property engaged in interstate commerce, by being transported through a state, on its journey from one state to another, would not be liable to taxation in the state through which it is passing; and, if the sole purpose of the owner of live stock is to pass through the state on the way to Eastern markets, such stock will not have been brought here to be grazed. It is also true that, before personal property becomes subject to state taxation, it must have become identified and incorporated with the general mass of property in the state. We held that, when live stock are brought

into the state to graze, they are fully identified and incorporated with the other property of the state, and that, if that purpose is present, the length of time the property remains here is immaterial; that in such case no question of interstate commerce is involved which prevents the exercise by the state of its power of taxation. And we said: "We observe no distinction, in respect to the matter under consideration, between the case of a sheep owner of Utah, or some other state, driving or bringing his sheep into this state for the purpose of and permitting them to graze here, and an owner of like property residing in this state who brings in from another state sheep for the same purpose." Adhering to the views expressed in our previous opinion, we quote further some observations then made respecting this character of property: "Live stock in this state is, in the greater part, maintained by feeding or grazing upon the natural grasses of the soil. In the case of some kinds of live stock, they are largely allowed to roam at will, but over territory more or less confined in extent. With sheep, the custom is to keep them in convenient flocks or herds, intrusted to herders, and to direct them from place to place, generally, as to a particular herd, in some certain locality, but covering in most cases a rather large and indeterminate territory. They are thus maintained until in proper condition for disposition, shipment, or other purposes of the owner. The only way in which such property becomes identified and incorporated with the other property of the state is by being turned at large or herded, to be maintained by grazing. Whether the purpose is that they shall remain in the state permanently or not is not a determining factor. Such a purpose does not exist in the case of a greater proportion of all the live stock in the state. The object of a cattle grower is to ship out of the state his cattle, as soon as they arrive at the proper age, size, or condition. To some extent, that is also the purpose which the sheep owner has in view. We do not understand that an ultimate design to transport sheep out of the state is at all inconsistent with a purpose of bringing them into the state to graze. The time of the contemplated shipment may be uncertain, or it may be extended for a considerable period into the future. Incidentally, no doubt, that intention should be taken into account; but we do not conceive it to be a conclusive circumstance in determining the situs of the property, or the purpose of its presence within the state. It is altogether clear that, in case of herd sheep in this country they must, according to custom, be maintained somewhere by grazing until the time fixed upon has arrived for starting them upon their journey to some final destination. It may well be that if it is not desired that they shall reach such destination before a certain time, and that in the meantime the necessity

of allowing them to graze and obtain the benefits therefrom is recognized, places therefor may be selected by the owner which will subserve the latter purpose, and at the same time facilitate their final transportation when the occasion therefor shall occur. Such property is migratory. They are almost constantly moving. The character of the natural grasses, and the effect thereon by the grazing of sheep, is such that such movement is necessary. They cannot be permitted to remain stationary and feed in the same place a very long period of time. Therefore it follows that, as they must move, their course can be readily directed along the direction in which they are eventually to be taken. In such a case the purpose of grazing is not inconsistent with the idea of a driving or transportation to some distant place. Nevertheless the mere fact that in such driving they are also permitted to graze upon the way will not determine, at all hazards, the character of the purpose in bringing them into the state. Each case must, it would seem, depend upon its own facts. It will not do to say that in every case, because an owner brings his sheep into the state to drive them through it to some other jurisdiction for purposes of sale or otherwise, that they are therefore merely in transit, for the reason that such a course might be selected which would consume quite a time in getting out of the state, and at the same time the animals would be maintained by grazing the same as if kept in the state from which they came, or if they had originally been within this state, and all the benefits would be derived that would accrue in the absence of any such intended transportation. The sheep would thus be used here in the same and only manner in which during the same time they would be used anywhere. We are of the opinion, therefore, that in determining the purpose and the situs the course and method of travel is a proper subject and one of the elements for consideration."

It is not expressly agreed in this case that the sheep were brought into this state to graze, nor, on the other hand, that they were not here for that purpose. That ultimate fact, then, was to be determined from the other facts and circumstances which were agreed to. The district court, following the rule previously laid down in the case, in holding the property taxable must have found that a part of the purpose of the owner in bringing his sheep into the state and transporting them through it was that they might graze here, and while in transit receive the benefits to be derived from the grazing of his animals upon our natural grasses. Is that finding justified by the agreed facts in the case? We are of the opinion that it is, and shall endeavor, as briefly as consistent with the importance of the question, to state the reasons that influence our conclusion.

The evidence is that the plaintiff "was

driving and transporting his sheep through the state of Wyoming from the then territory of Utah to the state of Nebraska"; and again, "Said herd of sheep was being driven across the state of Wyoming to Pine Bluffs Station for the purpose of shipment." In all this there is nothing conclusively inconsistent with a purpose originally existing to bring the sheep into this state to graze, not as a mere incident of the transit, but as an independent object of their coming into the state on foot, and of their movement. No doubt said independent purpose of grazing was connected with the intention to ultimately ship them by rail out of the state, and to so direct their course of travel while grazing that they would gradually pass through the state, and, at a time approximately anticipated, reach the contemplated point of shipment. The fact that it was not intended to maintain them permanently within the state was shown, in our former opinion, not to operate as a determining factor in the case. The distance traveled by the sheep during a period of six to eight weeks, while they were in the state, made a daily travel of about nine miles. It may be, as suggested by counsel, that this is the maximum distance which such animals can be safely driven for such a continuous period of time, when the manner in which they were maintained is considered. Nevertheless we believe it to be also true that sheep will for that or even a much longer period travel daily eight or ten miles, and possibly occasionally a few miles further than that, and, if allowed to graze, obtain all the sustenance they require. It is not uncommon for sheep in this region to move in a day, while grazing, five and six miles, in the absence of a definite destination, and although not in transit from one place to another. Sometimes, in the case of ordinary grazing of a herd of sheep, they will move a greater distance; and that is not unusual, we believe, if it is found necessary to go further to reach a supply of water. In trailing or driving sheep from place to place over a period of time more or less extended, it is not the custom to force them to any particular speed of travel. Those in charge confine their efforts to a mere direction of travel; keeping them headed in the desired direction, but permitting them to go slowly enough to eat of the natural grasses as they proceed. Under competent herders, sheep so driven will easily travel the daily distance covered by the sheep in question, and be well maintained at the same time by grazing along the route of travel, when conducted through the public domain and pastures, and over territory such as was traversed by the sheep of plaintiff in their journey through this state. In such case, then, sheep so traveling, while not brought into competition with other property of the state for the purposes of sale, perhaps, are in daily competition with all the live stock regularly maintained in the localities of the

route of travel, in respect to the use of the natural grasses of the soil, incapable of reproduction in the same year. More than that, the effect of the grazing of sheep is such that it is a matter of common knowledge that a pasture over which they have been permitted to graze in large bunches or herds is rendered unfitted for the grazing of other classes of domestic live stock. Now, the sheep of plaintiff did not follow in the course of their transit any public highway. They roamed over pastures, fenced and unfenced, and across the public domain, and were allowed to spread out a quarter of a mile in width. In other words, they were so directed or herded that they might graze. The same railroad over which they were ultimately shipped could have been reached without coming into Wyoming at all, and that by being driven a less distance than was necessary to drive them to reach any point in this state. This appears from the agreed statement. We know judicially that between the western boundary of the state and Pine Bluffs Station, which is situated close to the Nebraska line, there were numerous stations at any one of which the sheep could, if desired, have been transferred to the railroad for shipment. It seems impossible to conceive that a part of the plaintiff's purpose was not the grazing of the sheep in this state. Indeed, we are inclined to view the facts as disclosing that purpose to have been the controlling one, and that the method adopted for the movement of the sheep was employed for the reason that the sheep could at the same time be maintained in like manner as if they had been kept in Utah, and perhaps new pastures found, while keeping the owner's home ranges for other sheep or for another season or time of year.

Counsel for plaintiff in error suggest, indeed, that it is the custom of the trade to first put sheep on "feed lots" for varying periods before offering them for sale in open market, and that as the food used is corn, which is ready for consumption the latter part of October, in the corn-feeding states, of which Nebraska is one, the shipper plans to reach his destination about November 1st, partly on account of the availability of the grain at that time, and partly because driving at a later date would be difficult and hazardous on account of storms. They concede that those purposes could be as well accomplished by holding the sheep at the point of departure until a later date, and then shipping them through quickly by rail. But they state that such shipment a longer distance by rail would be much more expensive. The agreed facts are, however, silent as to the difference, if any, in the matter of expense between the two methods. Adopt the contention of counsel for plaintiff in error, which has been ably presented, and it would be possible for sheep owners to keep their large herds moving from one state to another, and thus avoid taxation altogether;

and such in many instances would, in our judgment, be the actual result. Thus the commerce clause of the federal constitution would operate as a mere cloak to permit an evasion of state taxation on the part of a large and growing class of personal property.

The conclusion we have reached we believe to rest upon sound reason, and upon principle to be sustained by the authorities cited and reviewed in our previous opinion, as well as by others to be hereinafter referred to. When property is held for any other purpose than that of continuing the shipment within a reasonable time, it cannot be considered as in transit. *Prentice & E. Com. Clause*, 63; *Oil Co. v. Combs*, 96 Ind. 179; *Myers v. Commissioners*, 83 Md. 385, 35 Atl. 144, 34 L. R. A. 309; *Lumber Co. v. Willetts*, 118 Ill. 559, 9 N. E. 254; *Rleman v. Shepard*, 27 Ind. 288. The general rule is that when goods are held for any other purpose than for transportation the transit has ceased. *Prentice & E. Com. Clause*, 224. A state may tax all property which has a situs within its limits, regardless of the fact that it may have come from or is destined to another state. *Id.* 225. In the case of *Lumber Co. v. Willetts*, supra, the lumber company, having its place of business at Burlington, Iowa, bought logs in Wisconsin and Minnesota, where they were rafted and towed down the Mississippi river to the company's mills. Some of the logs would be stopped on the way down the river at New Boston Harbor, in Illinois, and left there until needed at the mills. In sustaining a tax assessed by New Boston upon the logs in the harbor at that town in May, 1885, the court, reaching the conclusion that the property was not in transitu, said: "New Boston Harbor, or Sturgeon Bay, as it is usually called, is only thirty miles up the river from Burlington. It is very accessible, and it seems plain that the company had selected the bay as a place of storage for its logs,—a place where its property could be shipped and kept in safety until such time as it was needed at the mills in Burlington. Indeed, for all practical purposes, it may be said that the transit of the property ended at New Boston. * * * The property was therefore kept at New Boston on account of the profit of the owners to keep it there. The company made money by the transaction. * * * If, then, the company had this property located in our state, and it was here for profit, and it was so located as to claim the protection of our laws, the property, in our opinion, had a situs here, and was liable to taxation." Now, in the case at bar the property was not kept in storage, but it was used for a profit to the owner, and it was so located as to claim the protection of our laws. In our view of the agreed statement, it is doubtful if the transportation of the sheep could be considered as having commenced until their shipment at Pine Bluffs Station, under the rule laid down in *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475,

29 L. Ed. 715, referred to in our former opinion. 7 Wyo. 263, 51 Pac. 593, 39 L. R. A. 594. We discover little distinction, if any, in respect to the matter under discussion, between storage in transit and grazing in transit. In *Oil Co. v. Combs*, supra, the Indiana court, conceding that property in transit through that state, and there only for the purpose of transportation, would not be subject to taxation, said: "Property within the state for the purpose of undergoing any part of the process of manufacture is here for more than a temporary purpose connected with its transportation. The situs of the property does not depend upon the extent of the work that is to be done upon it; for, if it is here to be put through any of the stages in the process of its manufacture, it is here for a purpose which legitimately subjects it to taxation." In that case the property consisted of staves which the plaintiff had contracted for to be delivered to it at Pittsburg, Pa.; but under the contract they were first to be delivered at the yards of plaintiff in Perry county, Ind., to receive a finishing touch, called "bucking," and then to be shipped to plaintiff at Pittsburg. The court said further: "Property in this state for the purpose of being subjected to a process essential to its fitness for sale or use is situated here, no matter what may be its ultimate destination." It seems unnecessary to enlarge upon the applicability of the principle announced in the above-mentioned case to the question now before us. The property, of course, in the case at bar, was not here for any process in the way of manufacture; but the principle is precisely the same, the difference existing in the character of the property. The sheep were here to be maintained, while in transit to a shipping point, by feeding upon a valuable natural product of our soil, and which in itself furnishes the possibilities for the largest and most profitable industry of our state. It is of no consequence whatever that transportation on foot would be cheaper than by rail. Probably it would not be any less expensive if the owner was obliged to follow the public highways and purchase feed for his sheep en route. The cheapness consists in the benefits to be derived from the grazing of the sheep. Taking into account the nature of the property and the customary method of its maintenance, and the principle would be the same whether the sheep were brought into the state and kept the same length of time in a single county, and then shipped by rail, or caused to traverse two or more counties or the entire state and then shipped; the purpose to graze them existing in either case. They are susceptible of grazing as much as necessary for a reasonable maintenance by the latter method as by the former. The same question in relation to cattle was before the supreme court of Oklahoma. *Half v. Green*, 62 Pac. 816. It was said in that case: "The allegation in the petition that 'the cattle were

brought into the reservation for the purpose of grazing the same in transit to market' is not sufficient to take these cattle out of the general rule." See, also, *Collins v. Green* (Okla.) 62 Pac. 813; *Lasater v. Green*, Id. 816; *Russell v. Green*, Id. 817. In *Russell v. Green* the court say: "It is next contended that these cattle were what is known as 'through cattle'; that they were only stopped off in the Osage Indian reservation so that they could rest and recuperate; that they were to be shipped on to market after they were pastured a short time. This position is taken only for the purpose of evading the true spirit of the transient property act. The petition itself shows that the object and purpose of locating these cattle in the Osage Indian reservation was to graze them, and put them on the market some time during the summer or fall. In other words, the owner intended to fatten them on the grass in the reservation, and then market them in the fall. These cattle were properly taxable, and the owner cannot evade taxation by calling them 'through cattle.'" A similar question arose in Texas. The owners of certain cattle assessed in Texas sought to avoid the tax on the ground that the cattle were only passing through Texas en route from Oklahoma to Chicago. The cattle in question were brought from their accustomed range in Oklahoma Territory to some feeding pens of the owners at Bowie, in Montague county, Tex., to be fattened for market. They were first driven to Waggoner, Tex., and thence carried by rail to Bowie, under written contracts fixing Chicago as the place of their ultimate destination,—consigned, however, to the owners themselves. The cattle were unloaded at Bowie and fed there for about 90 days, when they were carried to market under bills of lading naming Waggoner as the initial point. The court say: "We are not inclined to hold that cattle in Texas, while being fattened in the owner's pens for the outside markets, are too transient to have a situs and to be taxable here. Indeed, feeding cattle for such markets has become, as grazing cattle has long been, a permanent as well as extensive and profitable pursuit of the Texas people. It is a local industry, and during the feeding season the cattle, from whatever source they may come, become an important part of the mass of personal property of the state, enjoying alike the protection of our laws, and subject to the common burden of taxation. * * * Still less are we inclined to hold that cattle so situated are exempt from local taxation in consequence of the commerce clause of the constitution. If it should be so held, then to what movable property in the states may not this ever-expanding clause be extended? The paper cloak of an adjustable through bill of lading, like these found in this record, may thus be easily made broad enough to cover from local taxation all the cattle of Texas, whether grazing in pastures or on the open range, or

feeding in pens. To the feeding in transit privilege need only be added the grazing in transit privilege, and all will be covered. If the owner may be allowed ninety days for feeding, why may he not be allowed six months or a year or two for grazing? In both cases the cattle may be said, figuratively speaking, to be on their way to Chicago or other market, their ultimate destination, but not in the sense of interstate commerce or tax laws." *Waggoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153. See, also, *Cattle Co. v. Williamson* (Okla.) 49 Pac. 937.

Upon the statement of facts, we think the district court was justified in finding that the sheep of plaintiff in error were brought into this state for the purpose of grazing, and thus had acquired a situs here for the purpose of taxation; and we are of the opinion that the tax in no sense interfered with the operation of the interstate commerce clause of the federal constitution. Indeed, we are convinced that the facts admitted show that the manner in which the sheep in question were handled or cared for was practically the same as that employed by residents of the state interested in the sheep-growing industry, who submit to the revenue laws of the state without question. The wild natural grasses of this state, in common with all the arid region of the west, do not grow in the same abundance as tame grass, nor furnish near the amount of feed per acre. This partially explains the reason for the necessity of the almost constant movement of sheep sustained by grazing, and renders more clear the reason for the average daily travel of a herd of sheep consisting of 10,000 head, as in the case at bar. The judgment will be affirmed.

CORN and KNIGHT, JJ., concur.

(9 Wyo. 235)

STANLEY v. FOOTE et al.

(Supreme Court of Wyoming. Feb. 28, 1901.)

ATTACHMENT—GARNISHMENT—INTERVENER—PETITION—DISMISSAL—COSTS.

1. A claimant to money garnished or property attached cannot intervene and be made a party in an action to which the attachment or garnishment is auxiliary.

2. Where a claimant to money attached in the hands of a garnishee intervenes in an action against the original debtor, a judgment for costs should be rendered against him on dismissal of his petition.

Error to district court, Johnson county; Joseph L. Stotts, Judge.

Action by Robert Foote against J. M. Stanley, in which J. S. Stanley intervenes. From a judgment for plaintiff, intervener brings error. Modified.

Alvin Bennett and E. E. Enterline, for plaintiff in error. G. E. A. Moeller, for defendant in error Robert E. Foote.

KNIGHT, J. On September 9, 1898, defendant in error Robert Foote commenced an

action against defendant in error J. M. Stanley upon a promissory note, and secured a writ of attachment and order of garnishment, upon the ground that "said defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors." On September 19, 1898, J. M. Stanley, as defendant in the aforesaid action, filed his answer—First, admitting execution and delivery of note sued; second, denying payment as indorsed thereon; third, pleading statute of limitations; and thereafter a reply was filed denying the claim that the statute of limitations had run. On September 20, 1898, upon an application made, an order of court was entered allowing J. S. Stanley to become a party to said action for the purpose of having his interest in the property involved therein determined, and he was given until October 15, 1898, to file his petition of intervention. On October 11, 1898, said J. S. Stanley, the plaintiff in error, filed his petition of intervention, alleging ownership of all property attached, and the proceeds thereof (\$665), held by garnishee (a part not yet due), the same being the proceeds of the sale of said property. On November 15, 1898, the garnishee answered that he was indebted to the defendant, J. M. Stanley, as found by the court on the same day. On November 15, 1898, upon an examination of garnishee being had, the court, after hearing the evidence presented, finds that the garnishee, J. A. Sonnamaker, is indebted to J. M. Stanley in the sum of \$665; that of said amount the sum of \$100 is due, and of the remainder a part will be due upon the delivery of the ST brand, and the remainder in one and two years from August, 1898; and renders judgment that said garnishee pay the \$100 found due to the clerk of the court, subject to the order of the court, and be held for further answer. On the 16th day of November, 1898, J. M. Stanley, by his testimony, presented to the court his motion to dissolve the attachment, and the record shows that evidence was adduced, and the court, being fully advised in the premises, denies said motion; to which ruling defendant, J. M. Stanley, by his counsel, excepted. Then follows in the record this statement: "This cause coming on further to be heard before the court, without the intervention of a jury, a jury herein having been expressly waived, and the court having heard the evidence adduced, the argument of counsel, and being fully advised in the premises, doth find that the defendant, J. M. Stanley, is indebted to the plaintiff, Robert Foote, upon the note sued upon in the sum of \$199.83, with interest at one and one-half per cent. per month from December 27, 1890, less a payment of \$3.75, on June 3, 1896, and also in the further sum of 10 per cent. for attorney's fees, as provided for in said note. It is therefore adjudged, ordered, and decreed that the said plaintiff, Robert Foote, do have and recover judgment of and from the said defend-

ant, J. M. Stanley, the sum of \$478.21, and the further sum of \$47.82 as attorney's fees, and his costs herein expended, taxed at \$12.90; to which finding of the court the defendant by his counsel now and here excepts." Subsequently, on the 3d day of May, 1899, Robert Foote, the plaintiff in the proceedings above set forth, without objection of record, filed his amended answer to the petition of J. S. Stanley, the intervener, as follows: "Comes now Robert Foote, plaintiff herein, and for his answer to the petition of intervention of J. S. Stanley says: First defense: That he denies each and every allegation in said petition of intervention contained. Second defense: And, for a second and further defense to the petition in intervention of said J. S. Stanley, plaintiff says: First, that at the time of incurring the indebtedness on which this action is based, and for which plaintiff has obtained judgment against the defendant, J. M. Stanley, and for a long time prior thereto, the defendant, J. M. Stanley, was the legal owner of the brand known as ST brand, and was also the owner of several hundred head of horses in said brand, all being in Johnson county, Wyoming, and by and with the knowledge, consent, and acquiescence of said J. S. Stanley, who was at all times herein stated a resident of said Johnson county, Wyoming, represented to plaintiff that he was the owner of said property, and held himself out to the public generally as such owner, and, by reason of his said ownership and representations of ownership so made by said defendant, the plaintiff sold goods, wares, and merchandise to the said defendant, J. M. Stanley, for which the note on which plaintiff's action is based was subsequently given, said plaintiff extending said credit on the representations so made by said defendant; that during all of said time, up to and including the year 1898, said defendant, J. M. Stanley, by and with the consent, knowledge, and acquiescence of said J. S. Stanley, had possession of all said live stock, and held himself out to the plaintiff and the public generally as the owner thereof, making sales of portion of said live stock in his own name from time to time, and at the time of the commencement of this suit said defendant, J. M. Stanley, for the purpose of defrauding his creditors, had just contracted the sale of his entire herd of horses to John Smith and J. A. Sonnamaker, and already delivered 74 head of said horses, and that the money and credits now claimed by said J. S. Stanley represent the proceeds from the sale of said live stock; that all of the said actions of the said defendant, J. M. Stanley, were had and done by and with the consent, connivance, knowledge, and acquiescence of the said J. S. Stanley; and that, by reason of the facts aforesaid, said J. S. Stanley is now estopped and precluded from having or claiming any interest in or right to the said described live stock, or the proceeds from the sale thereof, as against the plaintiff herein.

Wherefore plaintiff prays judgment that the petition in intervention of said J. S. Stanley be dismissed, that said J. S. Stanley take nothing, and said plaintiff recover his costs herein,"—to which said answer intervenor, J. S. Stanley, on May 10, 1899, filed a general denial. On the same day, May 10, 1899, the cause was heard by the court upon the issues joined, and a decision was reserved until August 15, 1899, when the following judgment and decree was rendered: "Now, on this 15th day of August, A. D. 1899, the said cause having been heretofore submitted to the court upon the petition of intervention of J. S. Stanley, and the amended answer of the plaintiff, and the reply of the intervenor to said amended answer, and the evidence in said cause, a jury herein having been expressly waived, and the court, being now fully advised in the premises, finds generally in favor of the plaintiff, and against the intervenor, J. S. Stanley, and the court finds that the said intervenor, J. S. Stanley, is estopped to claim any interest in and to the money and credits garnished on September 13, 1898, in the hands of J. A. Sonnamaker and John Smith, and finds that the plaintiff is entitled to have the proceeds of said garnishment subjected to the payment of the judgment heretofore rendered in this cause in the November, 1898, term of this court, in favor of Robert Foote, plaintiff, and against J. M. Stanley, defendant; and the court further finds that the bill of sale for the property in controversy, executed by J. M. Stanley to J. S. Stanley, was executed in fraud of the creditors of the said J. M. Stanley; to each and all of which said findings the intervenor, J. S. Stanley, by his counsel at the time excepted. It is therefore considered, ordered, adjudged, and decreed by the court that the intervenor, J. S. Stanley, take nothing by his intervention proceeding, and that the plaintiff, Robert Foote, have the proceeds of the property garnished and attached in this suit to the amount and extent necessary to satisfy his judgment herein obtained against J. M. Stanley, and the costs in this proceeding, taxed at \$——. It is further ordered and considered by the court that the garnishee, J. A. Sonnamaker, forthwith execute and deliver to the clerk of this court his two certain promissory notes, each dated October 1, 1898, each for the sum of \$282.50, with interest from date at the rate of eight per cent. per annum, one due in one year after date, and one due in two years after date, payable to J. M. Stanley or bearer, and, upon his compliance with this order, the said J. A. Sonnamaker is decreed to be the owner of the ST brand, and all horses bearing said brand, wherever they may be found upon the range, being about seventy-four in number; and this judgment shall stand in lieu of a bill of sale from the said J. M. Stanley to the said J. A. Sonnamaker of said horses and brand. It is further ordered and adjudged that the clerk of this court, out of the sum of one hundred

dollars, heretofore paid him in this cause by said Sonnamaker, garnishee, shall pay, first, the unpaid costs in this action, and the balance to the plaintiff in this cause, for credit upon the judgment herein. It is further ordered and decreed that if the said J. M. Stanley and J. S. Stanley shall, within twenty days from the date of this decree, execute and deliver to the clerk of this court a bill of sale, conveying, by title clear from incumbrance, the brand ST and the horses bearing the same, in Johnson county, Wyoming, about seventy-four, more or less, and shall pay to said clerk of the court the remaining unpaid balance upon the judgment and costs herein, then the clerk shall deliver to said J. S. Stanley the said notes of Sonnamaker, above described, and the judgment herein shall be released and fully satisfied; but, in case the said J. M. Stanley and J. S. Stanley shall fail and neglect within the said twenty days to execute and deliver the bill of sale as herein ordered, then this decree shall stand in lieu of and as a bill of sale conveying to J. A. Sonnamaker, from and on behalf of Stanley Brothers, J. M. Stanley, and J. S. Stanley, the ST brand, and all the horses bearing said brand, on the range in Johnson county, Wyoming, on October 1, 1898, and the clerk of this court shall pay the proceeds of the two notes heretofore mentioned to the plaintiff, Robert Foote, until the judgment and costs in this action are fully paid, and shall pay the remainder of said proceeds, after said judgment and costs are fully paid, to J. S. Stanley, intervenor; to each and all of which said orders, and to which said judgment, the said J. S. Stanley, intervenor, by his counsel, at the time excepted. And the intervenor, by his counsel, now presents to the court his motion for a new trial herein; and the court, being fully advised, doth overrule the same; to which ruling of the court the intervenor by his counsel now and here excepts. Thereupon, upon the application of the said intervenor, J. S. Stanley, the said intervenor is given until the first day of the next regular term of the district court in and for Johnson county, Wyoming, within which time to prepare and present to this court, or the judge thereof, his bill of exceptions herein, for its or his allowance. And thereupon, upon further application of the said intervenor, J. S. Stanley, it is ordered that the execution of the foregoing orders and judgment be stayed for twenty (20) days; and it is further ordered that the execution of the foregoing orders and judgment be further stayed, if within said twenty days the said J. S. Stanley, intervenor, execute a good and sufficient undertaking in the sum of \$1,000, with good and sufficient surety, to be approved by the clerk of this court, conditioned as by law required. It is further ordered that the foregoing judgment be entered of record by the clerk of said court, upon receipt of the same. Done in open court, this 15th day of August, A. D. 1899. Joseph L. Stotts, Judge."

Plaintiff in error contends "that the judgment of the court is erroneous, and that the same should be reversed. The errors are so numerous that it would require a most extended brief to discuss them."

Defendant in error contends that the prayer in his answer to petition in intervention, viz. that petitioner take nothing and pay the costs of intervention, should have prevailed, as it appears to have done by a circuitous mode of determination; and it would seem needless to reiterate the statement that, if the final judgment is found to be fully warranted by the law, the pleadings, and the evidence in the case, it will not be disturbed in this court for mere irregularity of stating the same, or the mode or way in which it was finally arrived at.

We have carefully examined, not only the authorities cited by counsel, but many others, and have found many contentions made by plaintiff in error in line with claims made; as, for instance, after a complete and adequate plea of estoppel, upon evidence being tendered in support thereof, the objection of plaintiff in error was sustained on the ground that such evidence was "incompetent, irrelevant, and immaterial." And one of the errors claimed here is that the judgment rendered was not supported by evidence so excluded. Again, on the trial had upon the petition of intervention and answer, J. M. Stanley, the original defendant, against whom judgment was rendered upon a promissory note, and a brother of plaintiff in error, who intervened, testified as follows: "Q. What was your interest in the horses? A. One half. Q. Who owned the other half? A. My brother Albert Stanley. Q. Was your brother Al there when the deal was made? A. Yes, sir; I think so. I think the two went up, and rounded up the horses together." Before that this witness had testified, upon direct examination, as follows: "Q. Counsel for plaintiff has asked you about an assessment of Stanley Bros. State who did the Stanley Bros. refer to on the assessment. A. It means J. S. Stanley and Albert Stanley." Later on this same witness gives the following testimony: "Q. Where is your brother Al Stanley? A. He is home. Q. Where is that? A. Right out here about half a mile,—something like that." J. S. Stanley, the intervener, testifies as follows: "Q. You may state who owned the property out of which the proceeds arose, if any, which are now in the hands of Sonnamaker. A. I own the property. Q. How long did you own the property? A. Since the fall of 1894. Q. From whom did you purchase the property? A. J. M. Stanley. Q. The defendant in this action? A. Yes, sir." The record fails to disclose any sale of the interest of Al Stanley in the property to J. S. Stanley, or any one else, if he had such interest; nor was Al Stanley given an opportunity to defend the same. The above instances are referred to, that the unsatisfactory condition

of the record may be made to appear, and the correct application of a ruling made under like conditions, cited later on.

Counsel for plaintiff in error make the following claim in their brief, which has much merit: "Smith and Sonnamaker [the garnishees] were not parties to this action, and, of course, could not take advantage of, nor be bound by, estoppel. It was immaterial to them who owned the stock or brand. It cost them no more, nor no less, whether J. M. Stanley or J. S. Stanley owned them."

We deem it unnecessary to discuss further the briefs and record in this case, that it may appear that the case of Vallette v. Bank, 2 Handy, 1, is in point, and we will quote from said case at considerable length. The court says: "So far from it being necessary that the plaintiff, before he can obtain a judgment on his claim against the defendant, should have the fact ascertained that a garnishee has in his hands property belonging or is indebted to the defendant, the Code provides, in sections 218 and 219, that there shall be no final judgment against the garnishee, in the event of an action against him, until there has been a judgment against the defendant. If a garnishee fail to appear and answer, or if his answer be unsatisfactory, the plaintiff may at once proceed, by an action against him, for the amount of property or credits in his hands belonging to the defendant. The action against the defendant and that against the garnishee both proceed, but final judgment in the latter is not to be rendered until the former be determined. If the plaintiff succeeds, he may then proceed to a final judgment against the garnishee; if he fail, the garnishee is to be discharged, and recover costs. Code, §§ 218, 219. Such being the order of proceeding provided by law to ascertain whether the affidavit of the plaintiff that the garnishee is indebted to the defendant is sustained in point of fact, with what propriety can we, in a summary way, on an inquiry as to the regularity of the constructive service by publication, prejudice that question? The Code of Civil Procedure has certainly made a radical change in the forms of judicial proceedings. But it is as important now as before, indeed, to prevent confusion in the working of a new system,—it may be said to be more important,—that the proceedings of courts shall take their orderly and defined course. We think that the course prescribed by the Code to entitle the plaintiff to a judgment has been pursued. He has commenced his civil action in a case of which the court has jurisdiction, he has obtained an order of attachment, he has completed a service by publication, and offered the proof thereof required. The time for answer has expired, and the allegations in the petition have not been controverted by the defendants. The evidences of indebtedness stated in the petition have been produced to be filed or canceled. The plaintiff, therefore, in the absence of any

defense, must be considered as entitled to the judgment he has asked. We come next to the inquiry as to the facts or matters set up in defense. Before proceeding with this inquiry, it is proper to distinguish between the action and the provisional remedy or auxiliary proceedings to subject property or debts to the payment of the claim on which the action is founded. The action, as stated in the petition, and the order of attachment issued upon an affidavit, though for some purpose directly connected and dependent on each other, in reference to other purposes, are carefully to be distinguished. This distinction is in no respect more obvious than in reference to the question of defense. From the very nature of the subject-matter, there can, properly, be no defense to an order of attachment. When improperly or wrongfully issued, it may be discharged or set aside on motion by the proper party, on a proper showing, but it is in no respect a pleading to which an answer can be offered. If a third party claim the property affected by an order of attachment, it is made the duty of the sheriff to have the validity of such claim tried in a speedy form of proceeding. If such party, whose rights of property are violated, does not desire to bring his claim to the notice of the sheriff, to have its validity tried, he is in no respect barred from the assertion of his claim in the ordinary legal forms provided for obtaining the possession of property and redressing injuries sustained. To these remedies a claimant of the property should resort. The idea that a claim of a title to, or an interest in, the property attached, independent of any connection with the cause of action stated in the petition, will give the right to such claimant to appear and litigate with the plaintiff that cause of action, cannot, we think, be successfully maintained. There may be cases in which the interest in the property attached, on the part of a third person, also involved an interest in the justice and amount of the claim of the plaintiff in attachment. This appears to be the case with different attaching creditors. For such a case the Code probably intends to provide in section 225, directing, where several attachments are executed on the same property, or the same persons are made garnishees, the court, on motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments. We see no reason to doubt that under such a reference an unjust or fraudulent claim might be reduced or postponed. But a proceeding for that purpose, whether by a reference or an independent action, is quite different from allowing a third party to come into the action between the plaintiff and defendant, and defend the cause of action asserted by the plaintiff. It is difficult to see how such a position can be allowed to any other person than the defendant himself, or some one

standing towards him in a representative character. Upon any proper principle, it would appear to be sufficient for a plaintiff to establish his claim against the defendant and the property of the defendant. If the claim so established conflicts with the claim of third persons, it is for them to attach and set aside, on proper grounds, the claim of the plaintiff. They cannot be permitted, in view of a probable interference with their claims, to oppose an obstacle to the assertion of a claim on the part of another which the party directly and immediately interested does not think proper to present. If these principles be generally correct, they operate still more forcibly under our present system of practice. A plaintiff is required to present his claim under the sanction of his oath as to its correctness. A denial of his allegations, or any matter set up to avoid their effect, is to be sustained by the oath of the defendant. What warrant have we to permit a third person, only indirectly interested, to assume in this particular the position of the defendant? Whenever it may be proper, therefore, for a person to question the validity or amount of a claim in litigation between other parties, he must proceed in some form with that view. He cannot be permitted to do it indirectly, as a mere defendant to an action, with the cause of which he has no connection; his only interest being the possible effect of its determination upon some alleged right of his own. His position must necessarily be one of attack, and not simply of defense; his own right be set up in some affirmative shape, so that it may be met and controverted. Under these views, in the position of the pleadings in this case, we might well decline to express any opinion as to any other matters involved; and, for the reasons before given, we do not think it proper that we should now decide any of the very interesting questions which have been argued as to the rights of the parties to the property and credits in the hands of the garnishees. As we have already intimated, those questions will properly arise in actions by the plaintiff against the garnishees. The latter, certainly, who are parties interested, are not now before the court for the determination of those questions. In the position in which they now stand, our decision, if made, would not be obligatory on them or on the property in their hands. Some of the garnishees have not answered; others have answered, but only as garnishees, or under the oath of attachment, and not in the action. No issue has been or can be made on those answers. In an action brought by the plaintiff against the garnishees, or by a claimant of the property for its recovery or to assert his rights, the proper parties may be made and the questions presented; but, in our opinion, they do not arise, and it would be improper that they should be decided." This opinion was rea-

dered in May, 1855, and, by reason of subsequent revision, the sections of the statutes of Ohio were changed. Section 218 became sections 5551 and 5552, and are our sections 4018 and 4019; section 219 became section 5553, and is our section 4020; and section 225 became section 5559, and is our section 4026.

Whether or not a party may intervene when a claim is made to the ownership of the subject-matter of the suit is not here to be considered, as the subject-matter in this case at bar is a promissory note, in which plaintiff in error, as intervener, claims no interest. In the case of *Risher v. Gilpin*, 29 Ind. 53, we find the following discussion of the question here being considered, and we quote: "The first error assigned is upon the ruling of the court in admitting Bennett and Love to appear as defendants in the attachment proceedings. Such proceedings were unknown to the common law. They are authorized alone by statute, and hence we can only look to that source in determining what proceedings may be had, or who may be made parties thereto. Looking to the provision of our statute on the subject, we find nothing to authorize the claimant of property attached, in a suit against another party, to become a defendant in the attachment; but, on the contrary, it is provided, by section 169 of the Code (2 Gav. & H. St. 143), that, 'whenever any person other than the defendant shall claim any property attached, the right of property may be tried as in cases of property taken in execution, and the claimant, having notice of the attachment, shall be bound to prosecute his claim as in such cases, or be barred of his right.' This provision evidently contemplates an original suit, or proceeding instituted by the claimant to try the right of property. But the appellees' counsel insist that the remedy provided by the statute for a claimant of property attached by virtue of process against another person is applicable only in cases where the process is issued by a justice of the peace, and refers to the act on that subject in 2 Gav. & H. St. 632. But section 128 of the Code (2 Gav. & H. St. 127), under the title of 'Claim and Delivery of Personal Property,' provides that 'when any personal goods are wrongfully taken, or unlawfully detained from the owner or person claiming the possession thereof, or when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof.' But it is argued that this statute neither confers a new right nor provides a new remedy. Be it so, and still the argument proves nothing. The remedy provided, whether new or old, is an ample one for the trial of the right of property in such cases, and is certainly not inconsistent with that contemplated by section 169 of the Code."

In equity, although no one is entitled to be made or become a party to the suit who

has not an interest in its object, it is the usual practice to permit strangers to the litigation who claim an interest in the subject-matter to intervene and assert their title on their own behalf. 11 Enc. Pl. & Prac. 498. Many states by statute have provided that any person claiming the property attached can come in and have his rights determined. The Code of California provides: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties or an interest against both." Code Civ. Proc. § 387. Colorado has the same provision. Code, § 22. The Code of Iowa provides that: "Any person other than the defendant may, before the payment to the plaintiff of the proceeds of any attached debt, present his petition verified by oath to the court, stating a claim to the property or money or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which claim is founded." Section 3237, Revision. Section 3016 of the Code of 1873 of Minnesota has a Code provision in part as follows: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other parties, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the issues made by the intervention at the same time that the issue in the main issue is decided and the intervener has no right to delay." Gen. St. 1878, c. 66, § 131. The above section contains, in substance, the same provision as the statutes of Louisiana, so far as it relates to intervention. We might cite statutes of Georgia, Illinois, Kansas, Maryland, Massachusetts, Missouri, New Hampshire, Rhode Island, and Texas, where provision is made for intervention by one not having an interest in the cause of action. Wyoming has no such statute, but, on the contrary, seems to be bound by the construction placed upon the statute in the case of *Vallette v. Bank*, supra, prior to the adoption of the same statute by Wyoming, and cited by Mr. Whittier in his Ohio Annotated Code, in a note to section 5553, and we are unable to find that such construction had or has been qualified.

The record in this case shows that defendant in error, Robert Foote, made the contention that plaintiff in error, J. S. Stanley, ought not to be allowed to maintain any standing in this case. We find on page 22 of the record the following objection: "By Mr. Fisher: The plaintiff objects at this time to the taking of the testimony upon the

petition in intervention, for the reason that, the case having been decided upon its merits, the court has not now jurisdiction to try any issue arising by intervention." And later, after the first witness had been sworn, the following: "By Mr. Fisher: The plaintiff demurs orally to the petition of intervention, and objects to the taking of any testimony thereunder, for the reason that the petition in intervention does not state facts sufficient to entitle the intervenor to come into this case. The case having been disposed of on its merits, the court is without jurisdiction thereunder." Both objections were overruled. Under our system of practice, an execution cannot issue against a garnishee in the original action. Should he refuse to comply with an order of court to pay money into court, as well as when the answer is unsatisfactory, or the garnishee fails to appear, the plaintiff may proceed against the garnishee by action. Rev. St. § 4018. In such an action, should one be brought, a claimant to the money would no doubt have a right to intervene, under the provisions of section 3480, which reads as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein." See *Chilcote v. Conley*, 36 Ohio St. 545.

But there is no authority for the intervention in the original action by a claimant to money garnished or property attached in such action. A garnishee can always protect himself, if when he answers he knows a person other than the defendant claims the money, by so stating. The judgment of August 15, 1899, so far as it was given against the intervenor for costs, was to that extent proper, for the reason that the intervention in this suit was unauthorized by law, and that part of the order denying the intervenor's motion for a new trial was for the same reason proper. But it (the judgment for costs against J. S. Stanley) should have followed an order dismissing his petition of intervention, and no judgment should have been rendered attempting to adjudicate his alleged rights to the property or money attached.

The cause will therefore be remanded, with directions to the district court to modify its said judgment of August 15, 1899, accordingly, and when so modified should order a dismissal of the intervention proceedings, and embrace such order as to the payment and time of payment of the money attached in the hands of the garnishee, or so much thereof as may be necessary for the extinguishment of plaintiff's claim and costs, as the rights of the original parties to the suit and the answer of the garnishee require. The costs of the proceedings in this court will be taxed against the plaintiff in error.

POTTER, C. J., and CORN, J., concur.

(16 Colo. App. 1)

FARRIS v. WIRT et al.

(Court of Appeals of Colorado. Feb. 11, 1901.)
LIMITATION OF ACTIONS—CONTRACT—EXECUTION—FRAUD—TRUST.

Plaintiff alleged that the parties agreed to organize a mining corporation; that certain shares were to be retained, and the balance distributed among the parties; that the consideration for the stock which plaintiff was to receive was services already rendered and future services; that plaintiff delivered the agreement, certificate of incorporation, and a deed to mining premises held by him, in trust for all, to an attorney; and that defendants, without plaintiff's knowledge or consent, obtained possession of the papers, and destroyed them, and executed another certificate of incorporation, excluding plaintiff, and that defendants perfected the second organization, dividing the stock, including the shares to which plaintiff was entitled. The relief sought was a transfer to plaintiff of stock belonging to him, which had been issued to defendants. Held that, though there may have been fraud alleged on part of defendants, plaintiff's action arose out of a trust relation created by the parties, and therefore, as to limitations, was subject to Gen. St. § 2175, limiting actions for relief in case of a trust, and was not subject to section 2174, limiting actions for fraud.

Appeal from district court, El Paso county.

Bill by S. N. Farris against W. O. Wirt and others. From a judgment dismissing the bill, plaintiff appeals. Reversed.

C. S. Wilson, F. G. Salmon, and Gunnell & Hamlin, for appellant. H. McGarry, for appellees.

THOMSON, J. This action was brought to compel the defendants to transfer to the plaintiff certain shares of mining stock to which he alleged himself to be entitled. The complaint alleged that the plaintiff and the defendants Wirt, Roseberry, Jones, and Maehl entered into an agreement in writing, whereby the plaintiff, with Wirt and Roseberry, agreed to organize, in connection with Jones and Maehl, a corporation to be called the "Ben Hur Mining & Milling Company," with a capitalization of \$700,000, represented by 700,000 shares, of the par value of \$1 each, for the purpose of developing, operating, and perfecting the title to certain mining claims in the Cripple Creek mining district, in El Paso county, belonging to Jones and Maehl; that this agreement also provided for the retention by the company of a certain number of shares as treasury stock, and the distribution of the remainder among the parties to the agreement, the amount allotted to the plaintiff being 107,000 shares; that the consideration for the stock which the plaintiff was to receive was services already rendered by him to the other parties, and services to be rendered by him to the corporation when it could be organized; that a certificate of incorporation was prepared in conformity with the agreement, and was executed by all the parties to that instrument, in which those parties and two others were named as directors for the en-

suing year; that, pursuant to the agreement, the defendants Jones and Maehl executed and delivered to the plaintiff, as trustee, a deed to their mining properties, which properties were to be conveyed by him to the corporation after it should come into existence, upon the issue and delivery of the entire capital stock of the company to him in trust for the use and benefit of the parties entitled to it; that the plaintiff thereupon delivered the agreement, the certificate of incorporation, and the deed to one J. D. Hayes, who was acting as the attorney for all the parties concerned; that shortly afterwards the defendants, being the other parties to the agreement, without the knowledge or consent of the plaintiff, in some way obtained possession of the papers so deposited with Hayes, and destroyed or concealed them, and thereupon made another agreement among themselves, in which the plaintiff was ignored, and executed another certificate of incorporation of the Ben Hur Mining & Milling Company, which was the same as the first, except that it did not contain the name of the plaintiff, and then perfected the organization of the company, dividing the stock not placed in the treasury, including the 107,000 shares to which the plaintiff was entitled, among themselves; and that the defendants, outside of this stock held by them, were insolvent, and unable to respond in damages. A decree was prayed requiring the defendants to transfer to the plaintiff, out of their holdings, the stock belonging to him which had been issued to them.

The Ben Hur Mining & Milling Company was a party defendant; but, for the reason that our decision is not affected by its presence in the case, it is not intended to be included in the term "defendants," and further allusion to it is unnecessary. The complaint also alleged the purchase by the plaintiff of the right to 15,000 other shares, of which he averred himself entitled to a transfer from the defendants; but we find no evidence of such purchase, and have, therefore, left the allegation unnoticed.

Laches and the statute of limitations were pleaded; also material allegations of the complaint were put in issue; but, as the court made no finding upon the merits of the controversy, we have no authority to determine them. Upon the evidence, a decision for either the plaintiff or the defendants would not, perhaps, have been disturbed; but we have no power to decide questions of fact, and, in so far as the court below left such questions open, we can pass no judgment upon them. *Bank v. Miner*, 9 Colo. App. 361, 48 Pac. 837. After the evidence was in, on motion of the defendants, the court dismissed the complaint upon the sole ground that the action was barred by the statute of limitations. No other question was passed upon by the court, and there is therefore no other before us.

Whatever cause of action the plaintiff had

accrued about the 8th day of June, 1892, and this suit was instituted on the 14th day of November, 1895, about 3 years and 9 months afterwards. The theory of the defendants is that this is a proceeding for relief on the ground of fraud, and is, therefore, as to the time within which it should be commenced, controlled by section 12 of the statute of limitations, which reads as follows: "Bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards." Gen. St. § 2174. The plaintiff denies the applicability of the foregoing provision, and insists that the action arose out of a trust relation created between the parties, and therefore is subject to the limitation provided in section 13 of the statute of limitations, which reads as follows: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, * * * shall be filed within five years after the cause thereof shall accrue, and not after." Gen. St. § 2175.

Of course, if the defendants' theory of the nature of the suit be sound, the plaintiff waited too long. But it is manifest to us that the defendants have misconceived the case. This is not a proceeding for relief on the ground of fraud. The mere fact that the defendants may have been guilty of fraudulent practices, or that the acts which made the action necessary may have been fraudulent, has no particular significance. In order that a proceeding may be one for relief on the ground of fraud, the fraud must be the basis of the right to relief. The nature of an action is fixed by the allegations of the complaint, and when we look into the one before us we find that the foundation of the suit is the contract between the plaintiff and the defendants. On the hypothesis of the truth of the averments of this complaint, by virtue of that contract the plaintiff was entitled to a certain number of shares of the capital stock of the Ben Hur Mining & Milling Company as soon as it should be organized and its stock distributed. It is entirely immaterial that the incorporation papers which were first prepared were not used. The company which the defendants organized without the plaintiff was the same company which they had agreed to organize with him. The agreement remained in full force, notwithstanding they had surreptitiously come into its possession, and destroyed or concealed it. It could not be annulled without the consent of the plaintiff. When the defendants organized the company, and, in disregard of the plaintiff's rights, distributed stock among themselves to which he was entitled by the terms of the agreement, the law converted them into trustees for him, and they held the stock for his use and benefit. The contract between the plaintiff and the defendants was joint, and hence the liability of the defendants as trustees is also joint. We agree with counsel for the plaintiff that this is a proceeding to enforce a trust. The plaintiff

seeks to compel specific performance of the contract against the defendants as trustees. Such being the nature of the action, it was not barred by the statute, and in adjudging that it was the court erred.

The question whether there was laches on the part of the plaintiff is persistently pressed upon us. While the court made no finding upon the question, and therefore it cannot be considered by us, as the case must be retried, a few words concerning the nature of laches may not be amiss. Delay alone is not laches. During the delay some new condition must have intervened which would render the enforcement of rights, otherwise unimpeachable, contrary to the principles of equity. *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. Whether laches existed, or whether, considering the situation of the parties, the relations which had been established between them, and the conduct of the defendants, the latter are in a position to raise the question, must be determined by the trial court upon the evidence. The judgment will be reversed. Reversed.

(16 Colo. App. 76)

HAMILTON, et al. v. FOWLER.

(Court of Appeals of Colorado. Feb. 11, 1901.)

CLAIM BY HEIRS—ALLOWANCE.

Where a trust deed of property belonging to an estate, securing a note for money loaned for the benefit of the estate, was foreclosed, and the property struck off to the mortgagees, who, in consideration of a quitclaim deed from the heirs, transferred the note to one of such heirs, she was not entitled to an allowance against the estate for the balance due on the note, since the effect of the transaction was the payment of the note.

Appeal from Arapahoe county court.

Application by W. F. Fowler to set aside an allowance against the estate of Robert J. Hamilton, deceased, of which Hannah Hamilton was administratrix. From a judgment in favor of the applicant, the administratrix and claimant appeal. Affirmed.

G. W. Taylor and S. A. Osborn, for appellants.

THOMSON, J. This proceeding was instituted in the county court of Arapahoe county to set aside an allowance against the estate of Robert J. Hamilton, deceased, of which Hannah Hamilton was administratrix, of \$6,190.95 in favor of Jessie T. Hamilton, one of the heirs, by W. F. Fowler, a creditor of the estate, whose claim had been duly allowed. The order in the premises being unsatisfactory to Fowler, he appealed the case to the district court, where the allowance in favor of Jessie T. Hamilton was ordered to be set aside. Upon the return of the record to the county court, judgment was entered in conformity with the order of the district court. Jessie T. Hamilton and the administratrix have brought the case here by appeal.

The following is the history of Jessie T. Hamilton's claim: The administratrix, pursuant to an order of the county court, negotiated a loan of \$15,000 from Brown Bros. of Denver, for the benefit of the estate, executing her note, as administratrix, for the amount, to Brown Bros., and securing its payment by a trust deed of real property belonging to the estate. An installment of interest being unpaid, Brown Bros. proceeded to a foreclosure of their trust deed pursuant to its terms, and at the sale the property was struck off to them, as the highest bidders, for \$12,000. They then, in consideration of a quitclaim deed to them from the heirs of the intestate, transferred the note to Jessie T. Hamilton. Thereupon she procured an allowance in her favor for the unpaid balance, amounting to \$6,190.95. We think the judgment should be affirmed. If Brown Bros. acquired a perfect title through their foreclosure,—and there is no evidence that they did not,—the quitclaim deed from the heirs was of no value or importance. There was no consideration for the transfer of the note, and Jessie T. Hamilton, one of the heirs, cannot be allowed, upon pretense of a claim so obtained, to absorb the assets of the estate to the injury of creditors. But, if the title acquired through the foreclosure was not perfect, whatever had not passed to Brown Bros. was still subject to the payment of the debts of the estate, of which the balance due on the note was one; and until those debts should be paid the rights of the heirs in the title, whatever such rights may have amounted to, were in abeyance. Debts had been allowed against the estate which were unpaid, and for the purpose of their payment a sale of the remaining title, if there was any, could have been compelled. But, instead of proceeding in the county court for an order of sale, Brown Bros. took a quitclaim deed from the heirs, and turned the note over to Jessie T. Hamilton. As, on the supposition, there was a title which would pass by the quitclaim deed, that title was property to which the estate was primarily entitled for the purpose of discharging its debts, and nothing was conveyed to which the heirs had any present right. The consideration of the transfer of the unpaid balance was property which the estate and its creditors had the right to cause to be subjected to the payment of debts. Jessie T. Hamilton took that balance for the benefit of the estate. The execution and delivery of the quitclaim deed satisfied the note. The effect of the transaction was the payment of the note, and the estate was entitled to its cancellation. It could not be converted into a claim against the estate. Jessie T. Hamilton had no shadow of a right to the allowance which she procured, and it was most justly set aside.

Some other questions were originally involved in the litigation, but they seem to have been abandoned. Let the judgment be affirmed. Affirmed.

(16 Colo. App. 86)

NATIONAL FIRE INS. CO. et al. v. DENVER CONSOL. ELECTRIC CO. et al.

(Court of Appeals of Colorado. Feb. 11, 1901.)

ELECTRICITY—NEGLIGENCE—LIABILITY OF LIGHT COMPANY—NOTICE TO AGENT—EVIDENCE.

1. Where plaintiff hired contractors to wire its property for electric lighting, and afterwards contracted with a lighting company to furnish a current to light the building, the lighting company was not responsible for injury from fire caused by negligent wiring.

2. Where plaintiff hired contractors to wire its property for electric lighting, a company which afterwards furnished a current to light the building was not chargeable with notice of the negligent manner in which the wiring was done, merely because a superintendent of construction of such company casually saw the work as it was being done; it not appearing that he was an officer or director of the company, or examined the wire, or was impressed that the work was being done negligently, or that he was still employed for the company when the loss from alleged negligent wiring occurred.

3. The wires used in wiring plaintiff's building for purposes of electric lighting were not the best, and were unduly loaded with lights, which served to increase the danger from fire. Plaintiff requested the company furnishing the current to send a man to repair a broken wire, but it did not appear that he called for, or that the workman sent was, an expert; but he told plaintiff that there was no danger, and that the repairing would not be done immediately. In less than an hour afterwards a fire broke out, but there was no evidence regarding it, except that one of plaintiff's employes had noticed that an insulated covering on a wire in one of the rooms was burning, which indicated an undue current there. *Held*, that the evidence failed to establish that the electric current caused the fire, and the company could not be held responsible.

4. Where plaintiff's depot master requested the electric lighting company which furnished the current for lighting the building to send a man to repair a broken chandelier, and the man sent examined the break, and, on inquiry from the depot master, assured him that there was no danger, but it did not appear that he was other than a workman sent to repair, or that he was competent or authorized to advise, or that the depot master had any right to make the inquiries or rely on the answer, the evidence did not show that the electric lighting company was responsible for the man's statement.

Appeal from district court, Arapahoe county.

Action by the National Fire Insurance Company and others against the Denver Consolidated Electric Company and others. From a judgment in defendants' favor, plaintiffs appeal. Affirmed.

R. W. Barger, Platt Rogers, and Percy Wilson, for appellants. I. N. Stevens and F. W. Lienau, for appellees.

BISSELL, P. J. This is a case without a prototype. We have been cited to none at all similar, nor to any precedent which in our judgment even remotely tends to uphold the cause of action stated. This neither demonstrates nor tends to demonstrate that the plaintiffs have suffered no wrong, nor that

they are without a remedy for that stated, but it leads the court to be somewhat critical in the examination of the positions which the appellants have assumed.

The suit was begun by some ten or a dozen insurance companies against the Denver Consolidated Electric Company to recover the amount which they had paid to the depot company for a loss. In March, 1894, fire broke out in the Union Depot, and pretty nearly destroyed one end of the building, and the insurance companies were compelled to pay some \$60,000 for the loss. After paying it they brought this suit against the electric company for reimbursement. Disregarding any discussion of the query whether the insurance companies could maintain such a suit under any circumstances, even though the electric company had been responsible for the fire, we shall put the affirmation on the precise ground that they failed to make any proof or offer any evidence which tended, save most remotely, to establish the cause of the fire. The companies likewise failed to prove or offer to prove, or submit evidence which tended to prove, that the electric company was in any wise responsible for the loss. In other words, they wholly failed to produce any proof which would lay the responsibility for the fire on the electric company. The complaint stated several causes of action, but we shall dismiss the first two because no evidence was offered about them. These related to the careless and negligent manner of the wiring, the unsafe and dangerous character of the wire used, and charged that the fire was caused by this negligence. When it came to proof, however, there was nothing tending to show that the electric company had anything to do with the wiring or with the inspection of the wires, or that it made any contract or entered into any engagement to keep the wires in good repair and in a safe and proper condition. Evidence was offered to the effect that the building was wired in 1888 by the firm of Baxter & Spicer, of Philadelphia, under an employment by the Union Depot Company, and that the electric light company was not a party to the agreement, and did not execute it. What was done was done by the depot company at their own expense and on their own responsibility. The electric light company, under a contract with the depot company, connected their system with the wiring, and delivered a current for use. This was the extent of the connection between the two companies, and it was simply a delivery of a current for lighting purposes by one, and the payment of an agreed price therefor by the other. Whatever, therefore, may have been the character of the wiring or the nature of the work, it was a matter with which the electric light company was not chargeable. If it was negligently done, the negligence was the negligence of the depot company which put it in, or of the firm

which that company hired, whose negligence would, of course, be the negligence of the depot company. There was a total absence of evidence which sustained or which tended to sustain any knowledge on the part of the electric light company of the character of this wiring. The only evidence which they presented on this subject was that of Stern, who testified that in 1888, when this wiring was put in by Baxter & Spicer, he was the superintendent of construction for one or more of the companies which by consolidation became the Denver Consolidated Electric Light Company; that casually, from time to time, he saw this work as it was done by Baxter & Spicer,—saw the nature of the wiring and the method of its attachment. He was not very precise or positive in regard to its character. In other words, at the time the wiring was put in he does not appear to have been particularly impressed with any negligence on the part of Baxter & Spicer, nor with the defective character of the wiring, or the unskillful method of its attachment. At all events, if he was so impressed he said nothing about it. There was no evidence that he stated what he saw to any of the officers or directors of the electric light company. So far as we can see, he was an employé occupying perhaps a controlling position with reference to other workmen in the service of the electric light company, being the superintendent of construction; but he was not an officer of that company, nor was he a director in the corporation. He never examined the building to determine whether the wiring was adequate, nor whether it was properly put in. His observation was simply casually made as he went about the city looking after the construction of the plant of the electric light company, and the connections which were to be made with the various buildings in the process of construction. There was also a good deal of evidence offered, and some offered which was refused, tending to show that the wiring was, at the time of the trial, at least, and possibly at the date when it was put in, inadequate and unsafe. It was what is known as "underwriter's wire," which the experts testified was not the best kind of wire to be used about a building of that sort, though it is entirely safe if perfectly insulated. There was evidence which tended to show that the wires were run through holes in the rafters, and then along laths or slats, and had more or less connection with the woodwork. There was testimony which tended to show that, after the wiring had been put in, the wires had been unduly loaded with lights, which, as the experts say, tends to concentrate the heat to the largest wire, and has a tendency to unduly increase the heat at given points, and, if at those points it strikes the wood, may char and ultimately cause a fire. We have not attempted to state all the evidence in this direction, but this is substantially the

purport and tendency of the proof which was offered.

There is another basis on which the appellants attempt to rest their cause of action,—the circumstances of the fire. There was proof that in the evening, along about 11, a chandelier which was unlighted in the ladies' waiting room fell. The depot master immediately telephoned the electric light company to send a man down. For what purpose, and what sort of a person he wanted sent, the evidence does not disclose. There was nothing to show that he called for an electrical expert, or a man who was competent to determine whether the condition was a dangerous one. A man reported, presumably and ostensibly from the electric light company. He examined the chandelier, and went up into the upper story, and found the fuse had burned out which furnished the light in that section of the depot. He apparently made no extensive examination of the condition of the wiring. He was not requested by the depot master to do otherwise than to ascertain the cause for the fall of the chandelier and the trouble with the lights, and to see that in this respect everything was rendered safe. When he came downstairs the depot master inquired of him whether there was any danger, and he replied "No," and stated that it would be difficult to make the repair that night, but he would come down in the morning and repair the wire and fix up the lights. With this statement the depot master was satisfied, the employé went away, and within less than an hour thereafter a fire broke out. We do not know, nor are we advised by the record, whether this was caused by the electric current. We do know that the insulated covering on the wire in one of the rooms was being consumed, to the observation of one of the employés of the railroad company; and we do know from the expert's testimony that this indicated that some fuse had failed to burn out, and that there was an undue current in that locality. Otherwise than by a sort of guess, there is nothing to show that the fire came from the electric current, although, for the purposes of this decision, we are quite willing to assume that it did.

There are many reasons why this judgment in favor of the electric light company must be sustained. There was no competent evidence which established any responsibility on the part of the electric light company for the original wiring or for its inspection. The wiring was done by a concern with which the electric light company had no connection. The depot company hired them and paid for the work, and they, and they only, were responsible to the depot people for the character of what was done. Manifestly, under these circumstances, the electric light company cannot be held for any defect either in the character of the material used, or in the negligent and unskillful performance of the work. To state the evi-

dence and to state the situation is to dispose of this proposition. The only theory on which it is sought to hold the electric light company is that they had knowledge of the insufficient character of the wire and the defective construction, and, being advised of the dangerous character of the current which they were to supply, they were bound to advise the depot company about it, and had no right to make the connection and turn the current on without advising the depot company of the danger attending the use of electricity for lighting purposes, and especially about the danger of turning on the current where the wiring was of the sort and the work of the description which the proof disclosed. We do not think either proposition can be maintained, nor that there is anything in the case which justifies the application if defensible. In the first place, there is nothing which demonstrates that the electric light company had any knowledge either of the defective character of the wiring or of the negligent or unskillful construction. Stern's knowledge is not the knowledge of the electric light company, nor can any information which he acquired, in view of the way in which he acquired it, be imputed to that corporation. He was not the general agent of the corporation. He was an employé charged with certain duties, and, though those duties were of a supervisory nature, they in no sense made him the representative of the corporation, so that it would be charged with the knowledge which he casually acquired in going about the city. Since there was no connection between the Union Depot Company and the electric light company, and because the work was being done by an outside firm on employment by the depot corporation, we think it quite clear that the knowledge acquired by Stern was not knowledge brought home to the corporation. We do not need to discuss or consider what the rule is in those cases where knowledge has once been brought home to a corporation or to an agent of a corporation, and the event out of which their responsibility is supposed to grow occurs long subsequent to the acquisition of the knowledge. This is a matter which admits of discussion, but we are not required to express an opinion about it. It is always true that a principal is not bound by knowledge acquired by an agent unless that knowledge is present to the agent's mind at the time of the transaction out of which the responsibility grows. We need only cite one authority to it. *Campbell v. Bank*, 22 Colo. 177, 43 Pac. 1007. This case is not directly in point, nor has our attention been called to one which seems to be entirely applicable. If Stern ever acquired any knowledge, it was entirely unofficial, and it was not at the time of a transaction between the Union Depot Company and his employers. So far as the evidence discloses, he never communicated the information to any of the officers

or directors of the corporation. The fire happened years after the wiring was done, and years after the connection was made. It is not certain that Stern was in the employ of the electric light company when the fire occurred. To attempt to charge the electric light company with responsibility because of this casual knowledge, which was not communicated, and of which they were not advised when they made the connection and delivered the light, and of which they never had information, so far as the proof shows, would carry the doctrine of the responsibility of the principal because of the knowledge of his agent to a limit which is not recognized by any of the cases, and which is not justified by any legal principle. We do not assent to the position which the appellants take,—that the electric light company had no business to deliver the current without informing the depot company of the danger attending its use, and particularly of the danger attending its use where the wiring was defective or its construction unskillful and negligent. Where parties undertake to wire their own property, and then apply to a light company to deliver a current to light the building, they must be assumed to take all risks resulting from the character of the wire which is put in the building, and the method of construction which is adopted in putting it in. We do not believe that the principle contained in some cases to which our attention has been called, notably, *Lannen v. Gaslight Co.*, 44 N. Y. 459; *Farrant v. Barnes*, 2 C. B. (N. S.) 553; *Thomas v. Winchester*, 6 N. Y. 397; *Wellington v. Oil Co.*, 104 Mass. 64,—is at all applicable. In those cases, it will be observed, the injury was done to an individual because of the undisclosed, dangerous character of the material sold, or the negligent conduct of an agent. They were not cases in which injury was done to property. Besides, the dangerous character of the article was not known, understood, or readily ascertainable by the individual to whom the stuff was furnished. This is, of course, true with reference to explosive oil, with reference to the nitric acid carboy, and with reference to the extract of belladonna. No such condition or circumstances attended the supply of the electric current. It is a matter of common knowledge, and in fact of universal knowledge, that an electric current is dangerous, and must be discreetly and prudently handled in order to avoid danger either to life or to property. We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it

seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property. We do not believe any such responsibility rests on the company as to require them to advise the persons who apply for the connection that they must see to it that the wiring is of a certain class or description, that it is insulated in a particular manner, and that there is no connection between it and the woodwork, and, failing in this, that they will be liable for any damages which may happen because of the negligent or unskillful nature of the construction. When parties wire houses, they are supposed to have done it intelligently, and to have hired competent persons for the purpose, to whom alone they must look in case the work is improperly and unskillfully done.

There is still another reason why the appellants must fail. They did not show that the electric light company was responsible for the conduct of the man who was sent there to look after the property at the time the chandelier fell. There is no proof that the depot master had any right to either inquire of the employé, or rely on his answer, in settling the question of the presence or absence of danger. The chandelier fell, and naturally put out some of the lights, and they telephoned for a man to come down and attend to the matter. This he did, and when he went up to the locality of the accident he discovered that the fuse had burned out, which put out the light, and probably caused the destruction of the wire, which permitted the chandelier to fall, though the latter proposition is not clear. When he came down he was inquired of by the depot master whether there was any danger, to which he responded "No." There is nothing which demonstrates that he could bind the light company by this declaration. A workman sent to repair is not necessarily one who is competent to advise. It might be true the electric light company would be quite willing to be held responsible for the work done by the employé, or held responsible for his examination as to what ought to be done in an emergency of that description. This, however, in no manner establishes the fact that the company would be willing to be held responsible, or ought to be held responsible, for a statement that the general situation was such as to be free from danger. This would assume a knowledge on his part of the condition of the wiring all over the building, and would presume an examination of the general situation to enable him to answer that direct question, and so answer it that the depot company could rely on it, and in case of failure hold the electric light company responsible. We do not believe his agency or his relations to the company were sufficiently established to bind the company by his declarations. Even though this position be not well taken, it is true, on the evidence, that the condition

was not such as to require that the current should be shut off when the employé went there. It is quite possible that his statement was absolutely true. It is likewise possible that there may have been elsewhere in the building defective material or negligent construction which resulted in the fire. It is equally possible, and the contrary presumption may not be indulged in under the evidence, that the fire did not break out because of the accident, or of anything resulting from it, but because of the condition which had theretofore existed, and which culminated when the connection with the chandelier broke. The testimony of the experts is to the point that where the insulation is defective and the wiring is attached to woodwork, with an excess current, it may char and break out in fire. This may be precisely what happened. There is nothing which tends to prove that the fire was caused by the breakage which the employé was sent to investigate and repair. We think, however, the affirmance of the judgment can be very safely rested on the broad proposition that the electric light company had nothing to do with the furnishing of the wiring which was put into the building, or with its attachment to the structure, and, if any injury happened or a fire broke out because of defective wiring or negligent construction, it is a matter for which that corporation cannot be held responsible. The depot company hired an independent firm to put it in, and neither they nor anybody in privity with them can look to anybody except the contractors who did the work. We can discover nothing in the proof which would warrant us to disturb the judgment, which will accordingly be affirmed. Affirmed.

(16 Colo. App. 73)

MEISS v. MEISS.

(Court of Appeals of Colorado. Feb. 11, 1901.)

DIVORCE—ALIMONY—ORDER—APPEAL—JURISDICTION—COURT OF APPEALS.

Where a citation for contempt for failure to pay alimony was sustained, and petition for an order declaring the decree for alimony satisfied by agreement denied, and defendant was ordered to pay the alimony originally decreed, an appeal from such order will not lie to the court of appeals, since it is part of a divorce proceeding, of which such court has no jurisdiction.

Appeal from district court, Arapahoe county.

Suit for divorce by Sadie Meiss against George Meiss. From an order sustaining a citation for contempt, and denying his petition for an order declaring the decree for alimony satisfied, defendant appeals. Dismissed.

N. Q. Tanquary, for appellant. Lucius W. Hoyt, for appellee.

WILSON, J. In April, 1897, in a suit pending in the court from which this appeal is taken, in which the appellee was plaintiff and the appellant was defendant, the court

rendered a decree of divorce, and also for alimony to the plaintiff in a certain sum, to be paid by the defendant until the further order of the court. In August, 1898, the defendant filed in the court what he termed a petition, setting forth that subsequent to the rendition of the decree for divorce and alimony he had settled in full the decree for alimony in pursuance of a contract and agreement entered into between him and the plaintiff, the terms of which he set forth; wherefore he prayed an order of the court declaring said decree for alimony completely and fully satisfied. Shortly thereafter the court, upon motion of the plaintiff, directed the issuance of a citation directing the defendant to appear on a day specified, and show cause, if any he might have, why he should not be held in contempt of court for failure to comply with the order and judgment of the court decreeing the payment of alimony to the plaintiff. The defendant made answer to the citation, setting forth substantially the same facts as in his petition. A hearing was had by the court at the same time both upon the citation of the defendant and upon his petition. Evidence was heard on behalf of both parties, and at its conclusion the court sustained the citation, and denied the petition of defendant, and it was ordered that the defendant pay to plaintiff the sum originally decreed for alimony from the date of the last payment made by the defendant to the day of the hearing. From this defendant appeals to this court. The plaintiff moves to dismiss the appeal on the ground that this court has no jurisdiction.

Since the appeal in this cause was taken, the sole question presented for our determination—namely, the jurisdiction of this court—has been twice expressly decided in this court, and also by the supreme court. Under the authority of these decisions it must be held that the motion to dismiss for want of jurisdiction is well taken. *Mercer v. Mercer*, 18 Colo. App. 237, 57 Pac. 750; *Eickhoff v. Eickhoff*, 14 Colo. App. 127, 59 Pac. 411; *Mercer v. Mercer*, 27 Colo. —, 60 Pac. 349; *Eickhoff v. Eickhoff*, 27 Colo. —, 61 Pac. 225. The main action in this case was for a divorce, and under the decisions cited this court has no appellate jurisdiction in such cases. The order or judgment for alimony grows out of the main case, and is inseparable from it. It is a mere incident to it, and "it goes where the principal goes." The order from which an appeal is here sought was one made in the identical cause in which the decree was rendered for divorce. The petition of defendant was simply a motion in the cause. It had no other nor further force or effect. The entire proceedings in which the order was made were in the same cause. It is true that they affected only one part of the decree,—that a money judgment awarding alimony,—but it was a part and parcel of the same judgment in which a divorce was decreed, wholly growing out of and being

dependent upon the proceedings and decree for divorce. For the reasons fully given in the cases to which we have referred, this court is without appellate jurisdiction. Having no jurisdiction of the main action, it has none of any part of it, nor of any incident to it. The motion will be sustained, and the appeal dismissed. Appeal dismissed.

(16 Colo. App. 80)

HOWARD v. GRAYBEHL et al.

(Court of Appeals of Colorado. Feb. 11, 1901.)

EVIDENCE—JUDGMENTS—ASSIGNMENT— CANCELLATION—SETTING ASIDE.

1. J. assigned a judgment in replevin against E. to H., of which assignment E.'s attorney knew. A stipulation was made subsequently in a divorce suit between J. and E., by E.'s attorney and H., attorney for J., which recited simply that no alimony would be sought. E.'s attorney swore that the stipulation was made in consideration of the cancellation of such replevin judgment. H. and his law partner swore that it was made in consideration of their not urging the defense of adultery on E.'s part in the divorce suit. *Held*, that the evidence did not sustain the finding that the stipulation was made in consideration of canceling such judgment.

2. Where the only defense pleaded in a suit on an appeal bond in replevin by the assignee of the bond and judgment was that the assignor had agreed to cancel such judgment for a consideration, and the assignor had assigned the judgment previous to such agreement, to the knowledge of the defendant, judgment for the defendant was error, since the parties to a suit, knowing of the assignment of the judgment therein, could not cancel it to the prejudice of the assignee.

3. Where the evidence that a stipulation was made in consideration of an agreement to cancel a certain judgment was almost overcome by the terms of the stipulation itself, which made no mention of such consideration, it was error to set aside such judgment on such evidence.

Appeal from district court, Arapahoe county.

Action on appeal bond in replevin by Henry Howard against Emily C. Graybehl and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Allen & Webster, for appellant. Ward & Ward, for appellees.

BISSELL, P. J. John Graybehl had judgment on the 16th day of October, 1893, against his wife, Emily, in a replevin suit over a lot of household stuff. The judgment was for the return, or in lieu thereof the payment of \$300 and costs. This somewhat singular condition of affairs grew out of another litigation between them, wherein Emily brought an action for divorce against John, praying alimony, in which latter suit John had answered in denial, and with a counter charge of adultery. The replevin suit seems to have been brought very much on the allopathic theory of a counter irritant. All this was in 1893. Matters dragged along for quite a while in the county court. It finally went to judgment, and was appealed

to the district court. On the appeal a bond was executed by Emily Graybehl, N. Q. Tanquary, her attorney, and F. E. Carringer. In 1895 the replevin judgment was assigned to Howard & Howard, who had been attorneys for Graybehl, and probably still were; and presumably, and as it is alleged, for a valuable consideration, the bond itself was transferred in 1896. Of this assignment of the judgment to Howard & Howard the record clearly shows that Mrs. Graybehl and Tanquary had notice. Either a copy of the assignment or a notice of it was served on Mrs. Graybehl where she was at work, and information about it was given to Tanquary. When the divorce case was about to be reached for trial, and Graybehl's attorneys were commencing to hunt up evidence against Mrs. Graybehl to support their counter charge, negotiations were entered into between Howard & Howard and Tanquary. There is a wide variance between the lawyers, who were both witnesses, as to what occurred,—Tanquary asserting, on one side, that they came to him and were frequently in his office; and, on the other side, that the propositions came to them from Tanquary, and that he was the one who proposed that they should make some adjustment concerning this counter charge of adultery. Tanquary asserted that the agreement was that the claim for permanent alimony in the divorce suit should be abandoned, and as a consideration therefor Mr. Graybehl should either transfer or satisfy this judgment in replevin, and Mrs. Graybehl should keep the goods. The record discloses that the goods were taken under the writ, but were in the possession of Mrs. Graybehl, or, rather, in Tanquary's possession, in one of his houses, for a long time, though he states that he had returned them to her before these negotiations begun. However this may be, the point in dispute between the parties is with reference to the consideration of the stipulation. This stipulation was in the divorce case, and is, substantially, that, the matter of alimony having been fully adjusted, it is agreed that no proof in relation to it shall be given on the trial, and no alimony should be asked. This was signed by Tanquary, attorney for the plaintiff, and by Henry Howard, Jr., as attorney for the defendant. It will be observed that it contains nothing about the satisfaction of the judgment or the dismissal of the appeal or the suit, or the retention of the goods by Mrs. Graybehl. In fact, it is utterly silent except on the one question of the waiver of any claim for alimony. The Howards insist that this was on an agreement that they should abandon and make no proof about their counter charge of adultery. They insist that the paper was signed in their office, and not in Tanquary's. We must concede the weight of the testimony is undoubtedly with them, both as to the circumstances of the negotiation, and the consideration on which the stipulation was bas-

ed. It is quite impossible for us to understand how it could happen that a stipulation abandoning the claim for alimony should be signed by the parties, based wholly on the consideration of the satisfaction of a judgment then in esse, and the retention of the goods which were the subject-matter of the suit by the judgment defendant agreed upon, and it contain nothing about it. If the agreement had been made between two laymen, this might possibly be true. Entered into between counsel who are supposed to be learned in the law, and to know what is necessary to preserve and protect the rights of the parties, it is quite past our comprehension. The only reasonable conclusion about it is that the Howards' contention is right, and that this waiver of a claim for alimony was really stipulated in order to avoid and get rid of the counter charge of adultery, and the necessity either to attempt to make proof to the contrary, or get into a record matters which should reflect upon the personal character and reputation of Tanquary's client. If we were compelled to decide the question, we should undoubtedly hold that the contention that the stipulation was based on this consideration was not supported by the testimony.

We do not, however, necessarily base our judgment on this matter. There is a legal proposition from which there is no escape, and which must reverse this judgment. There was no plea or defense interposed to this action on the bond, except a recital of these facts respecting the stipulation. The matter was pleaded as an agreement between John Graybehl and Emily Graybehl, and to the point that these parties agreed that in lieu of alimony Emily should retain possession and control of the property, and that the judgment should be satisfied of record. As pleaded, this was an agreement between the respective parties to the two different suits,—the divorce and the replevin suit. At that time the judgment was not owned by John Graybehl, nor had he any interest in it. It may be,—though we do not undertake to say,—had the record disclosed the assignment to the Howards to have been without consideration, and that John still had an interest, the agreement might have been binding, and, once established or found to have been made, would operate as a bar to the suit. Howard, to whom title in the bond and judgment now rests, could only maintain his suit and recover against the sureties on the theory of an ownership for a valuable consideration. We are not satisfactorily advised what the fact may be. As we before said, it was pleaded as an agreement between the parties. The evidence clearly demonstrates that there had been a transfer of the judgment to Howard long prior to the making of the stipulation, to the knowledge of both Mrs. Graybehl and her attorney, Tanquary. Manifestly, it was quite impossible for the two parties to the suit to make any agreement for the satisfaction

of the judgment and the dismissal of the action to the prejudice of the assignee of the judgment, they being advised of the situation of the title. It may be quite true Mrs. Graybehl would have a remedy, and possibly the bondsmen might have a remedy against Graybehl for a breach of the agreement, the agreement having been found to have been made. This remedy, however, does not consist of a defense to the action on the bond, which belongs to somebody else, but in an action for a breach of his agreement to protect Mrs. Graybehl in the possession of the property. We are not prepared to say, if the plea had been in different shape, and it had been pleaded by way of estoppel against the Howards, who owned the judgment, and it had been charged that they were the owners and made the agreement intending to bind both themselves and Mr. Graybehl, or that they misled these parties to their prejudice because of their procedure, and committed a fraud on Mrs. Graybehl, still owning and asserting their title to the judgment, such a plea might not be available. The matter was not so pleaded, but was set up as an agreement between John and Emily.

We likewise see very grave difficulties about setting aside a judgment on this kind of testimony. A judgment is a very grave thing, and even in equity, which is the only jurisdiction having power to cancel judgments, which are solemn adjudications of record, it would not be vacated or set aside on parol testimony unless it is exceedingly clear, satisfactory, and convincing. The testimony in this case reaches no such level, and in fact is almost, as we look at it, entirely overcome by the terms of the stipulation, which make no mention of the consideration, to wit, the satisfaction of the judgment and the transfer of the title to the property. Even though by construction the answer might be taken to state an ample consideration, or to set up matters which embrace the subject-matter of a plea in estoppel, we are quite of the opinion that, without some element of fraud or deceit, the Howards would not be estopped, so long as Mrs. Graybehl and her attorney, Tanquary, had full knowledge of the situation of the title, unless there was some sort of a consideration moving between Mrs. Graybehl and the Howards. This, of course, is on the hypothesis that the Howards held title for a valuable consideration,—either money paid, or property turned over, or services rendered. Holding good title on an adequate consideration, which we assume under the proof, there must be some contract or stipulation to bar them from asserting the judgment. We are compelled to express our opinion in this general fashion because the negotiations were had between two attorneys. We therefore find it exceedingly difficult to imagine that Mr. Tanquary could have been deceived or misled about the matter. He knew or ought to have known that Graybehl was in no situation or condition to negotiate for the satis-

faction of the judgment while Howard held and owned it. He had no right to assume that John Graybehl had the power to make any stipulation about the judgment. He could hardly claim to have been deceived or misled, and, if he took chances that this would be operative as an estoppel, he cannot be heard to complain because he is now called on to respond and pay the penalty of the bond to which he subscribed.

Taking the whole case together as it stands, we do not believe that the testimony warranted the judgment, or that it can be upheld upon any known and well-established principle of law; and it will therefore be reversed and sent back for further proceedings in conformity with this opinion. Reversed.

(16 Colo. A. 120)

SMITH et al. v. STUBBS et al.

(Court of Appeals of Colorado. Feb. 11, 1901.)
REPLEVIN—FORTHCOMING BOND—VALIDITY—ACTION—PARTIES—PLEADING.

1. A forthcoming bond given by defendant in replevin bound the obligor to the sheriff, instead of to the plaintiff, as required by Mills' Ann. Code, § 83; but it was conditioned for the delivery of the property, or the payment of its value to plaintiff, and not to the sheriff, the nominal obligee. *Held*, that the bond was valid, and binding on the sureties as a common-law obligation.

2. Plaintiffs in replevin may sue in their own names on a forthcoming bond executed for their exclusive benefit which has been assigned to them by the sheriff, the nominal obligee.

3. An objection that a partnership cannot sue because of its failure to file a list of members with the county clerk, as required by Sess. Laws 1897, p. 248, must be raised by answer, and not by demurrer.

4. To aver a fact on information and belief is insufficient where, from the very nature of the fact alleged, it must be within the knowledge of the pleader.

5. Where sureties on a forthcoming bond given by defendant in replevin set up the defense that they have been discharged by reason of an agreement between plaintiff and defendant by which the proceedings in the replevin were postponed without their consent, it is not sufficient for them to aver that the agreement was valid, but the facts showing its validity must be disclosed.

Appeal from district court, San Juan county.

Action by F. L. Stubbs and another against W. H. Smith and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Buchanan & Searcy and J. T. Whitelaw, for appellants. Barnes & Barnes, for appellees.

THOMSON, J. In August, 1892, Stubbs & Jakway brought replevin against George A. Smith, J. T. Smith, and W. H. Smith to recover the possession of certain specific personal property. The sheriff executed the writ by taking the property into his possession, and thereupon W. H. Smith, as principal, and the appellants herein, as sureties, executed and delivered to the sheriff the fol-

lowing writing obligatory: "Know all men by these presents, that we, W. H. Smith, E. L. Roberts, Morris Lonergan, Geo. Hemphill, and Jos. Bordeleau, are held and firmly bound unto Henry Sherman, sheriff of the county of San Juan, in the state of Colorado, and to his executors, administrators, and assigns, in the penal sum of thirty-two hundred dollars, lawful money of the United States, for the payment of which sum we hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this obligation is such that whereas, a certain writ of replevin was lately issued from the district court of said county of San Juan in favor of Stubbs & Jakway, plaintiffs, and against the above-bounden W. H. Smith, defendant, dated the 29th day of August, eighteen hundred and ninety-two, and directed to the sheriff of said county to execute, by virtue of which said writ the said sheriff, Henry Sherman, has levied upon and taken as the personal property of the said defendant * * *; and whereas, the said W. H. Smith, defendant, is desirous of retaining the said property in his possession, according to the provisions of the statute: Now, if the said W. H. Smith, defendant, shall have or cause the said property to be forthcoming and delivered to the said plaintiff, if the delivery be adjudged, and for the payment to him of such sums as may, for any cause, be recovered against the defendant herein in said county of San Juan, and shall not in the meantime dispose of or injure the said property, or any part thereof, nor suffer or permit the same to be disposed of, or injured, or diminished in value, then this obligation to be null and void; otherwise, to remain in full force and effect. Witness our hands and seals this 31st day of August, eighteen hundred and ninety-two. W. H. Smith. [Seal.] E. L. Roberts. [Seal.] Morris Lonergan. [Seal.] Geo. Hemphill. [Seal.] Jos. Bordeleau. [Seal.]" Upon the execution of the foregoing instrument the sheriff delivered the property he had taken by virtue of the writ to W. H. Smith. In 1896 a trial of the cause resulted in a verdict for the replevin plaintiffs, and a judgment against W. H. Smith for the delivery of the property to them; or, in case the delivery could not be had, for the sum of \$1,000, the value of the property, and for costs. An execution was issued on the judgment commanding the sheriff to cause the property to be delivered to the plaintiffs, or, in case of failure in that, to cause to be made the \$1,000 and costs. The execution was returned wholly unsatisfied. Henry Sherman, sheriff, then assigned the forthcoming bond to Stubbs & Jakway, who brought this suit upon it against the sureties, assigning as breaches of its conditions the recovery of the judgment in replevin, and the failure of the principal obligor, W. H. Smith, to deliver the property to the plaintiffs, or pay its adjudged value. A demurrer to the complaint was overruled, and the

defendants answered. The questions arising upon their answer will be considered further on. The plaintiffs had judgment, and the defendants appealed.

It is very strongly urged for the defendants that the bond in suit is not valid as a statutory bond for the reasons that it was not made to the person designated by the statute; that it was executed by only one of the defendants, and that it contains conditions not prescribed by the statute; and that it is void as a common-law bond, because it was supported by no sufficient consideration. We shall subject these propositions to a careful examination. The following is the statutory provision concerning forthcoming bonds in replevin: "At any time within forty-eight hours from the time of the taking of the property and the service of the writ, the defendant may, if he do not except to the sureties of the plaintiff, require the return of the property upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties who shall justify before such undertaking shall be accepted or approved, to the effect that they are bound to the plaintiff in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required in such time, it shall be delivered to the plaintiff, except as provided in this chapter." Mills' Ann. Code, § 83. To make the obligation in suit a compliance with the foregoing section, it should have bound the obligors to the plaintiffs for the performance of its conditions. That section requires a written undertaking, executed by two or more sureties, to the effect that they are bound to the plaintiff, etc. This bond was not so drawn. The obligors bound themselves to the sheriff; but while, nominally, he was the obligee, the obligation was conditioned for the delivery of the property, or the payment of its value, not to him, but to the plaintiffs. It appears very clearly upon the face of the instrument that its sole purpose was to indemnify the plaintiffs, and that the sheriff had no interest in the bond. It was their bond, and not his. But it was not a compliance with the Code provision, and was, therefore, not a statutory security. However, its want of conformity to the statute will not alone render it void. An obligation entered into voluntarily, and for a sufficient consideration, unless it contravenes the policy of the law, or is repugnant to some provision of the statute, is valid at common law. *Barnes v. Brookman*, 107 Ill. 317. See, also, *Robards v. Samuel*, 17 Mo. 555. This bond was the voluntary act of the defendants. Its consideration, namely, the relinquishment by the sheriff to the principal obligor of the property which had been taken, was sufficient; and none of its conditions, whether statutory or

not, was in any wise in contravention of the policy of the law, or repugnant to the provisions of any statute. It was held in *Waterman v. Frank*, 21 Mo. 108, that a delivery bond given by a party other than the defendant for property seized under execution, and made payable to the officer levying the writ instead of the plaintiffs, where the statute required the bond to be given by the defendant and in favor of the plaintiff, was nevertheless valid as a common-law obligation. In their facts that case and the one at bar are exactly parallel. These sureties entered into this obligation voluntarily. They had the legal right to make the contract. It accomplished the purpose for which it was executed, and they cannot now be heard to say that, simply because it fails of conformity with the statutory provisions, it is void. The plaintiffs were the real parties in interest, and possibly might have maintained this suit in their own names, without an assignment from the sheriff. That officer was merely a nominal obligee in an instrument executed for the exclusive benefit of the plaintiffs; and the assignment which he made, and which, if it was necessary, it was his duty to make, removes whatever doubt might otherwise exist as to the right of the plaintiffs to sue in their own names. *Patterson v. Mater* (C. C.) 26 Fed. 31; *Waterman v. Frank*, supra.

The point was made by the sureties upon their demurrer to the complaint that the plaintiffs could not maintain their action because they had failed of compliance with an act of the legislature approved March 31, 1897, requiring partnerships doing business under any name other than the personal names of the constituent members, in order to enable them to prosecute suits for the collection of debts due them, to file for record with the recorder of the county in which they do business an affidavit setting forth the full Christian and surnames of all the members of the partnership. Sess. Laws 1897, p. 248. This objection was not warranted by the facts; but, even if it was, it could not be taken by demurrer. In so far as the pleadings advise us, the partnership was doing business under the personal names of its constituent members. It appears to have been composed of two persons, one of whom was named Stubbs and the other Jakway, and its name was Stubbs & Jakway. The purpose of the statute was to afford the public the means of ascertaining the individual names of persons doing business under a common name, where such names could not be found in the common name itself. In this case the common name was composed of the names of the individuals. But, even if the proceeding prescribed in the statute was required of this partnership, it was unnecessary to set it forth in the complaint. Obedience to law is always presumed, and, if the fact was otherwise, it should have been so made to appear in the answer.

A demurrer to the sixth defense of the defendants' answer was properly sustained. The following was that defense: "That these defendants are informed and believe, and so upon information and belief allege the truth to be, that at the time of the alleged execution of the undertaking in the plaintiffs' complaint set forth the said Roberts placed his signature to said instrument upon the express agreement, understanding, and condition that certain other solvent and financially responsible persons, to wit, George Hemphill, Joseph Bordelean, and a certain other solvent and financially responsible person, would also sign said instrument and become co-sureties with him, the said Roberts; that the said Hemphill and Bordelean likewise signed the said instrument only upon the understanding, agreement, and condition that the said Roberts and one other person should sign and become bound as co-sureties with them; that, after these defendants had so been procured to sign said instrument, one Morris Lonergan signed said instrument, and that no other person ever did, at any time, sign the same as co-surety; that the said Lonergan is, and at all times herein mentioned was, solvent; that neither of these defendants knew that said Lonergan had signed the same, and that neither of them ever at any time consented or agreed to become co-sureties with the said Lonergan, or to enter into said undertaking, without the signature of said fourth solvent surety, and that neither said Bordelean nor said Hemphill would have entered in said undertaking but for the said signature of the defendant Roberts thereto; and that these defendants therefore should not be held on the said undertaking." The matters contained in this answer are not set forth as facts. Their sole foundation is information imparted to the defendants, and a belief resulting from the information. But, if there was such an agreement as is stated, it was made by the defendants; and the condition upon which they consented to sign the bond was their own. They therefore knew whether there was such an agreement or not. Yet they alleged it, not as of their own knowledge, but as having been informed of it. From the very nature of the fact alleged, it must have been within their knowledge; and to aver it on information and belief was improper pleading. See *Bliss*, Code Pl. § 326; *Kephart v. People* (Colo. Sup.) 62 Pac. 946, 2 Colo. Dec. 341.

A question apparently of more difficulty arises upon the fifth defense, to which also a demurrer was interposed and sustained. The allegations of that defense were that at the time of giving the bond the principal obligor was solvent, and so continued until after the expiration of a reasonable and sufficient time for the recovery of judgment; but that the plaintiffs, with the purpose of unlawfully, wrongfully, and fraudulently injuring the sureties, and of unlawfully and fraudulently obtaining from them payment of cash

on the bond, instead of procuring the property through the regular and timely proceedings of the court, wrongfully, negligently, and fraudulently delayed and abandoned the prosecution of their suit for an unreasonable length of time; that without the knowledge or consent of the sureties, by valid agreement between themselves and the principal obligor, without cause, and in furtherance of their fraudulent purpose, the action was continued for long and definite periods of time; and that during the period of wrongful and fraudulent delay the principal obligor became financially embarrassed, and the property for the forthcoming of which the bond was given was wasted and lost. Sureties on bonds given in judicial proceedings are upon the same footing with sureties in other cases. Their rights and remedies are the same, and whatever will discharge sureties directly liable for the debt will discharge them. *Campau v. Seeley*, 30 Mich. 57; *Toles v. Adee*, 84 N. Y. 222. A binding agreement between the creditor and the principal, made before or after the commencement of suit, by which proceedings against the principal are delayed for a definite time without the consent of the surety, operates to discharge the latter. *Comegys v. Booth*, 3 Stew. 14; *Nisbet v. Smith*, 2 Brown, Ch. 449; *Phillips v. Rounds*, 33 Me. 357; *Blaine v. Hubbard*, 4 Pa. St. 183; *Toles v. Adee*, supra; *Brandt*, Sur. §§ 342, 373, 378. It is not alleged in this defense that the agreement between the plaintiffs and the principal obligor was followed by any order of the court continuing the cause. The continuances to which the defense refers were, so far as its disclosures are concerned, merely postponements of the trial of the case for different periods, by agreement of parties. The agreement not having resulted in any order of the court preventing the plaintiffs from pressing for a trial, the question now is whether the agreement for delay, as it is stated in the defense, tied the hands of the plaintiffs, so that they were compelled to remit their prosecution until the agreed period had expired. To have the effect of discharging the sureties, the agreement must have been one by which the plaintiffs were legally bound. The plethoric and redundant charges of wrong, negligence, and fraud have no relevancy to the question to be determined. It is what the plaintiffs did, and not what they thought, from which the liability or nonliability of the sureties must be found. If, by an agreement between the plaintiffs and the replevin defendants, or any of them, the former became legally barred from the prosecution of their action for a definite period of time, their act might be available to the sureties as a defense. But it is only in case the agreement could be enforced against the plaintiff that such a result would follow. If it lacked some element necessary to render it enforceable, the plaintiffs were still at full liberty to push their suit, and the liability of the sureties was unaffected; and

it is absolutely unimportant with what motives the plaintiffs entered into a void agreement. Now, as a statement of an agreement by which the plaintiffs bound themselves in law to refrain from the prosecution of their suit, this defense is a failure. To make the agreement binding upon the plaintiffs, it must have been supported by a sufficient consideration; but no consideration whatever is alleged. It is averred that the agreement was valid, but that statement might as well not have been made. It is the statement of an unmixed legal conclusion, and must be disregarded. In *Winne v. Colorado Springs Co.*, 3 Colo. 155, the plea of the sureties was that the appellee, without their consent, gave the principal maker of the note further time for its payment for a good and valuable consideration. Chief Justice Thatcher held the plea bad, for the reason that the averment of a good and sufficient consideration was simply the statement of a conclusion of law; saying further that the facts should have been disclosed. The demurrer to the defense under consideration was properly sustained. The judgment is affirmed. Affirmed.

WILSON, J., not sitting.

(10 Okl. 741)

MORFORD v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 8, 1901.)

PERJURY—OFFICER DE FACTO.

1. Perjury cannot be assigned upon the alleged false testimony of a witness, given in the course of a trial, where the court has no jurisdiction of the offense charged or of the defendant. But if the proceedings are merely erroneous or voidable, even if there be such irregularities or defects as would require a reversal of the cause on appeal, false testimony given in the course of such trial, if material, does constitute perjury.

2. Where an office exists under the law, and a person is elected to fill such office, and duly qualifies and enters upon the discharge of his official duties, he is a de facto officer, and his acts are valid, notwithstanding the fact that he may not possess all the necessary qualifications as prescribed by the statute to fill such office.

3. The official acts of a de facto officer are recognized as valid on the high ground of public policy, and for the protection of those having official business to transact; and the acts of such de facto officer cannot be collaterally attacked.

(Syllabus by the Court.)

Error from district court, Payne county; before Chief Justice John H. Burford.

Robert Morford was convicted of perjury, and brings error. Affirmed.

Keaton & Kearful, for plaintiff in error.
J. C. Strang, Atty. Gen., for the Territory.

HAINER, J. The appellant, Robert Morford, was indicted, tried, and convicted of the crime of perjury in the district court of Payne county, and sentenced to serve a term of five years at hard labor in the territorial penitentiary, at Lansing, Kan. The perjury

of which the defendant was convicted was assigned upon certain alleged false testimony given in the case of the territory against William G. Martin, who was tried and convicted upon the charge of criminal libel in the probate court of Payne county in November, 1897. There is no contention in the brief of counsel for appellant that any error was committed in the trial of the case at bar which would warrant a reversal of the cause, but the only contention is that in the case of the territory against Martin, who was tried and convicted of criminal libel in the probate court, and which judgment was subsequently affirmed by this court (8 Okl. 41, 56 Pac. 712), he was not tried for such offense according to law; that said trial of Martin was coram non iudice, and therefore void, for the following reasons: (1) That the trial in the case of the territory against Martin in the probate court, wherein it is alleged in this case that the false testimony was given, was had before a jury composed of only six persons; (2) that said trial was had upon a mere complaint of one other than the county attorney; (3) that the trial by jury was presided over by a probate judge who was not a lawyer, nor ever licensed to practice law.

In *Martin v. Territory*, 8 Okl. 41, 56 Pac. 712, this court held that the probate courts of this territory have jurisdiction of the offense of criminal libel. The probate court having jurisdiction of the defendant and of the offense of which he was convicted, any error occurring during the trial, no matter how irregular or erroneous it might have been, is no excuse or justification for the crime of perjury, for which Morford was indicted, tried, and convicted. It is true that the doctrine is well established that, where the court has no jurisdiction of the defendant or of the crime of which he is charged, any false testimony given in the course of such trial does not constitute perjury; but, on the other hand, if the trial was merely voidable, even if there be such defects as would require a reversal of the cause on appeal, false testimony given in the course of such trial, if material, constitutes perjury. Wharton, in his work on Criminal Law (section 2225), announces the rule as follows: "A suit which is actually void and null from want of jurisdiction or other incurable defects is not one in which perjury can be committed. But if the proceedings are merely voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if such false evidence could by any contingency be introduced as testimony."

The trial of Martin by a jury composed of only six persons, upon the charge of criminal libel, if error, was merely erroneous, and would not render the entire proceedings null and void for want of jurisdiction. And hence, we think, so far as the issues involved in this case are concerned, it is wholly immaterial whether or not Martin was tried

by a jury of six persons or by a jury composed of twelve persons, as it is contended by the appellant. It would be a strange and novel doctrine to announce that perjury could not be predicated upon false testimony given in the course of a trial that was merely irregular, erroneous, or voidable, and which could not affect the jurisdiction of the court in which the trial was had, although such errors might have occurred on the trial as to constitute reversible error on appeal.

The next proposition for which counsel contend this case should be reversed is that the trial of Martin in the probate court for the offense of criminal libel was had upon a mere complaint of one other than the county attorney. The record does not sustain counsel in this contention. It appears from the testimony of Robert Lowry, who was a witness in this cause, that an information was filed in the probate court, instead of a complaint; that such information was filed by the county attorney; and that said information was prepared by Mr. Lowry in connection with the county attorney. The record, also, in the case of the territory against William G. Martin, *supra*, shows that the information was filed by the county attorney, A. T. Neal, based upon a positive affidavit sworn to by one Samuel Dial.

And, lastly, counsel for appellant insist that this cause should be reversed for the reason that the trial in the libel suit of Martin was presided over by a probate judge who was not a lawyer, nor ever licensed to practice law. The record discloses that the presiding judge was duly elected, qualified, and acting as probate judge of Payne county at the time the alleged false testimony was given by the appellant; that the presiding judge had served for more than two years as probate judge of said county, and had been re-elected and was serving his second term. It is true that the record shows that he was not a licensed lawyer, and did not possess the qualifications prescribed in section 2, c. 18, Sess. Laws 1895, which reads as follows: "Sec. 2. That in addition to other qualifications required of a probate judge, he shall be a licensed lawyer in good standing, shall be of the age of twenty-five years or over, and shall have practiced his profession for at least three years next preceding his election." But, notwithstanding the fact that the probate judge was not a licensed attorney at the time he was elected, there is no question that at the time said cause was tried in the probate court he was a *de facto* probate judge of said county, and had full power and authority to try said cause and administer oaths to witnesses. The acts of a *de facto* officer are as valid and effective, when they concern the public or rights of third persons, as though they were officers *de jure*. Where an office exists under the law, and a person is elected to fill such office, and duly qualifies and enters upon the discharge of his official duties, he is a *de*

facto officer, and his acts are valid, notwithstanding the fact that he may not possess all the requisite qualifications as prescribed by the statute to fill such office. In *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314, the supreme court of the United States, in discussing this subject, said: "An officer de facto is not a mere usurper, nor yet within the sanction of law, but one who colore officii claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Wilcox v. Smith*, 5 Wend. 231; *Gilliam v. Reddick*, 4 Ired. 368; *Brown v. Lunt*, 37 Me. 423. Judicial as well as ministerial officers may be in this position. *Freem. Judgm.* § 148. The acts of such officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and lasting evils." In *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, Mr. Justice Field, in delivering the opinion of the court upon this subject, said: "Where an office exists under the law, it matters not how the appointment of the incumbent was made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice Manning, of the supreme court of Michigan, in *Carleton v. People*, 10 Mich. 259: 'Where there is no office there can be no officer de facto, for the reason that there can be none de jure. The county offices existed, by virtue of the constitution, the moment the new county was organized. No act of legislation was necessary for that purpose. And all that is required, when there is an office, to make an officer de facto, is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer de jure. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact. * * *' In a very recent case, Mr. Chief Justice Fuller, in discussing this subject in *Ex parte Ward*, 173 U. S. 452, 19 Sup. Ct. 459, 43 L. Ed. 765, announced the following rule: "Where a court has jurisdiction of an offense and of the accused, and the proceedings are otherwise regular, a conviction is lawful, although the judge holding the court may be only an officer de facto; and the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus." The learned judge also declared in this case that "the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." Conceding that the probate judge who tried Martin for criminal libel and administered

the oath to the appellant when the alleged false testimony was given, and upon which the perjury is assigned, was only a de facto officer, his acts while exercising the duties and functions of a probate court were valid; and his acts could only be attacked in a direct proceeding, and not in a collateral manner, as attempted in this case.

We have examined the record, and can perceive no error committed in the trial of this cause which could in any manner affect the substantial rights of the plaintiff in error. The judgment of the district court is therefore affirmed. All the justices concurring, except BURFORD, C. J., who presided in the court below, not sitting.

(10 Okl. 714)

MAAS v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 8, 1901.)

CRIMINAL LAW—INSANITY—BURDEN OF PROOF—ARREST OF JUDGMENT.

1. Where one is being tried for murder, and his defense is insanity, lunacy, or unsoundness of mind at the time of committing the act, the defendant, in the first instance, is presumed to be sane and of sound mind, and the burden is upon him to introduce sufficient evidence to raise a reasonable doubt of his sanity. When he has done this, the territory, before a conviction can be had, is required to prove his sanity beyond a reasonable doubt.

2. Under section 1852, St. 1893, one who has sufficient mental capacity to know the wrongfulness of an act which is by law declared to be a crime is responsible, and subject to punishment therefor.

3. Section 5373, St. 1893, only requires the trial court to impanel a jury to inquire into the sanity of a defendant, who is brought before it for judgment and sentence, when the trial judge entertains a reasonable doubt of the defendant's sanity; and where the trial court overrules the motion in arrest of judgment, which is based upon the condition of the defendant's mind, and sentences him, its finding as to such matters is entitled to the same weight and credit as a verdict against the defendant by a jury, and such finding will be disturbed on appeal only when it clearly appears on the face of the record that the proofs offered on the hearing of such motion were such as to raise a reasonable doubt of the defendant's sanity.

(Syllabus by the Court.)

Appeal from district court, Blaine county; before Justice John L. McAtee.

Conrad Maas was convicted of murder, and appeals. Affirmed.

R. B. Forrest, C. A. McBrian, and I. H. Lookabaugh, for appellant. J. C. Strang, Atty. Gen., for the Territory.

BURWELL, J. The appellant was tried and convicted of the crime of murder, in the district court of Blaine county, and sentenced to life imprisonment at hard labor. From this sentence he appealed to this court, and contends that the trial court erred in two of its instructions to the jury upon the defense of insanity, and these instructions we will now consider:

"Instruction 28. In this case it is claimed

for the defendant that, at the time of the commission of the act, his mind and judgment were affected by an insane delusion, or by insanity, and to such an extent as to render him of unsound mind, and not responsible for his acts.

"Instruction 29. In reference to this point, you are instructed that although you may believe from the evidence that the defendant, at the time of the killing of his wife, Martha Maas, was affected by an insanity, or was laboring under an insane delusion, yet this would not exempt him from liability for his acts, if the jury believe from the evidence, beyond a reasonable doubt, that he intentionally fired the shot or shots which killed the deceased, and that he knew and was conscious at the time that what he was doing was wrong, and punishable by the law of this territory."

To the giving of each of these instructions the defendant saved an exception. If these two instructions stood alone, unaided by any other, it might be said that they were insufficient to present fully the question of insanity; but when considered in connection with the other instructions requested by the defendant, and given, they are a correct statement of the law.

Instruction 28 is merely a statement of the defendant's contention, and instruction 29 states the rule of law applicable thereto. Before discussing the general rules of law regarding insane persons, we will notice the express provisions of our own statutes. Section 5372, St. 1893, provides: "An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment or punished for a public offense while he is insane." Section 1852, St. 1893: "All persons are capable of committing crimes except those belonging to the following classes: * * * Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that, at the time of committing the act charged against them, they were incapable of knowing its wrongfulness."

Now, it is contended by the appellant's counsel that the statute recognizes two classes: (1) That one who is a lunatic or insane cannot, under any circumstances, be punished for an act done by him; and (2) that one of unsound mind, including persons temporarily or partially deprived of reason, cannot be punished for a criminal act upon proof that at the time of committing the act charged against him he was incapable of knowing its wrongfulness. This position is incorrect. We think that the language, "upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness," modifies "lunatics" and "insane persons," as well as "persons of unsound mind" and "persons temporarily or partially deprived of reason." In other words, the language, "upon proof that

at the time of committing the act charged against them they were incapable of knowing its wrongfulness," modifies all of subdivision 4 of section 1852 which precedes it; and an insane person or a lunatic, before he can be excused from the consequences of an act which is declared to be a crime, on the ground of insanity or lunacy, must introduce his proof to show that, at the time of the commission of the act charged, he did not, by reason of his insanity or lunacy, have sufficient understanding to know that the act was wrong. Under this section of the statute, the test of responsibility is fixed at the point where one has the mental capacity to know that the act is wrong, and if one has sufficient mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act, he is responsible for the same; and it is immaterial what standard scientific men may fix, or by what rules the medical profession determines that one is a lunatic or insane, he is in law insane or a lunatic, or of unsound mind, or temporarily or partially deprived of reason, to such an extent as will excuse him from punishment, only when he has not the capacity to know the wrongfulness of the particular act, but the knowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same. But no matter what the condition of a defendant's mind at the time of committing an act which the statute declares to be criminal, he can only be excused, where his defense is lunacy, insanity, or unsoundness of mind, upon proof that he was incapable of knowing its wrongfulness, and the duty of establishing this proof is upon the defendant. But to what extent? Upon this point the authorities differ. Two states, New Jersey and Delaware, follow the rule that the defendant must prove his insanity beyond a reasonable doubt before he can be acquitted. But perhaps two-thirds of the states follow the rule that the defendant must prove his insanity by a preponderance of the evidence. Among the states following this rule are Alabama, Arkansas, California, Connecticut, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Nevada, and this is the rule in England. One of the best-considered cases which follows this rule is *State v. Lewis* (Nev.) 22 Pac. 241, written by Chief Justice Hawley. This opinion is clear and logical, and shows great research and a thorough understanding of the subject. But with the development of criminal law, and the advancement of civilization, the rules which once governed the defense of insanity are being relaxed so as to give defendants the fullest opportunity to present the truth to the court and jury, that full justice may be done; and, while it is

true that this defense is sometimes successfully manufactured and imposed upon courts and juries, the adjudicated cases show no greater abuse of this defense than of the defense of alibi or self-defense. The defense of insanity, when successfully made, appeals to the tenderest sentiments and mercies of the jury, but when feigned and detected it invites their utmost contempt; and, while juries are always ready to deal kindly with one who is so unfortunate as to be dethroned of his reason to such an extent that he cannot distinguish between right and wrong, they are also, as a rule, quick to punish a guilty defendant who tries to escape the consequences of his act through fraud and deceit. Therefore, viewing this defense from every standpoint, we see no good reason why the defense of insanity should be singled out and governed by rules as to burden of proof different from those applicable to other cases, and we feel constrained to enunciate the rule as to the burden of proof, where the defense is insanity, to be this: Every person is presumed to be sane, or of sound mind, and able to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act; and the burden is upon the defendant in the first instance to overcome this presumption by introducing sufficient evidence to raise a reasonable doubt as to his sanity. When this is done, then the state must prove the defendant's sanity beyond a reasonable doubt, in order to secure a conviction; and if, taking the evidence all together, the jury entertain a reasonable doubt as to the defendant's sanity, he should be acquitted. As has been well said by some of our ablest jurists, to doubt the defendant's sanity is to doubt his intent, and where one has not capacity to form an intent there can be no crime. Hence the above rule, which is now the settled law of the following states: Illinois, Indiana, Kansas, Michigan, Mississippi, New Hampshire, New York, and Nebraska. Some of the authorities go to the extent of holding that the defendant is not required to introduce sufficient evidence to raise a reasonable doubt of his sanity, but, if he introduces any evidence tending to prove insanity in the slightest degree, that the state must then prove his sanity beyond a reasonable doubt. This rule is manifestly unjust to the state. A defendant is presumed to be sane, and this presumption continues until a reasonable doubt of his sanity is raised by competent evidence, and, under our statutes, the burden of raising this doubt is placed upon the defendant. Section 5227, St. 1893, provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter,

or that the defendant was justifiable or excusable." This statute was originally adopted in California, and has been repeatedly construed by the supreme court of that state. The early cases laid down the rule that in all trials for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation, or that justify or excuse the killing, devolves upon the defendant, and that such mitigation, justification, or excuse must be proved by a preponderance of evidence; but the later cases have repudiated this doctrine, and now hold that this section of the statute simply casts upon the defendant the burden of introducing sufficient evidence to raise a reasonable doubt of his guilt of murder (*People v. Ah Gee Yung* [Cal.] 24 Pac. 860; *People v. Bushton* [Cal.] 22 Pac. 127); and this is the construction which we adopt. If the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable, no evidence need be introduced by him; but, if the proof of the territory does not tend to show justification, excuse, or mitigation, then the burden is on the defendant to introduce sufficient evidence to raise a reasonable doubt as to his guilt of murder. Therefore, under our statute, a defendant is required to do more than introduce some evidence tending to prove his insanity. He must introduce sufficient evidence to raise a reasonable doubt of his sanity before the prosecution is required to introduce any evidence upon that subject. There was no error in the instructions complained of, and the instructions on the question of insanity, when considered all together, state the law fully and very liberally for the defendant.

Only one other question is raised by the defendant, and that is: Did the trial court err in overruling defendant's motion in arrest of judgment? After the defendant committed the crime for which he was convicted, and while he was confined in the county jail of Blaine county awaiting trial, he was adjudged insane by the county board of insanity, by a vote of two to one, the probate judge finding that the defendant was sane. On the hearing of the motion in arrest of judgment, the defendant's attorneys introduced in evidence this order of the county board of insanity adjudging the defendant insane. To rebut the inference that might arise from this order, the territory filed certain affidavits from persons who had seen the defendant, and, among others, the affidavit of the deputy sheriff, who talked with him frequently while he was confined in jail. The court, after considering all of the evidence, overruled the motion in arrest of judgment, and the defendant excepted. Section 5373, St. 1893, provides: "When an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arise as to the sanity of

the defendant, the court must order a jury to be impaneled from the jurors, summoned and returned for the term, or who may be summoned by direction of the court, to enquire into the facts." Under this section, when an indictment is called for trial, or, upon conviction, the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant the court must order a jury to be impaneled to inquire into the facts, but the judge must necessarily determine for himself as to whether or not he entertains a doubt of the defendant's sanity. He has an opportunity to see the defendant, and, in this case, the judge had presided over his trial just prior to the time the motion was presented, and the judge's facilities for forming an opinion as to the defendant's mental condition were most excellent. An appellate court is authorized to say that the trial court erred in a matter of this kind only when it affirmatively appears from the face of the record that the evidence before the trial court was of such a character as to clearly raise a doubt of the defendant's sanity in the mind of the trial judge. A finding determining this question against the defendant is entitled to the same faith and credit as a finding of a jury against a defendant in the trial of a case. The finding of the county board of insanity was not the finding of a court, and, strictly speaking, was not proper evidence, as the only effect of such a finding is to admit one to the territorial asylum for treatment. So far as the issue on the motion in the trial court was concerned, it amounted to no more than the expression of an opinion by any other person out of court, and was therefore incompetent as evidence. *Maass v. Phillips* (Okl.) 61 Pac. 1057; *Dewey v. Allgre*, 37 Neb. 6, 55 N. W. 276; *Leggate v. Clark*, 11 Mass. 308; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934. An adjudication to fix one's legal status must be by the probate judge under an entirely different provision of the statute, and a county board of insanity has nothing whatever to do with such adjudication. *Maas v. Phillips*, supra. The trial court was justified, under the showing, in overruling the motion in arrest of judgment. The case should be affirmed, and the judgment of the trial court carried into execution. It is so ordered. All of the justices concurring, except McATEE, J., who presided at the trial below, not sitting.

(10 Okl. 660)

Ex parte CURTIS.

(Supreme Court of Oklahoma. Feb. 8, 1901.)

CONTEMPT—PUNISHMENT.

A judgment or order of the court that the defendant be committed to the county jail until he obeys said order, and until the further order of the court or judge thereof, upon a conviction for contempt in refusing to obey an order of the court requiring him to pay certain permanent alimony, is void for the reason

that the duration of sentence is indefinite and uncertain.

(Syllabus by the Court.)

Application of John Curtis for writ of habeas corpus. Writ granted.

Warren & Maurer, for petitioner.

HAINER, J. This is an original proceeding in this court for a writ of habeas corpus. It appears from the petition and the return of the sheriff that on the 21st day of March, 1900, in a certain action then pending for divorce in the district court of Canadian county, wherein one J. Maude Curtis was plaintiff and the said petitioner, John Curtis, was defendant, upon due notice to said defendant, John Curtis, an order was made by said court, and entered of record, commanding the said defendant to pay to the clerk of said court the sum of \$15 on or before the 25th day of March, 1900, as permanent alimony for the support and maintenance of one Andy Curtis, the infant child of said J. Maude Curtis, and also the sum of \$15 on the 25th day of each and every month thereafter, and also the sum of \$25 on or before the 1st day of April, 1900, as reasonable attorney's fees for the plaintiff's attorneys. It further appears that afterwards, to wit, on the 11th day of June, 1900, the plaintiff, by her attorney, filed her information in said court showing that the said defendant, John Curtis, although able to comply with said order, had refused to do so; and that thereafter, to wit, on the 19th day of June, 1900, a hearing was had before said district court of Canadian county, Oklahoma territory, on said matter, and, after hearing said matter, the court, being fully advised in the premises, ordered that the said John Curtis be committed to the county jail of said Canadian county "until he obeyed said order, and until the further order of the court or judge thereof." The petitioner sets up four grounds upon which he seeks to be discharged by this court. We think it is only necessary to consider one of them, and that is the fourth ground, which is as follows: "Because the order of commitment does not allow the defendant to be released upon complying with the order of the court, but must await the further order of the court, and depends upon the court, or judge thereof, when the defendant may be released, because the term of imprisonment is thus made dependent upon the further order of the judge or court, and is indefinite." It will thus be seen that the order of commitment provides that the petitioner herein shall be confined in the county jail of Canadian county, Oklahoma territory, "until he obeys said order, and until the further order of the court or judge thereof"; and hence this proceeding comes clearly within the rule laid down by this court in *Taylor v. Newblock*, 5 Okl. 647, 49 Pac. 1114, where it was held that: "A judgment or order of court that a defendant stand committed to the county jail until the further order of the court for a contempt in refusing to obey a previous order

requiring him to surrender certain promissory notes, adjudged to be the property of another, is illegal and void for uncertainty as to the duration of punishment, and will not justify the imprisonment." We therefore hold that the order of commitment of the court that the defendant be confined in the county jail until he obeys said order, and until the further order of the court or judge thereof, upon a conviction for contempt in refusing to obey an order of the court requiring him to pay certain permanent alimony, is void, for the reason that the duration of sentence is indefinite and uncertain. Whether the court or judge thereof has the power to commit a person for failure to comply with the final judgment or order of the court in awarding permanent alimony is a question that has not been briefed or discussed by counsel, and we therefore express no opinion thereon. The writ of habeas corpus is therefore awarded, and the petitioner is discharged. All the justices concurring, except IRWIN, J., who presided in the court below, not sitting.

(10 Okl. 724)

**CHICAGO BLDG. & MFG. CO. v. PEW-
THERS.**

(Supreme Court of Oklahoma. Feb. 8, 1901.)
CHANGE OF VENUE—JUSTICE'S COURT—JURISDICTION—WAIVER.

1. A change of venue will not lie from a justice of the peace to a probate court, or from a probate court to a justice of the peace, in a civil action, even though the amount involved is within the jurisdiction of a justice of the peace.

2. Where a court has no jurisdiction over the particular cause or of the person of the defendant, and the defendant appears specially for the purpose of calling the attention of the court to such irregularities, and the court thereupon overrules his motion to such jurisdiction, he may save his exception, file his answer, and proceed to trial without waiving such error; and he may take advantage of such error on appeal to a higher court.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Chief Justice John H. Burford.

Action by the Chicago Building & Manufacturing Company against J. Pewthers. A judgment for plaintiff was reversed in the district court, and plaintiff appeals. Affirmed.

Uhl & Miller, for appellant. Robert A. Lowry, for appellee.

BURWELL, J. This action was commenced by the plaintiff in error before George P. Uhl, a justice of the peace in the town of Stillwater, in Payne county. Service of summons was had upon defendant, who appeared generally and filed an affidavit for change of venue on account of the bias and prejudice of the justice. The application was sustained, and thereupon the case was transferred to the probate court of Payne county. The defendant appeared before the probate court and filed a motion to dismiss the case for the

reason that the court had no jurisdiction of the cause, and for the further reason that a change of venue would not lie from a justice of the peace to a probate court. The probate court overruled this motion, and thereupon defendant saved his exception, answered, and proceeded to trial, but insisted all through that the court had no jurisdiction to try the case. Judgment, however, was rendered in favor of the defendant, from which plaintiff appealed to the district court, where, under the law, he was entitled to a trial de novo. When the case was called for trial in the district court the defendant again raised the question of the jurisdiction of the probate court to try said cause on a change of venue from a justice of the peace, and thereupon the district court dismissed the action without prejudice, and taxed the costs to the plaintiff. Plaintiff appealed to this court.

The first question which we will consider is, will a change of venue lie from a justice of the peace to a probate court, or from a probate court to a justice of the peace, in civil cases, wherein the amount involved is within the jurisdiction of a justice of the peace? We think not. The only provision of the statutes authorizing a change of venue from a justice of the peace is found in article 7 of Justices' Civil Procedure (St. 1893, § 4717): "If, on the return of process, or at any time before trial shall have been commenced, either party shall file with the justice of the peace before whom any cause is instituted or is pending for trial, an affidavit, stating: First, that such justice is a material witness," etc. (stating all of the grounds for a change of venue), "the trial of the case shall be changed to some other justice of the peace, as provided in the next section." Section 4718: "If the place of the trial be changed on account of the bias or prejudice of the justice, or of his being a material witness in the cause, such cause shall be transferred for trial before some other justice of the peace of the same township, if there be one there legally competent to try such cause; if there be no such justice within such township, or if such change be granted on account of the bias or prejudice of the citizens of such township against such party, the case shall be taken to some justice in an adjoining township of the same county." From these two sections it will be seen that a change of venue can only be had from one justice of the peace to another justice, and not from a justice of the peace to a probate court. But it is insisted by the appellant that a probate judge, when trying causes within the jurisdiction of a justice of the peace, is, under article 15, p. 364 of the Statutes of 1893 (act extending jurisdiction of probate courts), an ex officio justice of the peace. This contention is incorrect. A probate judge or probate court never acts as an ex officio justice of the peace, but is at all times a probate judge or a probate court; but, as a probate court, under our law, it has also the "ordinary pow-

ers and jurisdiction of justices of the peace." *Decker v. Cahill* (Okla.; not officially reported) 61 Pac. 1101. At common law a change of venue would only lie to another court of equal jurisdiction, and not to one of a lower or higher jurisdiction; and this is still the rule, except where the statute expressly provides differently. But, notwithstanding the want of power to grant a change of venue to the probate court, the justice made out his transcript and certified the papers over to it, and both parties appeared in that forum. The defendant, however, only entered a special appearance in that court, and moved, to dismiss the action because a change of venue would not lie to that tribunal, and contended that the probate court had acquired no jurisdiction of the cause. It is clear that the probate court could not try the cause by virtue of the change of venue, and when the defendant raised the question of the jurisdiction of that court it was its duty to proceed no further, but to return the papers to the justice from whom they came, not because the probate court did not have jurisdiction of the subject of the action, but because it could not acquire jurisdiction of the particular cause, or of the person of the defendant, in that manner; and, while the motion of the defendant was in form a motion to dismiss, it should have been treated by the court simply as a motion questioning the jurisdiction of the court. But the motion was overruled, and exception saved, whereupon the defendant entered upon the trial; and plaintiff insists that by doing this he waived any error that the court may have made in overruling his motion to the jurisdiction of the court, and that the defendant, by entering upon the trial, voluntarily appeared, and the trial in the probate court amounted to a voluntary appearance and trial in that court, and that the probate court had jurisdiction of both the persons to the action and the subject-matter. With this contention we cannot agree. It is true that the probate court had jurisdiction of the subject of the action; that is, the matter in controversy was such a cause as could be tried in that court if commenced in the proper manner. But the court did not have jurisdiction over that particular cause, or of the person of the defendant. The justice before whom the action was commenced acquired jurisdiction over that particular case, and it was impossible for him, or the parties, or all of them, to transfer that jurisdiction to any one except another justice, unless an appeal was taken to the district court. Jurisdiction of courts of limited powers is conferred, not by consent of parties, but by express statutory law, and there is no provision of our statutes by which a case can be transferred from a justice of the peace to a probate court.

It may be that if the defendant had appeared voluntarily in the probate court, and tried his case there, he would be bound by

the judgment rendered in that or any appellate court, and that the voluntary trial by the parties in that tribunal, which had jurisdiction of the subject of the action, would amount to an original trial commenced therein; but upon this we will not here express any opinion, as that is not this case. There was no voluntary general appearance by the defendant. His appearance was special, and was for a special purpose, and when the court overruled his motion he had a right to do one of two things: He could save his exception and stand upon his motion, and refuse to appear further in the case, or he could answer and go to trial; and his going to trial, under such circumstances, would not waive any rights under his motion. It is, perhaps, true that the general rule, followed by most of the states, is that one, by pleading to the merits or participating in the trial of a cause after a motion, under special appearance, to the jurisdiction of the court over the person or of the particular cause has been overruled, waives such jurisdictional questions, although the motion should have been sustained; but that is not the better rule. Our procedure was taken from Kansas, and the supreme court of that state has held that want of jurisdiction of the person is not waived by pleading to the merits and going to trial after a motion to quash a summons or service of a summons filed under a special appearance is overruled. *Bentz v. Eubanks* (Kan. Sup.) 4 Pac. 269; *Dickerson v. Railroad Co.* (Kan. Sup.) 23 Pac. 936. And the supreme court of the United States, as well as other courts whose opinions are entitled to great weight, have rigidly followed this practice. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 38 L. Ed. 377; *Railway Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Secrest v. Arnett*, 5 Blackf. 366; *Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; *Mullen v. Canal Co.* (N. C.) 19 S. E. 106; *Kinkade v. Myers* (Or.) 21 Pac. 557; *Woodbury v. Henningsen* (Wash.) 39 Pac. 243.

Under these authorities and sound reason, we hold that the probate court, by assuming jurisdiction of the case and of the person of the defendant, committed error, and that such error was not waived by the defendant's going to trial upon the merits, and that the defendant was entitled to have the error corrected in this case in the district court. Viewing this case as we do, it necessarily follows that the probate court ought not to have docketed the same, and that the order of dismissal without prejudice made by the district court was correct, and should be affirmed at the costs of appellant. It is so ordered, and the district court of Payne county is hereby directed to return all of the papers certified to that court by the probate court of said county, with directions to that court to return the original papers received from the

justice's court to said justice. All of the justices concurring, except BURFORD, C. J., who tried the cause below, not sitting.

(10 Okl. 730)

CHICAGO BLDG. & MFG. CO. v. KIRBY.
(Supreme Court of Oklahoma. Feb. 8, 1901.)
CHANGE OF VENUE—JUSTICE'S COURT—JURISDICTION—WAIVER.

1. A change of venue will not lie from a justice of the peace to a probate court, or from a probate court to a justice of the peace, in a civil action, even though the amount involved is within the jurisdiction of a justice of the peace.

2. Where a court has no jurisdiction over the particular cause or of the person of the defendant, and the defendant appears specially for the purpose of calling the attention of the court to such irregularities, and the court thereupon overrules his motion to such jurisdiction, he may save his exception, file his answer, and proceed to trial without waiving such error; and he may take advantage of such error on appeal to a higher court.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Chief Justice John H. Burford.

Action by the Chicago Building & Manufacturing Company against F. P. Kirby. A judgment for plaintiff was reversed in the district court, and plaintiff appeals. Affirmed.

Uhl & Miller, for appellant. Robert A. Lowry, for appellee.

BURWELL, J. The facts in this case are identical with those in the case of Manufacturing Co. v. Pewthers, 63 Pac. 964. That case was commenced before the same justice, and change of venue taken to the same probate court. The judgments in the probate and district courts are the same in both cases, and the appeal taken in the same manner. And for the reasons stated in that case the judgment of the district court of Payne county in this case is hereby affirmed at the costs of the appellant. It is so ordered, and the district court of Payne county is hereby directed to return all of the papers certified to that court by the probate court of said county, with directions to that court to return the original papers from the justice's court to said justice. All of the justices concurring, except BURFORD, C. J., who tried the cause below, not sitting.

(10 Okl. 732)

LIGHT v. CONOVER.

(Supreme Court of Oklahoma. Jan., 1901.)

INDIANS—LEASE—VALIDITY.

A written or parol lease entered into between the plaintiff and the defendants, without the consent and approval of the Indian agent and the commissioner of Indian affairs, for the pasturage of cattle located upon the Kiowa, Comanche, and Apache Indian reservations, is null and void, and therefore no action can be maintained thereon.

Burford, C. J., dissenting.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John C. Tarsney.

Action by George W. Conover against John W. Light and another. Judgment for plaintiff, and defendant Light appeals. Reversed.

This was an action brought by the plaintiff, George W. Conover, against the defendants Martin and Light to recover the sum of \$595, for rent which the plaintiff claimed was due for the use of a certain pasture located in the Kiowa and Comanche reservations. The petition alleges, in substance: That for more than 20 years last past the plaintiff was a member of the Comanche tribe of Indians located in the Kiowa, Comanche, and Apache reservations in said territory, and that in the year 1886 the Comanche tribe of Indians authorized the plaintiff to inclose a certain tract of land as a pasture, and that under the said agreement the plaintiff inclosed a large tract of land with a fence, and took possession thereof, and has since occupied the same. That said agreement was never canceled or revoked by said tribe of Indians. That on July 11th, 1892, the plaintiff entered into a written lease with Martin and Light, by the terms of which lease the plaintiff rented to the defendants a portion of the above-named pasture upon the following terms and conditions, to wit: "The said Martin and Light agree to pay as rent the first year \$2,000, and for every other year the sum of \$2,600, and said G. W. Conover is to continue the said Martin and Light in possession of said land as long as he can do so. The said rent is to be paid, the first quarter's rent, \$500, this day paid; second quarter, \$500, in six months; the third quarter in nine months; the fourth quarter in twelve months; and the others three months thereafter in quarterly payments so long as the said G. W. Conover shall keep said Martin and Light in possession of the said land." That on the 1st day of April, 1895, the plaintiff entered into a written lease with the Kiowa, Comanche, and Apache Indians for said lands for a term of one year ending on March 31, 1896, and said lease was approved by the commissioner of Indian affairs, and remained in full force and effect until the 31st of March, 1896. That the defendants remained in possession of said land until the 31st of March, 1896, with the knowledge, consent, and approval of the agent of said Kiowa and Comanche reservations and the commissioner of Indian affairs, but failed and refused to pay any rent after the 10th day of January. The defendant John W. Light filed an answer, in which he admitted the execution of the leases pleaded by the plaintiff, but averred, in substance, that the written lease entered into between the plaintiff and the defendants on July 11, 1892, and the subsequent parol agreements entered into between the plaintiff and the defendants, whereby the defendants used the said pasture for grazing purposes, was unauthorized, and therefore illegal and void, for the reason that said lease and the subsequent parol agreements were

made and entered into without the knowledge, consent, or approval of the Indian agent in charge of the Kiowa and Comanche Indians, and also without the approval of the commissioner of Indian affairs. It was further alleged in said answer that the plaintiff had no power or authority to sublease said lands, or any portion of them, to the defendants, or to any one else, without the consent and approval of the Indian agent or commissioner of Indian affairs. It was further alleged that the said plaintiff neglected to report the lease entered into between the said plaintiff and the defendants to the Indian agent, and for the purpose of deceiving the said Indian agent in the premises concealed from said agent the fact that said plaintiff executed said lease to the defendants, and at all times denied to said agent that said lease existed, and denied to said agent that the said defendants were using said land for grazing purposes by the consent of the plaintiff. It was also alleged in the answer that the Indian agent had no knowledge of said lease between the plaintiff and the defendants until some time in February, 1896, when he ordered said defendants to vacate said pastures. To this answer the plaintiff filed a reply consisting of a general denial. The issues being thus joined, the cause was tried by a jury, and a verdict rendered in favor of the plaintiff for \$138. Thereupon the defendant filed a motion for a new trial, which was overruled, and exception reserved, and judgment rendered upon the verdict of the jury in favor of the plaintiff and against the defendant John W. Light. It appears that the defendant Martin was never served with a summons, and did not appear in the action. From this judgment the defendant Light appeals.

C. M. Fechheimer, Blake & Blake, and W. T. Beeks, for plaintiff in error. Charles H. Carswell, for defendant in error.

HAINER, J. (after stating the facts). A number of errors are assigned and discussed by the plaintiff in error, but we think it is only necessary to consider one of them, which is decisive of this case, and that is the validity of the written lease entered into between Conover and Martin and Light on July 11, 1892, and the subsequent parol agreement which the plaintiff claims was entered into with the defendants, and upon which he recovered judgment. The lease entered into between the plaintiff and the defendants on July 11, 1892, was made without the consent and approval of the Indian agent or the commissioner of Indian affairs, and was, therefore, absolutely void. It appears from the record that the plaintiff did not obtain a lease from the Indian agent until April, 1895, which was for a period of only one year, beginning on the 1st of April, 1895, and terminating on March 31, 1896. It also appears that this lease was approved by the commissioner of Indian affairs, and was no doubt a valid lease, but under the

conditions of this lease Conover had no power or authority to enter into a contract to lease or sublease any of said lands, or any portion thereof, to the defendants, or any other person, without the consent and approval of the Indian agent or the commissioner of Indian affairs. The written lease between Conover and Martin and Light being absolutely void, any subsequent parol agreement entered into between them without the consent and approval of the Indian agent or the commissioner of Indian affairs must, necessarily, be absolutely void. The court, in its instructions to the jury, assumed that the contract between Conover and Martin and Light was valid, and also that the parol agreement between the plaintiff and defendants was legal, and, in effect, instructed the jury that the burden of proof was upon the defendants to show that the lease was made without the consent and approval of the Indian agent or the commissioner of Indian affairs. This was clearly erroneous. The burden of proof was upon the plaintiff in this action to show that he had a valid lease, and, in order to establish a valid lease it was necessary for him to prove by a preponderance of the evidence that it was made with the consent and approval of the Indian agent and the commissioner of Indian affairs. It is true, the plaintiff in his petition alleged that said lease between the plaintiff and the defendants was made with the consent and approval of the Indian agent, and also with the consent and approval of the commissioner of Indian affairs. But the evidence absolutely fails to establish that fact, and we therefore think that the court erred in overruling the demurrer of the defendants to the evidence for the reason that the plaintiff had wholly failed to prove a cause of action against the defendants, or either of them. On the other hand, the evidence offered on behalf of the defendants conclusively proved that the plaintiff never had the consent and approval of either the Indian agent or the commissioner of Indian affairs to lease or sublease any of said lands to Martin and Light, or any other person or persons. Section 2116 of the Revised Statutes of the United States provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars. The agent of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, pro-

pose to, and adjust with, the Indians the compensation to be made for their claim to lands within such state which shall be extinguished by treaty." We think it is clear that the written lease entered into between the plaintiff and the defendants in July, 1892, as well as the subsequent parol agreement, were entered into in direct violation of the act of congress above referred to, and were contrary to the well-settled policy of the government in relation to the management, control, and supervision of the Indians and their lands. And the law seems to be well established that no action can be maintained on a contract that is in violation of a positive statute, or is based upon an illegal or immoral act. *Gärst v. Love*, 6 Okl. 46, 55 Pac. 19; *Kelly v. Courter*, 1 Okl. 277, 30 Pac. 372; *Ewell v. Daggs*, 108 U. S. 146, 2 Sup. Ct. 408, 27 L. Ed. 682; *Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508; *Coppell v. Hall*, 7 Wall. 558, 19 L. Ed. 244. It has been held that one who enters with cattle or other live stock upon the Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry with the consent of the tribe. 18 Op. Attys. Gen. U. S. 235-486.

But it is contended by the defendant in error that the defendants were tenants of the plaintiff, and used and occupied the land, and therefore they are estopped from denying the plaintiff's title, or to question the legality of the lease. We think not. The written lease, as well as the parol agreement, were not only contrary to public policy, but were entered into in violation of a positive statute, and hence the doctrine of estoppel does not apply. In *Dupas v. Wassell*, 1 Dill. 213, Fed. Cas. No. 4,182, it was held that a lease of land upon which the Hot Springs were situated, being in violation of an act of congress, was absolutely void, and that the ground rent for the use of the lands could not be recovered; and it was further held that the lessee was not estopped from setting up the illegality. In *Mayer v. Association* (Kan. Sup.) 51 Pac. 215, which was an action to recover upon a contract to lease for a period of five years a large body of land, constituting what was formerly known as the Cherokee Strip or Outlet, and which was entered into between the Cherokee Nation and the association, but without the consent and approval of the government, or any of its duly authorized agents, it was held by the supreme court of Kansas to be in violation of section 2116 of the Revised Statutes of the United States, and was, therefore, void, and that no action could be maintained thereon. Mr. Justice Johnston, in the course of the opinion, said: "It is clear that the contract of lease between the plaintiff and the defendant conflicted with the government policy, and was a direct violation of a positive statute. It was, therefore, illegal, and the courts generally hold that no action can be maintained

on a contract forbidden by law. "The policy of the law is to leave the parties in all such cases without remedy against each other. The courts will not lend their aid to a party who founds his action upon an immoral or illegal act. If, from the plaintiff's own statement or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of the state, there the court says he has no right to be assisted." *Gerlach v. Skinner*, 32 Kan. 86, 8 Pac. 257; *Korman v. Henry*, 32 Kan. 49, 343, 3 Pac. 764, 4 Pac. 262; *Winnen v. Newman*, 35 Kan. 709, 12 Pac. 144; *Flersheim v. Cary*, 39 Kan. 178, 17 Pac. 825; *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207; *Melchoir v. McCarty*, 31 Wis. 252; *Downing v. Ringer*, 7 Mo. 585; *Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co.* (Mo. Sup.) 40 S. W. 107; *Gould v. Kendall* (Neb.) 19 N. W. 483; *Mackintosh v. Renton* (Wash. T.) 3 Pac. 830; *Whart. Cont.* § 340; 9 Am. & Eng. Enc. Law, 909. And, again, it was said by the same judge: "The contract in this case is to be distinguished from those which are merely void from want of compliance with some form, or which are lacking in other essentials. Here it was prohibited by statute, and, being unlawful, it does not fall within the class of contracts which are void because of the infancy of one of the parties, or because of the statute of frauds. In cases like this the courts will not lend their aid to the parties either to recover damages under the illegal contract, or the profits supposed to have been derived from the unlawful transaction by either party. The fact that the defendants co-operated in the transgression, and are equally implicated with the plaintiff, does not prevent them from setting up the defense of invalidity. There is no innocent party here in whose favor an exception can be made, as the prohibitory provision affected all alike. It is unlike the case of *Cattle Co. v. Thompson*, 57 Kan. 792, 48 Pac. 34, where Thompson was not a party to the illegal contract, and was permitted to recover, under the pleadings, upon a quantum meruit for services in connection with pasturage on some of these lands. The controversy arises here directly between the parties to the illegal contract, and the plaintiff seeks a recovery through and under that contract. The parties voluntarily entered into the contract, and they must be held to have had knowledge that in doing so they were violating the law." We approve of the doctrine announced by the supreme court of Kansas, and think that it is decisive of the case under consideration. We therefore hold that the written lease entered into between the plaintiff and the defendants on July 11, 1892, and the subsequent contract entered into with Martin and Light without the consent and approval of the Indian agent and the commissioner of Indian affairs, were absolutely void, and that no action can be maintained thereon. The judgment of the district court of Canadian county is therefore

reversed, and the cause remanded, with directions to dismiss the action. All the justices concurring, except BURFORD, C. J., dissenting.

(10 Okl. 424)

BOGGS v. UNITED STATES.¹

(Supreme Court of Oklahoma. Sept. 4, 1900.)

CRIMINAL LAW—INSTRUCTIONS—APPEAL—REVIEW.

1. Under the laws of this territory, the giving of oral instructions by the court to the jury, if objected to by the defendant, and when exceptions are saved thereto, is reversible error. But every communication between the court and the jury on the trial of the cause is not necessarily an instruction. Only when the statements of the court amount to a positive direction as to the law of the case will such statements be regarded as an instruction, within the meaning of the statute requiring the instructions of the court to the jury to be in writing.

2. Where a conviction is had upon the testimony of expert witnesses, if the jury have been properly instructed as to the law, on appeal this court will not invade the province of the jury, to determine the weight and credibility of the witnesses or the degree of credence to be given to their testimony. If upon an examination of the entire record this court is satisfied that there is evidence in the case which reasonably tends to sustain their findings, the verdict of the jury will not be disturbed.

3. On appeal this court will render judgment without regard to errors or defects which are purely technical, and will not consider exceptions which do not affect the substantial rights of the parties.

Hainer and McAtee, JJ., dissenting.

(Syllabus by the Court.)

Appeal from district court, Pottawatomie county; before Justice B. F. Burwell.

George G. Boggs was convicted of embezzling a registered letter, and appeals. Affirmed.

The defendant was tried at the March term, 1899, on an indictment containing seven counts, charging in as many different ways the same offense,—that he secreted, embezzled, or destroyed a package containing a registered letter that was being transmitted through the United States mails, and which had come into his possession in the regular course of his official duties as postmaster of Shawnee, Okl. T. To this indictment the defendant filed a motion to set aside, which was by the court overruled, and exception saved by the defendant; and afterwards defendant filed a demurrer to the indictment, which was by the court overruled, to which defendant excepted. Defendant then entered a plea of not guilty, and afterwards, to wit, on the 21st day of March, 1899, the said cause came on for trial. After hearing the evidence and the instructions of the court, as well as arguments of counsel, the jury retired to consider of their verdict, and afterwards, to wit, on the 25th day of March, 1899, the jury, not having agreed

upon a verdict, were by the order of court brought into court, all parties being present, and the following communication passed between the court and jury: "The Court: Gentlemen, have you agreed upon a verdict? A. by the Foreman: No, sir; we have not. The Court: Do not state how you stand, at all, but I want to ask you a few questions. What seems to be the trouble? Do you not understand the instructions, or is it a difference as to the facts and the evidence? A. Foreman: I am unable to say. The Court: What do you say,—the next juror? A. I think the difference is in regard to the evidence. The Court: Do all the rest of you agree that that is the trouble? A. Yes, sir. The Court: Well, is there a difference as to what the facts are, or as to what the evidence that was introduced establishes? A Juror: Yes, sir; as to what the evidence establishes. The Court: There does not seem to be any difference as to what the evidence really is? Answer. No, sir. The Court: But the difference is as to what it proves? (All answer in the affirmative.) The Court: What do you think the possibilities are for arriving at a verdict from further deliberations? By Juror: It seems like it was a pretty poor chance, to me. The Court: What do the rest of you gentlemen think? Answer. Jurors: We think it is almost impossible. The Court: Have you talked the evidence over and reasoned together? (All answer in the affirmative.) The Court: You have considered every phase of it that would enable you to arrive at a verdict? (All answer in the affirmative.) The Court: I hardly feel justified, gentlemen, in discharging you at this time. I think I will direct you to return to your room and consider the matter further. Of course, it is not the intention or desire of the court to keep you out to compel you to arrive at a verdict,—nothing of the kind. All the court wants, and all the law requires, is that you give this matter your honest, candid, careful consideration; and if you can arrive at a verdict honestly and conscientiously and correctly, as you view the evidence in the case, of course it is your duty to do it, but you should not sacrifice your own views, if you believe them to be correct, simply for the purpose of arriving at a verdict. That you ought not to do; but it is your duty to consider the evidence, talk it over, and arrive at a verdict if you can conscientiously. A Juror: I would like to ask if we would be allowed to bring in a verdict different from any of these forms that we have? The Court: If you desire to submit— Of course, I don't know what kind of a verdict you could possibly bring in, other than one of these that were submitted. There is just the one issue that is before you,—as to whether or not this defendant is guilty. That is the only question. If you will read the instructions as to this particular point— I think they are plain. If he concealed or

¹ Rehearing denied January 5, 1901.

secreted, embezzled, or destroyed,—if he did any one of these,—why, he is guilty, or, if he did all of these, he is guilty. There would be no difference in the crime at all. I cannot conceive of any other verdict that should be returned, except guilty or not guilty of some one of the offenses or that offense. Do you mean by a different verdict one that does not include all of the counts in the indictment? Juror: Yes, sir. The Court: You can return a verdict on any one of the counts, or on any number of them, or all of them. By a Juror: I will ask you a question. I do not know whether it will be right or not. There is some of these charges that this jury—none of us understand the penalty to. That seems to be the trouble. The Court: Gentlemen, in that connection the court will instruct you that you absolutely have nothing to do with the penalty that is attached to a crime. That you are not to determine. No matter how wise or unwise our legislators may have been, they took that out of your province, to say as to what punishment should be inflicted upon a party when found guilty. The issue that is submitted to you, and the only issue for you to determine, is as to whether or not he is guilty of this charge, and you have no right to take into consideration the punishment that might be inflicted. You are to try and to determine the truth of this charge, not as to how much he might be punished if he is found guilty." To all of the remarks of the court defendant excepted for the reason that the same were not in writing. The jury then retired, and afterwards on the same day the jury returned the following verdict: "We, the jury impaneled and sworn in the above-entitled cause, do, on our oaths, find the defendant, George G. Boggs, guilty of secreting letters containing inclosures, as charged in the third, fifth, sixth, and seventh counts of the indictment. G. F. Price, Foreman,"—which verdict was filed by the clerk and read in open court, to which defendant excepted. Defendant filed his motion for new trial in the statutory form, and within the statutory time, which motion was by the court overruled, to which defendant excepted. Defendant was then sentenced by the court to one year and one day imprisonment on each of said counts in the United States federal penitentiary at Ft. Leavenworth, in the state of Kansas, to which defendant excepts, assigns the same as error, and brings the case here for review.

J. H. Woods, R. E. Woods, and H. H. Howard, for plaintiff in error. John W. Scottborn, U. S. Atty., and B. S. McGuire and L. M. Keyes, Asst. U. S. Attys.

IRWIN, J. (after stating the facts). The first assignment of error that is urged by the plaintiff in error for a reversal of this case is that there was not sufficient evidence to

sustain the verdict of the jury in the court below, and as an argument in support of this counsel refer to the fact that the prosecution rely almost entirely upon the testimony of the expert, Prof. Tolman, on handwriting; and counsel give a very learned and eloquent dissertation on expert testimony and its general unreliability, which might, and probably would, have had great weight with the jury, as it was their province to weigh, examine, and determine the degree of credence and amount of belief to give to this testimony. We think an examination of the record will disclose that there were many circumstances developed by the evidence that, taken in connection with the testimony of the expert, may have materially aided the jury in arriving at their verdict. But, even conceding what is claimed by plaintiff in error, that the only testimony was that of the expert, Tolman, it was the peculiar province of the trial jury to weigh the evidence and determine its truth or falsity, and to decide what weight it shall have; and, in accordance with the rule so often announced by this court, "when the jury have been properly instructed as to the law, and the evidence reasonably tends to sustain their findings, this court will not invade the province of the jury, to weigh the evidence, and will not disturb the verdict."

The second assignment of error is that the court, while the jury were deliberating upon their verdict, after being instructed in writing as to the law of the case, and before a verdict was reached, called the jury into open court and gave them oral instructions without the consent of the defendant. Now, if this contention of plaintiff in error is sustained by the record, then there would be no doubt but, under the law of this territory, this would be reversible error. Hence, as to this assignment of error, this case turns entirely upon the question, were the remarks of the court to the jury an instruction, within the meaning of the statute, which requires all instructions to be in writing? This brings us to a consideration of the meaning of an instruction as defined by the courts and law writers. In the case of *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670, the Indiana supreme court defines an instruction to be "an exposition of the principles of law applicable to a case, or some branch or phase of a case, which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven." The same court, in the case of *Lawler v. McPheeters*, 73 Ind. 577, say: "Instructions proper are directions in reference to the law of the case." Bouvier, in his *Law Dictionary*, gives this definition of the word "charge," which in our law is synonymous with "instruction": "Charging a jury is stating the precise principles of law applicable to the case immediately in question." In the case of *McCallister v. Mount*, 73 Ind. 567, the court says: "The essential idea of

a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligation to obey." In *Bradway v. Waddell*, 95 Ind. 175, it is said: "A direction to the jury to reject evidence, as to the form of verdict, or the like, is not an instruction, within the meaning of the statute." In support of this the court there cite with approval *McCallister v. Mount*, 73 Ind. 567; *Lawler v. McPheeters*, 73 Ind. 577; *Stanley v. Sutherland*, 54 Ind. 339; *Trentman v. Wiley*, 85 Ind. 33. The distinguished and learned author of our splendid work on *Pleading and Practice*, after carefully compiling the most reliable definitions of the term "charge" or "instruction," and after a careful and painstaking investigation of the subject, as a general, careful, and accurate definition of the term uses the following clear, concise, and unmistakable language: "In conclusion it may be stated that nothing short of a positive direction as to the law applicable to the case will be construed an instruction, within the meaning of the statute." 11 Enc. Pl. & Prac. p. 259.

In this connection it may be well to consider some of the oral remarks by the court to the jury which the courts have held not to be an instruction, within the meaning of the statute requiring all instructions to be reduced to writing. The language of the Indiana statute in reference to written instructions is: "When the arguments of the cause are concluded the court should give general instructions to the jury which shall be in writing and be numbered and signed by the judge, if required by either party." In the case of *Stanley v. Sutherland*, 54 Ind. 339, the trial judge said orally to the jury, speaking of some of the defendant's evidence: "Gentlemen of the jury, I instruct you that this evidence will have no bearing on the case unless the plaintiff is connected with it in some way, or the fact brought to the knowledge of the plaintiff." Held, that this statement did not constitute an instruction, within the meaning of the statute. The supreme court said: "Literally the word 'instruction' may apply to any direction given by the court to the jury, but, as used in the statute making it incumbent on the court to reduce its instructions to writing, it relates to the law of the case, and may properly be said to mean an exposition of the principles of law applicable to a case, or some branch or phase of a case, which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven." The language of the Michigan statute on this subject is as follows: "The court shall in no case orally qualify, modify or in any manner explain the written charge." In the case of *O'Donnell v. Segar*, 25 Mich. 379, the trial judge made this oral statement to the jury in explanation of his written charge: "The bringing of a suit for exempt property, or claiming it was exempt, was justified by law, and must be

so regarded by the jury as well as by the court." To which remark the defendant objected and excepted. Held not to be error. The supreme court say: "We can readily see that this was the expression of a mere legal truism, which could not and did not modify the effect of any of the written charges given, and consequently cannot be treated as error." In *Colorado* the language of the statute is: "The instruction shall be reduced to writing, and may be taken by the jury on their retirement and returned by them with their verdict." In the case of *Strepey v. Stark*, 7 Colo. 625, 5 Pac. 111, after the jury had been out a considerable time without agreeing upon a verdict the trial judge called them in, and addressed them orally at length, calling their attention to the disastrous effect to litigants and the hardships to the public on account of the failure of juries to agree upon a verdict at the end of protracted litigation, calling the attention of the jury to the fact that this was the third trial of the present case, and it was the desire of the court to secure a verdict if it was within the bounds of possibility, at the same time telling them that his remarks were not intended and should not be understood or construed in any other way than to impress upon the minds of the jury the importance of an agreement. Held not error. In *California* the statute reads: "In no case shall any charge or instruction be given the jury otherwise than in writing, unless by the mutual consent of the parties." In the case of *People v. Jackson*, 57 Cal. 316, after deliberating for a considerable time without arriving at a verdict, the jury came into court and asked the question: "What is the least punishment for the crime of grand larceny?" The trial judge answered: "You have nothing to do with the punishment." Held proper and no error. In *Missouri* the statute provides: "In no criminal case shall the court give to the jury any charge or instruction on any question of law or fact, except the same be in writing, and filed in the case, and if any court shall violate the statute the party may except, and the judgment shall be reversed." In *State v. Good*, 132 Mo. 127, 33 S. W. 793, the trial judge said orally to the jury: "I caution you, gentlemen, to distinguish between questions asked by counsel, and the answers excluded by the court, and the matters testified to on the stand by the permission of the court." Held not to be error, as not being an instruction, within the meaning of the statute. In the case of *Hasbrouck v. City of Milwaukee*, 21 Wis. 217, the trial judge prefaced his written charge with oral remarks as follows: "During the long and fatiguing trial the court may have become impatient at the delays of counsel, and made remarks that may possibly have influenced some juror. I wish it specifically understood that nothing I have said was intended to influence unduly the verdict of the jury, and

I do not wish any juror to be influenced in the least by it. In submitting this case to you, I will not comment at all upon the evidence, leaving you to weigh it all in your own judgment, and bring in your verdict accordingly." Held not to be error. In the case of *Millard v. Lyons*, 25 Wis. 516, a juror, after the reading of the written charges, asked "whether the plaintiff had a right to use the defendant's divided grain to feed the stock and sheep." The trial judge answered orally: "He would not have the right by law." This was held no part of the charge, the supreme court saying: "The question might have been answered by the simple word 'No,' and it would be nonsense to require the court to write the word and then read it to the jury." In *Grant v. Insurance Co.*, 29 Wis. 125, the trial court said to the jury: "The defendant has offered no evidence to sustain the issues he has presented, and, the plaintiff's proof being conclusive, you must find a verdict for the plaintiff." This was held no violation of the statute. In the case of *State v. Jones*, 7 Nev. 418, which was a trial for larceny, the trial judge made oral remarks to the jury as follows: "The court is not desirous of punishing the jury, but as it is a great expense to the county, and a venire of seventy-five jurors has already been exhausted, and this trial has taken a great deal of time already, and it is very doubtful if another jury can be got in this county to try this man, I will give you an instruction upon the point on which you were in doubt last night, and it may aid you to make up a verdict." He then read over one of the instructions included in the written charge. In passing upon this assignment of error, the court, speaking through Justice Lewis, says: "It was not a statement of the law governing the case, nor an instruction in any manner directing the jury how to find a verdict. It is in no sense a charge. The law of the case had been previously given to them, and they were fully aware of the gravity of the duty imposed upon them. Clearly the immediate tendency of the remarks was simply to induce a more careful and anxious consideration of the case; to let the jury understand that they should make an effort to agree upon a verdict, simply, but not contrary to the evidence, law, or the rights of the defendants. No such conclusions can properly be drawn from the remarks, nor would it be warranted when taken in connection with the written instructions given, wherein the rights of the defendants are fully guarded. It is true, such remarks had better not be made, but still, in this case we are unable to see that the defendants could have been prejudiced by what was said."

We cite the foregoing cases, and the remarks made by the trial courts, and the holding of different courts thereon, to illustrate the truth of what has been so well said by Justice Brewer in the case of *State v.*

Potter, 15 Kan. 320: "The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded, but the court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." Now, we are aware that this authority is one cited by counsel for plaintiff in error to sustain the position taken by them; but we think a careful analysis of it, and a candid comparison with the case at bar, will show that it not only fails to sustain the contention of appellant, but does tend to sustain the position we have taken, to wit, that the oral remarks made by the trial judge in the case at bar were not an instruction or charge to the jury, within the meaning of the statute. Now let us for a moment compare the two cases. They were both criminal cases; the Kansas case being a charge of murder; the statutes of Kansas and Oklahoma being practically the same. The language used by the trial judge in that case was as follows: "I mean by that that makes him principal, and not accessory. There is no such thing, in my judgment, as accessory in this case. Those acts make him principal, and should be regarded by you as principal, and not accessory. He is either principal or nothing." The Kansas statute is: "The judge must charge the jury in writing, and the charge shall be filed among the papers of the case." Gen. St. p. 858 (Cr. Code, § 236). The Kansas supreme court held that this language was not an instruction or a charge, within the meaning of this statute. Observe the similarity of language to the case at bar. The Kansas judge said: "These acts make him principal, and not accessory, and should be regarded by you as principal, and not accessory. He is principal or nothing." The trial judge in the case at bar said: "If you will read the instructions— I think they are plain. If he concealed or secreted, embezzled or destroyed,—if he did any one of these,—why, he is guilty, or, if he did all of them, he is guilty." It certainly seems to us that the language used in the Kansas case was much stronger and much more in the nature of an instruction, for in that case the judge says, "Those acts make him principal," thereby making a positive statement of what the evidence established, thus drawing an absolute conclusion from the evidence and stating it to the jury, while in the case at bar the judge simply says that, if such and such things are established, he is guilty, giving no indication as to the opinion of the court on the subject of whether or not such facts have been proven. Then, again, the remarks of the judge on that occasion should be

taken as a whole. Isolated portions should not be separated out, and conclusions drawn from part alone, unconnected with other parts of the remarks. We can only get the true meaning and a correct and intelligent understanding of the effect of the remarks upon the jury by examining them as a whole. It seems to us that the entire conversation between the court and the jury is qualified, and its meaning and understanding modified, by the remark: "If you will read the instructions of the court— I think they are plain." This was the key by which the language then being used by the court was to be understood and interpreted by the jury. He said: "If you will read the instructions of the court— I think they are plain. If he concealed, secreted, embezzled, or destroyed, he is guilty." In what way are they plain? Why, they are plain that you are instructed by them that if he concealed, secreted, embezzled, or destroyed, he is guilty. The court was making no direct statement, but was simply referring to the instructions previously given, and this was in answer to the question, "Can we render a verdict different to the forms furnished us?" We think the reasoning of Judge Brewer in the Kansas case will apply with equal force to this case. He says: "It may be remarked that the purpose of this statute is to secure to the defendant the exact rulings of the court, in order that he may avail himself of any errors in the rulings; that it was not intended to cast any unnecessary burdens upon the court, or to hamper and restrict communications between the court and jury; that it should be so construed as fairly to secure that purpose, and not to be made a mere weapon of technical error; that in answer to questions, as there is nothing to require the questions to be reduced to writing before they are put, it would seem trifling to compel the answer to be so reduced, when the answer is simply responsive to, and depends for its meaning upon, the unwritten question." It seems to us that, tested by this last rule, the oral statement in this case must be held not to violate the statute, and no ground for reversal. Many words are used, but, after all, it amounts to no more than a negative reply to the question asked, to wit, "If a party could be an accessory." The court's reply was: "There is no such thing as an accessory. The party is principal or nothing." In the case at bar the court said the party is guilty or not guilty; if he did these things, he is guilty. In the Kansas case the judge said, "These acts make him principal." In this case the judge said, "If he did these things, he is guilty." There certainly can be no dispute over the fact that the language used by the judge in the Kansas case was more objectionable than the case at bar, yet the Kansas supreme court said such statement was not an instruction, within the meaning of the statute. This was a construction put upon the Kansas

statute by the supreme court of that state, which statute is practically the same as ours.

It will be seen that in the remarks of the trial judge to the jury no independent proposition of law was given, and no comment on the evidence was made. The whole tenor of the conversation was as to the form of a verdict the jury could return. The remarks of the court were all directed to the answer to the inquiry as to whether they could return a verdict different from the forms furnished, and was all in explanation as to the form of verdict they might or ought to return. And, as to all questions of law, he refers the jury to the written instructions previously given, with the remark, "I think they are plain." It is our duty to presume that the jury were men of reason and of ordinary intelligence, and that they were capable of understanding ordinary, plain English language; and, this being so, when the court said to them: "If you will read the instructions— I think they are plain,"—it will not be presumed that they understood that the remarks were to be taken as a new or different statement of the law than that contained in the written charge, but they would certainly understand that he was referring them for the law of the case to the written instructions. We take the rule to be well settled that an oral direction to the jury as to the form or character of the verdict they may return is not such an instruction as is contemplated by the statute requiring all instructions to be in writing; and we think, when the record is fairly examined, and the remarks of the court properly and correctly construed in the light of the interrogatory of the juror to which they were an answer, they clearly fall within this class. As the record shows that the jury were fairly and fully instructed as to the law of the case in the written charge of the court, we are unable to see how the rights of the defendant have been jeopardized or his interests unfavorably affected by the remarks of the court to the jury; and by the Statutes of Oklahoma of 1893 (section 5330, Cr. Proc.) it is made the duty of this court on appeal to give judgment without regard to technical errors or defects, and not to consider exceptions which do not affect the substantial rights of the parties; and as, on an examination of the entire record, we are unable to see how these remarks of the court could in any way have prejudiced or affected the rights of the defendant, this assignment of error cannot be sustained, as we take the rule to be well established that, when a statute in express and unequivocal terms declares that judgment shall be given without respect to error or objection that does not affect the substantial rights of the parties, it must be made to appear to the court that the substantial rights of the complaining party were unduly prejudiced, before the judgment will be reversed. We have examined the authorities submitted by the counsel for plaintiff in error, but we think that all of these cases

are where there is no doubt of the fact of the remarks of the court being an instruction, and in this they differ from the case at bar. We have no desire to complain of the provision of our statute which requires all instructions in criminal cases to be in writing, and which prohibits all oral instructions; and in a case where the remarks of the trial judge were such as to amount to a statement of a proposition of law applicable to the case, and were such as an ordinarily intelligent jury would understand to be an instruction as to the law of the case, if the same was saved by the exception of the defendant we would have no hesitation in reversing the cause. But, on the other hand, we are very much averse to disturbing the judgment of the court when there has been a fair trial before a fair jury, who have been properly instructed as to the law, and where the record shows that substantial justice has been done, on matters purely technical, and on defects which do not in any way materially affect the substantial rights of the defendant.

Another assignment of error is that the court refused to sustain a motion to set aside the indictment on the ground that a previous indictment for the same offense was pending and undisposed of against the defendant when the present indictment was returned by the grand jury. We think a sufficient answer to this contention will be found in the language of the Indiana supreme court in the case of *Hardin v. State*, 22 Ind. 347. The court say: "A defendant is not allowed in criminal cases, as in civil actions, to plead in abatement that another indictment is pending against him for the same offense. The demurrer was correctly sustained. Another indictment pending for the same offense constitutes no ground for abatement. This, in criminal prosecutions, seems to be the settled rule, and we perceive nothing in the plea before us exempting it from the force of that rule." *Dutton v. State*, 5 Ind. 533. "Where defects are found in an indictment it is proper to apply to the grand jury and have that body return a new one availing the defects in the first, and it is no good ground for abatement that the former has not been actually discontinued when the latter is returned." *Gannon v. People*, 127 Ill. 507, 21 N. E. 525. "It is also urged that no conviction could be had upon the second indictment so long as the first was undisposed of. There is no merit in this. If both indictments had been in court, the defendant could have been tried upon either." *Rosenberger v. Com.*, 118 Pa. St. 77, 11 Atl. 782; *Bonner v. State*, 29 Tex. App. 223, 15 S. W. 821; *Reddan v. State*, 4 G. Greene, 137. We take it that these authorities are conclusive of the question raised by this assignment of error.

We have made a thorough and careful examination of the record, and we think that it discloses that the defendant has had a fair, impartial, and legal trial; and, finding no error in the instructions or rulings of the court,

we think the decision of the district court should be sustained, which is accordingly done. All of the justices concurring, except BURWELL, J., who, having presided in the court below, took no part in this decision, and except HAINER and McATEE, JJ., dissenting.

(10 Ok1. 533, 617)

GOODRICH v. WILLIAMSON et al.

(Supreme Court of Oklahoma. Aug. 25, 1899.)

INTERPLEADER—WHEN ALLOWED—PARTIES DEFENDANT.

1. This is an action upon a promissory note, brought by the assignee, Goodrich, against Williamson, the maker, to recover the amount thereof. The defendant the Oklahoma National Bank intervened, charging that the note was executed by Williamson to M. I. Dowden in fraud of the creditors of E. W. Dowden, of whom the interpleader was one, and asked that the liability claimed in behalf of the plaintiff should be disallowed, and his claim thereto set aside, and the proceeds of the note awarded to the bank thus interpleading. *Held*, that this proceeding is not contemplated either by sections 36, 41, 45a, or 496 of the Code of Civil Procedure, and will not be permitted without the consent of the plaintiff.

2. In a legal action like the present, in which the plaintiff seeks nothing but a money judgment, he cannot be compelled to bring in and to admit other parties than those whom he has chosen as defendants.

3. In a case like this, in which the interpleader makes charges of fraud against M. I. Dowden and E. W. Dowden, and seeks to recover money alleged to be theirs from a third person, the Dowdens are necessary parties to the proceeding.

4. Section 43 of the Code of Civil Procedure does not justify the relief sought for by the defendant, Williamson, in filing his affidavit in this cause. Under this section of the statutes, in order to entitle him to the order of the court sought for and obtained below, there must have been a privity between all the parties, the debt claimed by the interpleader and the amount thereof must have been the same, and the claims of both the interpleader and the plaintiff must be strictly legal, and equitable claims are not provided for by the statute.

On Rehearing.

Upon reconsideration it is *held* that the defendant, Williamson, having filed his affidavit in the case, which was in effect an answer and an admission of liability to the extent of the indebtedness then due upon the note sued upon, the way was cleared for the order of the court as against him, which was a judgment against him for the specific amount of money demanded against him by the plaintiff, and that the judgment of the court should be, as to him, affirmed, and that he should be discharged from further liability.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice J. R. Keaton.

Action by D. M. Goodrich against T. W. Williamson. The Oklahoma National Bank filed an interplea. Judgment for interpleader. Plaintiff brings error. Modified.

This is a suit brought to recover the sum of \$5,000, the amount of a promissory note dated August 17, 1895, given by the defendant, Williamson, to Mrs. M. I. Dowden, payable in a year, and assigned for value, as de-

clared in the petition, on August 19, 1897, to Goodrich. The suit was begun September 23, 1896. Thereafter, on September 29, 1896, the Oklahoma National Bank, upon its own motion, and without leave, filed a pleading in the cause, which it termed an "interplea." This interplea averred that on December 13, 1895, it had recovered a judgment against E. W. Dowden, the husband of M. I. Dowden, for the sum of \$3,429; that an execution had been issued thereupon, and returned unsatisfied; that it had obtained another judgment for the sum of \$7,634, with an attorney's fee of \$500, upon April 8, 1895, in the same court, against James Geary, J. F. Stiles, and E. W. Dowden. Real estate was attached in that action, which was not disposed of at the time of the filing of the interplea. Execution was also issued, and was returned not satisfied. The averment further made was that on August 17, 1895, Williamson and E. W. Dowden were respectively owners of 125 shares of stock in the Dowden-Williamson Grocer Company; that Dowden's stock, with the exception of a single share, was held in the name of his wife, the defendant in the action; and that on that day Dowden made a pretended sale of his stock to Williamson for \$21,000, of which \$6,000 was cash, and the balance in three notes for \$5,000 each, due in one, two, and three years, one of which is the note sued upon by Goodrich. It averred that the sale to Williamson was made for the purpose of hindering and defrauding creditors, and that the note for \$5,000 sued upon here was fraudulently transferred to Goodrich, without consideration, and that there was then pending in the same court an action against E. W. Dowden, M. I. Dowden, and T. W. Williamson and the Dowden-Williamson Grocer Company to set aside the sale of the stock, and apply the same to the satisfaction of the judgments above mentioned. The prayer of the interplea was that when judgment was rendered against Williamson the Oklahoma National Bank, interpleading, should be subrogated to all the apparent rights of the plaintiff, Goodrich, in the collection of the judgment, and that the proceeds should be applied in satisfaction of the judgments of the bank. The plaintiff moved to strike the interplea from the files, which was overruled. His demurrer, which was then filed, was sustained, because the interplea, while asserting the invalidity of the transactions mentioned, also sought to uphold them upon other grounds; the interplea having been thereupon amended, and the prayer changed so as to ask that "if, in the event plaintiff fails in said cause [meaning the case pending to set aside the transfer of stock to Williamson as fraudulent, and subjected to the payment of judgments of the bank] to subject said stock to the payment of said indebtedness, that the interpleader be subrogated to all the apparent rights of the plaintiff." A demurrer to the amended interplea was overruled. Ex-

ceptions were reserved upon the rulings of the court overruling the motion to strike out the interplea and upon the demurrers. The plaintiff, Goodrich, then answered the interplea, denying the averments of fraud on his part, averring that the note sued upon was transferred to him in good faith and for value. The defendant, Williamson, before trial filed an affidavit in the cause in order to avail himself of section 3915 of the statutes of 1893, wherein he alleged that he executed the note in good faith; that the Oklahoma National Bank, without collusion with the defendant, made a claim to the subject of the action, and that the affiant was ready to pay the money due as the court should direct, and prayed that he be permitted to pay the amount into court, and be discharged from liability thereon. This prayer was granted over the objection and exception of the plaintiff, and the money paid into court, and the note surrendered to Williamson, in obedience to the mandate of the court. The defendant thereafter took no part in the action, which proceeded to trial before a jury on the issues formed by the interplea, the answer of the plaintiff, the amendment to the answer, and the reply of the bank.

Trimble & Braley, John A. Eaton, and H. H. Howard, for plaintiff in error. R. G. Hays and J. S. Jenkins, for defendant in error Oklahoma Nat. Bank. B. F. Burwell, for defendant in error T. W. Williamson.

McATEE, J. (after stating the facts). The errors assigned by the plaintiff are argued upon the proposition that the action was a suit to recover the amount due upon a promissory note; that the bank should not have been permitted to intervene, and that Williamson should not have been permitted to pay the money into court, and that the note should not have been delivered to him. The provisions of the Code of Civil Procedure which are principally relied upon by the bank to sustain its right of intervention are sections 36 and 41 of the Code of Civil Procedure, which read as follows:

"(3908). Sec. 36.—Any person may be made a defendant who has or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

"(3913). Sec. 41.—The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in."

In construing similar provisions of the Codes of Civil Procedure the supreme courts of the different states have uniformly sustained the contention of the plaintiff in error. In *Chapman v. Forbes*, 123 N. Y. 532, 28 N.

E. 3, the plaintiff charged that George P. Breen, as agent of the plaintiff's testatrix, received \$1,200, which was paid by him to defendant for the use of the estate of the plaintiff's testatrix, and that the defendant refused to pay the same to plaintiff. The defendant denied the indebtedness, and alleged that he received the money, but that it was the individual property of Thomas H. Breen, whose assignee had sued to recover it, and that the fund was subject to equities existing between Breen and the defendant; and the defendant moved to make Williams, the assignee of Thomas H. Breen, a party defendant, upon the ground that section 452 of the New York Code did not authorize the proceeding, and that the court could not change a legal action into a suit in equity at the instance of a third party, and against his will. The court, by Judge Peckham, now a justice of the supreme court of the United States, in construing the statute in question, said, as to section 122 of the New York Code (which is identical with section 41 of the Oklahoma Code of Civil Procedure), that: "The decisions of our courts have been quite uniform that the section above quoted referred to parties in what, under the old practice, would have been suits in equity, and that it was never intended to make it incumbent upon a plaintiff in an action at law to sue any other than the parties he should choose," and that "McMahon v. Allen, 12 How. Prac. 39, gave what seems to me to be a correct definition of the meaning of the old Code (section 41 of the Oklahoma Code) with reference to a complete determination of the controversy. He said 'that was where there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to a suit can be determined.' Judged by that standard, the controversy between these parties can be completely determined without the presence of any other person. The plaintiff claims judgment for money which he alleges defendant received belonging to plaintiff. The defendant sets up facts which, if proved, constitute a perfect defense to the action. The presence of no other person is required to finally determine the issue, and the determination affects no other person's rights. There is nothing in the added portion of section 452 of the new Code which would alter the rule. The portion added is this: 'And when a person not a party to the action has an interest in the subject-matter thereof, or in real property, the title to which may be in any manner affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by proper amendment.' The person not a party to the action in this case is the assignee of the person giving the money to the defendant, and such party has no interest in the subject of this action, within the meaning of the section referred to. The subject of the action is to obtain payment of

the debt due plaintiff from defendant. The facts upon which the debt is based may be of an equitable nature, but the action is to recover a debt. The defendant, by way of defense, denies the existence of the alleged facts upon which the plaintiff bases his claim. The defense, if proved, is a good one. He need show nothing further than that the money was not the money of plaintiff. Whose money it was, if it did not belong to the plaintiff, is a matter in which the plaintiff has not the slightest interest, nor is such an investigation the subject of this action. The plaintiff does not seek a judgment in this action for any money of the assignor which he deposited with the defendant. And a judgment in plaintiff's favor has absolutely no effect upon any rights which the assignee may have against the defendant. The assignor, therefore, cannot have an interest in the subject of this action, within the meaning of the Code. It is impossible to see how the assignee can have such interest when no judgment that the court can give can in any way affect his claim against the defendant, and where a complete determination of the controversy between the plaintiff and defendant can be had without first ascertaining or settling the rights of any other person. In *People v. Albany & V. R. Co.*, 15 Hun, 126, the supreme court at general term said that the views expressed in *Webster v. Bond*, 9 Hun, 437, in regard to the application of section 122 of the old Code should apply to section 452 of the new. The *Webster Case* held that a person bringing a legal action cannot be compelled to sue any person, except such as he may elect to sue. If the amendment in this case were allowed, the defendant would succeed in converting a plain action at law into a suit at equity, and thereby instituting an investigation as to the ownership of a fund in the hands of the trustee, and obtaining a decree in relation thereto." Judge Peckham, in passing upon that case, further said: "Nor does the defendant obtain any right to compel the plaintiff to bring in the assignee as a party under section 417 of the new Code," which is identical with section 36 of the Oklahoma Code of Civil Procedure. And the supreme court of New York, there speaking through him on the latter section, said that: "This section does not enlarge the right of the defendant beyond what he has under section 452 [section 41 of the Oklahoma Code]. There can be a complete determination or settlement of the question involved in this action as between the parties to it, without the presence of any one else; and as to the controversy between the plaintiff and the defendant, no one else has an interest therein adverse to the plaintiff. The order made in this case was a discretionary one. The court had no power to make it." It was also said in *Britton v. Bohde*, 85 Hun, 449, 32 N. Y. Supp. 882, that: "It is not only in a case like this, where the party seeking to inter-

vene claims at most a mere equitable lien upon the subject of the action, that he is denied the right to intervene, but the rule seems to be the same where he claims to be the actual owner. This action is to recover the sum of \$800, alleged to be due from the defendant on account of a mortgage. * * * The appellant seeks to intervene on the ground that this sum really belongs to it. We think this fact, if true, gave the appellant no right to intervene. If the plaintiff is not the owner of the claim, he will be defeated in this action. But, even if he should wrongly succeed therein, the appellant would no wise be injured. If it has a valid claim against the defendant, it may sue for it, and the recovery in this action will no wise bar its claim. This action is an action at law, and it is settled by authority that in such actions the plaintiff has the privilege of determining what parties he will proceed against, and that other parties cannot intrude themselves into the action against his will." And it was said in *Coursen v. Hamlin*, 2 Duer, 513, that, "As the plaintiff has brought a legal action, and seeks nothing but a money judgment, he cannot be compelled to bring in other parties than the one he has chosen to make defendant." To the same effect are *McConihe v. Hollister*, 19 Wis. 269; *Pennoyer v. Allen*, 50 Wis. 308, 6 N. W. 887. In *Boyer v. Hamilton*, 21 Mo. App. 520, a firm named Melton & Claphamson owed Hamilton a sum of money upon which an account had been stated. Boyer bought the account of Hamilton, and drew on Melton & Claphamson for the amount. Boyer's draft was dishonored. He sued Hamilton, and Melton & Claphamson, the firm, answered that they had owed Hamilton as claimed in the petition, and that their obligation had been assigned to Boyer, but said that a firm called Howard & Kreiter had a claim on the fund. The court ordered Howard & Kreiter to be made defendants, and they thereupon filed an answer asserting their rights. The court said upon these facts that: "The entire proceeding in regard to the intervention of Howard & Kreiter was irregular. The court seemed to have treated the proceeding in the nature of an interpleader, losing sight of the principle that the debtor alone can maintain such a bill, and not the creditor. *Hathaway v. Foy*, 40 Mo. 540. The fund in controversy was never in possession of the court, and the court could never have made any order in regard to its distribution, even if the pleadings and evidence would have warranted it. The only disposition which can be made of the case here is to direct such a judgment as is called for by the pleadings and uncontroverted evidence. The defendants Howard & Kreiter, even if recognized as parties to this proceeding, have given no legal evidence to defeat the plaintiff's recovery. If they have any valid claim on the fund in controversy as against the plaintiff, they can assert it by some method in

conformity with established rules of procedure in an independent action against him. There is nothing even to show that he is not financially responsible. The defendants Melton & Claphamson have admitted their liability by their answer, and no reason exists why judgment should not be rendered against them. All the judges concurring, the judgment is reversed, and the cause remanded, with directions to the trial court to strike the answer of Howard & Kreiter, and the plaintiff's reply thereto, from the files, and to render judgment in favor of the plaintiff against the defendants Melton & Claphamson for the amount in controversy, with interest from date of the institution of the suit, and to dismiss the cause as to the defendant Hamilton."

Section 1903 of the Revised Statutes of Missouri of 1889 is identical with section 36 of the Code of Civil Procedure of Oklahoma. In *Kortjohn v. Seimers*, 29 Mo. App. 271, the plaintiff, as receiver of Singer & Berg, sued defendant, who was a trustee named in a deed of trust executed by one Noenninger in favor of said Singer & Berg. Defendant had sold the property named in the deed of trust, and refused to pay the proceeds to plaintiff, claiming that the notes were given in payment of work done under a contract, the terms of which had been violated; that for such violation Noenninger had a cause of action against Singer & Berg, and a claim upon the fund in suit. Noenninger applied in the court of original jurisdiction to be made a party defendant, and filed an answer. This application was sustained, and the court said of this practice: "Our statute provides that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. Rev. St. § 3465. This means that a plaintiff may make any party thus situated a defendant to the action, and not that any party may insist on being made a defendant to any legal controversy which is likely to affect his interest in some collateral manner. The latter construction would lead to the most absurd results, and results entirely at variance with our methods of legal procedure. We have discussed this proposition in *Boyer v. Hamilton*, 21 Mo. App. 521, 524, to which we refer. * * * In fact the entire proceeding of allowing Noenninger to come in and defend was irregular from beginning to end." *Boston v. Wright*, 3 Kan. 220, was an attachment suit in which certain real estate was taken, and Wright appeared, and moved for a dissolution of the attachment. The motion was overruled, and upon his application Wright was made a party defendant, and was permitted to file an answer, alleging that he was the real owner of the real estate. A verdict was found for him, and Boston took a writ of

error. In that case, in construing section 47 of the Code of Civil Procedure of Kansas (which is identical with section 41 of the Oklahoma Code), the court said that: "The controversy between parties in an action is determined by the pleadings, of which, as we have before seen, attachment proceedings constitute no part. And with that controversy in the present case, as between Boston and McGuire, no one will say that Wright had or could have had anything to do. Indeed, his answer shows that he has no interest whatever in it. If these views be correct, the section referred to gives no authority for making Wright a party defendant in this cause. We think that the court erred in making the order, and that the error was such as would prejudice the substantial rights of the plaintiff. The court should have granted the motion for a new trial." The judgment was reversed. This decision was rendered before the enactment of section 45a of the Kansas Code (which is section 45a of the Oklahoma Code of Civil Procedure), and the cause was governed by the sections of the Code which are identical with sections 36 and 41 of the Code of Civil Procedure of Oklahoma. And it was said by Pomeroy in his Remedies and Remedial Rights (section 424) that: "The occasions on which a third person may intervene in a pending action are very few. The scope of the provision is exceedingly limited. It has been said that its operation is confined to those cases in which a bill of interpleader would have been permitted, under the former practice, to accomplish the same end. It is certain that the right to intervene can only be exercised in actions for the recovery of real or personal property. It does not exist, therefore, in an action to recover money; * * * nor in an action in the nature of a creditors' suit to reach a surplus of money in certain person's hands; * * * nor in any action on contract for the recovery of debt or damages." The section last referred to (section 45a of the Code of Civil Procedure) provides that: "Any person claiming property, money, effects, or credits attached, may interplead in the cause, verifying the same by affidavit, made by himself, agent or attorney, and issues may be made upon such interpleader, and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay." This is also relied upon by the defendants in error. Upon a similar statute in Missouri it was said by the supreme court of that state that "the section referred to contemplates that only persons who claim to own the property attached may interplead." *Abernathy v. Whitehead*, 69 Mo. 28. And "an interplea in an attachment suit is a remedy conferred by the statute. Its uses, therefore, must be limited to the cases in which it is authorized by law." *Gordon v. McCurdy*, 26 Mo. 304. And in *Spooner v. Ross*, 24 Mo. App. 599, it was said that:

"An interplea is in the nature of a replevin, ingrafted by statute on the proceeding in attachment. *Burgert v. Borchert*, 59 Mo. 85. Certainly, then, it will not lie where the action of replevin will not. The very object of the action in replevin is the recovery of specific personal property, in kind. It partakes in this respect of the nature of a proceeding in rem. *Wells*, Repl. §§ 33, 34. * * * Especially is this true of an interplea. It is a claim for the recovery of the possession of the specific thing. Unlike the action of replevin, no money judgment in damages can be awarded in lieu of the specific property claimed. It is peculiarly a possessory action, 'the right to present possession of the property being the principal question in controversy.' *Wells*, Repl. § 39. It involves the exclusive right of the claimant to the immediate possession of the chattel, and the fact of the wrongful detention thereof by the defendant as against the claimant. *Id.* §§ 46, 94, 98; *Hunt v. Chambers*, 21 N. J. Law, 623; *Kingsbury v. Buchanan*, 11 Iowa, 397; *Noble v. Epperly*, 6 Port. (Ind.) 416."

Section 496 of the Code of Civil Procedure is also cited by the defendant in error as furnishing authority for the proceeding by interplea here. It provides that: "When a judgment debtor has not personal or real property, subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he may have in real estate, as mortgagor, mortgagee or otherwise, or any interest he may have in any banking, turnpike, bridge or other joint stock company, or any interest he may have in any money, contracts, claims or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in the possession of any person, body politic or corporate, shall be subject to the payment of such judgment, by action or as hereinafter provided." It does not authorize the interposition of the claims of the interpleader in this action brought by the plaintiff, Goodrich, upon the single issue of the liability of the defendant, Williamson, to him upon a promissory note. The relief sought for by the interpleader changed the issue completely. And, the appearance and admissions of Williamson having determined the issue of the case in favor of the plaintiff, the only issue in the cause was thereby resolved.

Under the proceeding which was initiated by the interplea and the proceedings thereunder other parties became necessary to the cause, other issues were raised, and the proceeding thus added was of a purely equitable nature, involving allegations of fraud against the plaintiff, Goodrich, against M. I. Dowden, and E. W. Dowden. We cannot find that any such scope has ever been given or attempted to be established under the section in question. The only authority cited in support of the proposition which

seems to call for any comment is that of *Ludes v. Hood*, 29 Kan. 36, which was an action brought by the judgment creditor against the judgment debtor, in which an execution had been returned unsatisfied, and in which it was sought to secure personal property to the payment of the debts of the defendant. The right to this remedy was sustained by the supreme court of Kansas, inasmuch as it is expressly provided for in the statute. The remedy provided for in the statute is in the nature of a creditors' bill, but it was never taught nor heard of in the practice and proceeding in equity upon a creditors' bill that the creditor seeking that remedy could intervene in a legal action like the present, involving only the determination of liability on a promissory note between the plaintiff and defendant, and be permitted to annex thereto a general remedy in behalf of creditors to secure the proceeds of the judgment in such a case upon allegations of fraud such as the creditor here seeks by this interpleader. And the statute here expressly provides that the proceeding shall be "by action," by which we understand that the creditor shall be the plaintiff and the debtor the defendant, and that the action shall be an original action, and not an intervention in a legal proceeding already begun by other persons. There is nothing in the language of the statute from which such a right can be inferred. The reasoning hitherto expressed herein with reference to the attempted construction of sections 36 and 41 and 45a of the Code of Civil Procedure is applicable to the attempt to exercise the right sought for here under the section of the statute now under consideration.

It is also contended by the plaintiff that M. I. Dowden and E. W. Dowden are necessary parties to the proceeding, that their interests in the subject-matter were affected by the judgment of the court, and that they should have been brought in and made parties defendant. We think this contention should be sustained. The whole transaction is charged to have been fraudulent on the part of both E. W. Dowden and M. I. Dowden. If it was fraudulent, it was void. The note for \$5,000 sued upon by Goodrich was assigned to him in discharge of former indebtedness claimed by him and by M. I. Dowden to be due from the latter to Goodrich. If the contention of the interplea should be sustained, the prior indebtedness of M. I. Dowden to Goodrich would remain unpaid. The interplea was, in substance, a creditors' bill, and sought to appropriate the amount in Williamson's hands to the payment of a debt claimed to be due to the interpleader, and to deprive Goodrich and M. I. Dowden of the proceeds. The effort was made upon the explicit charge of fraud against both M. I. Dowden and E. W. Dowden. We think the court should not have proceeded to the trial of the issues without the presence of both these parties. It is said

in *Pom. Rem. & Rem. Rights*, § 347, that: "In an action by a judgment creditor to reach the equitable assets of the debtor in his own hands, or to reach property which has been transferred to other persons, or property which is held by other persons under a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant, and the suit cannot be carried to final judgment without him;" citing many cases. *Child v. Brace*, 4 Paige, 309; *Beck v. Burdett*, 1 Paige, 305. And it was said in *Walt, Fraud. Conv.* p. 196, that: "Where the suit prosecuted is purely a creditors' bill embodying the elements of a bill of discovery, the debtor's presence would seem to be essential to the jurisdiction of the court." If the bank interpleading here could sustain this contention, the effect would be to deprive M. I. Dowden of the credit to which she would be entitled in consequence of her assignment of the note in suit here to plaintiff; and to that contention she was a material party, since the interpleader sought an order of the court that the money, the proceeds of the note assigned by her to the plaintiff, should be paid over immediately to the interpleader. It has been shown and held here that the intervention cannot be sustained. But, if it could have been held otherwise, she should have been made a party. So, also, we think, should E. W. Dowden, upon the same authorities and the same reasoning.

It is objected that all parties concerned in the determination of this case are not made parties here, and that no service of case-made has been made upon Williamson, which is true. Williamson has no concern in the case-made. Prior to the taking of any testimony, while the only questions which arose were those upon the pleadings and the attempted intervention, and upon the affidavit of Williamson, Williamson admitted his liability in full, was ordered by the court to pay over the amount of the indebtedness to the clerk of the court, and thereupon was discharged. To this order of the court an exception was reserved. It is contended by the plaintiff in error that, inasmuch as this was an action at law in which the right of the plaintiff in error to the amount of money represented by the promissory note sued upon was asserted, and inasmuch as the bank was wrongfully permitted to intervene and assert its claim, by which new issues were raised, and new parties made necessary, and delay was caused, and impediments permitted to the assertion of Goodrich's claim, the order of the court was erroneous, whereby Williamson was permitted to pay the amount due upon the note sued upon into court, and the note taken from the possession of Goodrich and transferred to the possession of Williamson, and to the order of the court which undertook to discharge Williamson from further liability. The provisions of section 43 of the Code of

Civil Procedure are set up as a justification for the order of the court, and as providing for it. Section 43 provides that: "(3915). Sec. 43.—Upon affidavit of a defendant, before answer, in any action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe keeping, or the payment, or deposit in court, or delivery of the subject of the action, to such persons as it may direct, and an order requiring such third party to appear, in a reasonable time, and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order, by the sheriff or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit or delivery thereof." We do not think the statute provides the relief contended for by the defendant in error, since it is held that such a statute as the present does not alter the settled principles which govern the right of interpleader. 3 Pom. Eq. Jur. § 1329. In order to entitle the interpleader to this remedy, certain conditions must exist, which are not found in this case. There must, in the first place, exist a privity between all parties, and the debt and duty and the amount claimed by each of the defendants must be the same. It was said in Story, Eq. Pl. § 293, that: "Bills of interpleader do not ordinarily lie, except in cases of privity of some sort between all the parties, such as privity of estate, or title, or contract, and where the claim by all is of the same nature and character. But where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill is wholly unmaintainable." And it is said in 2 Story, Eq. Jur., that: "In cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader." 2 Story, Eq. Jur. (11th Ed.) § 820. In *Pfister v. Wade*, 56 Cal. 43, plaintiffs' complaint was that they had purchased from one Trenouth, assignor of defendant Bliss, certain wheat in the warehouse of defendant Wade, for which plaintiffs agreed to pay Trenouth

\$2,880.85, then due; that Wade claimed a lien on the wheat for \$2,657.53, and refused to deliver it unless plaintiffs would retain the amount from the price of the wheat. The defendant Bliss claimed all of the proceeds and refused Wade's claim. The prayer was that the various defendants should be compelled to interplead upon their respective claims. The court said that: "It is an inflexible rule that the thing to which the parties make adverse claims shall be one and the same thing; or, in other words, the claims must be identical." And that: "Where the claims made by the defendants are of different amounts, they never can be identical." And that: "The claims of the defendants are not the same, nor of the same nature. Each, as alleged, arises out of a separate and independent contract with the plaintiffs by defendants severally." And that: "The right to the remedy by interpleader is founded, however, not on the consideration that a man may be subjected to double liability, but on the fact that he is threatened with double vexation in respect to one liability." And that: "A vendee sued by his vendor for the price of goods, and by a third party in trover for their value, cannot maintain an interpleader suit, since the claims made against him are not identical; the one seeking to have the benefit of a contract, the other claiming the value of chattels which are the subject of it." The court further said: "There is another reason why the present bill cannot be maintained. It is essential to the right of interpleader that the person standing in the position of a stakeholder is ignorant of the rights of the different claimants to the fund held by him; or, at least, that there is some doubt as to which of them is entitled to the fund, so that he cannot safely pay it to either. * * * Plaintiffs here cannot be permitted to claim that they are ignorant of the facts upon which the claims of defendants respectively are based. * * * The plaintiffs have acknowledged a right by way of lien in some sum in defendant Wade by taking a transfer from him, with the promise to pay him the sum, whatever it may be, for which he had the property in pawn. Thus they have incurred a separate liability to him, while they have assumed such an obligation as compels them for their own protection to contest the right of defendant Bliss to a portion of the purchase price. To recapitulate: It appears from the complaint that plaintiffs are not mere stakeholders, without any interest or claim of interest in the fund; that the claims of defendants are not identical in amount; that the claims in other respects do not relate to the same debt or duty; that the plaintiffs have acknowledged the validity to some extent of the claim of one of the defendants and incurred a separate liability to him; that the claims of each of the defendants arise out of a separate and independent contract. Judgment re-

versed." To the same effect is *McCauley v. Sears* (Idaho) 34 Pac. 814, in which section 4109 of the statutes of that state were construed, which is similar to section 43 here relied upon. *Bank v. Skillings*, 132 Mass. 410; *Railroad Co. v. Arthur*, 90 N. Y. 234; *Dodge v. Lawson* (Super. N. Y.) 19 N. Y. Supp. 904.

It is also contended by the plaintiff in error that, in order to sustain the right of interpleader under this section, Williamson must not have incurred an independent and unconditional liability to that which is claimed by the bank, and that, since the pleadings charge the defendant with two separate and distinct liabilities, an affidavit for interpleader will not lie to bind both in one suit. In *Mining Co. v. Hodges*, 59 Fed. 836, 8 C. C. A. 305, the mining company, in 1887, leased a coal claim from a syndicate composed of Davis, Nelson, Phillips, and Standley. After \$50 had been paid to the lessees, the company notified the lessors that there was no coal on the claim, and the \$50 was returned. In 1888 the company took another lease from a syndicate composed of Adams, Davis, James, Hodges, and McBride. In 1889, Standley, Phillips, and another brought suit against the coal company for rent of the claim under the lease of 1887. The company answered that it owed some one \$300 for coal mined on the leased premises; that it had taken the two leases before mentioned; that the two sets of lessors claimed title adversely to each other; that the defendant was induced to take the first lease by misrepresentation; and that, if it paid under the lease pleaded, it would be obliged to pay under the second as well; and asked that the second set of lessors be brought in, and compelled to interplead for the fund. The trial court on first hearing dismissed the second lessors from the case, and this judgment was affirmed in the circuit court of appeals; Judge Sanborn saying: "First. No case for an interpleader can be made unless the adverse claimants seek to recover the same thing, debt, or duty. Second. No case for an interpleader can be made where the holder or debtor has made an independent, personal agreement with some of the claimants regarding the subject-matter claimed, so that he is under a liability to them beyond that which arises from the title to the subject-matter. The statutes of Arkansas in force in the Indian Territory do not abrogate, but emphasize, these rules. They provide a summary method by which, where it appears 'in any action upon contract or for the recovery of personal property that some third party, without collusion with him [the defendant], has or makes a claim to the subject of the action, and that he is ready to pay or dispose thereof as the court may direct,' the court may order that the third party shall appear, and maintain or relinquish his claim against the defendant. Mansf. Dig. par. 4947. Statutes of this character are in force in

England and in many of the states, and are universally held to introduce no new cause of interpleader. Statutes 1 & 2, Wm. IV. c. 58; *Belcher v. Smith*, 9 Bing. 82; *Pustet v. Flannely*, 60 How. Prac. 67-69; *Johnson v. Maxey*, 43 Ala. 521-541. In *Belcher v. Smith*, supra,—a case which arose under an English statute much more comprehensive than the Arkansas statute before us,—the court declared that 'our duty is to see that the party applying for the exercise of our discretion has not voluntarily put himself into the situation from which he calls on the court to extricate him.'" "The reason for and the necessity of a strict enforcement of the second rule is obvious. Parties claiming title to the thing in dispute ought not to be, and cannot properly be, compelled to litigate any rights but those in controversy between themselves. If the holder of the subject-matter in dispute has placed himself under an independent personal obligation to one or more of the claimants, by which his liability to deliver the thing or pay the debt in question may be determined without a decision of the controversy between the claimants, it is plain that no litigation between the latter can ascertain the rights of the holder or debtor upon his personal obligation. Nor does the fact that the latter claims that his personal agreement was obtained by the fraud or misrepresentation of the obligee relieve the embarrassment, or except the case from this rule. The question presented by such a claim arises entirely between the parties to the personal obligation of the holder or debtor. It is nothing to the other claimants, nor are they interested in, or proper parties to, the litigation over it. It would be a monstrous proposition that one who makes agreements with two persons to sell and deliver the same article to each of them could bring the article into court, and compel the two purchasers to litigate the question which had the better right to the thing, before either could recover it of him, or that a tenant of an owner could take a second lease of the same premises from one claiming title to them, and then compel the real owner and the pretended owner to litigate, not only the title to the premises, but the validity of the leases the tenant himself had taken, before either lessor could recover his rent. If such a proposition could be sustained, any tenant might treat his landlord to as many suits as he could obtain leases of his premises. These independent personal obligations of the defendant to the adverse claimants to this mine, make it impossible for it to present any case for an interpleader here. If it has fallen into a pit of its own digging, the courts cannot make the interpleader its substitute. * * * Moreover, the plaintiffs and the interpleaders do not claim to recover the same debt from the defendant if A. makes one promissory note for \$500, dated October 1, 1890, payable to the order of B. and C. 6 months from its date, and another, for

the same amount, dated January 25, 1891, payable to the order of B. and D. 20 months from its date, and the respective payees sue the makers on their respective notes, it is absurd to say that B. and C. claim to recover of A. the same debt as do B. and D. The case here presented is yet stronger for the interpleaders. The plaintiffs claim to recover a debt which the defendant promised to pay to Davis, Standley, Phillips, and Nelson by the lease of October 1, 1887, for the term of 6 years, with a privilege of 20 years more. If the interpleaders claimed, by assignment or otherwise, to recover any part of the debt due under that lease, there would be a proper case for an interpleader. But they do not. Davis and Nelson both repudiated that lease, and expressly disclaimed any rights under or interest in it. The only claim of the interpleaders is that the defendant owes them rent due under the lease to Adams, Davis, James, Hodges, and McBride, dated January 25, 1888, for a term of 20 years from that date. Thus the plaintiffs and interpleaders, respectively, claim to recover of the defendant no part of the same debt, but two independent debts arising under independent leases, of different dates and different terms, payable to different lessors. Nor can the interpleaders be held as parties defendant to this action under the Arkansas statute in force in the Indian Territory, which provides that: 'Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the questions involved in the action.' Mansf. Dig. par. 4940; section 3908, Okl. St. The only controversy it is necessary to decide in order to determine the action between the plaintiffs and defendant is that over the validity of the lease of October 1, 1887, between them. In that controversy the interpleaders neither have nor claim any interest. It can be, and in fact it must be, completely determined in an action between the plaintiffs and defendant, because they are the only parties interested in the question. Its decision in the action between them cannot in any way determine or affect the rights of the interpleaders against the defendant, or of the defendant against the interpleaders, under the lease between them of January 25, 1888, or the rights of the plaintiffs and the interpleaders against each other to the title to the mine, and hence the latter are neither necessary nor proper parties to plaintiffs' action on their lease." *Mining Co. v. Hodges*, 59 Fed. 841-843, 8 C. C. A. 305.

In *Insurance Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93, the insurance company had, in 1874, issued to Franklin Pingrey a policy on his life in favor of his mother, Elizabeth Pingrey, who paid the premiums. In 1882 the insured surrendered that policy, and received a new one designated as a continuation of the other, but payable to

Clara Pingrey, the insured's wife. On the death of the insured the insurance company filed its bill to compel the two beneficiaries to interplead. The supreme court of Massachusetts said: "The questions arising between the plaintiff and the different defendants cannot all be tried in an issue between the two defendants alone. The mother claims to be entitled under the first policy. The widow claims under the second policy. By issuing the two policies, the plaintiff has exposed itself to both of these claims, and must meet them as best it may. The difficulty of maintaining the bill of interpleader is not technical, but fundamental. In this form of proceeding we cannot inquire whether the plaintiff has incurred a double liability. That result is possible. The plaintiff ought to be in a position to be heard upon that question; but on a bill of interpleader, which assumes that the plaintiff is merely stakeholder, the plaintiff cannot be heard. *Houghton v. Kendall*, 7 Allen, 72. A plaintiff cannot have an order that the defendants interplead, when one important question to be tried is whether, by reason of his own act, he is under a liability to each of them. *Cochrane v. O'Brien*, 2 Jones & L. 380; *Desborough v. Harris*, 5 De Gex, M. & G. 439; *Baker v. Bank*, 1 C. B. (N. S.) 515; *Story, Eq. Pl. par. 291*, et seq.; *Pom. Eq. Jur. par. 1320 et seq. Bill dismissed.*"

In *Conley v. Insurance Co.*, 67 Ala. 472, which was an exactly similar case, the court said: "It is not every case in which a party may be liable to double vexation, or in which, by different or separate interests, two or more persons claim of him the same thing, or the same debt or duty, that a court of equity will come to his assistance, and compel the claimants to interplead. The party must show that he stands not only indifferent between the claimants, that he is without interest in the controversy to be waged between them, but it must also appear that he is in the relation of a mere innocent stakeholder or depositor, and that by no act on his part the embarrassment of conflicting claims and the peril of double vexation has been caused. When he stands to either of the parties in the relation of a wrongdoer, or it appears by his own act or conduct double claims have been caused, he is not innocent; he is not without interest; and the court will not intervene to relieve him from the embarrassment in which he has voluntarily involved himself. *Shaw v. Coster*, 8 Paige, 339; 35 Am. Dec. 690; *Quinn v. Green*, 1 Ired. Eq. 229; *Crawshaw v. Thornton*, 2 Mylne & C. 1; *Sablich v. Russell*, L. R. 2 Eq. 441. * * * If there is embarrassment of conflicting claims, and the insurance company stands in peril of double vexation, and double liability for the same debt or duty, it is obvious the embarrassment and peril spring from its own voluntary acts and conduct, and not from the acts and conduct of either of the claimants. * * * The insurance

company, by making the change in the policies, has given rise to the rival claims upon it, and has committed a wrong against the original beneficiaries. It is not the office of a court of chancery to relieve them from the consequences of the wrong, or the double liability incurred by their erroneous conduct. Nor can it be just that the court should intervene, and compel litigation between parties, who, it may be, have each valid claims against the company, and no cause of controversy between themselves. * * * If there be any peril of double vexation for the same debt or duty, if there are, in fact, conflicting claims, they have their origin and life in the conduct—in the act—of the insurance company, not in the act or conduct of either of the claimants; and it is against their acts, and not its own, the insurance company can ask relief. * * * The company has a direct personal interest, according to the averments of the bill, in defeating the claim of one or the other of the defendants, and, having that interest, has no right to an interpleader."

In *Bechtel v. Sheaffer*, 117 Pa. St. 555, 11 Atl. 889, the court say: "It is true, as a general rule, the party seeking relief by an interpleader must not have incurred any independent liability to either of the rival claimants. If he has expressly acknowledged the title or right of one of them, and agreed to hold the property for him, or, disregarding the adverse claim of one, has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them." The rule so announced was followed in *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450.

In *James v. Pritchard*, 7 Mees. & W. 215, plaintiff sued in debt to recover for a rick of hay sold defendant. The plea of defendant was that he had contracted with plaintiff for the hay, but had been notified by one Saunders, administrator of Simlett, that the hay belonged to his intestate. Plea asked that plaintiff and Saunders be compelled to interplead (upon a practice similar to ours), but Baron Alderson denied the application, saying tersely: "I think the rule must be discharged, and that this is not a case within the interpleader act. The defendant has made a bargain with the plaintiff, and he must perform it, or show good cause why he does not." Applying those facts and the legal principle just announced, it seems that here Williamson has promised Goodrich to pay \$5,000 on the note in suit, but has been informed by the Intervener that it would charge him with a fraud in the execution of that note. We can easily imagine what the eminent Baron Alderson would say were he trying this case. His judgment would be: "The defendant has made a bargain with the plaintiff, and he must perform it, or show good cause why he does not." 3 Pom. Eq. Jur. par. 1326; *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 690; *Atkinson v.*

Manks, 1 Cow. 691. Mr. Freeman, in a note to the case of *Shaw v. Coster*, 35 Am. Dec. 690, sums up the doctrine thus: "If a party, by his own folly or inadvertence, or even through misfortune, becomes liable to deliver the same property or to pay the same debt to two different claimants, he cannot relieve himself from the predicament by interpleader."

It is also contended that the claims of all the parties must be strictly legal, and that equitable claims are not within the statute. Upon this proposition it is said by Judge Story in his *Equitable Jurisprudence* (section 822) that: "An issue or a direction to interplead at law would be obviously improper in all cases, except those where the titles on each side are purely legal. Equitable titles can only be disposed of by courts of equity."

We think, for the reasons and upon the authorities herein stated, that the court erred in permitting the intervention of the defendant, Williamson, and in permitting him to pay the money into court, to take the note from the possession of Goodrich, and be discharged from further liability, and that the order of the court so discharging Williamson should be reversed, and that the intervention of the Oklahoma National Bank should be dismissed, and judgment entered for the amount of principal and interest found to be due upon the note sued upon at this time. It is so ordered. All the justices concur, except BURWELL, J., who was of counsel, not sitting.

On Petition for Rehearing.

(Feb. 8, 1901.)

A rehearing has been allowed by the court in this cause upon rule No. 19, which provides that: "An application for a rehearing of any cause shall * * * particularly set forth the grounds thereof and showing either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court. * * *" Upon this rule the defendant in error proceeds to reargue the question of the right of a party to intervene, under the circumstances of this case, for the purpose of setting up an equitable claim to the matter in litigation; and it is now argued that there are two lines of decisions, one of which is represented by the courts of New York, Missouri, and Wisconsin, while the other is upheld by the courts of Indiana, California, Iowa, and Kansas; and the defendant proceeds to restate *Summers v. Hutson*, 48 Ind. 228; *Stich v. Goldner*, 38 Cal. 608; *Taylor v. Adair*, 22 Iowa. 279; and *Ludes v. Hood*, 29 Kan. 49. *Ludes v. Hood*, 29 Kan. 49, was cited in the original brief of defendant in error, and expressly treated in

the opinion of the court. *Summers v. Hutson*, 48 Ind. 228, was presented in the original brief of the defendant in error, and considered by the court. It was a case in which A. placed personal property in the hands of B., as his agent, to sell, and in which B., having sold the property to C., wrongfully took for it a note, not governed by the law merchant, to himself or to D. The note was assigned by the payee to an innocent assignee for a valuable consideration. The assignee of the note brought suit against the maker. A. was permitted in that action to show that he was the legal owner of the note; that the property, after it had been given, was his property, and that he had the right to be substituted to the rights and interests claimed by the assignee, and to recover on that note. It was a case in which A. was the legal owner of the note. The cases of *Stich v. Goldner*, 38 Cal. 608, and *Taylor v. Adair*, 22 Iowa, 279, are somewhat similar upon the facts to *Ludes v. Hood*, in the former of which the intervener was "the rightful owner of the note," and in the latter of which the intervener was "the equitable owner" of the promissory note sued upon. The other citation is not calculated to aid the court here in the correct solution of the question presented to us in the case at bar, since the statutes of intervention of the states of California and Iowa, which regulate the subject of intervention, provide that: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after the issue has been joined in the cause, and before the trial commences." *Pom. Rem. & Rem. Rights*, par. 413. It will be seen that the statutes upon which these authorities cited upon the application for rehearing are founded are totally dissimilar to those upon which the solution of the questions proposed here depend. Upon the ground, however, that the decision heretofore made is in conflict with a "controlling decision, to which the attention of the court was not called," or "which has been overlooked by" it, it is contended that the determination of the supreme court of Kansas in *Gerson v. Hanson*, 34 Kan. 590, is controlling, since it is an interpretation of the statutes of Kansas relating to new parties before the Code of Civil Procedure of Kansas was adopted as the law of this territory. In this case Wilson had an attachment against Lightbody. The attachment undertaking was executed by Wilson as principal and Hanson and others as sureties. The attachment failed. Gerson, the assignee of Lightbody, brought suit on the attachment bond against Hanson and Lehman, omitting to make Wil-

son a party defendant. Hanson and Lehman applied to the court to have Wilson brought in as a party defendant, and Wilson also filed his application to be made a party defendant, each of these applications setting up that Wilson had obtained a personal judgment in the attachment case against Lightbody, and that the amount of that judgment would be a proper subject of offset by Wilson against the claim of Gerson. Manifestly, Hanson, the assignee of Lightbody, had, on that account, omitted to make Wilson a party defendant in the suit on the attachment undertaking, and he accordingly resisted the application of Wilson and his sureties to have Wilson made a party defendant in that action. Since the action was upon an attachment bond, upon which Wilson was principal, and the controversy was one in which his interest, in so far as it was not only identical with that of Hanson and others, as against the plaintiff was one in which his liability was prior to theirs, he had, as provided in section 36 of the Code, "an interest in the controversy adverse to the plaintiff, and was a necessary party to a complete determination or settlement of the question involved therein." And the question was one in which, under section 41 of the Code, the determination of the controversy between the parties could be had "without prejudice to the rights of others or by saving their rights"; and the court properly permitted them to be brought in. In the case here considered Gerson could have sued and ought to have sued Wilson, because he was a party to the attachment undertaking sued upon. It expressly appeared in the case that Lightbody was insolvent. The case came expressly under sections 36 and 41 of the Code of Civil Procedure, but there is no analogy in the case to the case now being considered. In addition to the authorities heretofore cited upon the proposition upon the right of intervention, it was said in *Cosgriff v. Savings Institution* (Sup.) 52 N. Y. Supp. 189, that "the rule is well settled that the plaintiff in an action at law that seeks nothing but a money judgment cannot be compelled to bring in other parties than those he has chosen to make defendants." And it was said in *Wescott v. Patton*, 10 Colo. App. 544, 51 Pac. 1021, that "in a suit upon a promissory note by an assignee of the note a judgment creditor of the payee of the note has no such interest in the matter in litigation as to entitle him to intervene on the ground that the payee was insolvent, and transferred the note to the plaintiff without consideration, and for the purpose of hindering and defrauding his creditors." And it is said in *Pom. Rem. & Rem. Rights*, § 424, that: "The occasions on which a third person may intervene in a pending action are very few. The scope of the provision is exceedingly limited. It has been said that its operation is confined to those cases in which a bill of interpleader would have been permitted under the former

practice to accomplish the same end. It is certain that the right to intervene can only be exercised in actions for the recovery of real or personal property. It does not exist, therefore, in an action to recover money."

The proposition that E. W. Dowden and M. I. Dowden were necessary parties to the action is also averred in the petition for rehearing to be erroneous upon all the authorities. No "express statute or controlling decision to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court," has been cited, nor has the "question, statute, or decision so overlooked" been distinctly stated in the petition. A number of cases have been cited upon the proposition, which were contained in the original brief. It is said in *Pom. Rem. & Rem. Rights*, § 347, that: "In an action by a judgment creditor to reach the equitable assets of the debtor in his own hands, or to reach property which has been transferred to other persons, or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant, and the suit cannot be carried to final judgment without him." And it is again said by the same author in section 350 that: "In an action brought by or on behalf of a judgment creditor to reach a fund in the hands of an express trustee for the debtor, such debtor is a necessary defendant, and should be joined with the trustee. He is the person directly interested in the fund, and the one to be directly affected by the judgment." *Wait, Fraud. Conv.* § 129; *Bank v. Lanchelmer* (Ala.) 14 South. 776; *Child v. Brace*, 4 Paige, 309; *Beck v. Burdett*, 1 Paige, 305.

The question now remains touching the extent of the liability of T. W. Williamson; and section 4615, St. Okl. 1893, is cited as a statute to which the attention of the court has not hitherto been referred, as sustaining the contention that the extent of Williamson's liability ought to have been determined upon the order of the district court by which he was, on the 9th day of April, 1897, ordered to pay the amount then due upon the note sued upon by Goodrich into court. The statute reads as follows: "When there is no execution outstanding, the clerk of the court in which the judgment was rendered may receive the amount of the judgment and costs, and receipt therefor, with the same effect as if the same had been paid off to the sheriff on an execution; and the clerk shall be liable to be amerced for refusing to pay the same to the party entitled thereto, when requested, and shall also be liable on his official bond." The finding of the district court was that Williamson was indebted upon the note in the sum of \$5,000 principal and \$650 interest accrued prior to the 29th of March, 1897, which was the date of the filing of his affidavit and application, which was, in ef-

fect, an answer admitting his liability to that extent, and asking permission to be permitted to pay that amount into court, and be discharged from further liability. And the judgment of the court thereupon was that he should pay in the sums of principal and interest and costs which had accrued up to that time, and he should be thereafter discharged and relieved from all other and further liability to either Goodrich or the Oklahoma National Bank. The action thus taken by Williamson by his "affidavit," which was, in effect, an answer and an admission of liability to the extent of the indebtedness due upon the note sued upon, cleared the way for the order of the court as against him, which was, in effect, a final judgment as to him. He was the defendant in the cause. The action was brought against him, and, but for the intervention of the Oklahoma National Bank, it was such an admission as would have finally determined the case. There is no evidence of any collusion between Williamson and the Oklahoma National Bank by reason of which the bank became an intervener in the action. It is true that it was not a full determination of all the issues which have been brought into the case, but it was a determination of the issues which were involved in the case as against him, and the further procrastination of the cause, by which Goodrich has been delayed in obtaining possession of his money, has resulted from the delays caused by the intervention of the Oklahoma National Bank. It is the opinion of the court that Williamson's liability should be finally determined by the order of discharge made in the district court, by which he was "discharged and relieved from all other and further liability to either of said parties." All the justices concur, except BURWELL, J., who was of counsel, not sitting.

(38 Or. 522)

WILLIS v. CRAWFORD.

(Supreme Court of Oregon. March 4, 1901.)

ATTORNEYS—JOINT PROSECUTION OF SUIT—SPECIAL PARTNERSHIP—ACCOUNTING—EVIDENCE—SUFFICIENCY—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

1. N. employed plaintiff and defendant, who were not partners, as his attorneys in the prosecution of several suits, the costs and expenses of which were paid by N. Plaintiff alleged that defendant had misrepresented the amount of fees he received from N., and fraudulently retained more than his share. *Held*, that the joint service of plaintiff and defendant in preparing and prosecuting the suits did not establish such a special partnership between them as would give equity jurisdiction of the action.

2. Where plaintiff and defendant, who were not partners, were employed by N. as his attorneys to prosecute several suits, and plaintiff alleged that defendant misrepresented the amount of fees he received from N., and fraudulently retained more than his share, plaintiff's bill for an accounting was properly dismissed on the ground that he had an adequate remedy at law.

Appeal from circuit court, Douglas county; H. K. Hanna, Judge.

Action by William R. Willis against A. M. Crawford. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is a suit to dissolve an alleged partnership and for an accounting. The transcript shows that one J. T. C. Nash was the owner of a mine in Douglas county, Or., which he sold to the Victory Placer-Mining Company, a corporation, receiving therefor its bonds in the sum of \$90,000, and an assignment of a cause of action instituted by one W. H. Harris against the International Nickel-Mining Company to recover the sum of \$10,000. A cross bill having been filed in said action, making Nash a party, he retained the plaintiff and defendant as his attorneys, who secured for him the amount involved, receiving as fees for their services the sum of \$350 each. They also commenced a suit for Nash against the Victory Placer-Mining Company, and secured a decree making their client's bonds a first lien upon the property so sold by him. The corporation having made default in the payment of the interest due on its bonds, and the mine having been operated at a loss, actions were commenced against said corporation by its creditors, whereupon the plaintiff and the defendant, as Nash's attorneys, intervened, and secured the appointment of a receiver. A sale of said bonds having been negotiated for \$30,000, of which sum \$500 was paid in cash, and promissory notes of the purchasers thereof were executed for \$5,500, payable April 5th of that year, and \$2,000 on the 5th of each month thereafter until and including April, 1898, Nash, on February 27, 1897, without plaintiff's knowledge, executed to Crawford a writing promising to pay him one-third of the purchase price, when paid, in consideration of the latter's service for several years as an attorney and in securing the sale of said bonds; and it was stipulated that from the sum so received Crawford would pay Willis all sums due him for service rendered Nash. Willis, on March 29, 1897, received from Nash a check for \$600, and thereafter the defendant paid him the sum of \$150 on account of his attorney fees, the latter having received \$750 for the same service. The promissory notes evidencing the purchase of said bonds having been paid as they severally matured, the defendant, in pursuance of Nash's agreement, received and retained the sum of \$8,500. In July, 1898, the plaintiff, having found in the defendant's office, joining his in the same building at Roseburg, Or., the memorandum executed by Nash, took possession thereof without the defendant's knowledge, and thereupon commenced this suit, alleging that Crawford was his partner in the trial of said causes for Nash; that the defendant collected all sums paid on account of attorney fees, and falsely represented that he had received only \$1,800

therefor; that no settlement had ever been made respecting said attorney fees, and the defendant refuses to render a statement of the terms of the agreement entered into with Nash, or to give a correct account of the sums he has received as fees in pursuance thereof; and praying a decree for one-half the sum which it may be found the defendant has received. A demurrer to the complaint on the ground that the plaintiff had a plain, speedy, and adequate remedy at law having been overruled, an answer was filed, denying the material allegations of the complaint, and averring that about April 5, 1898, Nash settled with the plaintiff, and paid him the sum of \$750 in full satisfaction of his demand, since which time he rendered no service for Nash; and also alleging that the plaintiff has a full, complete, speedy, and adequate remedy at law for the redress of his alleged wrongs. The reply having put in issue the allegations of new matter in the answer, the cause was referred to Ira B. Riddle, who took the testimony, from which the court found that the plaintiff and defendant were partners in the business transacted for Nash; that the defendant entered into an agreement with Nash whereby he received and retained the sum of \$8,500, which agreement inured to the benefit of said partnership, and that the plaintiff was entitled to recover from the defendant the sum of \$1,250; and, having rendered a decree in accordance therewith, the defendant appeals.

J. C. Fullerton and E. B. Watson, for appellant. Dexter Rice and W. R. Willis, for respondent.

MOORE, J. It is contended by defendant's counsel that no partnership existed between the plaintiff and the defendant; that, if the latter received any money from Nash to which the plaintiff was entitled, he had an adequate remedy at law for the recovery thereof; and that the court erred in holding that equity had jurisdiction of the cause. It is not alleged in the complaint, and the evidence fails to show, that the plaintiff and defendant were general partners, though each paid one-half the cost of the fuel used and of the rent of the separate rooms occupied by them, and a city license was issued to them as partners to practice their profession as attorneys at law in Roseburg, Or., from January 1, 1896, to July 1, 1897; but Crawford testifies, and he is not contradicted in this respect, that the license was issued in the form indicated so as to save the cost of one license. The parties not being general partners in the practice of law, did the joint service rendered by them for Nash establish inter se such a special partnership as would authorize a court of equity to assume jurisdiction of the cause by reason of their relation of trust and confidence? A partnership is an agreement entered into between two or more persons to unite their

labor, skill, money, and property, or either or all of them, in a lawful enterprise for their mutual account. Story, Partn. § 2; 17 Am. & Eng. Enc. Law, 828; Cogswell v. Wilson, 11 Or. 371, 4 Pac. 1130; Kelley v. Bourne, 15 Or. 476, 16 Pac. 40; Dawson v. Pogue, 18 Or. 94, 22 Pac. 637, 64 L. R. A. 176; Flower v. Barnekoff, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149. Whether the parties are partners inter se must be determined in a suit instituted for that purpose, from their intention to enter into that relation, as legally ascertained from their agreement to that effect. 17 Am. & Eng. Enc. Law, 832; Kelley v. Bourne, supra; Klosterman v. Hayes, 17 Or. 325, 20 Pac. 426; Nelms v. McGraw, 93 Ala. 245, 9 South. 719; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785; McDonald v. Matney, 82 Mo. 358. It is not asserted by Willis that they intended to form a partnership, and, in the absence of any testimony in this respect, their intention must be ascertained, if possible, from the evidence of their conduct. The defendant testifies that no agreement had been entered into whereby the plaintiff was to be paid one-half the money received from Nash as attorney fees, but that he had divided the sums so received equally with Willis until the latter settled with Nash respecting the amount so due him, and was thereupon discharged as his attorney. An agreement between two or more persons to divide the profits resulting from the prosecution of a business venture in which they have a common interest was once regarded as affording an accurate test of partnership; but such standard is not now deemed conclusive evidence of the existence of such relation. Cox v. Hickman, 8 H. L. Cas. 267; McDonnell v. Battle House Co., 67 Ala. 90; Culley v. Edwards, 44 Ark. 423; Smith v. Knight, 71 Ill. 148; Clark v. Barnes, 72 Iowa, 563, 34 N. W. 419; Colwell v. Britton, 59 Mich. 350, 26 N. W. 538; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26; Eastman v. Clark, 53 N. H. 276; Day v. Stevens, 88 N. C. 83; Curry v. Fowler, 87 N. Y. 33; Harvey v. Childs, 28 Ohio St. 319; Smelting Co. v. Smith, 13 R. I. 27. In Bloomfield v. Buchanan, 13 Or. 108, 9 Pac. 912, it was held that it was not necessary that there should be an express stipulation to share the profit and loss of a business enterprise in order to form a partnership; Mr. Justice Thayer saying, "If it were understood between the parties that there was to be a communion of profit, it would be a partnership." The language thus quoted, when considered by itself, would seem to imply that an agreement to divide the profits of an enterprise in which the parties had an interest necessarily created a partnership; but, when the utterance is read in connection with the context, it clearly shows that such was not the intention of the learned justice, and that the agreement referred to did not defeat the theory of a partnership, when so intended by the parties, because it did not provide for shar-

ing the losses. In Webster v. Bray, 7 Hare, 159, decided in 1849, two railway companies, having contemplated the construction of a line of railroad, each retained a solicitor to represent its interests; but, the companies having consolidated, the solicitors continued to render services for the new company without any agreement as to the division of the business to be performed by each, or in respect to their compensation therefor. The defendant performed much more service for their client than the plaintiff, and, having received a large sum in payment thereof, the latter instituted a suit for an accounting, alleging that they were special partners, and entitled to share equally the profits incident to their joint employment. At the trial it was proven that the plaintiff remarked to the defendant, soon after their employment by the consolidated company, that in cases of a special partnership it was the custom, so far as he had observed, for the solicitor performing the service to retain from 10 to 25 per cent. of the sum charged, in addition to the office charges and expenses, as his compensation, and the defendant replied that there could be no misunderstanding between honorable men respecting the matter, whereupon it was decreed that the sum so received by the defendant should be divided in the manner indicated; thus apparently holding that the existence of a partnership was to be determined from an agreement of the parties to share the profits. To the same effect, see McGregor v. Bainbrigge, 7 Hare, 164, decided in 1848, and Robinson v. Anderson, 7 De Gex, M. & G. 239, decided in 1855. Plaintiff's counsel rely upon the two cases last adverted to, and the remarks of Mr. Lindley in his work on Partnership (2d Am. Ed., p. 118), in support thereof, wherein it is said that: "If two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further." But the decision in Cox v. Hickman, supra, rendered in 1860, wherein it was held that an agreement entered into between two or more persons to divide the profits resulting from a business venture did not afford conclusive evidence of a partnership, destroyed the foundation upon which the conclusion in McGregor v. Bainbrigge and Robinson v. Anderson was predicated, and hence the text relied upon to support the decree herein is of little value in determining the question of partnership inter se. Every partner is a principal having a joint interest in the property and business of the firm of which he is a member. He is also an agent of each of his associates therein, and a communion of profit and loss is the test of his relationship towards them. 17 Am. & Eng. Enc. Law, 829. Upon the dissolution of a partnership by the death of a member the right to make contracts,

incur liabilities, manage the whole business, and dispose of the whole property, passes to the surviving members, and not to the representatives of the deceased. *Dwinel v. Stone*, 30 Me. 384; *Donnell v. Harshe*, 67 Mo. 170. In *Finckle v. Stacy*, Macn. Sel. Cas. (2d Ed.) 40, the plaintiff and defendant performed certain work for the Duke of Marlborough under a joint contract with him, for which they jointly received and immediately divided certain sums of money paid on account thereof. There being a sum in arrear, however, which the duke refused to pay, the defendant requested plaintiff to join him in maintaining an action to recover the same; but, the latter declining to comply therewith, the defendant brought an action against the duke, and recovered one-half of the sum due under the contract, whereupon the plaintiff instituted a suit to recover a moiety thereof on the ground that a partnership existed between the parties, and that the money which the defendant so recovered was secured on their joint account; but it was held that the joint contract entered into with the duke was an agreement to do a particular act, and not to form a partnership, and that the plaintiff was not entitled to recover. It is elementary, however, that, when the parties have so intended, a partnership may be formed for a single transaction. *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803; *Solomon v. Solomon*, 2 Kelly, 18; *Musler v. Trumbour*, 5 Wend. *274.

In the case at bar the evidence shows that Nash paid all the costs and expenses of the suits and actions in which the plaintiff and defendant appeared as his attorneys, and hence they never expected to share and did not participate in the losses incident to the trial of said causes. They shared the compensation paid by Nash for their joint service, but, as such participation in the joint earnings is not conclusive evidence of a partnership, it cannot be said from this fact alone that they sustained that relation to each other, without being driven to the deduction that the employment of more than one attorney to make preparation for or to try a cause ipso facto creates a special partnership,—a conclusion to which we cannot yield our consent. To hold otherwise is to conclude, in the absence of any evidence to the contrary, that a local attorney, employed only to assist in impaneling a jury, because of his knowledge of and acquaintance with the jurors in attendance, entitled him to an equal share of the attorney fee paid for the preparation required to be made and the care necessarily exercised in the trial of a cause, which would be carrying the doctrine of special partnership to the very verge of absurdity. It was incumbent upon the plaintiff to establish by a preponderance of the evidence the existence of the special partnership relied upon to give a court of equity jurisdiction of the cause; but in this respect we think he has failed. Our statute for the

protection of private rights contains the following provision: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law." *Hill's Ann. Laws Or.* § 380. A court of equity and a court of law in this state, though presided over by the same judge, are essentially different forums, and the rule is well settled that a court of equity will not grant relief where there is an adequate remedy at law. *Wells, Fargo & Co. v. Wall*, 1 Or. 295; *Phipps v. Kelly*, 12 Or. 213, 6 Pac. 707; *Miller v. Tobin*, 16 Or. 540, 16 Pac. 161; *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Ming Yue v. Navigation Co.*, 24 Or. 392, 33 Pac. 641; *Stemmer v. Insurance Co.*, 33 Or. 65, 49 Pac. 588, 53 Pac. 498; *Denny v. McCown*, 34 Or. 47, 54 Pac. 952.

Having concluded that no partnership, either general or special, existed between the parties, the important question to be considered is whether the plaintiff has a plain, adequate, and complete remedy at law. In *Dawson v. Gurley*, 22 Ark. 381, it was held that an agreement entered into between several persons to divide, when received, a reward offered for the apprehension of a fugitive from justice, did not constitute a partnership, and that, if one of the parties to the agreement received the entire reward, he was liable to each of the others for his proportion in an action for money had and received. So, too, in *Hurley v. Walton*, 63 Ill. 260, it was held that the joining of two or more persons in a single adventure, in which the profits were to be equally divided, does not constitute them co-partners in such a sense as will oust a court of law of jurisdiction in respect thereto. If it be assumed that the money which the defendant received was paid on account of the services rendered by the parties, the plaintiff has a plain, adequate, and complete remedy at law in an action for money had and received to his use, and hence a court of equity never had jurisdiction of the cause. It follows from these considerations that the decree is reversed, and the suit dismissed.

(9 Wyo. 326)

WYMAN et al. v. QUAYLE.

(Supreme Court of Wyoming. Feb. 21, 1901.)

MECHANICS' LIENS—STATEMENT—SUFFICIENCY—OWNER OF PROPERTY—AVERMENT—NECESSITY—EVIDENCE—ADMISSIBILITY—ALTERNATIVE PROVISION OF STATUTE—COMPLIANCE—PERSONAL JUDGMENT—SUFFICIENCY OF EVIDENCE—CREDIBILITY OF WITNESS—PREPONDERANCE OF EVIDENCE—REVIEW.

1. Rev. Stat. 1899, div. 2, tit. 2, c. 5, § 2893, provides that an applicant for a mechanic's lien shall file the name of the owner or owners of the property on which a lien is sought, if known to the applicant; and section 2889 declares that mechanics or other persons performing work or furnishing materials for any building shall have a lien "on complying with the provisions of this chapter." *Held*, that

where a statement for a mechanic's lien did not state the name of the owner, and there was no allegation in the statement or pleadings that the name of the owner was unknown, the lien could not be maintained.

2. Rev. St. 1899, div. 2, tit. 2, c. 5, § 2893, provides that an applicant for a mechanic's lien shall file a statement containing the name of the owner or owners of the property on which a lien is sought, if known to the applicant. *Held*, that where the statement and the pleadings did not allege the name of the owner, or that it was unknown to the applicant, evidence that defendant owned the property should have been excluded as irrelevant to any issue raised by the pleadings, as plaintiff, by failing to state or plead the owner's name, was not entitled to a lien.

3. Rev. St. 1899, div. 2, tit. 2, c. 5, § 2893, provides that an applicant for a mechanic's lien shall file a true description of the property on which the lien is intended to apply, with the name of the owner or owners, contractor or contractors, or both, if known to the applicant. *Held*, that the fact that the statute is in the alternative, requiring an allegation of the owner or contractor, or both, does not entitle one to a lien under a statement which failed to allege the name of the owner, and which did not contain an allegation that such name was unknown, since the allegation of the owner's name was necessary to give notice to all parties interested.

4. L., who entered into a contract to erect a building on the land of defendants, was unable to obtain credit for the necessary material, and plaintiff furnished it on agreement that defendants should pay for it out of the first money due on L's contract. L. fell sick, and was unable to complete the building, and plaintiff finished it with defendants' consent. *Held*, that the evidence was sufficient to support a personal judgment against defendants for the material furnished and the work performed by plaintiff.

5. Where the evidence was passed on by the trial court, questions involving the credibility of witnesses and the preponderance of the evidence will not be reviewed on appeal.

Error to district court, Uinta county; David H. Craig, Judge.

Action by John Quayle against William H. Wyman and another. From a judgment in favor of plaintiff, defendants bring error. Modified.

Hill & Ausherman, for plaintiffs in error. John A. Bagley and Hamm & Arnold, for defendant in error.

CORN, J. This was a suit brought to obtain judgment upon an account for materials alleged to have been furnished by the plaintiff to the defendants in the construction of a certain building, and to foreclose a mechanic's lien upon the premises upon which the materials were used. There was a demurrer to the petition, which was overruled. The court heard the evidence, and rendered judgment against the defendants in favor of the plaintiff for the amount of his claim and interest, found that the same was a lien on the premises, and decreed that they be sold unless payment of the amount should be made within 60 days. The defendants appeal to this court. Numerous errors are assigned, a part of which only it will be necessary for us to consider. No exception was preserved to the overruling of the demurrer,

and that question is not before us for decision.

It is insisted that the plaintiff acquired no lien upon the premises, for the reason that he failed to comply with the requirements of the statute in the statement of his claim filed with the register of deeds, and especially in that it does not state the name of the owner of the property. The requirement of the statute is that he shall file "a just and true account of the demand due him, after all just credits shall have been given, which is to be a lien upon such building or improvements, and a true description of all the property, or so near as to identify the same, upon which said lien is intended to apply, with the name of the owner or owners, contractor or contractors, or both, if known to the person filing the lien." Rev. St. 1899, div. 2, tit. 2, c. 5, § 2893. A preceding section of the chapter (section 2889) provides that mechanics or other persons performing work or furnishing materials for any building or improvements shall have a lien "upon complying with the provisions of this chapter." The lien is exclusively a creature of statute, deriving its existence only from positive enactment. It is a remedy given by law, which secures the preference provided for, but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements. Phil. Mech. Liens, § 9. The act in question declares that the persons designated shall have a lien upon complying with the provisions of the chapter, one of such provisions being that an account shall be filed. It is therefore indispensable to the creation of the lien that the prescribed account or statement be filed. And the statement must contain a just and true account of the demand due him, after all just credits shall have been given; a description of the property sufficient to identify the same; the name of the owner or owners, contractor or contractors, or both, if known to the person filing the lien; and it must be verified by oath. These particulars are all material. They are wisely provided for, to enable the register of deeds to make the abstract required by the succeeding section, to give timely notice to owners that their property is sought to be charged, and to protect third persons (purchasers or mortgagees) by apprising them of the alleged claim. *Beals v. Congregation*, 1 E. D. Smith, 654; *Reindollar v. Flickinger*, 59 Md. 469; *Malter v. Mining Co.*, 18 Nev. 212, 2 Pac. 50; *Rugg v. Hoover*, 28 Minn. 407, 10 N. W. 473; *Mayes v. Ruffners*, 8 W. Va. 386; *Kelly v. Laws*, 109 Mass. 396. The statement filed with the register of deeds in this case does not set out, and makes no attempt to set out, the name of the owner. Under all the authorities which are numerous and uniform upon the subject, the defendant in error acquired no lien. There is no allegation in the

statement or in the pleadings, and it is not claimed, that the owner was unknown. Upon the trial evidence was introduced to show ownership in the defendant Woodward. It should have been excluded as irrelevant to any issue in the case; the defendant in error not having taken the required steps to obtain a lien, or to make any evidence admissible in support of his claim for a lien.

Counsel for defendant in error cite several authorities which, it is claimed, sustain the view that the name of the owner need not be stated. We think none of them is in conflict with the principle before stated,—that when required by the statute the name of the owner must be stated, if known. *Hays v. Mercier*, cited by counsel, was decided under a statute which contained no such requirement, and the court say in their opinion: "While it would, no doubt, be good practice, in an affidavit for a mechanic's lien, to make the direct averment that the person with whom the contract was made was the owner of the property, yet we find nothing in the statute which would require a technical averment as to such ownership. The language of the law is 'that the person entitled to a lien shall make an account in writing of the items of his labor, skill, machinery or materials, and after making oath thereto [that is, to the account] shall file the affidavit [or, rather, the account so verified] in the office of the county clerk.' It is true that the allegation of ownership is an essential averment to the maintenance of the action. But this averment, in our opinion, is required only in the petition for the foreclosure of the lien. The petition in this case contains all necessary averments upon this subject. To the petition alone, then, when assailed by demurrer, must we look." 22 Neb. 660, 35 N. W. 896. It appears, therefore, that in the opinion of the Nebraska court the allegation of ownership is an essential averment, even when not required to be stated in the affidavit for the lien. In the case before us there is no allegation of ownership either in the petition or in the affidavit for the lien. *Moritz v. Splitt*, 55 Wis. 441, 13 N. W. 555, was decided under a statute which did not specify that the name of the owner should be stated in the claim for a lien. It was alleged in the complaint that the defendant had title to the land described; and it was held in that case that the statute was sufficiently complied with. In the California case of *Lumber Co. v. Newkirk*, under a statute providing that the claim of lien should state the name of the owner or reputed owner if known, the complaint charged "that the claim filed stated the name of E. B. Newkirk as the owner of said house, and a reputed owner of a leasehold interest in said realty, and stating in said lien that the owner of the fee of said real estate was unknown." The court held that the plaintiff was only required to state the names if known, and if they were not

known the claim filed was sufficient if it was silent on that subject. 80 Cal. 276, 22 Pac. 231. The decision is not an authority in this case, there being no claim that the name of the owner was unknown. But counsel for defendant in error suggest that the language of the statute is in the alternative, and that the requirement is complied with if the owner or the contractor, or both, be named; that the provision is by way of permission to the person filing the account to name either or both. We are unable to adopt the construction suggested. The chapter extends its protection not only to principal contractors, dealing directly with the owner of the property, but to subcontractors, laborers, and material men; and, keeping this fact in view, any apparent obscurity in the language employed disappears. Where a contractor deals directly with the owner, from the nature of the case, only the name of the owner is required to be, or can be, stated. But in the case of a subcontractor, laborer, or material man, his dealings are or may be solely with a principal contractor; and, in order to give notice to all parties interested, he is required to name in his statement both the owner and principal contractor, if known to him. Our statute is taken substantially from the laws of Missouri. The supreme court of that state, in discussing it, say: "Now, the law under consideration requires that the statement filed shall include a true account, with all just credit given; a description of the property, so that it can be identified, with the name of the owner or contractor, or both if known; and that it shall be verified by affidavit. These all constitute the elements essential to securing the lien. We cannot say that one of the constituent parts is more matter of substance than another. The language seems plain and unambiguous, and we are not permitted to impair its force or fritter away its meaning by construction." *Hoffman v. Walton*, 36 Mo. 619.

It is also urged by plaintiffs in error that the personal judgment against them is not sustained by sufficient evidence. There was some conflict in the testimony, but there was evidence tending to show the following state of facts: One Langford entered into a contract with the defendants to erect a building for them upon ground owned by Mrs. Woodward, for the sum of \$800. That Langford found himself unable to obtain the necessary material unless the defendants would provide for payment for it. That the plaintiff furnished the materials for the building upon an agreement with the defendants that they would pay him for the same out of the first money due upon the contract with Langford. The latter fell sick, and was unable to complete the building. It was completed by the plaintiff with the consent and approval of the defendants, and they moved into and occupied it. This is unquestionably sufficient to sustain the judgment,

and, the court below having passed upon them, questions involving the credibility of witnesses or a mere preponderance of the evidence will not be reviewed by this court.

We find no material error in the record, except as above pointed out. The judgment, in so far as it decrees a mechanic's lien in favor of the plaintiff upon the property in question, is reversed. As a personal judgment in favor of the plaintiff against the defendants, it is affirmed, and the judgment of the district court is modified accordingly. No costs of appeal are allowed to the defendant in error, but costs of appeal are allowed to the plaintiffs in error, and are to be deducted from the judgment above affirmed.

POTTER, C. J., and KNIGHT, J., concur.

(16 Colo. App. 108)

COWELL et al. v. SOUTH DENVER REAL-ESTATE CO. et al.

(Court of Appeals of Colorado. Feb. 11, 1901.)

WILLS-EJECTMENT - PARTITION - POWERS-SALE-SETTING ASIDE-RETURNING PRICE-ACQUIESCENCE - NONJOINER - WAIVER-POWER CO-EXTENSIVE WITH ESTATE GRANTED.

1. Where a widow took a life estate in half of testator's property, and the children a fee in the balance, with a remainder after the life estate was exhausted, and there had been no partition, ejectment would not lie, during the widow's life, against one to whom she sold such property, since she had the right to possession during the continuance of her estate.

2. Where there was no showing in a suit to set aside a sale of real estate that the plaintiff had secured any part of the purchase price, the fact that there was no offer to return the price was immaterial.

3. Where the answer averred that the plaintiff in a suit to set aside a sale of land acquiesced in such sale, but the replication denied the allegation, the fact that the complaint contained no allegation of nonacquiescence was immaterial.

4. Where the widow and executrix was not made a party to a suit to set aside a sale by her of the testator's property to defendant under power in the will, the failure to take advantage of the defect, either by demurrer or answer, constituted a waiver of the objection.

5. Where a power of sale was given by will to the executrix as such, and embraced only the right to make a sale for the best interests of the estate, it was a mere naked power to carry out the purposes of the will, and could not be used to divest the estates of devisees, unless such exercise was necessary in the execution of such purposes.

6. Where the complaint, in a suit by devisees taking the fee in half of a testator's estate, and a remainder in the other half, subject to a life estate therein by the executrix, to set aside a sale of land by an executrix under a power, shows that more than enough money to pay all debts and legacies came into the hands of the executrix from the estate, and such power was granted to the executrix in connection with a life estate, the plaintiffs had a right to relief under the facts set up, and were entitled to give proof under the complaint, since such power was co-extensive only with the life estate bequeathed in connection therewith, in the absence of the necessity of a broader power to carry out the purposes of the will.

Appeal from district court, Arapahoe county.

Bill by Harrison Cowell and others against the South Denver Real-Estate Company and others to set aside a transfer of real estate under a power in a will. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

F. D. Taggart and Wells & Taylor, for appellants. A. B. Seaman and H. S. Silverstein, for appellees.

BISSELL, P. J. The condition of the record precludes the determination of more than one question, with some collateral inquiries which grow out of it. This is to be regretted, because the suit suggests some other inquiries, and, if we were able to express our conclusions about them, the subsequent progress of this litigation would be very much facilitated. The extraordinary way in which the case went off prevents it. In order to illustrate the condition of affairs, we observe, before proceeding to state the contents of the bill, that the complaint was filed, issue tendered by answer and replication, and the cause went to trial. When it was reached in its regular order, and a witness was called, the objection was made that no evidence could be introduced under the complaint. The trial judge took this view of the matter, and judgment was rendered against the complainants. The replication took issue with all the affirmative matters in the answer, so that in reality the naked question is, did the complainants or any of them state a case on which they were entitled to make proof?

We will now state generally, without attempting to recite in detail, the substance of the bill. We do this because it is quite evident from the arguments of counsel, as well as from the disposition of the case below, that the court's view on one question led to the ultimate ruling.

In 1888, William Cowell died, leaving a widow, and the complainants herein, his children, as his heirs and legatees, under a will by which he disposed of his estate. Therein he provided that his just debts and the expenses of his last sickness and funeral should be paid. He then bequeathed unto his several children various sums, amounting to \$4,500. He then disposed of his residuary estate by a provision giving to the widow the use of half of the remainder for her life, and upon her death all the estate bequeathed to her for life should be divided, share and share alike, among the children then living, and the children of the deceased, if any. By an independent clause, the other one-half of the remainder he bequeathed absolutely to his children in equal parts. He appointed his wife executrix, without bond, and then inserted this provision: "And I hereby expressly authorize and empower her, my said executrix, to dispose of any and all of real estate for such price, and upon such terms, as in her judgment shall be for the best interest of my estate, and for that purpose do

hereby expressly empower her to make, execute, acknowledge, and deliver any and all deeds of conveyance requisite or necessary to carry into effect this power and authority to sell, convey, and dispose of my said real estate, and all such conveyance of my real estate shall be effectual to vest in the grantee or grantees named in such deed or deeds a good and perfect estate in fee in the real estate so conveyed; and I appoint my said wife, Lydia, to be testamentary guardian of each of my children, without bond." The complaint charges that on the 26th of September the will was admitted to probate, and letters testamentary issued, and then describes the estate. It is said to have consisted of about \$8,000 in moneys and personal property, and a fee-simple title to lots 17 to 22, in block 127, East Denver, two lots in block 109, and certain parts of lots in block 19. The debts were alleged not to have exceeded \$5,500. No claims were presented against the estate except one amounting to \$315.00. The widow never filed an inventory nor complied with the statute with reference to the administration of estates. It is charged that, within a year after Cowell's death, Mrs. Cowell got, from moneys belonging to the personal estate and rentals, enough to pay all debts and funeral expenses and a part of the legacies, to wit, about \$2,000. The bill then proceeds to aver that on the 5th of April, 1889, Mrs. Cowell, as executrix, sold and conveyed lots 31 and 32, in block 109, and got therefor \$65,000. It then charges that in 1890 she undertook to sell to one Price lots 17 to 22, in block 127, for the purchase price of \$140,000, reciting that \$15,000 was actually paid. Following these averments, there were divers allegations respecting the attempted payment of the remainder of the \$125,000, charging that part of this sum was paid by deeding lands of little value, and on which there were incumbrances, whereby the executrix only got equities, no actual sale having been made, but only a barter and an exchange, and charging divers and sundry fraudulent acts on the part of McIntosh & Mygatt, who were the moving parties in the enterprise, and who acted on behalf of the South Denver Real-Estate Company, in which the title ultimately vested. We do not propose to state what these allegations were, because we do not intend to decide any particular question that could possibly arise out of them. The propositions suggested by these matters can only be properly considered and equitably determined on the incoming of proof, should it be found at the trial that the proof as offered can be admitted under the issues and in the form in which it may be tendered. It may be well here to state that part of the complainants were infants and sued by their next friend. The others were of adult age, becoming such after the death of the father, but how long before the filing of the bill we do not know. This is a matter purely of

speculation from the terms of the will and the date of the papers. The answer set up sundry and divers matters in defense, among others an application by the widow for leave to borrow \$15,750, and to pledge the note of Price given for a part of the purchase price of the property, and an allegation that this order was made. The answer then proceeds to set up that this money was borrowed of one Wood, and that some of the complainants signed the note, and that it afterwards passed into the possession of the National Bank of Commerce, with which McIntosh & Mygatt were connected, and under the control of either one or both of them; an ultimate sale of the note and the collateral, whereby the title to the Price note became vested in McIntosh & Mygatt, or the South Denver Real-Estate Company, or all three, as the case may be. In the absence of evidence, we may be permitted to conceive this plea was evidently put in to admit proof of conduct which would estop the adults from maintaining their action. Whether this would be enough or not we do not even suggest because of the absence of testimony, though it is quite manifest the allegations alone were worthless as a defense. There were also sundry averments respecting the knowledge and acquiescence of the adult plaintiffs with respect to which the same suggestions may be made.

Sundry objections were offered to the introduction of testimony. We do not deem it wise to consider many of them, lest what we say may be found inapplicable when the proof comes in, and our suggestions be not only matters of supererogation, but wholly irrelevant. We shall only very briefly refer to one or two matters which would possibly be enough to sustain the judgment on the appeal in case we disagreed with the appellees on the main proposition. We do not say this is true, but we say, even assuming them to be true and to be sufficient, yet, as we look at the record, they are at present inapplicable. The first suggestion is that the case is not one for equitable cognizance; that the plaintiffs could maintain ejectment, and therefore the bill ought to be dismissed. We do not believe it. In the first place, the parties have proceeded to state the facts in their complaint, and we have yet to learn that, under any code system which prevails at the present time, the party is to go out of court because he has brought his suit in equity when he ought to have brought it in law, or vice versa, and that he is to be barred or suffer the misfortune which may come from a dismissal of his suit because of the date at which it was filed with reference to the time when his rights accrued. Aside from this, however, we do not believe ejectment could be maintained. The plaintiffs were not entitled to possession in that sense which would permit them to bring an action in ejectment. It will be observed that there had been no par-

tion of the estate,—the widow took a life interest in half of it, and the children a fee in the balance, with a remainder after the life estate was exhausted. It is quite impossible for us to see that they were entitled to these particular lots or to the possession of them, and that the life estate of the widow did not attach. Until legal determination, that question was an open one. If the widow had a life interest in these lots, and it is possible she might have asserted it, her deed undoubtedly conveyed the right of possession, and ejectment would not lie. Where there is an undivided estate, and the plaintiffs have a fee in part of it, and the widow a life estate in the balance, we do not see how ejectment could be maintained prior to partition, and we believe that an equitable suit is a proper remedy to ascertain the rights of the parties. We have grave doubts respecting the form and complexion of this bill, and the nature of the relief which it seeks; that is, we doubt whether the parties have drafted a bill which will in the end permit a complete determination of the rights of the parties. In some respects it seems to us their remedy has been misconceived, and the bill inaptly drawn, although perhaps it may be broad enough to entitle them to a judicial determination of the character of the deed. How they will get any substantial relief without the presence of all the parties we do not know. The bill could, with prudence and safety, be redrafted along somewhat different lines. This is, of course, for counsel to determine, but we state it because some of our suggestions would seem to be inappropriate to the bill as drawn.

The appellees also object because there was no offer to return the price, and no allegation that there was no acquiescence on the part of the adult plaintiffs. We do not discover from the bill or the answer, in the absence of proof at any rate, that the plaintiffs got any part of the purchase price. It is quite true the answer avers the adult plaintiffs did acquiesce, but that is a matter of proof, and, having been denied by the replication, we cannot assume the fact in order to sustain the judgment. It is quite clear there would have to be some proof of the receipt of the money to uphold the contention.

The objection is also made that the executrix and widow is not a party. We think she ought to be in the suit. There is no question concerning this proposition. This, however, affords no basis for the judgment, because these plaintiffs could maintain a bill as against the subsequent grantees of the estate, assuming that the facts or the law warrants it, without the presence of the executrix, unless they object because of the failure to join her. The matter probably sufficiently appeared on the face of the complaint to compel a demurrer, but, if it did not, it should have been set up by answer.

The failure to take advantage of a defect of parties undoubtedly waives the objection.

This brings us to the fundamental proposition, and the only one about which we propose to say very much,—the power of the widow and executrix to dispose of the estate. Notwithstanding the multitude of cases cited by the appellees which decide the question under divers conditions, though generally in cases where the power has been definitely granted, but to be exercised for definite purposes, we remain of the opinion that according to the weight of authority, as well as the volume and force of it, the law is not with them. The matter has been presented in various ways, and, while most of the decisions are applied and expressly limited to particular facts, we believe it may be safely said that an estate which is cast on the heir by the law, or devolved on him by will, cannot be divested or taken away by the exercise of a power given to a representative unless the intention is most clearly and most unmistakably expressed, and its use essential to the execution of the evident purposes of the testator. There is a very wide difference between the rule which controls in the interpretation of deeds and of wills. We must ascertain what the intention of the testator was, and, being able to gather that intention, it will control, regardless of the phraseology in which he has expressed his purpose. This principle has been declared by the supreme court of the United States in no unmistakable terms. It was said: "In the American cases there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator." *Peter v. Beverly*, 10 Pet. 532, 563, 9 L. Ed. 522.

It will be found wholly unnecessary to depart from the terms of the will in order to determine the intention and the extent of the power. As we proceed, it will be observed that the power is limited by reason of a condition resulting from the devise, and it will be wholly unnecessary to attempt to ascertain what the intention of the testator was in order to reach the conclusion that there was a limitation upon the power. Doubtless our position might be supported by a consideration of the terms of the instrument and of the representative capacity of the widow. Power was not given her as a legatee, but as an executrix. Under these conditions, the grant of power was a grant uncoupled with an interest, because the interest was unessential to the execution of the power, and was simply a naked one to carry out the objects and purposes of the will. This position is sustained by many authorities, and, under the terms of this devise, we believe the principle is clearly applicable. It will be noticed, by recurring to the

terms of the instrument, that the power was given to the executrix as such, and manifestly embraces only the right to make a sale for the best interests of the estate. This is a limitation upon the right to exercise it, and probably on the limit of its duration. *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Gregg v. Currier*, 36 N. H. 200; *Dexter v. Sullivan*, 84 N. H. 478; *Fluke v. Fluke's Ex'rs*, 18 N. J. Eq. 478; *Hope v. Johnson*, 2 Yerg. 123; *Sharpsteen v. Tillou*, 3 Cow. 651; *Moore v. Moores*, 41 N. J. Law, 440; *Hovey v. Chisholm* (Sup.) 9 N. Y. Supp. 671; *Ward's Lessee v. Barrows*, 2 Ohio St. 241. A good many other authorities might be cited along the same line, but these are enough to indicate the general course which the decisions take, and the doctrine which underlies the whole of them. A power of this description, so far as we are able to gather, is always limited to the purposes which the testator evidently entertained. There is a recognized difference between a power coupled with an interest and one without it, into which we need not enter, because here the widow took an estate by the express terms of the devise. The power was granted to her as an executrix, and was evidently given only for the purpose of carrying out the testator's intentions. We do not have to determine whether the situation and condition of the estate warranted the exercise of the power. It has sometimes happened where the estate was to be sold and reinvested, or where it was to be sold for the purposes of division and partition, a different construction has been given to the terms of the power; but this is only in subordination to the general principle already expressed, to wit, what were the purposes and intentions of the testator, and how broadly must the power be construed in order to effectuate them? On the allegations of the bill, these questions are presumably out of the case. The bill charges that the debts were only a few thousand dollars, and the legacies only \$4,500, and that no debts were proven against the estate; showing, presumptively, that the debts and legacies were all paid. The bill likewise shows—and, under the present condition of affairs, we must assume it to be true, because the plaintiffs were not permitted to offer proof about it, and the case went off on the hypothesis that the complaint did not state a cause of action—the widow received sixty odd thousand dollars, besides the cash on hand at the date of the testator's demise. This was largely more than enough to pay the debts and all specific legacies, and leave the balance of the estate to go as it had been devised. If this is true,—and we must assume it for our present purposes,—it necessarily follows that the power need not have been exercised as to the lots in controversy in order to carry out any purpose or intention deducible from the terms of the instrument.

This proposition being out of the way, we come now to what, in our view, is the funda-

mental question. As already intimated, the heir can never be disinherited except by an express devise, or by a purpose declared in the instrument from which there is no escape. This principle is old and well settled, and we refer only to a single text-book and two or three authorities concerning it. 1 Redf. Wills (2d Ed.) p. *425, note 5; Id., 434, § 18; *Areson v. Areson*, 3 Denio, 458, 461; *Allen's Ex'rs v. Allen*, 18 How. 385, 15 L. Ed. 396.

Starting with this fundamental principle, the balance of the journey, and the authorities which we shall cite, will be along a well-defined highway. On the death of Cowell, and by his will, the estate was divided into two parts, of which the children took the fee in one-half, the widow a life estate, and the heirs a fee in the remainder. We do not undertake to determine, nor do we decide, whether this statement as to the widow's estate is absolutely and entirely accurate. We do not undertake to determine in advance whether a failure on her part to elect that she would not take under the will deprived her of the fee in the one-half of the estate to which under the statute she was entitled. We have already decided that the testator may not devise away from the widow the absolute one-half, though in that case there was an election and an assertion. We do not concede it would make any difference whether the widow took a life estate in one-half of it, or an absolute fee in one-half of it. In either event, as we read the cases, her power would only be co-extensive with the estate which was bequeathed to her, unless, to carry out the evident purposes of the testator, a broader power must be given her, which she might exercise to the disinheritance of the heirs, or the destruction of the estate given to the legatees. This question has been before the supreme court of the United States, and we are satisfied to begin and end our examination with the opinions of that court when they are unanimous, or reasonably so. In the two cases which we shall cite from that court, it is undoubtedly held that, where a power of disposal accompanies a devise of a life estate, the power is limited to whatever acts the person holding a life estate can perform consistent with the estate devised, unless the words clearly indicate a larger power, and a larger power must be exercised in order to effectuate the intentions of the testator. In the opinion of that court, construing a will, and granting a power in the words, "to do with as she sees proper before her death," these words only confer a power to deal with the property in such manner as is consistent with the estate granted. As the court puts it, "whatever power of disposal the words confer is limited by the estate with which they are connected." *Brant v. Iron Co.*, 93 U. S. 326, 23 L. Ed. 927. This doctrine was afterwards affirmed, and this express language approved, in a very similar case. *Giles v. Little*, 104 U. S. 291, 26 L. Ed.

745. Vide, also, *Patty v. Goolsby*, 51 Ark. 61; 9 S. W. 846; *King v. Whiton*, 15 Wis. 685; *Brearley v. Brearley*, 9 N. J. Eq. 21; *Trust Co. v. Holderbaum*, 86 Iowa, 1, 52 N. W. 550.

From these authorities, it is quite clear that a power given to an executrix in terms like those used in this will, and under like circumstances, and coupled with a life estate, gives no right to make any sale or disposition of the property, unless such sale or disposition is necessary to carry out the express provisions of the will, and is essential to the due administration of the estate. We put in this limitation, not because the authorities require us to limit it, for they seem to broadly hold that wherever there is a power of sale, as in this case, coupled with a devise of a life estate to the representative who is to exercise it, it may be only exercised in a manner consistent with the estate granted, yet we are not in the present litigation compelled to go to this extent. It is enough for us to hold that the power given to the executrix could only be exercised with reference to the estate devised, because it is quite evident from the allegations of the bill, and we assume the proof will accord with it, that no other disposition was essential or necessary in order to effectuate the testator's purpose, to wit, pay his debts and pay the specific legacies granted. Under these circumstances, the heirs may not be disinherited or the legatees deprived of their legacies by the use of this power, which can only be exercised for the best interests of the estate. The estate, as we understand it, may be absorbed and used for the purposes of distribution or the payment of debts. Where, as in this case, land is specifically devised, it is in no sense, as we look at it, part of the estate with reference to which the executrix is given power. It has passed by the terms of the devise to the legatees, subject only to the power of the executrix, either in the exercise of that specifically granted, or under statutory authority to appropriate it to the payment of debts. It is quite clear, when once it appears that no sale was necessary to pay debts or legacies, that the legatees must take the undisposed of balance, subject, possibly, to a life interest in some or all of it, free and clear from the power of disposition by the representative. As the case stands in the bill, we believe the complainants had a right to offer proof. We further believe that, the proof being adequate and in accordance with the averments, they would be entitled to a decree adjudging this conveyance invalid. It would certainly be true as to the minor heirs, who are peculiarly wards of chancery. Whether it would be true as to those who have become of adult age, or whether there are any facts or circumstances which would estop them, either by acquiescence, the receipt of money, or otherwise, we do not undertake to say, because there is nothing before us which will afford a basis for the decision. We have gone as far as we

believe the situation of the record warrants, and with these suggestions the case must be reversed and remanded. Reversed.

(23 Utah, 22)

RIO GRANDE W. RY. CO. v. TELLURIDE POWER TRANSMISSION CO. et al.

(Supreme Court of Utah. Dec. 11, 1900.)

REVIEW—ORDER OF FEDERAL COURT REMANDING CAUSE—RES JUDICATA—PLEADING—FINAL JUDGMENT ON MERITS—FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATUTE—CORPORATE EXISTENCE—POWERS—NATURAL PERSON ACTING FOR CORPORATION—CORPORATION—POWER TO ACQUIRE PROPERTY—SETTLER ON PUBLIC LANDS—PRE-EMPTION RIGHTS—SALE.

1. The supreme court of this state has no power to review on appeal an order of a federal court declining jurisdiction and remanding the cause to the state court.¹

2. When the same matter is directly in question in another suit between the same parties, and the judgment of the former suit is directly in point, it will be, as a plea, a bar; as evidence, conclusive.

3. While it is a general rule that estoppel by a former judgment must be pleaded, the rule does not apply to cases when no opportunity to plead the estoppel is given; and, when a former judgment is admissible under the general issue, it is just as conclusive when so presented as if it had been pleaded.

4. A successful defense to one of a series of actions founded upon the same transaction or subject-matter, if it goes to the merits of the whole, is a complete estoppel to any subsequent action between the same parties, upon the principle that a judgment is final as to all points and questions actually litigated and determined by it.

5. Sections 2, 6, 9, 10, art. 12, Const., are expressly embodied in section 2293, Comp. Laws Utah 1888, as amended in 1896, and in sections 351, 352, Rev. St. 1898, and prohibit foreign corporations from doing business in this state unless they have complied therewith, and any corporation failing to so comply is not entitled to the benefits of the laws of this state relating to corporations.²

6. A corporation can only have an existence under the express laws of the state where it is created. It can exercise no power not granted by its charter or some legislative act, and a foreign corporation coming into this state cannot bring with it powers with which it is not endowed in the state where created.

7. Where it sufficiently appears from the evidence that the defendant, who is a natural person, performed his acts for the use and benefit of the defendant, which is a corporation, he cannot be treated as a personal claimant and owner of the easement and right of way in controversy; the corporation being incapable of acquiring such ownership.

8. A party settling upon unsurveyed government land, who in good faith complies with the statutory requirements, is entitled, as against subsequent settlers, to pre-empt the land, but would derive no right thereto by purchasing the claim of a prior settler, unless by actual entry at the proper office he had acquired some right thereto.

(Syllabus by the Court.)

Appeal from district court, Fourth district; W. N. Dusenberry, Judge.

¹ *Telluride Power Transmission Co. v. Rio Grande W. Ry. Co.*, 20 Sup. Ct. 245, 175 U. S. 639, 44 L. Ed. 856.

² *Barse Live-Stock Co. v. Range Val. Cattle Co.*, 50 Pac. 630, 16 Utah, 59.

Action by the Rio Grande Western Railway Company against the Telluride Power Transmission Company and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

This is an action, under the laws of Utah, to condemn a strip of ground for a right of way, 200 feet wide by about 4,500 feet long in Provo Cañon, Utah county, along and near the Provo river. The complaint was filed September 12, 1896, and, among other averments, alleges plaintiff's corporate capacity, and its authority to construct a line of railway through Provo Cañon; that in 1889 it filed with the secretary of the interior, at Washington, a copy of its articles and proofs of organization; that on or about March 1, 1896, it commenced a survey and location of its line of road over the land claimed by the defendants, from Provo through the cañon, and completed it for a distance of 40 miles from Provo, and on both sides of the cañon, for 20 miles, upon unsurveyed land of the United States; that a map of such survey has been made and adopted by it as its definite location, and that it has commenced and prosecuted the construction of its road on such line; that, prior to plaintiff's survey, defendant Ferguson (who does not appeal) had or claimed some possessory right by occupation of some part of such land not surveyed, over which plaintiff's line of road runs; that plaintiff claimed for its right of way for railroad purposes a strip of land 100 feet wide on each side of the center line of its survey up the river, across land that defendant Ferguson claims; that the land is necessary for the construction and operation of its road; that plaintiff is the owner and in the possession thereof; and that it could not purchase said right of way from either of the defendants. Defendants the Telluride Power Transmission Company and L. L. Nunn answered jointly, and denied many of the allegations of the complaint, and claimed the land and possession thereof, and a right to flow the same for power purposes. Among other matters, the answer denies the jurisdiction of the district court; claims the title and possession of the premises and flow of the water as part of a reservoir site, and for agricultural purposes, and as having been claimed by defendants and Nunn prior to the railroad survey; that the property was claimed for a public use, and therefore could not be condemned by the proceedings instituted by the plaintiff; and also claims that the plaintiff did not intend to construct a railroad. Defendant Ferguson answered separately, alleging the main facts in the former answer, and alleged a contract to convey to defendant Nunn. Ferguson, who was a squatter upon the land, died in February, 1897. His widow and heirs answered after his death, and claimed to occupy the land sought to be condemned, but subject to the paramount title of the United States.

The testimony is very voluminous and somewhat contradictory, but tends to show, among other things, the organization of the plaintiff in 1889, with authority to build and construct a line of railroad over either of the two lines surveyed in the cañon in question; that soon after its organization the plaintiff filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same; that on March 24, 1896, it commenced a survey and location of its railroad up said cañon, over the land in question, which is unsurveyed land of the United States; that plaintiff has made a map of said survey and located its line, and the survey and location thereof has been adopted by it as the definite location thereof, and that it has since prosecuted the construction of said road with all convenient speed to the completion thereof; that at different intervals of time after August 1894, and prior to March 24, 1896, defendant Nunn had been upon the land, in the interest of the defendant company, with Mr. Holbrook, and some levels were made along the cañon; that survey stakes were placed in different localities, and plans for a dam were discussed, and some underbrush was cut along the river; that Mr. Holbrook, as trustee, under the direction of Nunn, posted a notice, dated October 5, 1894, about 200 feet above the county bridge near Bridal Veil Falls, and about 2,800 feet below Middle Rock, and 4,200 feet below Hanging Rock, claiming the right to take water 80 yards above the county bridge, near where the notice was posted, and near Thayer's house, for the purpose of generating an electrical current, etc., but in May, 1895, this project to take such water near this point was abandoned, and in May, 1895, Middle Rock was selected by the engineer of the defendant company, as a point of diversion, by a temporary plat, and in 1895 surveyors acting for the defendants ran a trial line from Middle Rock 3,700 feet above Holbrook's notice. This power line was 60 feet above the level of the river at Middle Rock, and run up the river about one mile above Hanging Rock, and down the river about the same distance. A stake marked, "Top of the Dam," was set near the lower level and the river, 15 feet above the water line. This stake remained there until August, 1896. About March 26, 1896, preliminary surveys were made for a flume on the lower level. On March 24th notices were posted by defendants' chief engineer, and Nunn's name was attached thereto. One of these notices was posted at Middle Rock on the 60-foot level, and a like notice was posted at Deer creek, 7 miles above Middle Rock. The notices claimed all land lying up the stream below the level of the point of the notices, for reservoir purposes, and a dam at the point opposite the notices so constructed as to contain the water of the stream on the level with the notices, and for the purpose of using the

water for agricultural and manufacturing purposes. Thereafter Nunn declared the notices a mistake, and that he did not intend a 60-foot dam at that place, but intended to raise the water 85 feet at Hanging Rock, and directed a survey at Hanging Rock on the 85-foot level. No notice was given for an 85-foot dam at Hanging Rock, but surveys were made. Some work was done in April, 1896, and in the summer of 1896, near this point. No dam was constructed at Hanging Rock, and no notice to erect it had been given. A dam 15 feet high would not injure the plaintiff's line or the county road. An 85-foot dam at Hanging Rock would flow the cañon over 4 miles above that point, and would flow the county road and railroad from 1 to 70 feet, and would require a change of the railroad grade for about 9 miles, at a cost estimated at \$20,000 per mile, besides many other expenditures. In December, 1896, Ferguson, who was a squatter upon the land sought to be condemned for a railroad right of way, conveyed his interest therein to the defendant Nunn. The question of the damages to the property was submitted to the jury, and damages were awarded to the defendants. The question concerning conditions precedent to the condemnation, and whether the plaintiff had shown a right thereto, and all conflicting and adverse claims to the property, were reserved by the court.

Brown & Henderson and S. A. Bailey, for appellant. Bennett, Harkness, Howat, Sutherland & Van Cott, S. R. Thurman, and E. A. Wedgwood, for respondent.

After stating the facts, MINER, J., delivered the opinion of the court.

1. The Telluride Power Transmission Company and L. L. Nunn, the appellants, filed a petition to remove the case to the federal court, alleging diversity of citizenship. This petition was denied by the district court, and after transfer to the federal court by filing a transcript of the proceedings the case was remanded to the district court. The appellants now object to the jurisdiction of the state courts to hear or try the case, and ask this court to review the order of the United States court in remanding the case to the district court of the state. This we cannot do. From such an order no appeal lies to this court. The order remanding the case is final, and this court has no authority to review on appeal the order of the federal court remanding the case to the state court. *Morey v. Lockhart*, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. Ed. 68; *Railroad Co. v. Thouron*, 134 U. S. 45, 10 Sup. Ct. 517, 33 L. Ed. 871; *Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; *Telluride Power Transmission Co. v. Rio Grande W. Ry. Co.*, 175 U. S. 639, 20 Sup. Ct. 245, 44 L. Ed. 305.

2. Many of the questions involved in this

case were passed upon by this court in the case of *Rio Grande W. Ry. Co. v. Telluride Power Transmission Co.*, 16 Utah, 125, 51 Pac. 146. In that case the court held, in substance: That respondent was such a railroad corporation as was contemplated by section 2338, Comp. Laws Utah 1888. That its articles were such as were contemplated by it, and that it was entitled to 10 years from the time it duly filed them within which to finish the road and put it in full operation. That it sufficiently appeared from the record that the plaintiff had located its right of way upon the land in dispute under section 1 of an act granting railroads the right of way through the public lands of the United States, found in 18 Stat. p. 482, pt. 3. That the plaintiff has duly filed its articles of incorporation, and due proof of its organization thereunder, with the secretary of the interior, and that it surveyed and located its right of way over the land in dispute (being along the same line in question here) about the 1st day of July, 1896. That the plaintiff's location of its right of way over the land, and its possession thereof, were lawful. That under subdivision 4 of the same act (18 Stat. 483), the land in question being unsurveyed land of the United States, the plaintiff had 12 months after the land was surveyed by the government within which to file with the register of the proper land office a profile of its road. That under the laws of this state, and section 2339, Rev. St. U. S., the defendants never had the title, possession, or right of possession to the land in question, or acquired any vested right in accordance with the laws or customs of the country, or any right to flow or otherwise occupy said land, or prevent the use and occupation thereof by the plaintiff railroad company, and that their adverse claim to the land in question as against the plaintiff was unfounded, and that plaintiff was entitled to judgment. That the defendants, if properly organized, might have obtained a valid right to any unappropriated water of Provo river for the purpose of operating machinery, for irrigation, or other useful purpose, under the laws of this state and under section 2339, Rev. St. U. S. This section reads as follows, in part: "Wherever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed." That such right was not unrestricted, however. That it must be exercised within a reasonable time. That, while dams and reservoirs may be erected, they must be kept within reasonable limits. That defendants' dam, to a height of 15 feet,

would not interfere with the use of the highway in the cañon, or with the use for other legitimate purposes. That the defendants had not appropriated the land in dispute, and that neither of the defendants was in actual possession of the land when the plaintiff located his right of way, took possession, and engaged in grading it.

3. On the trial of this case the judgment roll of the former case referred to was placed in evidence, under objection. The complaint was a common complaint to quiet title to an easement under the act of congress, and the possession of a strip of land adjoining Ferguson's strip on the northeast, extending along the cañon to Hanging Rock and Middle Rock, to appellant's alleged diverting dam. The defendants were the same, except Ferguson, and the answer was about the same. Holbrook disclaimed, as here. The identity of the land was admitted. Ferguson did not appeal. The issue in the case was left between the appellants and the plaintiff, as here on this appeal, and practically on the same questions. Appellants objected to the introduction of the judgment roll in evidence, because it was not pleaded. The evidence was admitted, but no assignment of error was made upon its reception. The question is, what effect does the evidence have? In the present case the plaintiff does not base its cause of action upon the judgment. No counterclaim was put in by the defendants, and there was no opportunity to plead it to the answer. Besides, the judgment was not rendered or decision reached in the supreme court until the issues were made in this case. The judgment in such cases should be pleaded, if the plaintiff bases any right upon it, and there is an opportunity to plead it. As a plea, the judgment is a bar; as evidence, it is conclusive on the point decided between the same parties. In 1 Herm. Estop. § 107, it is said: "But when the same matter is directly in question in another suit, and the judgment of the former suit is directly in point, it will be, as a plea, a bar; as evidence, conclusive." In section 784, Black, Judgm., it is said: "A former recovery in which the same matter was tried and determined upon the merits may be given in evidence without being specially pleaded whenever the party, plaintiff or defendant, had no opportunity to plead the judgment specially, and its effect in such case is equally conclusive as if it had been pleaded." While it is a general rule that estoppel by a former judgment must be pleaded, the rule does not apply to cases where no opportunity to plead the estoppel is given; and when the judgment is admitted as evidence, where there is no opportunity to plead it, both the preponderance of authority in this country and the weight of sound legal reason sustain the doctrine that a former judgment, if admissible under the general issue, is just as conclusive

when so presented as if it had been pleaded. 2 Black, Judgm. §§ 784, 787, and cases cited. So, a successful defense to one of a series of actions founded upon the same transaction or subject-matter, if it goes to the merits of the whole, is a complete estoppel to any subsequent action between the same parties. This rule is based upon the principle that a judgment is final as to all points and questions actually litigated and determined by it. The estoppel operates only in regard to matters in issue between the same parties, and upon the determination of which the judgment was rendered; and, if the second action is upon a different claim or demand, the judgment in the prior suit operates as an estoppel only as to those matters in issue or controverted upon the determination of which the final judgment was rendered. Black, Judgm. §§ 750, 751, 755; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 27 Fed. 277; Roberts v. Railway Co., 158 U. S. 1, 15 Sup. Ct. 756, 30 L. Ed. 873. The principles announced in the former decision, so far as pertinent in the present case, must be considered as determining the questions adversely to the appellants, if the parties were the same. But the parties are not the same. Ferguson was not a party in the former suit. The former decision must be treated as authority and as determining the law in this case in so far as it decided the same questions involved in the present case.

4. The record shows that the San Miguel Gold-Mining Company was organized in Colorado February 7, 1891, with a capital of \$15,000,000, and was authorized to acquire, by purchase, lease, or otherwise, mining property, together with water rights, power, ways, mills, and mill sites; to develop, mine, work, and utilize the same; and to carry on a general mining business. Its principal office is in Telluride, Colo., and its principal business is to be done in Colorado; and its articles provide that part of its business may be done in Boston, Mass., and its principal office kept there. The stock is non-assessable, and no requirements for payments of subscription are incorporated in it. In February, 1896, an amendment of its articles was made and filed with the secretary of state in Colorado changing the name of the company to the Telluride Power Transmission Company. Appellant Nunn was its manager. Section 427, p. 614, 1 Colo. St. 1893, among other matters provides that, "when said corporation shall be created under the laws of this state for the purpose of carrying on part of its business beyond the limits thereof, such certificate shall state that fact." Subdivision 2 of this section provides that the object for which the company is created shall be stated. Section 498 authorizes Colorado corporations authorized to do business out of the state to accept the laws of the other states, and there exercise its franchise. So it appears that the appel-

lant company is a mining corporation organized in Colorado without complying with the statute, and with no other power to do business as such in this state. Without complying with the constitution and laws of this state with respect to foreign corporations, it unlawfully assumes to appropriate both land and water within this state. This must be so, because, under section 2, art. 12, of the constitution of this state, no corporation in existence in this state when the constitution is adopted shall have the benefit of its laws without filing with the secretary of state an acceptance of the provisions of the constitution; and under section 6 no corporation organized out of the state shall be allowed to transact business in this state on conditions more favorable than those prescribed by law for similar corporations organized under the laws of the state. Under section 9 no corporation is allowed to do business in this state without having one or more places of business therein, with an agent upon whom process may be served, nor without first filing a certified copy of its articles of incorporation with the secretary of state. Section 10 provides that no corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation. Section 2293, Comp. Laws Utah 1888, as amended in 1896, and sections 351, 352, Rev. St. 1898, expressly embody these provisions of the constitution, and prohibit foreign corporations from doing business in this state unless they have complied with these requirements of the law; and any corporations failing to so comply with the provisions of the law are not entitled to the benefits of the law of this state relating to corporations. The appellant corporation did not comply with the laws of this state, and has no power to engage in its business of mining or to acquire any water rights under the laws of this state. A corporation of Colorado coming into this state cannot bring with it powers with which it is not endowed in Colorado. It can only have an existence under the express laws of the state where it is created, and can exercise no power which is not granted by its charter or some legislative act. The appellant corporation never filed with the secretary of state of the state of Utah a copy of its articles of incorporation, by either name under which it was incorporated, and never accepted the laws or constitution of Utah; nor has it appointed any agent or fixed any place of business within the state, as required by law. The defendant corporation, therefore, is not entitled to the benefit of the laws of this state with reference to corporations. *State v. Southern Pac. Co. (La.)* 28 South. 372; *Oregon Ry. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; *Barse Live-Stock Co. v. Range Val. Cattle Co. (Utah)* 50 Pac. 630. Under section 2239, Rev. St. U. S., even if priority of possession of the property in

question was shown in the defendant corporation, still its right to locate and use the water or land is not recognized or acknowledged by the laws of this state, and it was not in a position to question the right of the plaintiff in the premises.

5. Appellant Nunn was a resident of Colorado,—the general manager and in charge of the business of the defendant corporation both in Colorado and Utah. The chief engineer, hydraulic engineer, and officers of the defendant corporation, including the president and attorneys, consulted with and acted with him with respect to the acts performed with reference to the appropriation of water and in making the improvements discussed by them at Hanging Rock; but no plan for a dam at Hanging Rock was ever actually made, and no dam was constructed there. Throughout the whole procedure the board of the defendant corporation was the controlling authority for and with whom Nunn acted. If Nunn had any right, it was with reference to the smaller power located below. The dam at Hanging Rock was to be a larger power, and was talked about in the project, but it was not constructed; and the ownership, if in any one, was in the defendant company, which was incapable of acquiring such ownership. While the testimony is very uncertain, it sufficiently appears that whatever was done by Nunn in the appropriation of water was done for the use and benefit of the defendant company; and he cannot be treated as a personal claimant and owner of the easement and right of way in controversy, as against the right of way as acquired by respondent.

6. It appears that Mr. Ferguson had settled upon 160 acres of unsurveyed government land situated in the cañon in question, above Hanging Rock, and resided there in 1895. In August, 1896, defendant Nunn entered into a contract to purchase said land after Ferguson should thereafter acquire a homestead title. In December, 1896, pending this action, Ferguson conveyed to Nunn whatever title he had in the land, and Ferguson occupied the land until his death, in February, 1897; and his family afterwards succeeded to its occupation, and were made or became parties to the action to condemn. So far as appears, defendant Nunn was never in occupation of the land, or any land above Hanging Rock. Under this conveyance, Nunn, not being a bona fide settler, nor in possession of the land, would take no right, except possibly the improvements, as against the right of way of the respondent. Ferguson's deed to Nunn divested Ferguson of whatever possessory right he had in the land. If the Ferguson heirs thereafter entered thereon in their own right, their possession only dated from the death of their father, in February, 1897, long after the respondent's right of way was acquired. The Ferguson heirs could not occupy the government land in their own right, and for Ferguson or Nunn; nor could Nunn home-

stead this land by proxy. A homestead or squatter's right is a personal right, and the possession under it must be personal. Not having obtained any right by contract or deed until 1896, after the commencement of this suit, and after the grant to the respondent had vested, subject to the payment of damages to the rightful party in possession, if any, and not having possession or the right of a bona fide settler under the act of congress, Nunn, under his deed, at most, simply had the right to enter upon the land and take the improvements. Having no title or possession, Nunn was not entitled to damages. As held in *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800, a party settling upon unsurveyed government land who in good faith complies with the statutory requirements is entitled, as against subsequent settlers, to pre-empt the land, but would derive no right thereto by purchasing the claim of a prior settler, unless by actual entry at the proper office he had acquired some right thereto. In the present case Nunn had made no entry at the proper office, and had no possession of the land or right of possession against the respondent. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920; *Moore v. Bessie*, 43 Cal. 511; *Sproat v. Durland* (Okla.) 35 Pac. 682.

Whether any damages accrued to the Ferguson heirs at the time the summons was served, in September, 1896, under section 3599, Comp. Laws Utah 1888, and *Roberts v. Railway Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 30 L. Ed. 873, we are not called upon to decide. The damages have been assessed by the jury and paid, and no appeal has been taken therefrom by them.

The appellants assign many errors upon the refusal of the court to instruct the jury as requested, upon the instructions given to the jury, and upon the facts found by the court. Under the view taken, these questions become unimportant, as neither of the appellants were injured in their rights; nor were either entitled to any damages under the facts shown in this case. The instructions were, at least, as favorable to the appellants as they had a right to expect.

Upon the whole record, we find no reversible error. The judgment of the district court is affirmed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

(131 Cal. 662)

RECLAMATION DIST. NO. 536 v. HALL.
(Sac. 706.)

(Supreme Court of California. Feb. 25, 1901.)
DRAINS—RECLAMATION DISTRICT—IMPROVEMENT ASSESSMENTS—ACTIONS—LIMITATION—WAIVER—INSTALLMENTS—ACCEPTANCE.

Under Pol. Code, § 3466, providing that, if any installment of an assessment due a reclamation district shall remain unpaid at the

expiration of 20 days from the date of the order directing its payment, a right of action for the entire assessment shall accrue, the acceptance by the district of an installment so delinquent is a waiver of its right of action thereunder for the entire assessment, so that the right of action for the remainder of the assessment is not barred in 3 years from the time such installment became delinquent.

Department 2. Appeal from superior court. Solano county; A. J. Buckles, Judge.

Action by reclamation district No. 536 against J. W. Hall to recover delinquent assessments. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Devlin & Devlin, for appellant. John M. Gregory and W. A. Gett, for respondent. A. L. Shinn, amicus curiæ.

PER CURIAM. The defendant was at all times named in the complaint the owner of lands in reclamation district No. 536. The assessment list, properly made and certified, was filed with the county treasurer of the county of Solano on December 4, 1891, where it remained for more than 30 days; and, the assessments not having been paid, the treasurer of said county returned the same on the 11th day of January, 1892, to the board of trustees of the plaintiff. The trustees at various times made calls for installments on the various assessments so made. The defendant paid the first nine calls or installments, but paid only a portion of the tenth, and has wholly refused to pay the eleventh. More than 20 days elapsed after the eleventh call before the commencement of this action. The eleventh call was made July 1, 1896. On October 12, 1897, the board of trustees of plaintiff made an order that, by reason of the failure of the defendant to pay such calls or installments, the whole amount of his said assessment should be due and payable at once, and that an action be commenced for the same. This action was commenced, in pursuance of said order, to collect the balance due by defendant on his whole assessment, and to have the same declared a lien upon the real estate owned by him upon which the said assessment was levied. The case was tried before the court, and findings filed, upon which judgment was ordered and entered in favor of defendant. Plaintiff has appealed from the judgment upon the judgment roll.

The question here is as to whether or not the judgment is the legal conclusion from the facts found. The court found "that on January 21, 1893, the said board of trustees, by an order duly entered on the minutes of said board, determined to call in an installment of 6¼ per cent. of the whole of said assessment, to wit, \$566.26; that owing to the said third installment not having been paid within twenty days from the date of said call, to wit, on or before February 11, 1893 (but was paid March 2, 1893), a cause of action for the collection of the same, and for the whole of said assessment remaining unpaid, against the land of said defendant, J. W.

Hall, to wit, 75 per cent. thereof, accrued, and as the complaint in this case was not filed within three years of time, reckoned from February 11, 1893, the cause of action stated in the complaint is barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure of the State of California." The call of January 21, 1893, remained unpaid for some 20 days after the time named in the call; and the court below proceeded upon the theory that a cause of action accrued thereupon for the whole assessment, and as the suit was not brought within 3 years after February 11, 1893, it was barred by the provisions of section 338, Code Civ. Proc. In this the court erred. The amount of the call of January 21, 1893, was paid March 2, 1893, and accepted by the plaintiff. Thereafter calls were made for installments August, 1893, November, 1893, January, 1894, September, 1894, April, 1895. These were the fourth, fifth, sixth, seventh, eighth, and ninth installments. They were all paid by defendant and accepted by plaintiff. It is provided in section 3466 of the Political Code as follows: "At the end of thirty days, the treasurer must return the list to the board of trustees of the district, and all unpaid assessments shall bear legal interest from the date of the return of the list to said board, and shall thereafter be collected and paid in separate installments, of such amounts and at such times, respectively, as the board, from time to time, in its discretion, may, by order entered in its minutes, direct; and a cause of action for the collection of any such installment shall accrue at the expiration of twenty days from the date of the order directing its payment: provided, that if any such installment shall remain unpaid at the expiration of said twenty days, then the whole of the assessment against the land owned by the person failing to pay such installment shall become due and payable at once, and may, in the discretion of the board, be collected immediately, in one and the same action." Under the provision of the said section quoted, the installment called for by the order of January 21, 1893, not having been paid within 20 days thereafter, the board of trustees could have regarded the whole amount of defendant's assessment as due and payable, and could at any time after the expiration of said 20 days, and before accepting payment thereof, have commenced an action therefor. But by accepting the amount of said installment March 2, 1893, the plaintiff waived its right to consider the whole amount due. If after March 2, 1893, and before making another call or order for payment, plaintiff had brought an action for the whole amount of the assessment, it could not have maintained it. It could not receive the payment, and at the same time claim the benefit or advantage it might gain by the failure to pay. The provision was inserted for the benefit of reclamation districts, and to insure prompt payment of installments as called for

by the board. If the district in such case desires to take advantage of the provision, it must do so before it has received the money from the party in default. It will not be allowed to take the money, and at the same time take the benefit or advantage arising from the money not being paid. It is too elementary to need citation of authorities that a provision in a promissory note that the whole amount of principal shall become due upon default of interest is waived by the payee afterwards accepting the interest. So a provision in a lease that it shall be void if the rent is not promptly paid when due is waived by the acceptance of the rent by the lessor after default. The same principle applies here. The defendant was indebted to the plaintiff for the entire assessment, payable in installments as ordered by plaintiff's trustees. The statute formed part of the contract, and is to be read into it. The whole amount by the assessment became due plaintiff upon default in the payment of the third installment. It afterwards accepted the payment. Defendant was, by the indulgence of plaintiff, allowed to make the payment after default. He cannot now claim advantage by reason of the indulgence shown him. The judgment is reversed, and the court directed to enter judgment for plaintiff upon the findings for the amount due, as prayed for, and declaring the same a lien upon the premises of defendant, and directing a sale thereof to satisfy the claim of plaintiff.

(131 Cal. 647)

PEOPLE v. TAPIA. (Cr. 683.)

(Supreme Court of California. Feb. 21, 1901.)

CRIMINAL LAW—APPEAL—RECORD—OPINION OF TRIAL JUDGE—MURDER—EVIDENCE—SUFFICIENCY—NEW TRIAL—CORPUS DELICTI—CONFESSION—INSTRUCTIONS.

1. On appeal from a conviction and an order denying a new trial, though the opinion of the trial judge attached to the bill of exceptions showed clearly that a new trial should have been granted because of the insufficiency of the evidence, such opinion cannot be considered in determining whether the conviction should be set aside, since it is not a part of the record.

2. Deceased was found among the ruins of his house, a great deal of his body consumed by fire. Tracks of a horse were discovered near the burned house, which, though not owned by defendant, had been in his possession a few days before. There was evidence that a purse found on defendant had been the property of deceased, though it was not clearly identified, and some evidence that defendant had been seen carrying a gun which had belonged to deceased, though he was not clearly identified as the person seen with it. An Indian, a comparative stranger to defendant, who was also an Indian, testified that defendant confessed to him that he killed deceased. *Held*, that a refusal of a new trial cannot be set aside on appeal, since it cannot be said, as matter of law, that there was no evidence to sustain a conviction of murder in the first degree.

3. Under Pen. Code, §§ 1093, 1127, providing that the court must state all matters of law necessary for the information of the jury, and must charge on any points pertinent to the issue if requested, it was error to fail to instruct

that in determining whether there was sufficient evidence of the corpus delicti the asserted confession or other evidence, which did not tend to prove the corpus delicti, but merely tended to connect defendant with the crime charged, could not be considered, though the instructions requested on such question were not correctly drawn.

4. Where, in a prosecution for murder, defendant's sole defense was that he did not commit the act, it was error to instruct that, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation or excuse devolved on him, since it was not applicable to the case.

In bank. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Ramon Tapia was convicted of murder in the first degree, and appeals. Reversed.

George H. P. Shaw, H. K. Heffleman, Nutt & Shaw, and Neale & Goodbody, for appellant. Tiley L. Ford (Henry A. Melvin, of counsel), for respondent.

McFARLAND J. The defendant was convicted of murder in the first degree, and sentenced to life imprisonment. He appeals from the judgment and from the order denying a motion for a new trial.

The appellant is an Indian, evidently unlettered and ignorant. He was charged with the murder of one Jacob J. Veitinger, who was a somewhat elderly man, and lived alone in a small house in the country. On July 28, 1899, his nearest neighbor, Mr. William Cooper, discovered that Veitinger's house had been burned down since the previous day, and found among the ruins the dead body of Veitinger. A great deal of his body had been entirely consumed by the fire; still we think it was sufficiently identified as the body of the deceased. But the evidence of the other facts necessary to make full proof of the corpus delicti—that is, that his death was caused by criminal means used by another person, and not by his own act or by accident—was very slight. We hardly think that any jury would have found that a murder had been committed without certain evidence tending somewhat to connect appellant with the crime charged, and particularly without the testimony of another Indian, named Francisco (who was comparatively a stranger to appellant), to the effect that appellant had made a confession to him that he (appellant) killed the deceased. Apart from this alleged confession, the main evidence relied on by the prosecution consists of some testimony that tracks of a certain horse were discovered at a point not very far away from the burned house, and at other points within a few miles, and that the horse, although owned by another party, had been a few days before in the possession of appellant; some testimony that a purse found on appellant had been the property of the deceased; and some testimony that appellant had been seen carrying a gun which had been the property of the deceased. The testimony as to these matters was, to say the

least, not very satisfactory; and these matters, if considered as proved, are not very convincing as to any of the facts necessary to appellant's conviction of murder.

There is in the bill of exceptions, regularly settled and certified, an opinion of the judge before whom the case was tried, given on denying the motion for a new trial, from which it certainly appears that he ought to have granted the motion. The judge examines the evidence in detail, and clearly shows that, in his opinion, it was not sufficient to warrant the verdict. He shows that the purse was not sufficiently identified as the purse of the deceased, that appellant was not identified as the person seen with the gun, and that the horse tracks do not "cut a very material figure." As to the asserted confession to Francisco, the judge says: "I do not see how anybody can possibly read that, or hear the man testify, and believe him at all. I do not give it a particle of credence. He is an enemy who is prosecuting the defendant. He is in jail himself. * * * Then as to that confession,—if I know anything about weighing evidence whatever,—after reading the testimony, that bears external and internal evidence of falsity from beginning to end." He then speaks of the unreliability of the testimony of certain Indians who were hostile to appellant, and, imagining that Francisco was on trial for the murder of Veitinger, shows that the facts would make as strong a case against him as against appellant, and says, "Therefore I say the evidence is unsatisfactory." But, after showing clearly that the evidence, in his opinion, was not sufficient to warrant the verdict, he questions whether "my doubts amounted to such reasonable doubts as would warrant the court in setting aside the verdict on the ground of the insufficiency of the evidence"; and he concludes as follows: "I believe I shall deny the motion, and let the supreme court pass on these questions." But "these questions" were questions of fact, over which the trial judge had full jurisdiction; while this court has appellate jurisdiction in criminal cases "on questions of law alone." As was said in *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228: "He [the trial judge], too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." See, also, *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *People v. Baker*, 39 Cal. 686; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657. The sufficiency of the evidence is a "question of law" only where the question is whether there is any evidence to support the verdict, or whether the evidence is so unsubstantiated as to practically amount to no evidence. "That the defendant may move for a new trial on the ground of the preponderance of the evidence in his favor upon

some issue which is material for the prosecution to establish, and that the court below, if of the opinion that there is such preponderance, should set aside the verdict, is a well established and recognized rule. It is also settled that this court will not deal with the question of the preponderance of evidence." *People v. Ashnauer*, 47 Cal. 98. We are not unmindful that a ruling of a trial court cannot be set aside here merely because a wrong reason was given for it. We are aware, also, that ordinarily an opinion of a lower court is not the subject of review here, and is not a legitimate part of the record. Therefore, in determining the question whether the trial court should have granted a new trial on the ground of the insufficiency of the evidence, we must disregard the opinion above noted; and, thus looking at the case, we are not prepared to say that, as a matter of law, there was no evidence to support the verdict. But, with the opinion before us, we cannot avoid a somewhat strong impression that the defendant has been wrongfully convicted of the high crime of murder in the first degree; and as, in such a case, a very slight error of law committed during the trial might have improperly influenced the jury, it is our duty to look with very close scrutiny into the assignments of error. Of course, a judgment will not be reversed for an erroneous ruling, where it appears that it could not have been prejudicial to the party who complains of it; but, considering the peculiar character of the evidence in the case at bar, it cannot be said that certain errors which we shall notice were not prejudicial.

As before stated, the main evidence against the appellant was his alleged confession to the witness Francisco. Of course, it is well-settled law that the corpus delicti must be established independently of evidence which merely tends to connect the defendant with the crime charged, and independently of any asserted extrajudicial admissions or confessions of the party charged, and that such admissions or confessions cannot be considered as evidence of the corpus delicti. In *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440, this court declared the rule as follows: "The term 'corpus delicti' involves the elements of crime," and that "defendant's admissions cannot be used to establish any necessary element in the commission of the crime." See, also, *People v. Thrall*, 50 Cal. 415. In *Gray v. Commonwealth*, 101 Pa. St. 380, the court says: "The true rule in such cases is believed to be this: When the commonwealth has given sufficient evidence of the corpus delicti to entitle the case to go to the jury, it is competent to show a confession made by the prisoner connecting him with the crime. Under such circumstances the jury should first pass upon the sufficiency of the evidence of the corpus delicti. If it satisfies them beyond a reasonable doubt that

the crime has been committed, then they are at liberty to give the confession such weight as it is entitled to." In the case at bar, if it be considered that there was some evidence of the corpus delicti, without the confession, which entitled the case to go to the jury, still that evidence was exceedingly slight, and it is highly probable that the jury considered the confession in determining that the corpus delicti had been sufficiently proved. In *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536, the lower court had instructed the jury substantially that they might find defendant guilty upon his admissions alone; and the appellate court reversed the judgment on account of such instruction, and said: "There was other evidence from which the jury might have found the corpus delicti, yet we cannot say but the jury might have found the conviction of the defendant upon his confessions alone under this instruction for their guide." In the present case the court refused to give certain instructions on this subject asked by appellant, and numbered 4 and 6. The clear purpose of these instructions was to inform the jury that in determining whether the crime charged had been committed they could not consider the confession, or any evidence which tended solely to connect the appellant with the supposed crime. Perhaps neither of these instructions, when closely examined, will be found to be absolutely perfect; but we think that either of them might have been given without any prejudice to the prosecution. By instruction 4 the court was asked to instruct the jury that: "If * * * you are not satisfied beyond a reasonable doubt whether Jacob J. Veltlinger met his death from natural or accidental causes, or from the act of some person, you cannot consider any evidence introduced herein for the purpose of or tending to connect the defendant with the crime upon which he is now being tried." The evident purpose of this instruction was to tell the jury that in determining whether the corpus delicti had been sufficiently proven they should not consider evidence which tended solely to connect defendant with the crime, and, if so understood, it would have been correct; but, as there might be evidence which tended to prove the corpus delicti, and also to connect the defendant with the crime, the instruction is perhaps subject to the criticism that it does not distinguish evidence having that double character. The instruction numbered 6 contains a correct statement of the meaning of corpus delicti, and the kind of evidence necessary to establish it. The last paragraph of the instruction is as follows: "Alleged confessions, and any other evidence the purpose of which is to connect, or attempt to connect, the accused with the offense charged, cannot be considered by you until the corpus delicti has been proved to your satisfaction to a moral certainty, and beyond a reasonable doubt." This is subject,

also, to the same criticism as that above noticed as applicable to instruction 4. But we think that if, in the opinion of the court, these instructions, as offered by appellant's counsel, did not aptly or with perfect correctness state the principle of law that was evidently intended, it should, under the peculiar circumstances of this case, either have modified them so as to comply with its views, and given them as modified, or should have given an instruction upon the subject in its own language. A court is not always called upon to instruct on a point when not asked to do so, and ordinarily counsel cannot complain of the refusal of an instruction which is not perfectly correct; but on a trial for murder, where a man's life or liberty is at stake, and with such a condition of evidence as is here exhibited, a court is not justified in refusing to instruct at all upon the paramount and vital questions in the case, simply because a particular form of instruction asked by counsel may be safely refused. Sections 1093 and 1127 of the Penal Code provide that the court, in charging a jury, must state to them "all matters of law necessary for their information," and must charge "on any points pertinent to the issue, if requested by either party." In the case at bar the defendant certainly requested instructions on a point clearly and paramourly "pertinent to the issue"; and, considering the peculiar circumstances of this case, we do not think that the court was justified in ignoring the point entirely on account of the form in which the request was made. We do not want to be understood as saying that, as a general rule, a judgment will be reversed for want of full instructions; but in this particular case we do not see how the jury could have properly come to a conclusion without an instruction that in determining whether there was sufficient evidence of the corpus delicti they could not consider the asserted confession or other evidence which did not tend to prove the corpus delicti, but merely tended to connect the appellant with the crime charged; and yet such instruction was not given in any part of the charge, although an instruction on that point was of the highest importance to a proper consideration of the evidence by the jury. The only instruction given which at all approached the point was appellant's instruction No. 2, which was merely to the effect that in determining whether the remains found in the ruins "were the remains of the body of Jacob J. Veitinger" they could not consider evidence tending to connect the appellant with the crime charged. Under the instructions given, the jury were at liberty to consider the confession as evidence of any fact necessary to be proven, and it is impossible to say that they did not so consider it; indeed, in view of the character of the other evidence, it is highly probable that the confession was the main evidence upon which they found that a crime had been commit-

ted. An instruction on this subject was clearly essential to a proper consideration of the evidence by the jury; and we think that in this case it was prejudicial error for the court not to give such instruction, after its attention was directly called to the point; and that, without such instruction, the appellant did not have a fair trial.

We think that it was also prejudicial error, considering the nature of the issues, to give the following instructions: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable. But you will observe in this connection that the burden of proof thus cast upon the defendant is not used in any literal sense. It is not necessary that the defendant shall in this matter, more than in any other, prove affirmatively that he did not intend such consequences. It is sufficient that it appears to your understanding by testimony given, by inferences correctly and properly drawn from the whole of the testimony in the case, that, notwithstanding the burden was cast upon him, there still exists in your minds a reasonable doubt of his guilt." Of course, this instruction should not have been given, for it was entirely inapplicable to the case. The appellant did not set up any defense by way of excuse for or justification of an alleged act. He denied that he committed the act, and that was his sole defense. The first part of the instruction is taken from section 1105 of the Penal Code, and is applicable only when a defendant sets up circumstances of mitigation, excuse, or justification of an admitted or proved homicide. But the instruction goes beyond the statute, and states further principles not applicable to the case. Of course, a judgment will not be reversed for an instruction containing a mere abstract principle because it is not applicable to the case, where it appears that no injury was done. But can that be said in the case at bar? The instruction assumed repeatedly the fact of the "commission of the homicide by the defendant being proved," and while the judge may not have intended to intimate that there was proof of such fact, yet the jury may readily have understood the language used to have that meaning. It is difficult to imagine why the instruction was given at all, and it cannot be said that it might not have influenced the jury, and thus prejudiced the appellant.

For the foregoing reasons the judgment must be reversed, and therefore it is not necessary to consider the exceptions to the very voluminous charges on the subjects of reasonable doubt and circumstantial evidence, some parts of which are at least doubtful. It will be assumed that, if there shall be an-

other trial, the instructions on those points will be confined to a few simple propositions. In conclusion we desire to say that this decision is based upon the very peculiar features of this case as above shown, and that in many cases the errors above noticed would not call for a reversal. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.

(131 Cal. 635)

HARDISON v. DAVIS. (L. A. 765.)

(Supreme Court of California. Feb. 21, 1901.)

BILLS AND NOTES — INDORSEMENT — CROSS COMPLAINT — OVERRULING DEMURRER — HARMLESS ERROR — EVIDENCE — ADMISSIBILITY — INDORSEMENT BY MISTAKE — AVERMENT — SUFFICIENCY — QUESTION OF FACT — REVIEW — NEGLIGENCE OF DEFENDANT — BURDEN OF PROOF — MISTAKE OF FACT — REASONABLE DILIGENCE.

1. Where, in an action against an indorser of a note, he answered that the indorsement was made by mistake, and without consideration, and also filed a cross complaint to the same effect for cancellation of the indorsement, and the court, sitting as a jury, found in defendant's favor on the issue raised by the petition and answer, an order overruling plaintiff's demurrer to the cross complaint was not prejudicial to plaintiff.

2. Where defendant, in his cross complaint and answer, averred that he indorsed a note sued on by mistake, and without consideration, an objection that the question as to how he came to sign his name on the back of the note was not admissible under the pleadings cannot be sustained.

3. Where defendant alleged that he indorsed the note in suit by mistake, and without consideration, it was not necessary to aver that the mistake was not due to his negligence.

4. Where, on an issue as to whether defendant indorsed the note in suit by mistake, and without consideration, defendant testified that he indorsed the note believing it was another for a less amount, which had been executed by the maker to carry out a joint enterprise of the maker and defendant, evidence as to whether any consideration moved from the maker, or plaintiff, the present holder, to defendant, for indorsing the note at the time the indorsement was made, was properly admitted.

5. A decision of the trial court on a question of fact will not be reviewed where there is substantial evidence to support it.

6. Where defendant averred that he indorsed the note in suit by mistake, and there was no evidence that the mistake was caused by defendant's negligence, the burden was not on defendant to show that he had not omitted any legal duty.

7. Under Civ. Code, § 1577, defining a mistake of fact as one arising from an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, that defendant indorsed the note in suit under the impression that he was indorsing another note, executed by the same maker, to be used in an enterprise in which defendant was interested, constituted a mistake of fact.

8. Where the court found that defendant's indorsement of the note in suit was made by mistake, and without consideration, the question of reasonable diligence required in rescinding a contract has no application, as there was no contract to rescind.

Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Edwin Hardison against F. E. Davis. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Blackstock & Ewing, for appellant. Toland & Andrews and Orestes & Orr, for respondent.

PER CURIAM. Action upon a promissory note for the principal sum of \$832, alleged to have been made and executed by James Mack to plaintiff on December 28, 1894. It is also alleged in the complaint "that on or about the 20th day of June, 1896, the defendant, Davis, wrote his name upon the back of said note, to give it credit, and delivered the same to plaintiff." Judgment is sought against defendant only, Mack not being a party to the suit. Plaintiff appeals from a judgment entered against him and from an order denying a new trial.

The defendant admits that he placed his signature upon the back of the note on the date stated in the complaint, but alleges that his doing so was the result of a mistake; that he did not intend to indorse the note in question, but did intend to indorse a \$400 note given on that date by plaintiff to the First National Bank of Santa Paula; that he had never agreed to indorse the note in suit, but did agree to help to obtain \$400 from said bank to be furnished to said Mack that he might go on the racing circuit of California with a certain race horse jointly owned by plaintiff, defendant, and said Mack; that in pursuance of this agreement the said \$400 was obtained from said bank, and defendant wrote his name thinking that he was indorsing the said \$400 note given to said bank for said last-mentioned sum; that he inadvertently wrote his name on the wrong note; that said note for \$400 was fully paid and satisfied by the plaintiff, defendant, and said Mack before the commencement of this action; and that the indorsement by defendant of the note in suit was without consideration therefor. The defendant pleaded the foregoing facts in his answer in defense to the action. He also set up the same facts in a cross complaint, and prayed that the court order the note in suit to be taken into custody of the court, and his name be canceled therefrom, and that it be declared that cross complainant is not liable upon said note, and for general relief. Plaintiff demurred to the cross complaints for want of facts to constitute a cause of cross complaint in said action. This demurrer was overruled, and plaintiff answered said cross complaints. A trial was thereafter had before the court, a jury having been specially waived. The defendant testified to the facts substantially as hereinbefore set out. The findings were to the same effect, and the judgment was that plaintiff take

nothing, that defendant's name be canceled from the note, that plaintiff be forever estopped from bringing any action against defendant on account of said note, and that defendant recover his costs.

1. There was no error prejudicial to appellant in overruling his demurrer to the cross complaints. The facts stated in the cross complaints were also pleaded in the answer as a defense; and, found to be true, they constituted a good defense, and it was on account of those facts that it was decreed that plaintiff take nothing in the action. On the complaint and answer alone the court could determine, as it did, from the evidence, that the signature of defendant was not binding upon him—First, because it was made by mistake; and, second, because it was given without consideration. The judgment that plaintiff take nothing estopped him from maintaining another action against defendant on this cause of action. The signature on the back of the note could be of no further value to plaintiff, and it could do him no harm to have it canceled. The error, if any was made in overruling the demurrer to the cross complaints, was, therefore, without prejudice to any substantial right of appellant.

2. The objection to the question asked of defendant as to how he happened to put his signature on the back of the note, based on the ground "that there is no averment of a mistake in the cross complaint," was properly overruled. There was such an averment in the cross complaint, and in the answer also, and the evidence sought was relevant under both. It was not necessary to allege that the mistake relied on was not the result of defendant's negligence.

3. Against the objection and exception of appellant the defendant, as a witness, was allowed to answer, and did answer in the negative, the following questions: "Did any consideration ever move to you from either Hardison or Mack for the indorsing of this \$832 note? Was there any consideration, at the time you indorsed this note, moved from Hardison to Mack for your indorsement?" The rulings in allowing these questions to be answered were not erroneous. The witness had already testified fully as to the circumstances under which he wrote his name on the back of the note in suit, and as to what induced him to do so. This testimony showed that there was no consideration for his indorsing the said note; and, being in a position to know the ultimate fact, and appellant having the opportunity to cross-examine him, it was not improper for him to testify directly that there was no consideration. *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 100. The other objections to testimony are not of sufficient importance to require special notice. It is sufficient to say that there was no error prejudicial to appellant in overruling them.

4. Appellant contends that the finding fa-

vorable to the defense of mistake is without support in the evidence. Defendant testified to facts which, if believed, established this defense beyond any question. And in support of the finding we must assume that defendant told the truth. This court has many times declared that it would not interfere with the decision of the trial court as to questions of fact, where there was any substantial evidence supporting it. This rule is not affected by the degree of evidence required under the law. It is left to the trial court to determine whether the evidence establishes the fact, just as it is left to that court to say where the preponderance of evidence is in other cases. *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930. Even in criminal cases, where the rule of proof beyond a reasonable doubt is firmly settled, the decision of the tribunal before which the witnesses appear as to questions of fact is rarely interfered with by the appellate court. There is no evidence that defendant's mistake was caused by the neglect of a legal duty on his part, and, in the absence of any evidence on the subject, the presumption is against any neglect of legal duty. There is, therefore, nothing in appellant's contention based on the alleged failure of defendant to make a negative showing on this subject. Defendant's mistake arose out of "an unconscious ignorance" of a present fact. Civ. Code, § 1377. The case of *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304, does not contain anything applicable to the case in hand.

The facts contended for by the respondent, and found by the court to be true, established the nonexistence of the alleged contract upon which the action was based. In other words, it was shown that there was no meeting of minds in the matter, and that no such contract ever existed. There was, therefore, no contract to rescind; and the rule of reasonable diligence, etc., laid down in the Code as applicable to cases of rescission, finds no application here.

The other points urged by appellant are without merit. The judgment and order denying a new trial are affirmed.

(131 Cal. 481.)

FLINN et al. v. MOWRY. (S. F. 1,604.)

(Supreme Court of California. Feb. 21, 1901.)

Modification of judgment. For former opinion, see 63 Pac. 724.

PER CURIAM. The judgment heretofore rendered herein is set aside, and the following judgment is rendered in lieu thereof: That portion of the judgment decreeing a lien against the lands of the defendant in the sum of \$238.76, and directing a sale of said lands in satisfaction thereof, is affirmed. The judgment against the defendant for the sum of \$1.146, with interest thereon, for the paving and curbing of Laguna street, is reversed, and a

new trial is ordered of the issues upon which the said personal judgment was given. The order denying a new trial, so far as it applies to the issues upon which the judgment was rendered for laying the sidewalk, and decreeing a lien therefor, is affirmed.

(6 Cal. Unrep. 637)

LATHROPE et al. v. FLOOD. (S. F. 1,703.)¹

(Supreme Court of California. Feb. 20, 1901.)

PHYSICIANS AND SURGEONS — CONFINEMENT CASE—UNWARRANTED ABANDONMENT—DAMAGES.

Defendant was employed to attend plaintiff during her first confinement. He assumed charge of the case, visiting plaintiff at intervals, until he deemed it the proper time to employ instruments to aid in the delivery of the child, whereon the plaintiff shrank back and screamed, compelling the defendant to let go the instruments. Defendant threatened the plaintiff that if she did not quit screaming he would quit the case, and on the failure of a second or third attempt to use the instruments he abruptly left the house. This was at midnight, and it was an hour or more before another physician could be obtained, who, on examination, found that plaintiff's condition was not such as to require the use of instruments just then. *Held*, that a verdict of \$2,000 was not excessive for the unwarranted abandonment of the case and the mental suffering occasioned plaintiff thereby.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by Margaret A. Lathrope and another against P. H. Flood. From a judgment in favor of the plaintiffs, the defendant appeals. Affirmed.

Garret W. McEnerney, for appellant. Wm. S. Barnes and Edgar D. Peixotto, for respondents.

HENSHAW, J. This is an action against a physician to recover damages for the alleged injuries occasioned by his negligent and unskillful treatment of his patient, and for injuries resulting from the violation of his contract of employment in abandoning her case, and leaving her, in a critical period, without proper or any medical attendance. The case was tried by a jury, which rendered a verdict for plaintiff in the sum of \$2,000. This appeal is taken from the judgment and from the order denying the defendant a new trial.

The defendant, P. H. Flood, a practicing physician in San Francisco, was employed by the plaintiffs to attend Margaret Lathrope in her prospective confinement. She was a young married woman, and pregnant with her first child. At the beginning of her labor, Dr. Flood was sent for and attended. He concluded that the case would be a prolonged one, and went away, visiting the house at intervals. He returned on the evening of the 27th day of April, and after examination of his patient decided that it would be necessary to employ instruments to aid in the

delivery of the child, and that the time for the use of such instruments had arrived. He therefore ordered the attendant nurse to place the patient in proper position, and inserted the instruments, whereupon the sick woman, in fear, or pain, or both, shrank back, compelling the doctor to let go of the instruments or greatly imperil the lives of both mother and child. He made a second effort with like result, and perhaps a third, though this is in controversy. He testifies that he warned the woman to be quiet, and explained to her the danger, both to herself and unborn infant, occasioned by her conduct, and finally told her that, if she "did not quit, he would quit." Upon the part of the plaintiff the evidence is that the woman was suffering excruciating pain, which was increased by the insertion of the instruments; that she screamed, whereupon the doctor said: "You quit your screaming. If you don't quit, I'll quit." Upon the failure of a second or a third effort to employ instruments, the defendant abruptly left the house, without a word of explanation or suggestion to any one. This was about midnight. The husband followed him into the street, imploring him to return, and not to leave his wife in that condition. The defendant refused. "The doctor's reply was, in substance, that the woman screamed, and he was not used to working for women that screamed. The doctor also said that there were plenty of doctors around, and that I could go to the German Hospital. I said, 'I know you cannot get doctors from the German Hospital at this time of night.'" Mr. Lathrope asked him to recommend somebody, and the doctor replied: "You can get any one you like. Get whoever the devil you please. I am not going back." Then he walked away. After an interval of an hour or more, during which time the patient was left with knowledge that the physician had abandoned her, and without any medical attendance, the presence of another physician was secured. He found her not so far advanced in parturition as to require the use of instruments until some six or eight hours afterwards, when, by their aid, he delivered her of an infant, which lived about eight minutes. It does not appear that defendant's treatment of the case up to the time of his abandonment of it was either negligent or unskillful. It does not appear that undue physical injuries were inflicted by his treatment, either upon the mother or the child. If either suffered in this respect, it is demonstrated that the actuating cause was the conduct of the patient in moving and shrinking while the instruments were actually inserted. Upon this it is contended by appellant that the verdict is grossly excessive, and that it would be difficult to sustain a verdict even for nominal damages. But other considerations enter into the determination of the question. It is the undoubted law that a physician may elect whether or not he will

¹ Reversed in banc. See 67 Pac. 683, 135 Cal. 458.

give his services to a case, but, having accepted his employment, and entered upon the discharge of his duties, he is bound to devote to the patient his best skill and attention, and to abandon the case only under one of two conditions: First, where the contract is terminated by the employer, which termination may be made immediate; second, where it is terminated by the physician, which can only be done after due notice, and an ample opportunity afforded to secure the presence of other medical attendance. Much expert testimony was given by physicians in this case to the effect that the relation of confidence between physician and patient is all-important, and that a physician is justified in abandoning a case where that relationship does not exist. This is quite true, but the circumstances of abandonment are equally important. He can never be justified in abandoning it as did this defendant, and the facts show a negligence in its character amounting well-nigh to brutality. A young woman is in the throes of labor with her first child. She is suffering apparently not only the natural travail, but something more. Her condition is such that the physician has decided that the time to employ instruments to aid her delivery is at hand. He does employ them; and because the woman, in her fear and anguish, is refractory, he, as he himself testified, "became disgusted"; "he was not a child, to be trifled with"; and so leaves the house in the dead hour of the night, without time or opportunity afforded for the family to procure the attendance of another doctor. Such conduct evidenced a wanton disregard, not only of professional ethics, but of the terms of his actual contract. It was a violation of that contract, and for all damages that resulted the defendant is justly responsible. *Barbour v. Martin*, 62 Me. 536; *Ritchey v. West*, 23 Ill. 385; *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627. The plaintiff testifies that her physical sufferings greatly increased after the doctor's departure, and while she was thus left unattended. What her mental sufferings, perturbation, and fear were, the evidence abundantly shows; and, indeed, it was most natural, under the existing circumstances, believing she was going to die, passing through woman's martyrdom thus unaided, that her mental anguish should have been most acute. The law has no scales by which to measure with exactness such mental suffering and the reflex effect of such mental suffering upon the physical condition. The jury, for the injuries suffered by plaintiff, were instructed that in fixing compensatory damages they were to take into consideration the physical injury and suffering and the mental suffering and humiliation, if any, caused by the defendant's negligent act or breach of contract. We can perceive nothing excessive in the verdict which they rendered, and nothing to indicate that they must have been influenced by passion or prejudice. The judgment

and order appealed from are therefore affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

(131 Cal. 625)

TUERS v. TUERS et al. (S. F. 1,496.)

(Supreme Court of California. Feb. 20, 1901.)

HUSBAND AND WIFE—DIVORCE—FRAUDULENT CONVEYANCING—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under Civ. Code, § 3439, declaring that every transfer of property made with intent to delay or defraud any creditor or other person on his just demand shall be void, the transfer of certain property by a husband to his daughter after his wife had commenced suit for divorce, but before himself or his daughter had any knowledge of such action or its contemplation, was valid.

2. A woman who had commenced suit for divorce prior to her husband's conveyance of his property to his daughter had no rights under Civ. Code, § 3457, subd. 4, providing that an assignment for the benefit of creditors is void as to such creditors if the assignor reserves any interest in the assigned property before all his existing debts are paid, since she was not strictly a creditor, nor was the assignment one for the benefit of creditors.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Martha J. Tuers against William G. Tuers and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. C. Block, for appellant. Chas. H. Hogg, for respondents.

HENSHAW, J. This action was brought by Martha J. Tuers, divorced wife of William G. Tuers, against William G. Tuers, Grace Patterson, his daughter, and her husband, to obtain a judgment declaring null and void a deed and transfer of his property made by defendant William G. Tuers to his daughter. The consideration for the transfer was love and affection, "and that the said Grace Patterson shall afford and give to me a home in her house for the term of my natural life." Before the execution of this instrument Martha Tuers had commenced her action for divorce against her husband on the ground of extreme cruelty. She obtained a decree awarding her a divorce with permanent alimony and counsel fees. In the present complaint she charges that the transfer was made by her husband after the commencement of the divorce proceedings, and was made and received with the common intent upon the part of the grantor and grantee to hinder, delay, and defraud her of her property rights in the divorce action, and that by reason of the transfer, and of the additional fact that William G. Tuers has no other property, she is in fact hindered, delayed, and defrauded in the collection of her alimony and counsel fees. The court found that at the time of the deed and transfer neither William G. Tuers nor Grace Patterson had any knowledge or information that Martha J. Tuers had begun or contemplated

beginning an action for divorce, alimony, and counsel fees against the defendant; and that the transfer was made and received in good faith, and for a valuable consideration, and without the intent upon the part of either party thereto to hinder or delay or defraud the plaintiff, or any creditor, or any other person out of any property right or rights whatsoever. Martha Tuers, at the time of the commencement of her action for divorce against defendant, was not, in strictness, a creditor. *Murray v. Murray*, 115 Cal. 286, 47 Pac. 37. She became such creditor at the time of obtaining her judgment. *Livermore v. Bouteille*, 11 Gray, 217; *Chase v. Chase*, 105 Mass. 385; *Burrows v. Purple*, 107 Mass. 428; *Morrison v. Morrison*, 49 N. H. 69; *Tyler v. Tyler*, 126 Ill. 536, 21 N. E. 616; *Ulrich v. Ulrich* (Conn.) 37 Atl. 393. Plaintiff, therefore, cannot bring her case within the provisions of subdivision 4 of section 3457 of the Civil Code, which declares that an assignment for the benefit of creditors is void as to such creditors if the assignor reserves any interest in the assigned property before all his existing debts are paid. The transfer here was not an assignment for the benefit of creditors, nor, as has been said, was plaintiff a creditor at the time it was made. But, upon the other hand, plaintiff had a right of action founded upon section 3439 of the Civil Code, declaring every transfer of property made with intent to delay or defraud any creditor or other person of his just demands to be void. It was upon this section of the Code that the action was based; but, before recovery may be had, plaintiff must establish the material averments of her pleading, and this, under the findings of the court, she has utterly failed to do. The judgment and order appealed from must, therefore, be affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

(131 Cal. 623)

VOSBURG v. VOSBURG. (L. A. 918.)

(Supreme Court of California. Feb. 20, 1901.)

APPEAL—MOTION TO DISMISS—ORDER OF COURT—REFUSAL TO OBEY.

Defendant appeals from a judgment granting plaintiff a divorce, from an order denying a motion for a new trial, and from a subsequent order directing him to bring one of the minor children from New York and give him into the custody of the plaintiff. Defendant did not obey this order, but kept the child, and stayed himself outside the jurisdiction of the court, for the purpose of preventing the execution of the judgment of the court with regard to the custody of the child unless such judgment were favorable to him. Held not sufficient ground on which to dismiss defendant's appeals.

In bank. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Kate S. Vosburg against John S. Vosburg. From a judgment in favor of plaintiff, from an order denying a motion for a new trial, and from an order granting plaintiff custody of minor children, de-

fendant appeals. Motion to dismiss appeal. Denied.

Works & Lee, for appellant. J. S. Chapman and Charles Silent, for respondent.

MCFARLAND, J. This case is before us on a motion of respondent to dismiss three appeals of appellant,—from the judgment, from an order denying a motion for a new trial, and from an order made subsequently to the judgment modifying the decree as to the care and custody of the minor children of the parties. The action is for divorce, brought by the wife against the husband, and was commenced in the superior court of Los Angeles county, in this state, where the parties resided. By the judgment plaintiff was granted a divorce, and it was decreed that, of the three minor children of the parties, plaintiff should have the custody of the two younger, and defendant the custody of the eldest, a son named Roydon. It was found by the court that before the commencement of the action defendant had taken the boy Roydon to the state of New York, upon a promise to plaintiff that he would return the child in the fall of the year 1898, but that he did not comply with the promise and had kept him in New York; and it was decreed that defendant should bring said boy back to Los Angeles and keep him within the jurisdiction of the court, and allow the plaintiff to have his society at certain stated times, and that upon defendant complying with that part of the decree he should have at stated times the society of the two children whose custody was awarded to plaintiff. Defendant made a motion for a new trial, and, it having been denied, he appealed from the judgment, and from the order denying said motion. Afterwards plaintiff filed a petition alleging that defendant had not brought Roydon back to California, but still kept him in New York, and praying for further direction as to the control of the children. Defendant appeared and contested the petition; and the court on July 7, 1900, made an order giving the custody of Roydon to plaintiff, and again directing defendant to bring him to California. From this order defendant also appealed.

The present motion to dismiss these appeals is based on the records on appeal, and on an affidavit of plaintiff in which certain facts are stated,—the most important ones being that defendant has not obeyed the order of July 7th, and has not brought the boy Roydon to California, or within the jurisdiction of said superior court; that his refusal to obey said order is without excuse; that he keeps said Roydon in New York, and stays there himself, for the purpose of preventing said superior court, or this court on appeal, from executing or compelling obedience to the judgment already given, or to any judgment which may be given with respect to the custody of said Roydon, unless it be agreeable

to him; and that he is speculating on the results of his appeals, and is thus guilty of contempt of courts. It further appears by the affidavit and the findings of the court that the appellant also took one of the younger children to New York at the time he took Roydon, and that, on a habeas corpus proceeding instituted by respondent before a New York court, the custody of said Roydon was awarded to appellant. These statements in the affidavit of plaintiff constitute substantially the grounds upon which the motion to dismiss the appeals is based. The situation as above set forth seems to afford the appellant some advantage which, perhaps, a party, under the circumstances, should not have; but we cannot see that it presents any legal ground for dismissing the appeals.

In determining the motion, we do not deem it necessary to pass on some of the points made by appellant,—as, for instance, that there was no jurisdiction to make any order as to the custody of the child out of the state; that pending the appeal from the judgment there was no authority in the court to change it by the order of July 7th; that this motion depends on questions of fact which were litigated at the main trial, and can be properly considered here only on an appeal from the judgment; and that the adjudication of the New York court on habeas corpus is conclusive as to the custody of the boy Roydon. Assuming, for the purposes of this opinion, that respondent's views on these matters are correct, still the case presented does not warrant a dismissal of the appeals. It certainly does not present one of the grounds for dismissing an appeal prescribed either in the Code or the rules of this court, and it seems to be admitted that there is no precedent for a dismissal for the reasons here relied on. It is contended that there should be applied to this motion the principle upon which certain appeals in criminal cases have been dismissed, because the appellant had broken jail and disappeared, but this contention cannot be maintained. In *People v. Redinger*, 55 Cal. 290, the leading case on the subject in this state, many of the authorities are reviewed, and the decision is put mainly on the grounds that a criminal action can proceed only when the accused is in custody, either actual or constructive; that he has the right "to appear and defend in person, and with counsel," and that, although our Code prescribes that "the defendant need not personally appear in the appellate court," still "he has no longer the right to appear by counsel when he has escaped from custody, until he has returned to custody"; that by breaking jail and escaping he had waived the right to have counsel appear for him, and had waived his right of appeal; and that courts are not required "to encourage escapes and facilitate the evasion of the justice of the state by extending to escaped convicts the

means of reversing their convictions." In such a case the defendant, by an act done after judgment, has so changed his status as to make the execution of the judgment impossible. But there is no such situation in the case at bar. The status of appellant and of the boy Roydon is exactly the same as it was at the rendition of the judgment and order from which he appeals. Whatever part of the judgment was enforceable at the time it was rendered and at the time the appeals were taken, would in like manner be enforceable upon its affirmance. In addition to the specific grounds for dismissing appeals prescribed by statute and rules of court, an appeal will also sometimes be dismissed where it clearly appears that the judgment has been satisfied or the case settled, so that there is no dispute remaining between the parties, and no actual controversy pending; but no such condition appears in the case at bar. And, moreover, we cannot see any other general ground upon which this motion to dismiss can be placed. The motion to dismiss the appeals is denied.

We concur: TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.; HARRISON, J.

(131 Cal. 631)

ROSE et al. v. MESMER et al. (S. F. 2,455.)
(Supreme Court of California. Feb. 20, 1901.)
PRACTICE—INJUNCTION—SUPREME COURT—
ORIGINAL JURISDICTION.

Where an appeal was taken to the supreme court from a judgment decreeing that a certain dam was maintained without authority, such court had no jurisdiction to grant a petition for an original injunction, alleging that certain of the defendants had threatened to enforce the judgment by removing the dam, and would do so unless restrained; such act amounting only to a threatened trespass by the parties, involving no act by the court.

In bank. Action by Anderson Rose and others against Louis Mesmer and others. Pending an appeal from the judgment therein, José Antonio Machado applies for a restraining order. Denied.

Graves, O'Melveny & Shankland, Dunn & Crutcher, and Lee & Scott, for petitioners. Clarence A. Miller and M. J. McGarry, for respondents.

HARRISON, J. Application for a restraining order. The superior court rendered its judgment in this action August 1, 1900, and it was entered of record August 6th. By the judgment the rights of the several parties to the action in certain lands described therein, and in certain waters held to be appurtenant to said lands, were defined and determined. It was also adjudged that no party to the action has any right to maintain a certain dam then existing, or any dam or other obstruction in the channel of La Ballona creek, upon parcel No. 55 of the lands described in the decree, or to divert any water by means

of such dam or other obstruction through any portion of a certain ditch denominated the "Upper Ditch," leading from said dam through and over a portion of the lands. An appeal was afterwards taken to this court, and an undertaking in the sum of \$300 filed in support of said appeal. An application is now made to this court on behalf of the appellants for an order restraining the respondents from removing said dam, or any part thereof, upon the ground, as stated in said application, that at the time of the rendition of the judgment the dam was upon said parcel of land, and in such condition as to divert all the waters of the creek across which it is constructed, and still remains in the same condition, and that by means thereof the petitioners divert and convey the waters upon their lands; that certain of the respondents "threaten that they will enforce the said judgment by entering upon the said land whereon said dam is situated and removing the said dam," so as to cause all the waters of the creek to flow elsewhere than upon the lands of the petitioners; and that said respondents will, unless restrained by an order of this court, enforce said decree by so entering upon said lands and removing said dam, and will prevent your petitioners from diverting the waters of said creek by means of said dam"; and that, in case said dam is removed, said petitioners will sustain great damage. The petitioners have cited several cases in support of their motion, wherein this court has restrained the superior court from enforcing the judgment appealed from, or set aside the proceedings taken by it therefor, upon the ground that by the appeal the power of the superior court to enforce its judgment was suspended until the determination of such appeal. But in each of these cases the superior court was itself seeking to enforce its judgment by some process issued thereon, or by proceedings instituted for the purpose of punishing the respondents for contempt in disregarding the judgment. It does not appear in the present case that the superior court is attempting to enforce its judgment, or that any process has been issued for that purpose. The statement in the petition that the respondents threatened to enforce the judgment "by entering upon said land whereon said dam is situated, and removing the said dam," does not indicate that the court is, in any respect, seeking to enforce its judgment. Whether the appeal herein has the effect to supersede the power of the court to enforce its judgment is not involved in the present proceeding. It does not appear that any application has been made to that court for this purpose, and, in the absence of any action by it, we are not called upon to determine whether the appeal has such effect, or, if it has, that the court would disregard it. In *Dulin v. Coal Co.*, 98 Cal. 304, 33 Pac. 123, we had occasion to consider the function of a writ of superseas, and the power of this court to control

the enforcement of a judgment of the superior court after an appeal therefrom had been taken. It was there held that the writ is directed to the court whose action is sought to be restrained, or to some officer of that court who may be about to enforce its judgment, and is limited to restraining any action under the authority of the court upon the judgment appealed from. It was also said: "The writ cannot be used to perform the functions of an injunction against the parties to the action restraining them from any act in the assertion of their rights other than to prevent them from using the process of the court below to enforce the judgment." The provision in section 949, Code Civ. Proc., by which an appeal in certain classes of judgments "stays the enforcement of the judgment," is, by the terms of the section, limited to "proceedings in the court below upon the judgment," and has no effect elsewhere. If the respondents have no right to remove the dam, their act in so doing may constitute a trespass for which the petitioners would have their remedy in the proper forum; but it is not within the jurisdiction of this court to issue an original injunction to prevent the commission of a trespass. The principles declared in *Dulin's Case* must control the rights of the parties in the present application. The application is denied.

We concur: McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

(131 Cal. 656)

SIMS v. PETALUMA GASLIGHT CO.
(S. F. 2,215.)

(Supreme Court of California. Feb. 23, 1901.)

CONTRACTS—VALIDITY—DIRECTORS—QUANTUM MERUIT—EVIDENCE—SUFFICIENCY—GAS PLANT.

1. A contract made on behalf of a corporation, by a person who is its president and one of its directors, with a partnership composed of himself and another person, is void, since the director occupies a fiduciary relation to the corporation, such that he cannot take part in any transaction where he has an interest adverse to that of the corporation.

2. Defendant contracted to pay plaintiff \$4,000 for erecting a gas plant to have a capacity of 3,000 feet per hour. The contract was invalid, and suit was brought on a quantum meruit. The capacity of the plant was between 1,000 and 2,000 feet. There was no testimony showing the value of the labor or materials used in erecting the plant. *Held* not sufficient to support a finding that \$4,000 is the reasonable value of the labor and materials used in constructing the plant.

In bank. Reversed.

For opinion in department, see 62 Pac. 300.

VAN DYKE, J. The complaint in this case contains two counts. The first declares upon a contract in writing alleged to have been entered into between Harvey J. Lewelling and Stephen W. Van Syckel, partners in business under the name and style of Lewelling & Van

Syckel, and the defendant gas company, August 20, 1896. It is alleged that by the terms of said contract Lewelling and Van Syckel agreed to build and erect certain water-gas apparatus at the gas works of said defendant, in Petaluma, Cal., for the purpose of manufacturing gas from crude oil, or distillate, by a process known as the "Van Syckel Water-Gas System," the work to be done and the materials to be furnished at the expense of the said Lewelling & Van Syckel, and the plant to have a capacity of 3,000 cubic feet per hour of 22 to 23 candle power gas, for which it is alleged that the defendant agreed to pay said Lewelling & Van Syckel the sum of \$4,000; and it is further alleged that the said Lewelling & Van Syckel constructed said gas plant according to the terms of said agreement, and that thereafter, and before the bringing of the suit, they assigned to plaintiff all their right, title, and interest in said contract, and that no part of the contract price had been paid. The second count is in the nature of a quantum meruit for work, labor, and services performed and for materials furnished by said Lewelling & Van Syckel to and for the defendant in the erection and construction of a water-gas apparatus at the gas works of said defendant, the reasonable value of which work, labor, and materials, it is alleged, is the sum of \$4,000. The court found, among other things, that the said S. W. Van Syckel on the 31st day of July, 1896, purchased of I. G. Wickersham, then the owner thereof, all the stock of the said Petaluma Gas Company, except five shares, for the sum of \$16,500, paying thereon the sum of \$1,000, and giving his note for the balance, payable in two years, at 6 per cent. interest; that to secure the payment of the said note said S. W. Van Syckel transferred the said stock to I. G. Wickersham, and agreed, as a further security for the payment thereof, to erect and attach to the said plant of the said Petaluma Gas Company his water-gas system; that, while said Van Syckel was so the owner of the stock of said gas company as aforesaid, the defendant entered into the agreement set out in the plaintiff's complaint, with Van Syckel & Lewelling, to construct the said water-gas system; that, the said Van Syckel neglecting to pay said indebtedness to said Wickersham, the said property subsequently reverted to the said Wickersham, the former owner thereof. From the record it appears that at the trial of the cause the written contract referred to was introduced on behalf of the plaintiff, showing that the same was executed by Lewelling & Van Syckel, as one of the parties thereto, and the Petaluma Gaslight Company, by S. W. Van Syckel, president, and F. A. Wickersham, secretary, as the other party thereto. It is set forth in the appellant's opening brief, and not controverted by respondent, that, after the cause had been submitted to the court upon argument, the court below held the written contract to be invalid, it appearing to have been executed by Van Syckel, as president of

the defendant company, on the one part, with himself and Lewelling as parties of the other part; but the court nevertheless found that Lewelling and Van Syckel finished and completed the gas plant according to the terms of the agreement mentioned in the first cause of action pleaded in said complaint. It also found that within two years next prior to the commencement of the action the defendant became indebted to Lewelling & Van Syckel in the sum of \$4,000 for work, labor, and services performed by them in the erection and construction of the water-gas apparatus at the gas works of the defendant, and for material furnished by said Lewelling & Van Syckel in and about said work at the special instance and request of said defendant; that the sum of \$4,000 is the reasonable value of said work and labor and materials so furnished. From the judgment entered in favor of the plaintiff on said findings, and from an order denying defendant's motion for a new trial, this appeal is taken.

The court was clearly correct in holding that, for the reasons stated, the contract introduced in evidence on the part of the plaintiff was invalid. Being president of the defendant corporation, Van Syckel necessarily was one of the directors thereof (Civ. Code, § 308); and as such he occupied a fiduciary relation to the corporation and its stockholders. "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." *Id.* § 2229. He cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his beneficiary. *Id.* § 2230. In fact, this rule did not have its origin with the Codes, but is much older. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee. "Hence the rule is unyielding that a trustee shall not under any circumstances be allowed to have any dealings with the trust property, with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary." *Wickersham v. Crittenden*, 93 Cal. 29, 28 Pac. 788. In *Railway Co. v. Blakie*, 1 Macq. 461, it is said: "So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interests of the cestui que trust which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other

person; they may even at the time have been better; but still so inflexible is the rule that no inquiry on that subject is permitted." See, also, *Cook, Stock & S.* § 648; *Mor. Priv. Corp.* § 516; *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665; *Berka v. Woodward*, 123 Cal. 119, 57 Pac. 777.

The written contract being out of the way, the question was not whether *Lewelling & Van Syckel* completed the gas plant according to the terms of that agreement, as there was no such agreement in law in existence; but the real question was what work and labor was performed and materials furnished for the company of which it received the benefit, and what the value thereof was, without regard to any express contract. The plaintiff could not recover on the written contract, but he might recover, as upon a quantum meruit, for what the defendant actually received in value. But the evidence does not support the finding that the plant was finished according to the contract. By the terms of that contract the plant was required to have a capacity of 3,000 cubic feet per hour, of 22 to 23 candle-power gas. *Van Syckel*, on behalf of the plaintiff, testified that it required two hours to heat the plant so that it would make gas, and then it would make from 1,000 to 2,000 feet until heated again. "The ordinary make, however, was from 1,000 to 1,500 feet." *Lewelling*, also on behalf of the plaintiff, testified: "I know the capacity of the machine per hour. It is inside the amount stated in the contract." He says on cross-examination that he "tested the capacity and found that it would make from 1,000 to 1,500 feet of gas per hour; that he saw it make that amount of gas two or three times." *Mr. Cheffins*, witness for the plaintiff, who had charge of the plant, testified that some days it would make 3,000 feet, and sometimes less, taking 14 to 15 gallons of oil per thousand feet. *William Mills*, witness for the defendant, who had charge of the plant from the first, testified that it would not make 3,000 feet per hour. This is the substance of the testimony in reference to the capacity of the plant constructed by plaintiff's assignors, from which it is seen that it does not support the finding referred to. There is no testimony whatever introduced showing the amount of work and labor, either in number of days or value of services, or the amount and value of materials furnished. The case seems to have been tried entirely upon the theory of the validity of the written contract, as the testimony introduced related to that only, and not to that of the second count on the quantum meruit. Defendant's attorneys sought to obtain testimony in reference to the value of the plant as constructed, and asked the following question of the witness *Mills*: "Has this plant been any addition to the original plant for making gas, or adds anything to the value of that plant?" This was objected to by the plaintiff as being irrelevant, incom-

petent, and immaterial, and the objection was sustained. Defendant further sought to ascertain which machine—the old or the new one—would make the best and cheapest gas, and the same objection and ruling were had thereon as to the other question. If the question before the court was whether the written contract had been performed or not, the objections were properly sustained; but, if it was whether the defendant had received any benefit from the work and labor performed or material furnished, the questions were proper, and the answers thereto should have been allowed. The finding that the defendant became indebted to *Lewelling & Van Syckel* in the sum of \$4,000 on account for work and labor performed and materials furnished in the erection and construction of water gas apparatus, and the further finding that the sum of \$4,000 is the reasonable value of said work, labor, and material furnished by said *Lewelling & Van Syckel* to the defendant, have not, nor has either, any support in the evidence. Judgment and order reversed.

We concur: *TEMPLE, J.*; *HARRISON, J.*

McFARLAND, J. I concur in the judgment. I concur, also, in the opinion of *Mr. Justice VAN DYKE*, except that part of it in which is discussed the general proposition that a trustee cannot deal with his beneficiary. In my opinion, the rule is stated too broadly. I think that under the rule the contract here involved was invalid, but the law as declared in the opinion would exclude exceptions which have been often sanctioned.

I concur: *GAROUTTE, J.*

(131 Cal. 590)

SCOVILLE v. ANDERSON. (S. F. 1,677.)
(Supreme Court of California. Feb. 18, 1901.)

INSOLVENCY—ATTACHMENT—TIME—COM-
PUTATION—CALENDAR MONTH—
DAYS—FRACTIONS.

1. Under Insolvency Act 1895, p. 139, § 21, providing that an attachment is dissolved if levied within one month prior to the commencement of insolvency proceedings, the commencement of such proceedings is an act, within *Code Civ. Proc.* § 12, declaring that the time in which any "act provided by law" is to be done is computed by excluding the first day and including the last; as the latter provision relates to acts "permitted by law," and not merely to acts commanded.

2. Insolvency Act 1895, p. 139, § 21, provides that an attachment is dissolved if levied within one month prior to the commencement of insolvency proceedings. *Code Civ. Proc.* § 12, declares that the time in which any act provided by law is to be done is computed by excluding the first day and including the last; and *Civ. Code*, § 14, subd. 4, enacts that the word "month" means a calendar month, unless otherwise provided. *Held*, that the rule given for the computation of time applied in computing the time between the levy of an attachment and the institution of insolvency proceedings, and fractions of a day would not be considered, as they are to be considered only in determin-

ing priority of events happening on the same day.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Bill by J. J. Scoville, assignee in insolvency, against A. Anderson, to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

Reed & Nusbaumer and H. W. Hutton, for appellant. Henry N. Beatty and W. W. Sanderson, for respondent.

HENSHAW, J. Upon January 22, 1896, A. Anderson, defendant and appellant herein, commenced an action in the superior court of the county of Alameda against one William Schmidt to recover a money judgment. Thereafter, on the 24th day of January, at the hour of 12:30 p. m., he caused an attachment to be levied upon certain real estate of William Schmidt, a member of the co-partnership of George F. Smith & Co., which real estate is situated in the city and county of San Francisco. At the hour of 4:20 p. m. of the 24th day of February, 1896, a petition was filed in the superior court of the city and county of San Francisco, asking that the partnership of George F. Smith & Co. be adjudged insolvent. An adjudication to this effect was given on the 17th day of November, 1896, upon which day Scoville, plaintiff herein, was appointed assignee. Meanwhile, by order and permission of the court in insolvency, Anderson was allowed to prosecute his action then pending in the superior court of Alameda county to a judgment, and he did so. He subsequently caused execution to be issued upon his judgment, and the land in San Francisco upon which the attachment had been levied was sold on the 1st day of September, 1896, Anderson himself being the purchaser at the sale. On the 5th day of September, 1897, he received his sheriff's deed for the land. Upon the 29th day of May, 1897, Scoville, as assignee of the insolvent co-partnership, commenced this action to quiet title to the land, and from the judgment and decree so quieting the assignee's title Anderson appeals.

Upon his appeal he presents two points for consideration: First, that Scoville's action is a collateral attack upon the order of the superior court granting Anderson permission to prosecute his action, and upon the judgment and execution of the superior court of Alameda county; and, second, that the attachment in the action prosecuted in the superior court of Alameda county was levied more than one month prior to the initiation of the insolvency proceedings. It is conceded that the fee of the property was in William Schmidt, and that all of Schmidt's title, except as affected by the lien of the attachment, passed to the assignee under his appointment, so that the assignee took title by relation as of the 24th day of February,

1896. Insolvency Act 1895, p. 139, § 21, *Dambmann v. White*, 48 Cal. 450. It is likewise unquestioned that an attachment of the property of an insolvent is dissolved by operation of law if levied within one month prior to the commencement of the proceedings in insolvency. Insolvency Act 1895, p. 139, § 21; *Cerf v. Oaks*, 59 Cal. 135. Section 49 of the insolvency act provides that, if the amount due the creditors is in dispute, the suit by leave of court in insolvency may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed. It was in pursuance of this provision of the insolvency act that the order of the court in insolvency was made permitting Anderson to prosecute his suit to judgment, and it does not appear that the order was any broader or went any further than this. In the present action there is no controversy over, and consequently no attack direct or collateral upon, the sufficiency of the judgment, nor the justice of the sum awarded. The respondent assignee admits Anderson's right to prosecute his action to final judgment. His contention is that the attachment lien was dissolved by operation of law by virtue of the fact that insolvency proceedings were commenced within one month next after the levy of the attachment; that, the attachment lien being dissolved, it was not merged into the judgment obtained by Anderson, and that the assignee's title acquired upon the 24th day of February, 1896, was freed from the lien of the attachment, and absolutely perfect; that, notwithstanding this, the existence of the sheriff's deed constituted a cloud upon his title, which he is entitled to have removed by a court of equity. Upon the other hand, respondent concedes that, if the attachment was filed more than one month before the commencement of the insolvency proceedings, it was and continued to be a valid, subsisting lien upon the property, antedating and superior to his own title, a lien that was subsequently properly disposed of by execution sale, and that the question, therefore, is not at all one of collateral attack upon a judgment the validity of which is not assailed, and the sufficiency of which is not in question, but is the single one, namely, did the assignee, on the 24th day of February, 1896, acquire a title to the real property described in the complaint, free of the lien of the attachment imposed upon said property by the levy of January 24, 1896? This position is sound.

Respondent relies upon the provisions of section 21 of the insolvency act, declaring that the "assignment shall dissolve any attachment made within a month next preceding the commencement of the insolvency proceedings." Appellant, recognizing that the validity or invalidity of his attachment lien depends upon this section, insists that in the computation and measurement of time, to protect his private right, the law will

regard the fractions of a day, and that between 1:30 o'clock in the afternoon of January 24, 1896, and 4:30 o'clock in the afternoon of February 24, 1896, more than one month had elapsed, and that his attachment lien was, therefore, not dissolved. In measuring and computing time it has been the rule from a very early day in this state to exclude the day upon which the event happened,—a rule and method of computation differing from that of the earlier English practice, which was the inclusive method, under which the time began to run upon the day of the happening of the event. Thus, while in *People v. Clark*, 1 Cal. 408, it is said that the general rule seems to be that in the computation of time from an act done the day of the act is to be computed, in the next case, of *Price v. Whitman*, 8 Cal. 412, the exclusive rule is adopted, and it is said: "Of late the general rule of construction seems to have been to exclude the first day;" and in *Iron Mountain Co. v. Haight*, 39 Cal. 540, where it was sought to have the court return to the earlier or inclusive rule, it is said: "We think we are bound by the gravest considerations of public order and security not at this late day to disturb the rule so distinctly and authoritatively settled." Finally, the matter was definitely put at rest by a provision placed in the Codes to the effect that "the time in which any act provided by law is to be done, is computed by excluding the first day and including the last." Code Civ. Proc. § 12; Cr. Code, § 10; Pol. Code, § 12. Still further as bearing upon the question we have in section 14, subd. 4, of the Civil Code, the provision that the word "month" means a calendar month, unless otherwise expressed. Applying these fixed rules, it is demonstrated that, if the act from which time is to run be considered the commencement of the insolvency proceedings, then the 24th day of February is excluded, and, counting backward one calendar month, there is included all the 24th day of January, upon which day the attachment was levied, and the attachment, consequently, was levied within the month. The same result is reached if the initiatory act be considered as the levying of the attachment upon the 24th day of January, by which method the 24th day of January is excluded from computation, and the month runs to and includes all of the 24th day of February. To this, however, objection is made that the filing of the insolvency proceedings was not, within the meaning of section 12 of the Code of Civil Procedure, "an act provided by law to be done"; but this language does not mean that it is an act the doing of which is commanded by law. It applies equally to all acts permitted by law, of which certainly this is one. The analogy in the case of the time allowed to respond to a summons, as to which it is not doubted that the statute applies, is perfect. The party upon whom service is made is allowed 10 days in which to

plead. There is no compulsion upon him to plead. He is merely permitted to do so if he wishes. It is an act provided by law to be done.

But it is still further insisted by appellant that, having due regard to the private rights of the parties litigant, the law will regard fractions of a day. The principle here involved was expressed in *Iron Mountain Co. v. Haight*, supra, as follows: "Fractions of days are not to be noticed, unless in a case in which it becomes necessary to ascertain the relative order of occurrences happening on the same day." The supreme court of the United States, in *Bank v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766, and in *Township of Louisville v. Portsmouth Sav. Bank*, 104 U. S. 472, 26 L. Ed. 775, reviews with much care the authorities and the learning of the law upon the question, and voices its conclusion as follows: "For most purposes the law regards the entire day as an indivisible unit, but, when the priority of one legal right over another depending upon the order of events occurring upon the same day is involved, this rule is necessarily departed from." Appellant places reliance upon the language of *Main v. Gilman* (C. C.) 11 Fed. 214, quoted with approval by this court in *Hoyt v. Railroad Co.*, 87 Cal. 610, 25 Pac. 160, 1066, where it is said: "It is insisted that the law knows no fractions of a day, but this ancient maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, or a decree was entered, or an attachment was laid, or any title accrued." But the principle underlying this language is easily discerned. Where the law requires or permits an act to be done within a statutory period of time or number of days, the question becomes one simply of the measurement of time, and, so measuring time, the first day is excluded, all of the last day included, and fractions of days are totally and universally disregarded. The acting party has all of the last day within which to proceed. But where the question before the court is one where the determination of private rights depends upon the order in point of time of the performance of two or more acts usually done upon the same day, the courts are, of necessity, required to determine the priority and sequence of these events, and to this end always, as of need they must, consider parts and fractions of days. No one, for example, would consider that a defendant upon whom a summons had been served at 10 o'clock in the morning was in default because his answer was not filed until 4 o'clock of the afternoon of the tenth day. Upon the other hand, where the question is that of priority of time in the levy of two or more attachments,—the recording of deeds and the like,—the actual time of performance becomes the essential question, and fractions of days are scrupulously regarded. Of this latter class of cases was that of *Hoyt*

v. Railway Co., *supra*, the facts being that a rule of this court provided that, if the transcript was on file when notice was given of a motion to dismiss the appeal for failure to file, that fact should be a sufficient answer to the motion. The transcript in that case was filed upon the day the motion was served, but some hours after service. In resisting the motion to dismiss, it was urged that the law would not regard fractions of a day, and that the appellant was in time, therefore, if his transcript was filed at any hour upon the day of the service of the notice. It was in answer to this that the language of the federal court above quoted was employed. It was thus not a question where fractions of a day were considered in the measurement of time, but merely where they were considered to determine the priority of the happening of one of two acts. *Price v. Whitman*, *supra*, and *Iron Mountain Co. v. Haight*, *supra*, were both cases where the measurement of time was under consideration. In both it was urged that fractions of days should be regarded. In both the question was considered, and the fractions rejected. The other cases relied upon by appellant will be found upon examination to be those where the question was not of measurement of time, but a determination as to the priority of the order of events occurring on the same day. The case at bar, then, involves the question of the measurement of time, as to which it is clear that the law will not regard fractions of days, and that the attachment lien was, therefore, avoided by the initiation of the insolvency proceedings upon the 24th day of February. The same conclusion was reached by the supreme court of Connecticut in a parallel case arising under its insolvency act. *Miner v. Manufacturing Co.*, 62 Conn. 410, 26 Atl. 643. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(131 Cal. 612)

CITY AND COUNTY OF SAN FRANCISCO v.
LA SOCIETE FRANCAISE D'EPARGNES
ET DE PREVOYANCE MUTUELLE. (S.
F. 1,541.)

(Supreme Court of California. Feb. 19, 1901.)

TAXATION — SOLVENT CREDITS — SECURITY —
NONTAXABLE SECURITY — SUPPLEMENTAL ASSESSMENT.

1. Under Const. art. 13, § 1, declaring that moneys, credits, bonds, stocks, and things capable of private ownership shall be taxed, outstanding loans are taxable notwithstanding that they are secured by pledge of nontaxable personal property.

2. Where a corporation had returned a sworn statement of its property, which was listed and assessed to it, and the taxes thereon collected, an additional assessment of property, not contained in the list, was properly made thereafter; the previous assessment, based on the verified list, not preventing the assessor from making another assessment of property that has escaped assessment; Pol. Code, §

3885, declaring that no assessment shall be illegal because not completed within the time required.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against La Societe Francaise d'Epargnes et de Prevoyance Mutuelle. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stanly, McKinstry, Bradley and McKinstry, for appellant. Alfred Fuhrman, for respondent.

GRAY, C. This is an action to recover \$5,851.60 alleged to be due to plaintiff from defendant as taxes for the fiscal year ending June 30, 1897, on solvent credits, admitted to be owned by defendant, aggregating \$348,721, and secured by nontaxable stocks and bonds. Plaintiff had judgment for the full amount demanded, from which defendant appeals, and urges as the grounds thereof—First, that the credits are not taxable, because they are secured by pledge of property not taxable; second, the assessor had no right or power to assess the said credits, because defendant had already handed in a sworn statement of its property for said fiscal year, which was listed to it, assessed, and the taxes thereon collected by the assessor (it all being personal property), and the said credits were not included in said statement nor in said assessment, but in an additional assessment, made by the assessor subsequent to payment made by defendant as aforesaid, and not based on any sworn statement.

1. We are of the opinion that loans or solvent credits secured by pledge on nontaxable property are taxable. Section 1 of article 13 of the constitution provides that "all property," with certain exceptions therein stated, "shall be taxed in proportion to its value." It further provides that the word "property" as used in said "article and section" shall include "moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership." The admitted credits or outstanding loans of defendant come clearly within the above constitutional definition of "taxable property," and the fact that such loans are secured by pledge of nontaxable personal property in no way affects the question.

2. The assessor was not bound by the verified list of property furnished by defendant, but it was his duty to assess to defendant any of its property that had for any reason escaped assessment. This question is set at rest, and the reasons given, in *People v. National Bank of D. O. Mills*, 123 Cal. 53, 55 Pac. 685; *Savings & Loan Soc. v. City & County of San Francisco* (Cal.) 63 Pac. 665. The power of the assessor to make a supplemental assessment embracing newly-discovered property cannot be limited or in any way affected by the previous assessment based on the verified

list made by defendant. It is the duty of the assessor to assess all the property for the current fiscal year, and this duty continues so long as the assessment books of such current year are under his control, and whenever he discovers property that has up to that time escaped assessment he should list and assess it to the owner in the manner provided in the Political Code. No assessment is illegal "because the same was not completed within the time required by law." Pol. Code, § 3885. We advise that the judgment be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(131 Cal. 618)

HELLINGS et al. v. DUVALL et al.
(S. F. 973.)

(Supreme Court of California. Feb. 20, 1901.)

APPEAL AND ERROR—MOTION TO DISMISS—
FORMER MOTION—SLANDER OF TITLE—ISSUES—JUDGMENT.

1. Under Code Civ. Proc. § 182, providing that, if an application for an order made to a court in which an action is pending is refused, no subsequent application for the same order shall be made except to a higher court, a motion to dismiss an appeal will not be considered after a former motion to dismiss has been denied.

2. In an action for slander of plaintiffs' title to certain real estate, a defendant's answer denied all allegations of the complaint, alleged ownership in her, and prayed for costs, and that plaintiffs take nothing by reason of their complaint. On the trial no evidence was offered on behalf of plaintiffs. The judgment, in addition to the relief demanded by defendant, adjudged that plaintiffs were not and that defendant was the owner of the land. *Held*, that so much of the judgment as related to the title to the land was erroneous, since plaintiffs' title was only incidentally involved in the action, and, on their failing to offer any evidence, ceased to be involved in any way, and defendant's title was not involved in the action or defense.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by W. B. Hellings and others against Henrietta Duvall and others. From a judgment for defendant Henrietta Duvall, plaintiffs appeal. Modified.

For former appeal, see 51 Pac. 335.

T. M. Osmont and Chas. H. Hubbs, for appellants. Henry S. Foote and Sidney M. Van Wyck, Jr., for respondent.

SMITH, C. Action for slander of plaintiffs' title to certain real estate. The complaint, besides stating in detail the facts constituting the slander, alleges the plaintiffs' ownership of the property described. The answer of defendant Duvall denies all the allegations of the complaint, and alleges ownership in her. The prayer of the answer is for costs, and that plaintiffs "take nothing by reason of their complaint." On the trial

no evidence was offered on behalf of the plaintiffs. The judgment, besides granting the relief demanded, further adjudges that the plaintiffs are not, and that the defendant Duvall is, the owner of the lands described in the complaint and judgment. There was a motion to dismiss the appeal on the ground of the omission of certain parts of the judgment roll from the transcript, including the answer of defendant Crittenden; and, the motion coming on to be heard, the appeal was dismissed June 7, 1897, as to that defendant, and on December 8th of the same year the motion denied as to the other respondent. 51 Pac. 335. This disposes of the motion to dismiss the appeal, and it would be improper for us to reconsider it. Code Civ. Proc. § 182. The appellants seek by this appeal to have the judgment modified by omitting the adjudication as to the land, and we have no doubt they are entitled to this relief. The plaintiffs' title was only incidentally involved in the action, and, on their failing to offer any evidence, ceased to be in any way involved. The defendant Duvall's title was not involved either in the action or defense, and the allegations of her answer on that point were surplusage. The adjudication of title in her favor was beyond the scope of the action or defense, and therefore erroneous. The defendant Crittenden is in no way interested in this question, and the dismissal of the appeal as to him does not affect it. We advise that the judgment be modified by striking therefrom the third, fourth, and fifth paragraphs thereof, the first-named paragraph commencing with the words, "Good cause therefor appearing, it is ordered, adjudged," etc., and the last ending with the words, "45 feet to the point of commencement," and, as thus modified, that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by striking therefrom the third, fourth, and fifth paragraphs thereof, the first-named paragraph commencing with the words, "Good cause therefor appearing, it is ordered, adjudged," etc., and the last ending with the words, "45 feet to the point of commencement," and, as thus modified, the judgment is affirmed.

(131 Cal. 639)

WARNER BROS. CO. v. FREUD et al.
(S. F. 2,248.)

(Supreme Court of California. Feb. 21, 1901.)

APPEAL—JUDGMENT—DISMISSAL—PAYMENT
—ESTOPPEL.

1. Where a judgment creditor has refused to acknowledge a sum paid to be a satisfaction of the judgment, he is thereby estopped from asserting, in a motion to dismiss an appeal from the judgment, that the judgment has been satisfied, and the controversy is at an end.

2. An appeal will not be dismissed on the ground that the judgment appealed from has been satisfied by payment of the sum due thereon, unless such payment was by way of compromise, or with an agreement not to pursue an appeal.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action by the Warner Bros. Company against Tiny Freud and others. From a judgment for the plaintiff, defendants appeal. Motion to dismiss. Denied.

W. S. Goodfellow and W. B. Bosley, for appellants. Hart H. North and Henry E. Monroe (W. B. Treadwell, of counsel), for respondent.

PER CURIAM. The respondent moves to dismiss the appeal upon the ground "that, after the taking of said appeal, the appellant Tiny Freud, administratrix with the will annexed of the estate of Morris Freud, deceased, voluntarily paid to the respondent, and the respondent accepted, the whole sum of money specified in the decree appealed from; thus effecting a satisfaction of said decree." The motion is made upon the transcript and an affidavit showing that on August 12, 1899, said administratrix paid to the respondent \$12,209.67 for the purpose of satisfying the judgment appealed from, and that the money was accepted, and the judgment satisfied. Without stating the facts so fully as might appear to be necessary if the merits of the appeal were now under consideration, the following will suffice for the purposes of this motion: Morris Freud died testate in 1882, seised of certain real estate, which he had mortgaged to the German Savings & Loan Society. By his will he devised to his wife, Tiny Freud, a life estate in said real estate, with remainder to five children in equal proportions; and said Tiny Freud is the administratrix with the will annexed of said estate. After the death of Morris Freud the bank foreclosed its mortgage, and on May 31, 1898, the property was sold thereunder, the bank becoming the purchaser. The respondent, having purchased the interest of one of the remainder-men, on November 30, 1898, as a successor in interest of the mortgagor, redeemed the property by paying to the bank the full amount of \$11,609.44, and afterwards brought the present action, against Tiny Freud as administratrix and also in her personal capacity, and against each of the other devisees, praying that the amount of said redemption money which each of the defendants should severally pay be ascertained, and that, in default of such payment by a day to be fixed by the court, each of the defendants so defaulting to be forever barred and foreclosed of all interest in the premises. The answer alleged that the interest which the plaintiff purchased from said devisee was subject to the payment of the debts, charges, and expenses of

administration, and that there are such debts, charges, and expenses remaining unpaid. The court found the proportion of the redemption money that should be paid by each of the defendants, and decreed that, in default of payment within 60 days, the interest of the defendant so defaulting should vest "absolutely and forever unconditionally in the plaintiff." From said judgment all the defendants appealed, and it is that appeal that respondent seeks to dismiss. The grounds upon which said motion is based have already been stated in the notice of motion and in the affidavit of Mr. North in support of the motion.

In opposition to the motion is an affidavit of Mr. Bosley, one of appellants' attorneys, stating very fully the circumstances under which said redemption money was paid by the administratrix, from which it appears that Mr. Bosley, Mr. Goodfellow, and Mr. Vandall went to the office of Mr. North, the attorney in fact of respondent, taking with them the money required to effect the redemption, a written tender, and a form of receipt to be executed by Warner Bros. Company by its attorney in fact and its attorneys, entitled in the court and cause, and the body of which is as follows: "Received from Mrs. Tiny Freud, administratrix with the will annexed of the estate of Morris Freud, deceased, the sum of \$12,209.67, paid by her pursuant to the terms of the decree entered in the above-entitled action, and in full satisfaction of the amount provided to be paid by her as such administratrix by the terms of said decree,"—dated August 12, 1899. The receipt that was given by respondent is as follows: "San Francisco, August 12, 1899. Received from Tiny Freud, as administratrix of the estate of Morris Freud, dec'd, twelve thousand two hundred nine and ⁶⁷/₁₀₀ dollars. [Signed] Warner Bros. Co., a Corp., per Hart H. North, Its Attorney in Fact." This receipt made no reference to the action, or the decree, or to any purpose for which the money was paid; but to all requests that the receipt prepared by the administratrix should be signed the reply was, "You have your receipt." Mr. Treadwell, of counsel for respondent, said, in effect, that they did not propose to sign anything or do anything that would enable appellant to get any of the money back; that it was their point that the administratrix had no right to effect redemption without an order of court. The facts stated in Mr. Bosley's affidavit were not replied to. It will be observed that in the notice of motion to dismiss this appeal there is no statement that the money was received or paid in satisfaction of the decree, but simply that the payment was voluntary, and the money accepted, "thus effecting a satisfaction of said decree"; and the affidavit of Mr. North is equally careful to avoid any statement that it was received in satisfaction of the judgment appealed from, though he concludes his

affidavit with the legal conclusion, "whereby the said judgment became and is satisfied." In an affidavit made by said Tiny Freud in opposition to said motion it is shown that in August, 1900, she filed a petition in the superior court for partial distribution of the estate of Morris Freud, in which she alleged that the land described in the judgment appealed from in this action was the community property of herself and said Morris Freud; that the corporation, respondent herein, appeared and filed an opposition to her said petition, in which it was denied that said property was community property, and alleged that in an action commenced by said corporation against said Tiny Freud and all other persons interested in the estate the superior court, on June 17, 1899, duly made and entered its decree, whereby it was adjudged, among other things, that the interest of Tiny Freud in said real property was a life estate only, and that she had no other interest therein. Her affidavit then proceeds to state that in the present case, in which said judgment was rendered, there was no issue as to whether said real estate was community property; and that she intends to file a supplemental brief, and ask that the judgment be reversed or modified in so far as it may be held to determine that she had only a life estate therein.

The appeal in this case is taken by all the defendants, viz. Tiny Freud, Rosa Vogelsdorf, Hannah Freud, Emily Elaiser, Tiny Freud as administratrix with the will annexed of the estate of Morris Freud, deceased, and Emma Freud as executrix of the last will and testament of Isaac Freud, deceased. The judgment specifies the amount to be paid by each of these defendants, and divested the estate of each one who should not pay within sixty days. The appeal is from the whole of the judgment. The alleged satisfaction of the judgment was made by Tiny Freud as administratrix. It does not appear that any other of the appellants consented to the payment. We see no ground upon which the respondent has any right to have the appeal dismissed as to any of the appellants, unless it be as to the administratrix. It is shown that there are debts, charges, and expenses of the estate of Morris Freud unpaid. It was her duty to protect the estate as far as possible. If she failed to pay the amount required by the judgment to be paid by her as administratrix, and this court should affirm the judgment, the estate would have been lost to the heirs and creditors. We think she was not bound to determine at her peril what the judgment of this court would be upon the questions of law involved. There was no compromise, no concession by respondent, no condition imposed or assurance given that the appeal would not be prosecuted. On the contrary, respondent expressly refused to sign a receipt acknowledging satisfaction of the judgment; nor has it since offered to give or sign an acknowledgment of

satisfaction; nor has any satisfaction of said judgment been entered of record; while the statement of its counsel at the time the money was paid, to the effect that nothing would be signed or done that would enable appellants to get their money back, and that the administratrix had no right to effect redemption without an order of court, would seem to imply that respondent did not intend that the payment should be the end of the matter. But, however that may be, the repeated refusals of respondent to acknowledge satisfaction of the judgment estops it from saying, for the purposes of this motion, that the judgment has been satisfied, and that for that reason the appeal should be dismissed. It cannot, for one purpose, refuse to acknowledge satisfaction of the judgment, and for another purpose insist that it is satisfied. In *Hayes v. Nourse*, 107 N. Y. 577, 579, 14 N. E. 508, it was said: "It must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal." In *Erwin v. Lowry*, 7 How. 184, 12 L. Ed. 660, the supreme court of the United States said: "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." Upon this point the foregoing is approved in *O'Hara v. O'Connell*, 93 U. S. 150, 154, 23 L. Ed. 840. In *Hayes v. Nourse*, supra, the court further said: "The statute giving the right to appeal only requires that the judgment shall be final; that the appeal shall be taken within one year after it is entered; and, anticipating such a case as that now presented, provides that, if the judgment appealed from is reversed, the appellate court may make or compel restitution. The same rule prevailed before the Code, and it was applied whether the judgment was paid before or after writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended." Freeman, in his work on Judgments (section 480a), says: "One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice; and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is

that, though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal." In the case at bar the court found that the real estate sold under the mortgage to the bank and redeemed by respondent, Warner Bros. Company, is of the value of \$25,000. The amount paid on August 12, 1899, to respondent, \$12,200.67, was less than one-half the value of the property. The judgment was a strict foreclosure of respondent's claim arising out of its redemption from the foreclosure sale; and under the judgment from which this appeal is taken, unless reversed, or satisfied by payment, the property would become forfeited to respondent. The payment made by administratrix, under these circumstances, was prudent, and might well be regarded as compulsory. In support of the motion, respondent cites several California cases, none of which conflict with those above cited. *Morton v. Superior Court*, 65 Cal. 496, 498, 4 Pac. 489, was considered in *Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 41, where it was said that *Morton v. Superior Court*, supra, "was a collateral attack upon the judgment by way of certiorari, and did not involve the right of appeal from a judgment that had been satisfied"; and that "section 1049 of the Code of Civil Procedure cannot be invoked to abridge the right of appeal where a judgment has been satisfied against the will of appellant." *People v. Burns*, 78 Cal. 646, 21 Pac. 540, and *In re Baby's Estate*, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239, cited by respondent, were cases where the fruits of the judgment had been received by the appellant. It was held in *Kenney v. Parks*, supra, that in such cases "a party in whose favor a judgment has been rendered cannot enforce the judgment, and, while enjoying its benefits, appeal therefrom, and seek its reversal." So, in *Marble Co. v. Black*, 123 Cal. 23, 55 Pac. 600, it was said: "Appellant first contends that the judgment was satisfied, within the meaning of section 1049 of the Code of Civil Procedure, by the execution sale; but this position is not tenable. The judgment was not, in fact, satisfied, and a forced payment by execution sale against a nonconsenting judgment debtor cannot be held to abridge any of his rights upon appeal;" and *Kenney v. Parks*, supra, was cited. *San Diego School Dist. of San Diego Co. v. Board of Sup'rs of San Diego Co.*, 97 Cal. 438, 32 Pac. 517, cited in support of the motion, is broadly distinguishable from the present case. That was mandamus to compel the supervisors to levy a tax for school purposes. The board levied the tax pursuant to the judgment, and afterwards appealed from the judgment which they had executed. This court granted the motion to dismiss the appeal, saying: "A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant, by its compli-

ance with the judgment, lose any property or rights of which restitution could be made in case of reversal. Code Civ. Proc. § 957. The proceeding was for the purpose of compelling the defendant to perform an official duty, and not one in which it had any personal rights to be affected." *Ferreira v. Tubbs*, 125 Cal. 691, 58 Pac. 308, also cited by respondent, has no application here. The question there was as to the effect of a tender pending the appeal. There was no motion to dismiss the appeal, which was taken by the plaintiff from a judgment in his favor. If he had accepted the amount of the judgment, it would, as there said, have been an end of the litigation. The motion is denied.

(131 Cal. 620)

TOMSKY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,206.)

(Supreme Court of California. Feb. 20, 1901.)

EXECUTORS—GUARDIANS—ATTORNEYS—PROFESSIONAL MISCONDUCT—COURTS—PEREMPTORY ORDERS—JURISDICTION—CONTEMPT.

1. A probate court, on a hearing in the matter of an estate and guardianship, has no jurisdiction to peremptorily order an attorney to refund money received from the executrix and guardian in excess of what the court considers reasonable for the services performed; hence its conviction of the attorney for contempt for refusing compliance with such order was unwarranted.

2. Where an executrix and guardian paid an attorney an amount in excess of what the court thought reasonable, it was error for such court to summarily find the attorney guilty of neglect of professional duty without opportunity of defense in the ordinary way, since the attorney had a right to be heard as to whether or not he had neglected the business of his employment.

Department 2. Certiorari to superior court, city and county of San Francisco; J. V. Coffey, Judge.

Certiorari on petition of William Tomsky against the superior court of the city and county of San Francisco to review an order adjudging petitioner, an attorney, guilty of contempt in refusing to refund retainer fees paid by a guardian and administrator. Orders vacated.

Wm. Tomsky, in pro. per. Henry H. Reid, for respondent.

PER CURIAM. Application for a writ of certiorari to review certain orders of said court, department 9 thereof, adjudging petitioner guilty of contempt. The petitioner was the attorney of one Dora Levy, the executrix of the will of Michael L. Levy, deceased, whose estate was being administered in said court, and also of said Dora Levy as guardian of the estate of one Marcus Levy, a minor, which was also pending in said court. The said Dora Levy paid to petitioner the sum of \$80 as a retainer and for costs in the estate, and the sum of \$30 as a retainer and for costs in the guardianship matter. On the 1st day

of November, 1897, the court made an order in the said estate, reciting that petitioner had received the sum of \$80 from the executrix, "which he claims as his attorney's fees," and that no order of court had been made allowing attorney's fees. The order then fixed the sum of \$25 as the attorney's fee for the services of petitioner, and further ordered that he "return to said executrix herein forthwith the sum of \$55." On the same date the court made an order in the guardianship matter reciting that petitioner had received from said guardian the sum of \$30, which "he claims as his attorney's fees herein," and that no order of court had been made fixing attorney's fees. The order then directed the petitioner to return to the guardian "forthwith the sum of \$30." On the 10th day of November, 1897, the petitioner, not having complied with the said orders or either of them, was, after notice, brought before the court on contempt proceedings. An order in the estate was made reciting, among other things, "that said William Tomsky obtained said moneys from said executrix under and by reason of his promise to her to diligently and properly attend to the settlement and final distribution of said estate, and to pay the necessary costs and charges of, and pertaining to, the administration of said estate, but that he has failed, neglected, and refused to perform the duties so undertaken by him, or to pay out of said moneys or at all the necessary costs and disbursements herein pertaining to said estate." The order further adjudged petitioner guilty of contempt of court in neglecting and refusing to return said money, as ordered by the court, and directed that he be committed to the county jail, imprisoned five days, pay a fine of \$100, and that he be further committed to the county jail for the period of one day for every \$20 of the fine, until said fine be paid. On the same day the court made an order in said guardianship matter, reciting the failure of the petitioner to pay the said \$30 as ordered by the court, and that said petitioner "has not used any of said moneys for the purposes for which he obtained the same, but has converted the whole thereof to his own use." The order further adjudged petitioner guilty of contempt in refusing to pay the said money as ordered by the court, and, as a punishment therefor, directed that he be imprisoned in the county jail for five days, and pay a fine of \$100, and, in default of payment, that he be committed to the county jail one day for each \$20 of said fine, until the fine be paid. The foregoing statement shows that the court, without a trial, and without giving the petitioner the right to a defense in the ordinary way, found him guilty of neglect of duty and failure to perform services, and directed him in a summary manner to refund the money that had been paid to him. The court in so doing exceeded its jurisdiction. The money paid to petitioner was not paid to him as a trust fund, nor was it paid to him by order of court for a certain purpose. It had not been embezzled

or fraudulently taken by him. It was money paid to him as a retainer, and for services by Dora Levy, who employed him. She had the right to employ him, and to make a contract with him, and such employment and contract were binding upon her. If petitioner failed to comply with his contract, or to perform the agreed services, she had her remedy by ordinary action against him, and the courts are open to her for such purpose. In her accounts with the estate, the court would allow her for reasonable attorney's fees, and if she paid out money for services that were never performed; or if she paid more than the reasonable value of such services, she might not be allowed such item in her account, but that would not affect the question as to her liability to petitioner. The petitioner had the right to his day in court, and to be heard as to whether or not he had neglected to attend to the business of his employment as agreed. It is true he is an attorney of the court and an officer thereof, but that does not deprive him of the equal protection of the law. The judge of the court could not arbitrarily order him to refund a retainer received by him, for the mere reason that in the opinion of the judge it had not been earned. The court would have the power to allow or reject the items so paid when the account of the executrix or guardian was presented for settlement, but its protecting arm does not extend so far that it can order all parties to refund money which, in the opinion of the judge, has been wrongfully obtained from the representative of the estate. It was said by this court in *Ex parte Hollis*, 59 Cal. 413: "It is a principle that underlies all institutions and forms of government that no man can be deprived of his property, except in proceedings according to law, unless it be confiscated for the necessities or good of the public. If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. Proceedings to punish him for contempt for not delivering it up, without a trial according to law, to another who claims it, are not the appropriate proceedings for the trial of issue of title. The issue of such title should be tried in an appropriate action, in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title." See, also, *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *In re Paschal*, 10 Wall. 492, 19 L. Ed. 994. In the latter case it was said by the supreme court of the United States: "The attorney may have cross demands against his client, or there may be disputes between them on the subject, proper for a jury or a court of law or equity to settle. If such appear to be the case, and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction; and, as the proceeding is in the nature of a contempt, the respondent ought to be permitted to purge himself by his oath. 'If he clear himself by his answers,' says Justice Blackstone, 'the complaint is to-

tally dismissed." We do not think the record in this case shows any professional misconduct. No fact is found from which we could say the petitioner was guilty of professional misconduct. If he neglected to perform the professional services which he had agreed to perform, it might be in one sense professional misconduct, but whether he did so neglect or not was a question the petitioner had the right to have tried in the proper manner. The orders are set aside and annulled.

(132 Cal. 1)

CROSBY v. CLARK. (Sac. 587.)

(Supreme Court of California. Feb. 25, 1901.)

EJECTMENT — RAILWAY LAND — SETTLERS — PURCHASE — IMPLIED TRUST — FRAUD — TRIAL — PLEADINGS — AMENDMENT.

1. Where defendant in ejectment, who had settled on railway land under application to purchase, alleged that plaintiff, who subsequently purchased the same land, obtained his deed by fraudulently representing that defendant had abandoned the land, and the testimony showed that plaintiff's deed was withheld by the railway until they should obtain a relinquishment from defendant, and that plaintiff subsequently told the railway agent that defendant had left, and his whereabouts were unknown, a finding that plaintiff, knowing all the facts, for the purpose of defrauding defendant, induced the railway to sell to plaintiff, was sufficient to support a judgment for defendant, though it did not state that plaintiff, on making application, falsely represented that defendant had abandoned the land; since Civ. Code, § 2224, declares that one who gains a thing by fraud is, unless he has some better right thereto, an involuntary trustee for the benefit of the person who would otherwise have had such property.

2. Where defendant settled on railroad land under an application to purchase, but plaintiff subsequently applied for and secured the same land by fraudulently representing to the railroad company that defendant had abandoned it, plaintiff held the same in trust for defendant, though the offers under which defendant settled on the land were not absolute, but provided that settlers who in good faith cultivated and improved lands belonging to the company would "generally" be given the preference.

3. Where defendant settled on land under application to purchase, and plaintiff applied for and secured the same land by fraudulently representing that defendant had abandoned it, in ejectment by plaintiff it was not error to allow defendant to amend his cross complaint by pleading a tender of the purchase price, and offer to deposit in court, as Code Civ. Proc. § 473, permits amendments of pleadings in conformity with justice.

In bank. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Judgment by F. C. Crosby against Owen Clark. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

A. M. Seymour, A. L. Hart, and Pullen & Wallace, for appellant. W. H. Carlin and L. L. Chamberlain, for respondent.

VAN DYKE, J. The action is in the nature of ejectment, brought to recover a portion of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 25, township 13 N., range 6 E., Mt. Diablo base and meridian, the land being situate in

Placer county. The plaintiff derails title to the land in question under a deed dated July 26, 1887, from the Central Pacific Railroad Company, which company, it was admitted, became the owner of the lands in the year 1862 by a grant under the act of congress of that year. By way of cross complaint the defendant set up a prior right to purchase from the railroad company the land in question, based on the offers of said company, contained in its printed circulars inviting settlement on its lands, and the acceptance by the defendant of said offers, and the settlement upon and continuous occupation of the land from the year 1872, and by written application to purchase made to the land agent of the company in pursuance of its offers contained in said circulars on December 7, 1874. It is also alleged in defendant's cross complaint that the deed to the plaintiff was fraudulently procured by means of false representations made by the plaintiff, with full knowledge of the facts and rights of the defendant, to the land agent of the company, to the effect that the said defendant had abandoned the land, which representations were made for the purpose of defrauding the defendant. It is further alleged in the cross complaint that, after the execution of the deed to the plaintiff, the defendant tendered to the plaintiff, and offered to pay him, the full amount of all moneys and expenses paid by him for the said deed and as the purchase price of said land and premises, and demanded a conveyance of said land and premises from the plaintiff, and tendered said money into court, and prayed that it be adjudged and decreed that the defendant is the owner of said land and premises, and that the plaintiff has no right and title in the same, and for general relief.

The case was tried upon the issues raised by the answer to said cross complaint, and the findings of the court were in favor of the defendant. The offers contained in the circulars issued by the railroad company are fully set forth in the findings. They, in substance, invite persons who desire to purchase lands from the railroad company, including settlers, pre-emptors, and other claimants, to make application to the land agent of the company at Sacramento, describing the land by legal subdivisions, stating that such application will be filed, and that the party would be allowed three months to complete the purchase, and that during that time the land would not be sold to another without giving the applicant 30 days' previous notice; that actual occupants of lands belonging to the company will generally have a preference in the purchase at the regular price, and that no addition to the price would be made where there were improvements on the lands made by the settler; that in the case of conflicting claims an adjudication of the respective claims would be made by the land agent, on due notice given to both parties, and that persons desiring to purchase could

buy on a credit of five years, by paying 20 per cent. of the price down, and interest annually in advance on the remainder of 10 per cent. per annum. It is also found that, induced by and wholly relying upon the offers, promises, and inducements made and held out to him by said corporation, the said defendant did, in the year 1872, enter and settle upon the described lands and premises, and has ever since, in such reliance and faith, held possession thereof, and did improve and possess said lands and premises, and that said defendant did accept the said offer and promises of the said corporation contained in the circulars aforesaid, and did file with said corporation, and deliver to, and the same was received and accepted by, it, his said acceptance and application to purchase said lands, in accordance with the terms of said circulars; that at the said time when the defendant filed his application, to wit, December 7, 1874, said corporation had not fixed the price of said lands and premises, and the same were not ready for transfer by said corporation; that the price was not fixed until the year 1887; that from the said December, 1874, down to and including the 27th day of July, 1887, said defendant was and continued to be in the open, actual, and sole possession and use of said lands and premises, visibly and notoriously, and during all said time did use and improve the same, and pay all the taxes thereon; that in the year 1887 the said corporation did fix the said price of said lands, and place and offer the same formally for sale; that the said defendant was at all times willing, able, and ready to pay the said corporation its said price in accordance with the terms of said circulars; that the said corporation failed and neglected to notify the defendant of the fixing of said price of said lands, or that said lands and premises were offered and ready for sale, and that said defendant did not know, or have any knowledge, prior to the date of the deed of plaintiff, that the said lands and premises were offered for sale, or were ready for sale; that said plaintiff was informed and was cognizant of and knew all and singular the matters and things aforesaid, and for the purpose of defrauding said defendant, and of reaping the benefit thereby for himself, and well knowing the rights of the defendant in the premises, did induce the said corporation to sell to him, said plaintiff, the lands and premises in question, and did then, to wit, July 27, 1887, receive from said corporation the deed in question. And as a conclusion of law that the plaintiff have and receive the sum so deposited in court by the defendant, and that the defendant be decreed the owner in fee and entitled to the possession of the land and premises in controversy, and for the costs of suit.

1. The appellant makes the point that the court failed to find that the plaintiff falsely represented that the defendant had abandoned the land in question at the time he made

application to purchase. The land agent of the railroad company testified that the plaintiff was informed of the application of the defendant to purchase, and of his rights in the premises, and the deed was withheld pending the filing of relinquishment or abandonment of the defendant's application, which was then on file in the land department of the railroad company; and that the plaintiff subsequently called at the office of said land department, and stated that the defendant had left the premises in question, and that his whereabouts were unknown. Although the finding is not as specific as the testimony would warrant, it is sufficient, in this respect, to support the judgment. It is that the plaintiff, knowing all the facts and circumstances, and knowing the rights of the defendant, and for the purpose of defrauding him, "did induce said corporation to sell to him." It clearly appears that the plaintiff could not have obtained his deed from the railroad company while the land was in the actual occupation and possession of the defendant, claiming rights under the offers and inducements of said company, without obtaining a relinquishment of the rights of said defendant, or, at any rate, after notice and hearing. "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing for the benefit of the person who would otherwise have had it." Civ. Code, § 2224; Story, Eq. Jur. § 885; Pom. Eq. Jur. § 1053. *Boyd v. Brinckin*, 55 Cal. 427, was a case similar to the one under consideration. That was ejectment commenced by the plaintiff, to which the defendant, by way of cross complaint, set up substantially the same facts as are contained in the cross complaint of the defendant in this case. A demurrer interposed to this cross complaint on the ground that it did not state facts sufficient to constitute a defense or cause of action against the plaintiff was sustained. On appeal the judgment entered upon the demurrer was reversed. In speaking of the nature of the contract between the defendant, who had settled upon the land, and the railroad company, the court remarks that a contract of this character belongs to the group which is said to be "created by representations made by one party and acts done by the other party upon the faith of such representations." Pom. Cont. § 60. "And, further, the defendant alleges that the plaintiff, before and at the time of purchasing, had knowledge of the agreement between the defendant and the railroad company, and of all of the defendant's acts thereunder. If so, the plaintiff took the land impressed with a trust in favor of the defendant, and holds it in trust for the defendant, and can be compelled at the suit of the defendant to specifically perform the agreement of the railroad company by conveying the land in the same manner

and to the same extent as the railroad company would have been liable to do had it not transferred the legal title; and the plaintiff is the proper party in the suit against whom to demand the conveyance." *Railroad Co. v. Terry*, 70 Cal. 484, 11 Pac. 709, was an action of ejectment to recover possession of the land occupied by the defendant. The defendant settled upon the land under the provisions of the printed circulars of the railroad company inviting settlers to go upon such lands and occupy and use them until such time as it would be ready to sell,—similar to the circulars and offers in the present case. When the land was graded, and the price fixed, the defendant made application under the circulars and offers to the land agent of the company to purchase, and his application was refused. The court, in its opinion, says that the company could not legally do this, "because the offer which it made to sell its lands to actual settlers, having been accepted by the defendant, who settled upon a portion of the lands, constituted a contract of sale, and established the relation of vendor and vendee between the company and defendant as a bona fide settler," and affirmed the judgment in favor of the defendant.

2. The appellant contends, however, that the cases referred to are not authority, for the reason that the offer of the company contained in the circulars in this case is different from the offer in the other cases, in this: The language of the offer in this case, as already shown, is, "Settlers and actual occupants who in good faith cultivate and improve lands belonging to the company will generally be given preference of purchase at the graded price." The word "generally" was omitted from the offers in the cases under consideration in *Boyd v. Brinckin and Railroad Co. v. Terry*, supra. However, in *Kelly v. Railroad Co.*, 74 Cal. 557, 16 Pac. 386, the terms of the offer contained in the circular were identical with the offer in the present case. That was an action to compel the defendant to specifically perform a contract for the sale of the land. It appears that one Cole had settled upon the land in question, and continued to reside thereupon, and make improvements, relying upon circulars issued by the railroad company similar to those referred to in this case, and believing that he would have the prior right to purchase from the company; and it appears that Kelly resided in the vicinity, and knew all the facts, and of Cole's equities. Cole intervened in the action, and prayed for the conveyance of the land in controversy to him. The court below decreed that the land be conveyed to Cole, and Kelly appealed. The findings showed that by reason of false repre-

sentations made by Kelly to the land agent of the railroad company, which were untrue, and known to be untrue by him at the time, the company was deceived, and entered into said contract; and, upon becoming aware of the deception which had been practiced by Kelly, refused to carry out the contract and make a conveyance. On the appeal, in reply to the contention of Kelly that the false representations were not productive of injury to the railroad company, this court said: "It is not necessary that the injury should result to the vendor. It is sufficient if it would result to third persons;" and the judgment was affirmed. In *Stark v. Starrs*, 6 Wall. 419, 18 L. Ed. 930, it is said "that, where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner;" and in *Johnson v. Towsley*, 13 Wall. 85, 20 L. Ed. 487, the court said: "If, for any reason recognized by courts of equity as a ground for interference in such cases, the legal title has passed to one party, when in equity and in good conscience it ought to go to another, a court of equity will convert him into a trustee." In this case it appears that the railroad company held itself ready to carry out its offer to the defendant under the circulars in question, and was only prevented from doing so by the fraudulent interposition of the plaintiff; and under well-settled principles of law the plaintiff should not be permitted to reap the fruits of his fraud.

3. The court did not err in allowing the defendant to amend his cross complaint pleading a tender and offer to deposit in court, nor in denying plaintiff's motion to strike out said amendment. Amendments to pleadings so as to enable the party to prove all the facts necessary to his cause of action or defense are favored. If, by reason of such amendment, the opposite party is taken by surprise, the cause can be continued, or time allowed to meet the amendment, or such other terms imposed as may be just under the circumstances. It can very rarely happen that a court would be justified in refusing a party leave to amend his pleading so that he may properly present his case. *Code Civ. Proc.* § 473; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Stringer v. Davis*, 30 Cal. 321; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86.

The conclusion reached renders it unnecessary to consider the question of adverse possession and the statute of limitations. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

(135 Cal. 472)

SCHAAKE v. EAGLE AUTOMATIC CAN CO. et al. (S. F. 1,501.)

(Supreme Court of California. Feb. 20, 1901.)

ACTIONS—JOINDER—PLEADINGS—PARTIES—COMPLAINT—UNCERTAINTY—DEMURRER—LEAVE TO AMEND—REFUSAL—MOTION TO VACATE—APPEAL—ABUSE OF DISCRETION—STATEMENT OF CAUSE OF ACTION—CORPORATIONS—DISTRIBUTION OF ASSETS—LIABILITY—PROPERTY CHARGED WITH LIABILITY—ACCOUNTING.

1. Where the court sustained demurrers to a complaint without leave to amend, and the complaint stated a cause of action, the face of the record showed an abuse of the court's discretion to allow or disallow amendment of the pleadings.

2. Where an order refusing leave to amend was inserted in an order sustaining demurrers to the complaint, the former order was excepted to by force of Code Civ. Proc. § 647, providing that an order allowing or refusing to allow amendments to the pleadings would be deemed to have been excepted to, and it was not necessary for the plaintiff to move to vacate or modify the order entered in order to have the point reviewed on appeal.

3. A complaint alleged that a contract between the inventor of certain patented machines and improvements and a can company provided that if such machines and improvements were sold by the can company, or transferred for use under a license outside of certain territory, the inventor was to have a certain per cent. of the profits accruing thereby to such can company. It further alleged that the can company did sell such inventions and improvements to be used outside of such territory without any reserve or limitation, and that the buyer at such sale and its licensees were using such machines and improvements outside of such territory. *Held*, that the complaint stated a cause of action against the can company.

4. Under Civ. Code, § 309, declaring that the directors of corporations must not divide or pay to the stockholders, or any of them, any part of the capital stock, except what remains after the payment of all its debts on its dissolution or the expiration of its term of existence, the capital stock of one corporation, issued to a number of persons, all but one of whom were the stockholders of another corporation, in consideration of the transfer to the former of all the latter's property, capital, patents, and assets, was in fact the property of such latter corporation, and a fund for the payment of its debts; hence all such corporation's stockholders who had received any of the stock issued by the former corporation were proper parties to a suit against the latter corporation.

5. Where a complaint seeking to recover a certain per cent. of the profits accruing to a corporation by reason of the sale of certain property states that such corporation received no consideration for the transfer of the property, but further alleges that the corporation to which it was sold issued 2,888 shares of its capital stock to the stockholders of the corporation selling it, in payment for such property, the statement as to consideration did not prevent the facts alleged from constituting a cause of action, since it was a conclusion of law erroneously drawn from the facts.

6. Where a corporation issued part of its capital stock to the stockholders of another corporation in consideration of the transfer of all the latter's property, assets, and patents, including the right to use and authorize the use of certain patented machines outside a certain territory, with notice that such transfer created a liability against the latter corporation, and that such corporation could not discharge the same, it took the property charged with

that liability, and was a proper party to a suit against the other corporation on the same.

7. Where a party had a right to a certain per cent. of the profits of the sale by a corporation of certain patents, and the corporation sold the patents, but directed the proceeds to be delivered to its stockholders, a complaint setting up these facts did not fail to state a case for an accounting, in that it failed to show that anything was received by the corporation for which it should account.

Department 2. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Action on contract by Henry Schaaque against the Eagle Automatic Can Company and others. From a judgment sustaining demurrers to the complaint, without leave to amend, plaintiff appeals. Reversed, with directions.

J. C. McKee and F. M. Parcels, for appellant. E. S. Pillsbury and Olney & Olney, for respondents.

PER CURIAM. The other defendants are the Pacific Sheet-Metal Works (a corporation), Henry Pierce, Irvin Ayres, C. H. Watt, F. P. Howard, W. H. Talbot, A. L. Ayres, H. L. Hutchinson, E. B. Pond, William Rennie, J. M. Duke, W. P. Johnson, May Martin Philips, and J. W. Philips. These defendants, except the last two, were stockholders in the Eagle Automatic Can Company, and held all its stock (2,000 shares); and Pierce, Ayres, Watt, Howard, and Talbot were directors. The amended complaint was demurred to by each of the corporations, and also by the individual defendants, severally; and these demurrers were sustained, without leave to amend, and plaintiff appeals from the judgment thereupon entered.

The amended complaint alleges, in substance, the following facts:

On October 26, 1892, the said Eagle Automatic Can Company, a corporation engaged in the manufacture of tin cans by the use of certain automatic patented machines and processes, at the city and county of San Francisco, as party of the first part, entered into a contract with the plaintiff, as party of the second part, the substance of which is as follows: The second party agreed to serve as superintendent of the can factory of the first party for three years from the date of the agreement, unless it should be sooner terminated according to the terms thereafter set forth; that, in connection with his duties as superintendent, he should give due attention and care to perfecting, improving, and developing the various machines and machinery in use in the factory, and endeavor to improve said machines and discover and invent others for use in said factory and business; that any and all inventions or improvements which had been or might be invented, discovered, or made by the second party during the time he had been or should be employed as super-

Intendent should be perfected and completed by the second party when so required by the first party, and applications for patents to be made when required by the first party at its expense, and to be assigned to it upon request, and, whether patented or not, any and all of such improvements or inventions so made should "be and remain the sole property of the party of the first part during the entire life of the patent or patents, and entirely in the control of said party, and for the exclusive use and benefit thereof: provided, that said party of the second part shall have an indefeasible interest in any and all of said inventions or improvements, whether patented or not, equivalent to twenty-five per cent. of all profits accruing to or received by the party of the first part on account of the sale, use, or license to use, or on account of the manufacture to sell, use, or license to use, any of said inventions or improvements, outside of the city and county of San Francisco." In consideration of the foregoing, the first party agreed to pay the plaintiff \$190 per month during said period of three years, or until the agreement should be duly terminated according to its terms. The first party also agreed "to pay to the party of the second part ten per cent. of the cost price of any and all machines or parts of machines or improvements on machines made, discovered, or invented by the party of the second part as hereinbefore set forth, which said party of the first part shall cause to be used or authorize the use of outside of the city and county of San Francisco; also to pay to the party of the second part twenty-five per cent. of all profits accruing to or received by the party of the first part on account of the sale, use, or license to use, or on account of the manufacture to sell, use, or license to use, any of said inventions or improvements outside of the city and county of San Francisco." It was further agreed that in the event that the first party retired from the business of manufacturing tin cans, and for that reason had no further use for the services of the party of the second part, "then this agreement to cease and determine, and all future obligations hereunder shall be mutually canceled and annulled," and the first party released from payment of said salary, and the second party from the duties of superintendent or other service, and that inventions or improvements thereafter discovered should be for the exclusive use of the second party: "provided, that no rights or interests or obligations arising or originating before this agreement is terminated as herein set forth shall be affected in any manner by the said termination hereof."

The plaintiff further alleges performance of his said contract, enumerates 12 inventions for which patents were issued, 8 for which patents were allowed but not yet issued, and 7 improvements not patented, all of which were assigned and delivered to the

said Eagle Automatic Can Company, and solely used by it; that in October, 1895, the defendant the Eagle Automatic Can Company entered into an agreement with the Pacific Sheet-Metal Works, a corporation, and a defendant herein, to sell to it all its capital, patents, property, rights, franchises, privileges, and assets owned, held, or controlled by the defendant the Eagle Automatic Can Company, including all the inventions and improvements made by the plaintiff; that the same was so sold and delivered, to be used outside of the city and county of San Francisco, "or anywhere, without reserve or limitation," and that no consideration therefor was received by the Eagle Automatic Can Company, but that the Pacific Sheet-Metal Works, with the knowledge and approval of all the defendants, issued 2,888 shares of its stock to the following named defendants: Henry Pierce, 700 shares; F. P. Howard, 354 shares; Irvin Ayres, 835 shares; O. H. Watt, 520 shares; H. L. Hutchinson, 340 shares; W. P. Johnson, 10 shares; and to May Martin Phillips, 129 shares. And it is alleged that said defendants gave no consideration for said stock, but received the same, according to said agreement, for procuring, consenting to, and ratifying said sale, and that thereby the Eagle Automatic Can Company was deprived of all its property, capital, and assets, has ceased to do business, and is insolvent. It is then alleged that the cost price of the machines and machinery patented, invented, and improved by plaintiff, and by him assigned and delivered to the Eagle Automatic Can Company, and by that company sold and delivered to the Pacific Sheet-Metal Works, was \$160,000, and the value of the stock issued therefor to the defendants above stated was \$190,000. It is then alleged that at the time of said sale "several of the said machines and machinery were practically worn out and of little value, and were subsequently abandoned, so that the whole lot was sold for a sum far in excess of its value, and a very large profit—the exact sum being unknown to plaintiff—thereby accrued to said Eagle Automatic Can Company on account of said sale authorizing the use of said machines outside of the city and county of San Francisco, and said profit was received by said defendants in stock, as stated." It is then alleged that the value of the patents on machines and improvements discovered and invented by plaintiff, and delivered to the Eagle Company under said contract, was \$74,000, the equivalent of which was paid to said defendants in stock, and which sum comprised the profits of the Eagle Automatic Can Company by the sale of said patents to be used outside of the city and county of San Francisco.

It is further alleged that said sale and transfer, the issuance of said stock, and the organization of said Pacific Sheet-Metal Works to receive said property and assets,

were in pursuance of a conspiracy theretofore entered into by and between all of the defendants, acting in concert, with the intent of defrauding plaintiff of his rights and interests in said property under said contract, and in pursuance thereof dividing the proceeds and profits resulting from the consummation of said conspiracy, to wit, "2,888 shares of the capital stock of said Pacific Sheet-Metal Works, as stated, of the value of \$288,800," and that all of said parties were fully aware and had notice of the existence of said contract, and that, as a result of said sale, plaintiff was entitled to 25 per cent. of the price paid for the patents sold and delivered to be used outside of the city and county of San Francisco, 25 per cent. of the profits on the machines and machinery so sold, and 10 per cent. on \$160,000, the cost of the same, all with the purpose and intent to wrong and defraud the plaintiff; that plaintiff has no means of ascertaining, and is unable to state, what part of said sum of \$288,800 was paid for the use of said patents inside of the city and county of San Francisco, and what part was for the use of said patents and machinery outside of said city and county; that the Pacific Sheet-Metal Works and its licensees have used and are now using all the said patents and improvements outside of the city and county of San Francisco, "and nothing has been received by plaintiff for or on account thereof from said Eagle Automatic Can Company, or from any of said defendants, or at all; that by reason of the premises said defendants, and each of them, are indebted to plaintiff in a sum, the exact amount of which plaintiff is unable to ascertain, and therefore cannot state, but no part of which has been paid."

The prayer is: (1) "That an accounting be had, and the original cost, as well as the real value at the date of the sale, of the property and assets of said Eagle Automatic Can Company, in which plaintiff had an interest by reason of said contract, sold to said Pacific Sheet-Metal Works, the price paid for the same, the proportion of the price paid for use and authority to use the said patents, machinery, and improvements outside of the city and county of San Francisco, and the profits accruing from the sale, be ascertained." (2) That he have judgment against each for such sum as he may be entitled to, with interest, and for other proper relief. Each of the corporations and the individual defendants demurred separately, specifying that the facts stated do not constitute a cause of action, that there is a misjoinder of parties defendant, that several causes of action are improperly united, that the complaint is ambiguous in certain particulars and unintelligible in others. On November 10, 1897, the court made an order reciting that, the demurrers having been theretofore submitted and taken under advisement, "It is ordered that said demurrers be, and the same are hereby, sustained, with-

out leave to the plaintiff herein to amend the complaint on file herein," and directing judgment to be entered in favor of the defendants for costs.

Respondents contend, however, that the court did not err in sustaining the demurrers "without leave to amend." It is said that the complaint had been once amended, that the allowance of a further amendment was wholly within the discretion of the court below, and that there is nothing in the record which shows an abuse of discretion; citing *Buckley v. Howe*, 86 Cal. 596, 605, 25 Pac. 132, 134, where it is said: "The privilege of amending after trial of the issue of law raised by demurrer is not one of right, but one resting in the discretion of the trial court. Code Civ. Proc. § 472. If the plaintiff desired to again amend, she should have applied to the court below, and, if refused, exceptions should have been taken. It is too late to make the point for the first time in this court, when nothing appears in the record to show an abuse of discretion." We do not question that proposition; but, if a complaint states a cause of action, the face of the record would "show an abuse of discretion" in sustaining a demurrer upon any ground without leave to amend. Accordingly, in *Buckley v. Howe* this court reviewed all the facts which were relied upon to show a cause of action, and concluded that she had failed to state facts sufficient to constitute a cause of action, and that the demurrer to her complaint was properly sustained. The order refusing leave to amend in this case was inserted in the order sustaining the demurrers, and was made at the same time. It cannot be presumed that the plaintiff asked leave to amend in advance of the ruling upon the demurrers, and, the order denying his right to amend having been made, and excepted to by force of the statute (Code Civ. Proc. § 647), it could not be required that he should move to vacate or modify it in order to have the point reviewed upon appeal. Demurrers for ambiguity or uncertainty are in aid of the pleading, and contemplate an amendment in the particulars specified in them. We do not say that there is no limit to the right to amend when such demurrers are sustained, since several failures—perhaps but one or two—may develop a want of facts, or show that the fault cannot be remedied. The case of *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113, cited by counsel for the Pacific Sheet-Metal Works, has no application. In that case the fact of an application for leave to amend appeared only by the affidavit of counsel, and there was no bill of exceptions or statement containing any action of the court thereon. The contract between the plaintiff and the Eagle Automatic Can Company is set out in full in the complaint, and its principal provisions have been hereinbefore sufficiently stated. Under its terms the plaintiff had no profit or interest in his patents and improve-

ments so long as their use was confined to the city and county of San Francisco. The contract contemplated, however, that these patented machines and improvements might be manufactured for sale or use under a license by other manufacturers outside of said city and county, and in such case he was to have the interest or profits therein specified. It is also alleged that in October, 1896, the Eagle Automatic Can Company agreed to sell to the defendant the Pacific Sheet-Metal Works "all the capital, patents, property, rights, franchises, privileges, and assets owned, held, or controlled by said defendant the Eagle Automatic Can Company, including all the inventions and improvements discovered or made by the plaintiff as hereinbefore set forth, and to be used outside of the city and county of San Francisco, or elsewhere, without any reserve or limitation whatever"; and that on or about February 12, 1896, the sale was consummated by the board of directors, with the approval of the stockholders. It is directly alleged that the Pacific Sheet-Metal Works was by said sale authorized to use said property outside of said city and county, and it is also alleged that the Pacific Sheet-Metal Works and its licensees have used and are now using the same outside of said city and county. These facts, if proved, would entitle the plaintiff to recover the percentages stipulated for in the contract, at least as against the Eagle Automatic Can Company. It is true, it is alleged that that corporation sold "all its property, capital, and assets of every kind and character, has ceased to do business, now is, and since said sale has been, entirely without assets and insolvent"; but that does not relieve it from liability for its debt. It is also true that it is alleged that it received no consideration from the Pacific Sheet-Metal Works for the property it sold to the last-named corporation; but it is alleged that the Pacific Sheet-Metal Works issued, in payment therefor, to the stockholders of the Eagle Automatic Can Company, 2,888 shares of its capital stock. But said corporation was not authorized to sell all its property for stock in another corporation to be issued not to it, but to its stockholders, as we shall hereafter see; and, the facts being stated, it is apparent that the pleader's statement that the corporation received no consideration for the sale is a conclusion of law erroneously drawn from the facts alleged; and, it further appearing that the property sold was "authorized" by the Eagle Automatic Can Company to be used outside of the city and county of San Francisco, a cause of action against said Eagle Automatic Can Company is stated. We also think that the Pacific Sheet-Metal Works, and the stockholders in the Eagle Automatic Can Company who received any of the stock issued by the Pacific Sheet-Metal Works in payment for the property sold to it by the first-named corporation, are each proper parties to the suit, and that the demurrer for

misjoinder of parties should have been overruled.

It is alleged that the Eagle Automatic Can Company sold all its property, capital, patents, and assets to the Pacific Sheet-Metal Works pursuant to an agreement, and that the last-named corporation issued to Pierce, Howard, Ayres, Watt, Hutchinson, Johnson, and May Martin Phillips 2,888 shares of its capital stock in payment therefor,—all of said persons, except Mrs. Phillips, being stockholders in the Eagle Automatic Can Company; that said corporation has ceased to do business, and is insolvent. The corporation, however, has not been dissolved, and the effect of this transaction was an attempted distribution of all its property, capital, and assets of every description to its stockholders, in violation of section 309 of the Civil Code, which provides, among other things, as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, * * * except as hereinafter provided. * * * Nothing herein shall prohibit a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence. * * * " Said corporation has not been dissolved, nor has its term of existence expired. It is alleged to be a corporation, and its demurrer admits its existence as such. Section 13 of the act of 1853 (St. 1853, p. 89) contained substantially the provisions now found in said section of the Civil Code, and those provisions were considered in *Martin v. Zellerbach*, 38 Cal. 300. In that case two corporations, each owning in severalty several water ditches, and having no interest in common, agreed to form a new corporation, to which each should convey all its property, the stock of the new corporation to be distributed in certain proportions to the stockholders of said two corporations. One of said original corporations was indebted to the plaintiff, who brought suit against it, attached the property formerly belonging to it, obtained judgment, and became the purchaser at execution sale, and obtained the sheriff's deed therefor. Before the plaintiff recovered said judgment the defendant recovered judgment against the new corporation, and sold the whole of the property held by the new corporation upon execution, and became the purchaser, and obtained a sheriff's deed therefor. Plaintiff sued to recover possession of the property which he had purchased, and the foregoing facts were set up as an equitable defense. The original corporations were the Eureka Lake Company and the Miner's Ditch Company, and the new corporation was named the Eureka Lake Water Company. It was the property conveyed by the first-named corporation that

was in controversy. The court, after saying that the transaction as agreed upon and attempted to be carried out, if effectual in law, would, of necessity, have resulted in an alienation of the entire property and capital of the Eureka Lake Company, and that not a dollar would have remained to satisfy the demands of creditors, said: "The contract was that this stock [in the new corporation] was to be issued, and it was afterwards issued, directly to the stockholders of the Eureka Lake Company. It does not vary the principle that the consideration to be paid was stock instead of money. If the contract had been that on the transfer of the property the Eureka Lake Water Company would pay to the stockholders of the Eureka Lake Company \$100,000 in cash, as the price of the property, the legal proposition involved would have been precisely the same as in this case. In either case the consideration would have been paid, not to the trustees as a fund primarily liable to creditors, but to the stockholders for their own use. * * * If this be not a violation of that provision of the statute which forbids the trustees 'to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company,' we are unable to conceive a case which would."

Kohl v. Lillenthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, involved a similar question. There two mining corporations, owning contiguous mining claims, formed a new corporation, to which they severally conveyed their mines, the new corporation paying therefor in stock 100,000 shares to each of the two corporations, one of which was organized under the laws of California. The plaintiffs, who were stockholders in said California corporation, brought suit against it and certain of its officers to compel a distribution of the stock received from the new corporation among its stockholders in proportion to the number of shares held by each. It was held that the stock issued by the new corporation in payment for the mining ground of the former corporation must be considered as part of the capital of such former corporation with which to carry on business, and cannot be distributed among the stockholders thereof until it ceases to exist, either by expiration of its term of existence or by the judgment of a court of competent jurisdiction. In this case *Martin v. Zellerbach*, supra, is cited and approved. See, also, *Railroad Co. v. Bee*, 48 Cal. 398, 405, a case of reincorporation, where it was said: "It was certainly not competent to the members of that corporation to dissipate this fund, and place it beyond the reach of creditors, by merely going through the process of reincorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one without consideration, and issuing the capital stock in the new cor-

poration to the holders of the capital stock in the old corporation. This transaction involved a breach of positive statute law."

It may be said that, at the time the sale by the Eagle Automatic Can Company to the Pacific Sheet-Metal Works was negotiated, there was no indebtedness existing against the former corporation in favor of the plaintiff. But there was a subsisting contract existing between them under which a liability might be created, and was created, by the sale to the Pacific Sheet-Metal Works. Of this contract the stockholders of the Eagle Automatic Can Company are charged with notice, since it was, in effect, their contract, executed by their board of directors; and it is alleged that the Pacific Sheet-Metal Works purchased with notice of it, and therefore with notice that the sale authorizing the use of the machines outside of the city and county of San Francisco created a liability in favor of the plaintiff which the selling corporation, because of the sale, could not discharge, and therefore it took the property charged with that liability. Under these circumstances, we think it clear that the Pacific Sheet-Metal Works is both a proper and a necessary party to the action, and that the stockholders of the Eagle Automatic Can Company who received the stock alleged to have been issued to them in payment for the property sold to the Pacific Sheet-Metal Works are proper parties.

It is also urged that the complaint does not show a case for an accounting. That it is a proper case for an accounting would seem to be clear. These patents and improvements were assigned to the corporation by the plaintiff, but reserving an interest in certain profits which might be realized by the corporation. The relation thus created was fiduciary, and, as to plaintiff's share or part of the profits realized, the corporation was a trustee. But counsel say that the complaint shows that no profit was realized or received by the Eagle Automatic Can Company to be accounted for. The corporation having sold the property, and authorized the delivery of the proceeds of the sale to its stockholders, in violation of the statute, will not be heard to say that nothing was received for which it should account. Nonpayment is sufficiently alleged.

As to the other grounds of demurrer little need be said. There are many faults in the complaint, but they are capable of amendment, and, as to most of them, what has been said will sufficiently indicate what they are. Faults consisting in ambiguities and uncertainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts; that is, as to facts of which the plaintiff cannot, from their nature, have as full information as the defendant, less certainty is required in the allegations of the complaint, partly because a desirable degree of certainty may be impossible, and partly because, the

facts being known to the defendant, he is not likely to be embarrassed or injured.

The allegation that the Eagle Automatic Can Company received no consideration for the sale has been sufficiently noticed.

In paragraph 9 it is alleged that the Pacific Sheet-Metal Works issued stock to the defendants named "to the value of \$190,000." It is alleged in paragraph 8 that 2,888 shares of its stock were issued to the persons there named, and in paragraph 10 it is alleged that said 2,888 shares were of the value of \$288,800. All of said 2,888 shares were issued to said defendants, and this difference in statement as to the value begets uncertainty. We think the judgment should be reversed, with directions to overrule the several demurrers for want of facts, and to sustain the demurrers for ambiguity and uncertainty in the particulars herein specified, with leave to the plaintiff to amend his amended complaint, if he shall be so advised; and it is so ordered.

(25 Mont. 112)

STATE ex rel. STATE SAVINGS BANK v. BARRETT, State Treasurer.

(Supreme Court of Montana. March 4, 1901.)

MANDAMUS—SUPREME COURT—ORIGINAL JURISDICTION—STATE WARRANTS—ASSIGNMENT—NEGOTIABILITY—ACCEPTANCE AT PAR—INTEREST—CONSTITUTIONAL LAW—CONTRACTS—IMPAIRMENT OF OBLIGATION.

1. Where the state treasurer refused to pay certain warrants drawn on the school of mines building fund, directed by statute to be paid therefrom, the mere fact that it was a state officer refusing to perform a ministerial duty was not a sufficient reason for invoking the original jurisdiction of the supreme court by an application for mandamus.

2. Where contractors were paid for state work by warrants drawn on a certain fund in the state treasury, and were entitled to interest thereon after presentation, the assignees of such contractors succeeded to all their rights, notwithstanding the warrants were nonnegotiable, and were entitled to interest on the warrants.

3. Where contractors working for the state agreed to accept warrants on a certain fund at par, and in full payment for the work, such acceptance did not preclude their statutory right to interest on the warrants, but merely bound them to accept such warrants at their face value.

4. Where a contract was made with reference to Pol. Code, § 1601, which provided that, if certain state warrants to be issued in payment of work on the state school of mines building could not be paid on presentation for lack of money in the state school of mines building fund, out of which they were to be paid, they should bear interest at the rate of 7 per cent. per annum from the date of presentation, Laws 1897, p. 124, repealing Pol. Code, § 1601, was void as to such contract, being in conflict with Const. U. S. art. 1, § 10, forbidding the impairment of the obligation of contracts by state legislation, and Const. Mont. art. 3, § 2, to the same effect: hence the holder was entitled to interest on such warrants.

Mandamus by the state, on relation of the State Savings Bank, to compel the state treasurer to pay certain state warrants. Writ granted.

McBride & McBride, for relator. Jas. Donovan, Atty. Gen., for respondent.

PIGOTT, J. This is a proceeding in mandamus instituted by the State Savings Bank for the purpose of compelling the state treasurer to pay certain warrants addressed to him, and drawn on the school of mines building fund. An alternative writ was issued. To the petition the treasurer demurs for want of substance. Eliminating its formal averments, and condensing its statements, the petition exhibits the following facts: By section 17 of the so-called "Enabling Act," approved February 22, 1889, congress granted to the state of Montana, for the establishment and maintenance of a school of mines, 100,000 acres of land (25 Stat. 676; 1 Supp. Rev. St. U. S. pp. 645, 648). Thereafter, by section 1 of "An act to provide for the location, incorporation, establishment, maintenance, management and support of the Montana School of Mines," approved February 17, 1893, the Montana State School of Mines was established as a corporation. Laws 1893, p. 177 (section 1572, Pol. Code). For the purpose of erecting, furnishing, and equipping buildings for this corporation, the legislative assembly by an act approved March 7, 1895, created the state school of mines commission, authorizing it to prepare plans and specifications for the erection of buildings, to advertise for bids for the construction thereof, and to let the contract to the lowest responsible bidder. Sections 1591, 1594, 1595, Pol. Code. The act further created a state fund, to be known as the "State School of Mines Building Fund," to the credit of which should go all moneys derived from the sale or rental of the lands granted by congress to the state for the purpose of constructing buildings for the state school of mines, and the moneys so received, as soon as realized from time to time, should forthwith be put into the state treasury, and placed to the credit of the fund named. Section 1600, Pol. Code. That portion of the act of March 7, 1895, which appears in the Political Code as section 1601, is as follows: "Upon the completion of said building or buildings and at any time previous thereto as per the contract entered into by the board of school of mines commissioners they shall certify such amount or amounts to the state board of examiners, who shall forthwith cause to be drawn a warrant or warrants on the said state school of mines building fund to the order of the person or persons described by the board as entitled thereto, for the full amount of their respective claims, which said warrant or warrants shall be taken and accepted as in full payment of the said indebtedness, and no appropriation for the payment of the said warrant or warrants shall ever be made or payment thereof ever be made by or from any other source than the said state school of mines building fund, and if, on the presentation of said warrant or

warrants to the state treasurer, there shall not be in said fund sufficient moneys to pay the same, the same shall be registered, as of date of presentation, and shall henceforth until paid bear interest at the rate of seven per cent. per annum." Another section of the act of March 7th appears as section 1597 of the Political Code: "All claims for the erection of said building or buildings shall be first approved by the school of mines commissioners and audited and allowed by the state board of examiners, and paid in the same mode and manner as claims against the state are paid: provided, however, that such claims shall be paid out of the respective funds designated in this act, against which they may be chargeable."

On July 28, 1896, the commissioners entered into a contract with Riddle & Roach for the erection and construction at Butte of a building for the state school of mines. Among other provisions, the contract contained the following: "It is hereby mutually agreed between the parties hereto that the sum to be paid to the contractors for the said work and material, and for the entire erection and completion of the said building, as above provided, shall be eighty-eight thousand four hundred fifty-six and eighty-five one hundredths (\$88,456.85) dollars, subject to additions and deductions on account of alterations, as hereinbefore specified, and that said sum shall be paid in warrants on the state school of mines building fund, which shall be drawn as provided in section 1601 of the Political Code of Montana, upon certificates of the board to the state board of examiners, and which warrants the contractors agree to accept at par in full payment and satisfaction of this contract." Pursuant to the contract, and in accordance with its terms, Riddle & Roach completed the building, which was approved and accepted by the commissioners, and is now used and occupied by the school of mines. At the time the contract was made, and at the time Riddle & Roach entered upon its performance, all of the sections mentioned were in force. After Riddle & Roach had in large measure performed the contract, by an act entitled "An act authorizing the issuance of bonds to provide for the payment of outstanding warrants and for the erection and completion of a building for the school of mines at the city of Butte and providing for the payment of interest thereon, and repealing of sections 1584, 1600 and 1601 of the Political Code of Montana," approved March 8, 1897, provision was made for a fund for payment of the cost of erection of the school of mines building then in process of construction by Riddle & Roach. Laws 1897, p. 124. This act abolished the school of mines building fund, and in its stead created the school of mines building, interest, and sinking fund, and, in effect, required that all moneys which had theretofore been payable into the first-

named fund, and that warrants drawn by the state school of mines commission should be paid out of the new fund. The act purported to repeal sections 1584, 1600, and 1601. In part payment of the erection of the building, the commissioners, in conformity with the contract and under the authority of section 1601, from time to time caused to be delivered to Riddle & Roach the warrants which are the basis of the present proceeding. When the warrants were delivered, there was no money in the fund upon which they had been drawn, and the state treasurer thereupon registered them, in accordance with the provisions of section 1601. The warrants were all registered between May 23, 1897, and September 6, 1899. The warrants were then assigned to the plaintiff (relator), which has presented them for payment. Although at the time of presentation there was and still is sufficient money in the school of mines building, interest, and sinking fund to pay all the warrants, both principal and interest, the treasurer refused, and continues to refuse, to pay any interest thereon, and demands the surrender of the warrants upon the payment of the principal amounts only. The ultimate question presented for decision is whether the warrants registered since the act of March 8, 1897, became operative bear interest from the date when they were registered.

1. The mere fact that a state officer refuses to perform a ministerial duty specially imposed upon him furnishes no reason why this court, in the exercise of its original jurisdiction, should grant a writ of mandate. District courts are ordinarily the primary forums, and in them should be commenced special proceedings, unless sufficient reasons exist why resort to the supreme court is necessary in the first instance. The sole ground upon which the plaintiff has invoked the original jurisdiction of this court is that the defendant is the state treasurer. The proceeding should have been commenced in the district court. In view, however, of the loose practice which in this respect has occasionally been indulged, we permitted the alternative writ to be issued and shall retain jurisdiction of the case; but in the future applications for writs of mandate must, in the language of subdivision 2 of rule 2, of this court (57 Pac. v.), "set forth * * * the reasons which render it necessary that the writ should issue originally from this court," and that the duty, the performance of which is sought to be enforced rests upon a state officer, board, or tribunal, will not be deemed a sufficient reason for invoking the original jurisdiction of the supreme court.

2. The first objection urged by the attorney general in behalf of the state treasurer is that "there is no privity of interest existing between the owners of the warrants and the original contract between the state and the contractors; that, even though the con-

tractors were entitled to interest, the mere ownership of the warrants by the relator would not subrogate them to the rights under the contract, but it would put the relator in the position of having purchased these warrants, which are nonnegotiable instruments, and a thing that bears no relation to the contract in any way. It is merely an order upon the state to pay out of a particular fund such money as the law authorizes to be paid out of the fund when the warrant is presented." In answer to this position, it is sufficient to say that the plaintiff, as assignee of the warrants, succeeded to, and is clothed with, all the rights which Riddle & Roach, the assignors, would possess were they yet the owners. That the warrants lack the quality of negotiability essential to constitute commercial paper neither adds to, nor detracts from, the rights of the plaintiff. If Riddle & Roach would be entitled to collect interest on the registered warrants, the plaintiff is likewise so entitled.

3. Further objection to allowance of interest is urged upon the ground that Riddle & Roach agreed to accept the warrants at par, and in full payment and satisfaction of the contract. The purpose of this part of the contract is obvious and its effect manifest. The warrants were to be accepted at their face values,—neither at a premium nor at a discount. Each warrant, at its par value, was to be accepted as a payment on the contract price. This was the purpose. The delivery of each warrant operated as payment to an amount equal to its face value, and thereby satisfied pro tanto the conditions of the contract. This was the effect. In illustration: A warrant for \$1,000, whether actually worth more or less, was, upon delivery to Riddle & Roach, payment of \$1,000 of the contract price, and to that extent was in satisfaction of the contract.

4. The final attack upon the petition consists in the suggestion that the payment of interest on the warrants after registration was not within the contemplation of the parties when the contract was made, and that, therefore, the repeal of sections 1600 and 1601 of the act of March 8, 1897, is applicable to warrants thereafter drawn, and annuls the provision of section 1601, which prescribed that warrants should bear interest at the rate of 7 per cent. per annum from registration until paid. The plaintiff, on the contrary, insists that the repeal of the provision allowing interest on registered warrants can have no effect upon its right to collect interest, for the reason that the repeal of the provision mentioned was an attempt to impair the obligation of the contract entered into between the state and Riddle & Roach, and hence that the act, in so far as it purports to abrogate the provision touching interest, is void.

That which binds a party to the fulfillment of his agreement is the obligation of a contract. It consists of the duty which the law imposes upon the parties to perform their agreements. See 15 Am. & Eng. Enc. Law (2d Ed.) 1040, and cases cited. The duty which the law casts upon a party to comply with the terms of the contract which he has promised to perform is therefore the obligation of his contract. Impairment of this obligation by state legislation is prohibited. Section 10, art. 1, Const. U. S.; section 2, art. 3, Const. Mont. When a state enters into a contract such as the one it made with Riddle & Roach, it is not acting in its governmental or sovereign capacity, but comes down to the level of persons. Its contract has the same meaning as that of similar contracts between subjects, and therefore the law imposes upon it the obligation to perform its agreement according to the terms thereof. *Murray v. City of Charleston*, 96 U. S. 443, 24 L. Ed. 760. The legislative assembly can no more impair the obligation of such a contract than it can the obligation of a contract made between individual persons. While a change in the form of obtaining redress may be made, provided a substantial remedy is given or remains, the obligation of a contract depends nevertheless upon its terms, and the means which the law in existence at the time it was entered into afforded for its enforcement. A statute which changes the terms of an agreement by imposing new conditions, or dispensing with those expressed or implied, is a law which impairs the obligation of a contract; for such a law "relieves the parties from the moral obligation of performing the original stipulations of the contract, and prevents their legal enforcement." *Railroad Co. v. Pennsylvania*, sub nom. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179. The degree of impairment is immaterial. A law lessening or increasing the obligation, or dispensing in even the slightest degree with its force, is repugnant to the fundamental law of the land. If at the time the contract was made the parties agreed in express terms, or by implication, that the warrants should bear interest after registration, a statute subsequently passed, purporting to repeal the law under which interest was allowed, and in reference to which the contract was made, would, if enforced, dispense with a condition, and thereby impair the obligation, of the contract.

When the contract was made, section 1601, supra, was in force. This section provided that the warrants should be taken and accepted in full payment of the indebtedness to be incurred for the construction of the building; that no appropriation for the payment of the warrants should ever be made, or payment ever be made by or from any other source than the state school of mines building fund; and, the legislative assembly

contemplating that there might not be in the state school of mines building fund sufficient money to meet the warrants drawn from time to time in payment of the contract price, it was further provided that if, on the presentation of such warrants to the state treasurer, there should not be enough money in the fund to pay them, they would be registered as of the date of presentation, and were thenceforth, until paid, to bear interest at the rate of 7 per cent. per annum. It was also contemplated by the parties themselves that payment of the warrants might be delayed or postponed beyond the time when they were presented, and that in such event Riddle & Roach should have the right to cause their registration, and be entitled thenceforth to interest, as provided in section 1601. One of the conditions of the contract was that the state would pay the face of the warrants upon presentation to the treasurer, whenever sufficient money should be in the state school of mines building fund for that purpose; and the state further promised that if, at any time, there should not be enough money in the fund to pay the warrants, they should be registered as of the date of presentation, and thereafter bear interest. This agreement explicitly set forth in section 1601, and referred to by the contract, was part and parcel of the consideration moving from the state, through its duly-authorized agents, to Riddle & Roach. The right to collect interest on the registered warrants is, under the facts shown to exist in the case at bar, as clear as is the right to receive the principal sums. The promise to pay the interest out of the money in the building fund after registration was a condition the performance of which the law imposed upon the state as a duty, and the performance of this duty devolved upon the defendant state treasurer. The impairment of this obligation is as much beyond the power of the legislature to accomplish as is the impairment of the obligation to pay out of the proper fund the amounts for which the warrants were drawn. The statute which authorized the contract to be made, and which was in force at the time it was made, conferred upon Riddle & Roach the right to receive interest on the warrants from the date of registration, and the contract was entered into in contemplation of, and with reference to, the statute. The state, when it contracts as a person, has no reserved right to withdraw or destroy by legislative action the effect of its promise, which, at the time it was made, was founded upon a valuable consideration. The demurrer is overruled. The defendant declines to plead further. Upon the filing of the proper praecipe therefor, judgment will be entered awarding a peremptory writ of mandate as prayed. Writ granted.

BRANTLY, C. J., and MILBURN, J., concur.

(25 Mont. 122)

HAUPT v. INDEPENDENT TEL. MESSENGER CO. et al.

(Supreme Court of Montana. March 4, 1901.)
INJUNCTION — IRREPARABLE INJURY — COMPLAINT — AMENDMENT — DISCRETION.

1. Where, on the trial of an action to restrain defendants from destroying plaintiff's telegraph wires and poles, there is no allegation in the complaint that defendants were threatening to do any injury to the plaintiff, or that he feared or believed there was an existing danger, or that defendants were insolvent, defendants' objection to any evidence, on the ground that the complaint fails to state any cause of action against them, should be sustained.

2. Where, in an action to restrain defendants from destroying plaintiff's telegraph wires and poles, the proposed amended complaint does not show that plaintiff has poles and wires of any material value, or sufficient for business, it is not an abuse of discretion for the court to refuse to permit such amended complaint to be filed, since such complaint does not show that plaintiff may be irreparably injured, and hence does not state a cause of action for injunction.

Pigott, J., dissenting in part.

Appeal from district court, Silverbow county; William Clancy, Judge.

Action by Henry S. Haupt against the Independent Telegraph Messenger Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Oliver M. Hall, for appellant.

MILBURN, J. This is an action wherein the plaintiff appeals from the judgment against him dissolving a restraining order and for costs. The complaint was filed February 15, 1896, praying for injunction to enjoin defendants from injuring and destroying certain poles, wires, and appliances said to belong to plaintiff, and from in any wise hindering plaintiff in the operation of a certain alleged messenger system, pursuant to the terms of a franchise granted by the city of Butte. It is alleged in the complaint that the city of Butte, by its ordinance numbered 364, granted to the predecessors of plaintiff certain franchises and privileges, to wit, to string wires over and across the buildings on Main street, from Copper to Mercury, and from Arizona to Montana, and to cross said streets in the city of Butte, without erecting any poles or posts on said streets, for the purpose of constructing "a parcel delivery and telegraph call system" within said city, and to erect and maintain poles and wires, with necessary arms and braces, on such other streets and alleys as may be necessary to carry on said business; that the plaintiff and his predecessors have at all times faithfully complied with all conditions imposed by the ordinance, and with all ordinances and regulations relating thereto, adopted by the city council and its officers; that, pursuant to the terms of said franchise, plaintiff "has constructed and erected, within the city of Butte, wires and poles and appliances for a district messenger service, and is now about to operate the same in accordance with the terms of said franchise";

that, "since the completion of the work of constructing said appliances for the operation of said messenger service, the defendants, and all of them, have threatened to this plaintiff that, if he attempts to operate said messenger system in accordance with the terms of said franchise, they will, by force, destroy said appliances and poles, and cut said wires, and by force render said messenger system inoperative"; that such acts will delay and obstruct plaintiff in the operation of said system, and render said system and the said franchise valueless to plaintiff; and that damages cannot be compensated in an action at law. Defendants answered, and plaintiff replied. Upon the trial, November 24, 1897, the defendants objected to the introduction of any proof by the plaintiff, upon the ground that the complaint did not state a cause of action against them, or any of them; which objection was sustained, the plaintiff excepting. Thereafter, and before the jury was excused, the plaintiff, in writing, moved the court for leave to amend his complaint. The court discharged the jury, and set the motion to be heard on November 27, 1897. The hearing was continued by consent. On December 1, 1897, a proposed amended complaint, embodying the matter contained in said motion, was served on defendants, and was duly presented to the court, together with said motion. The amended complaint sets out the said ordinance in full, and repeats, substantially, the allegations of the original complaint, except in the amended complaint it is averred that the poles, wires, and appliances are "for a district service," and, as to the threats, it declares that, "since the completion of the work of constructing said appliances for the operation of said messenger service, the defendants, and all of them, have threatened this plaintiff that, if he attempts to operate said messenger system in accordance with the terms of said franchise, they will, by force, destroy said appliances, and render said messenger system inoperative, and, if not restrained by the order of this court, defendants will carry said threats into execution." It further states "that the poles, wires, and appliances which the defendants threaten to destroy are absolutely necessary and indispensable to the carrying on of the said business, and, if the same are injured or destroyed, said business cannot be carried on while the said wires are being replaced." It is averred, also, that the loss of income cannot be told, for the reason that it is impossible to know in advance the patronage which may be secured, and that the defendant companies are insolvent. The motion to amend by filing the amended complaint was denied. Appellant assigns error in sustaining the objection to the introduction of evidence and in denying the motion to amend.

The original complaint did not state facts sufficient to constitute a cause of action.

There is nothing in it to show that, at the time of commencing the action, the defendants, or any of them, were threatening to do any injury to the plaintiff, or that plaintiff at that time feared or believed that there was then existing danger; there is not any allegation of insolvency of any of defendants; there is nothing to show that great or irreparable injury will result from the execution of threats. Some of these points will be considered later in this opinion.

The objection to the evidence was properly sustained.

The important question in this case is this: Did the court below abuse its discretion in refusing leave to file the amended complaint? No appearance was made by respondent in this court. The transcript, the brief, and the argument of appellant's counsel all fail to point out on what particular ground the court refused leave to file. We therefore are forced to make a critical examination of the amended complaint, and considering what judicial discretion is, to determine, without aid of counsel, whether or not the court abused its discretion. It is not possible to give a general outline of a bill in equity that would be applicable in all cases, or even in a majority of them. There are, at least, three rules to be observed, however: (1) To state the plaintiff's rights in the subject-matter; (2) to set up the acts which the defendant is doing or is threatening to do against such rights; and (3) to give a distinct statement, in ordinary and concise language, of such facts as show to the court that the injury will be irreparable.

We first seek for a distinct statement of facts which show that the injury will be irreparable. There is nothing alleged to show that the plaintiff has put himself in a position to do any business or to earn any income, or that he has expended more than a trifling sum, or that he has sufficient facilities, apparatus, appliances, or other means to carry out the purposes of the franchise. There is not a single allegation showing, or tending to show, that plaintiff has hired or engaged the services of operators, procured offices, or put up any considerable number of poles or wires or other appliances. The only allegation is that plaintiff "has constructed and erected within the city of Butte wires and poles and appliances for a district service." The most liberal construction of this language cannot make it to mean that he has put up poles, wires, and other appliances suitable and sufficient in number for the operation of a business so considerable that destruction of the same will result in irreparable injury. Possibly there have been put up no more than two poles and two wires, each one 100 feet long, with a telephone at each end thereof. The opinion of the complainant as to what will be irreparable injury is immaterial. The important question is, can the chancellor believe

from the statement of facts that irreparable injury will result, judging from the statement of facts? Reading the ordinance, we find that authority is given to string wires over houses in certain streets of the city, and to put up poles and wires on such other streets and alleys as may be necessary for the business, and as may be determined by the city engineer. How large a territory has actually been covered might well have been alleged, but is not stated. So here, again, the court has no means of knowing a fact upon which, with other things, if known, but not stated, it might base a conclusion that the business, if started, would be remunerative, and therefore irreparable injury would result from a destruction of the appliances now said to be ready for use. There being in this case no present income to be lost, the future income being merely speculative, the pleader should to a reasonable extent show to the court what work he has done, and what money he has invested,—that is, what his earning capacity is,—so that the court can reasonably infer whether or not the injury will be irreparable. The allegation in the amended complaint, therefore, as to the erection of the poles, wires, and appliances, is so indefinite and uncertain as, in our opinion, to be insufficient, since it fails to show that plaintiff has any property of such value that its destruction would result in irreparable injury.

We are of the opinion that the amended complaint does not state facts sufficient to constitute a cause of action, in that it does not show to the court facts from which a conclusion should be drawn that the plaintiff has established or set up any system or enterprise, interference with which would result to him in irreparable injury. We notice that all references in the amended complaint to the kind of business to be entered upon are conflicting, vague, and uncertain. They do not, in apt and suitable terms, describe the business contemplated by the city council. The ordinance authorizes the establishment of "a parcel delivery and telegraph call system," but plaintiff in his amended complaint denominates his supposed enterprise as "a district service," "messenger service," "messenger system," "district messenger and parcel delivery system," and in the prayer for injunction asks protection for his "messenger system," but does not, in a single instance or in any way, refer to it as a "parcel delivery and telegraph call system." The amended complaint was open to demurrer and to a motion to make more definite and certain. The court was not, by any rule or principle, bound to permit such a pleading to be filed. It is not abuse, but good use, of discretion to say to the plaintiff in such a case: "Your complaint is insufficient, and wanting in that definiteness, perspicuity, and certainty necessary to show that you are about to suffer irreparable injury, and, in my discretion, I refuse leave to

file it." It is not abuse of discretion to refuse leave to file an amended complaint which does not state a cause of action, or which would be open to a motion to make more definite and certain. *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369; *Boone*, Code Pl. § 239; *Shipman v. State*, 43 Wis. 381. By "discretion" is meant sound discretion, guided by law. It must not be controlled by humor, whim, or caprice, but by the judgment and conscience of the judge, and not by the judgment or conscience of others. It must be used in deciding what is just and proper, under the circumstances. It cannot be governed by any fixed principles or rules. The establishment of a clearly-defined rule would be the end of discretion. 9 Am. & Eng. Enc. Law, p. 473, and notes; *Howell v. Mills*, 53 N. Y. 332; *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797; *Jensen v. Barbour*, 12 Mont. 576, 31 Pac. 592. As the judgment must be affirmed for the reasons stated, we do not express any opinion as to the sufficiency of the allegations of the amended complaint as to threats. Affirmed.

BRANTLY, C. J., concurs.

PIGOTT, J. I concur in the judgment of affirmance, but do not agree to all that is said in the foregoing opinion. The amended complaint which was offered is deficient in its allegations touching the extent, amount, and value of the property the destruction of which was threatened by the defendants. There is not enough stated to show that the threats, if executed, would cause irreparable damage. The court did not abuse its discretion in refusing to permit the proposed amended complaint to be filed; for it does not state facts sufficient to constitute a cause of action at law,—or, rather, it does not contain allegations which, if proved, would entitle the plaintiff to a legal remedy,—nor set forth matter sufficient in equity to require the interposition of the extraordinary remedy of injunction. My concurrence is upon the ground that the averments of the complaint and of the amended complaint with respect to the property do not show that the threatened injury thereto will work irreparable damage. Upon the other questions so clearly stated and ably discussed by Mr. Justice MILBURN, I express no opinion, except in respect of the intimation that the amended complaint is open to a motion to make it certain, or more certain, as well as to a demurrer for want of substance. That it was obnoxious to a demurrer I am satisfied; but I am inclined to the view that, since subdivision 7 of section 680 of the Code of Civil Procedure provides for a demurrer on the ground that the complaint is ambiguous, unintelligible, or uncertain, a motion should not be entertained to make a complaint more certain. Where a demurrer lies for uncertainty, a motion ought not to be allowed for the same fault, unless the motion be considered as a

demurrer. If so considered, it should be filed within the time that a demurrer for uncertainty might be filed. The statute has prescribed attack by demurrer as the appropriate method of reaching the vice of uncertainty, and therefore a motion, as such, is not a remedy. Perhaps a motion may lie to make a complaint more definite; but for every fault mentioned in section 680, which appears upon its face, demurrer seems to be the sole remedy, except where there is want of substance or lack of jurisdiction. This view is supported, it seems to me, by section 685 of the Code of Civil Procedure: "If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

(26 Mont. 111)

HARRINGTON et al. v. SMITH et al.

(Supreme Court of Montana. March 4, 1901.)

APPEAL AND ERROR—RULES OF COURT—SPECIFICATION OF ERRORS—APPELLANT'S BRIEF—REFERENCE TO TRANSCRIPT.

Under Sup. Ct. Rule 5, subsec. 3, requiring that the brief of appellant shall contain a concise abstract of the case, referring to the page numbers in the transcript in such manner that pleadings, evidence, orders, and judgment may be easily found, and a specification of errors relied on, an order appealed from will be affirmed where appellant's brief does not refer to any page number of the transcript, or contain a specification of errors.

Appeal from district court, Deerlodge county; Theo. Brantly, Judge.

Action by Philip Harrington and others against Frank D. Smith and others. From an order granting a new trial after a verdict in their favor, plaintiffs appeal. Affirmed.

Napton & Napton, for appellants. Stapleton & Stapleton, for respondents.

PIGOTT, J. The plaintiffs recovered a judgment against the defendants in the district court of Deerlodge county. From an order granting a new trial, the plaintiffs have appealed. The order appealed from must be affirmed upon the ground that the brief of the appellants is not in compliance with the rules of this court in force when it was filed. Subsection 3 of rule 5, which was operative when the brief in question was filed, provides that the brief shall contain, "in the order here stated: (1) A concise abstract or statement of the case, presenting succinctly, the questions involved, and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and judgments may be easily found. (2) A specification of errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged.

* * * 16 Mont. 595, 44 Pac. vii. The brief for the appellants does not refer to any page number of the transcript, nor is there a specification of errors. In conformity with the now settled and uniform practice of this court, the only disposition that can be made of the appeal is to affirm the order. We should affirm without a written opinion were it not that we desire again to call attention to the necessity of a substantial compliance with the rules of the court prescribing the contents of briefs filed on behalf of appellants. A specification of the error or errors relied upon is an indispensable prerequisite to the considerations of appealed causes on their merits. *Rehberg v. Greiser*, 24 Mont. —, 62 Pac. 820, 63 Pac. 41. The order granting a new trial is affirmed. Affirmed.

MILBURN, J., concurs. BRANTLY, C. J., having tried the cause in the court below, does not participate in the foregoing decision

(7 Idaho, 548)

STATE v. SEYMOUR.

(Supreme Court of Idaho. March 5, 1901.)

CRIMINAL LAW—JUDGMENT—REVERSAL—EVIDENCE—SECOND TRIAL—ADDITIONAL EVIDENCE—REBUTTAL—INSTRUCTIONS—COUNTY ATTORNEY AS WITNESS—DISCHARGE OF DEFENDANT.

1. When, on an appeal, the judgment is reversed on the ground that the evidence is insufficient to justify the verdict, the trial court, on the motion of the county attorney, should dismiss the case, when it is shown that the state has no other or further evidence than that adduced on the first trial.

2. *Held*, in this case, that the state did not produce on the second trial further or additional material evidence than that produced on the first trial.

3. Under the facts of this case, it was error to refuse to allow the defendant to introduce, in rebuttal, evidence contradicting certain statements sworn to by a witness on behalf of the prosecution.

4. When a judgment has been reversed on the ground that the evidence is insufficient to sustain the verdict, and the case is remanded and a retrial is had, if no further or additional evidence is produced on the trial of the defendant's guilt the court ought to instruct the jury to return a verdict of acquittal.

5. It is error to excuse the county attorney from testifying on behalf of the defendant simply because he does not wish to do so.

6. When it is made to appear that the state cannot produce additional material evidence of the guilt of one tried for a crime, and this court reverses a judgment of conviction on the ground of the insufficiency of the evidence to support the verdict, this court will order a discharge of the prisoner.

Stockslager, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Fremont county; Jo. C. Rich, Judge.

Emery H. Seymour was convicted of grand larceny, and appeals. Reversed.

Hawley & Puckett and Caleb Jones, for appellant. Frank Martin, Atty. Gen., for the State.

SULLIVAN, J. The defendant was convicted of the crime of grand larceny, and from the judgment of conviction and order denying a new trial appealed to this court at the May term, 1900. See 61 Pac. 1033. The court there held that the evidence was insufficient to establish the guilt of the defendant, and the cause was remanded to the lower court. The cause was again brought on for trial in the district court at the November term, 1900. The county attorney thereupon made a motion to dismiss the case, which motion was in writing, and is as follows: "Henry D. Wilding was duly called and sworn as a witness on the part of the prosecution, and testified as follows: Counsel for defendant at this time objected to the introduction of any testimony in this case, for the reason that the prosecuting attorney had theretofore asked the privilege and made a motion to dismiss this case for the reasons stated in said motion, which are as follows: 'In the District Court of Fremont County, State of Idaho. State of Idaho, Plaintiff, vs. Emery H. Seymour, Defendant. Now comes J. E. Cochran, county attorney of Fremont county, and asks that the within case be dismissed for the following reasons: (1) Because, upon the evidence submitted upon the former trial, the supreme court of the state has held insufficient to sustain a verdict of guilty, and has remanded it for trial, which means, impliedly, if we have or can supply more competent evidence; otherwise, of course, they mean that he shall be discharged. This prosecution, being fraught with great interest to the people of the county, has been very industriously and vigilantly prepared and prosecuted by all the officers of this and the former county administration whose duty it was so to do, and every particle of legitimate evidence that any of us could procure we did, and it was well and forcibly presented at the former trial, and consisted of the testimony of witnesses whom the jury knew, and who comprise many of our best and most highly respected citizens, including our ex-sheriff and our present sheriff, and leading representative farmers of the county. From these witnesses the prosecution has not an additional fact that can be presented, and nothing from any witnesses of their standing or integrity. The only further testimony will be such as Edward H. Trafton, his wife, and one Ben Williams may swear to, and what that will be I think no man can know until it proceeds from the mouth on the witness stand, and from my knowledge of them would not believe them under oath; and I here apologize to the court for asking their indorsement on the information, knowing them as I do now, their character and reputation, but it was done by request, and without knowledge of what their testimony will be, and without stopping then, as I should have done, and considered fully the matter. At the former trial of this case Trafton was here as a witness for the de-

fendant, and, further, officiated in the capacity of attempting to get witnesses for the state to withhold testimony, and this court, on hearing of that action, ordered me to investigate the facts, which I did, and prosecuted him for that offense, and convicted him of it in the probate court. Since that time one of the Seymour boys was a witness, and an unwilling one, on the part of the state against this same Trafton on a charge of petit larceny; and, when he was convicted for that offense, he, in my presence and others, stated that he would get even for that, if not on him, he would on Emery Seymour, this defendant; and to this day he is under bonds to appear for preliminary examination on a charge of grand larceny, and the records of the criminal courts of this county abound in cases of the state of Idaho against Edward H. Trafton, and his reputation is such that he cannot and ought not to be believed. Of Mrs. Trafton, I have but to say that she is his wife, and has always been a witness when he was, and from their testimony I conclude that they are as man and wife are sometimes described, "as the twain being one flesh." Ben Williams I understand to be a fugitive from justice, and to escape prosecution for grand larceny, and not a stranger to the criminal dockets of this county, and I am informed is not and will not come into the jurisdiction of this court. Therefore, in view of the decision of the supreme court of this state, regardless of individual opinion as to its correctness, we will all treat it with the respect and force to which it is entitled, and, in view of the fact that we have no further reputable evidence, I am of the opinion that the necessarily great expense that its further prosecution will entail on the county ought not to be encouraged. While the court and all of its officers have done all that could be done, I feel that we would not now be justified in its further prosecution, even if a conviction should be possible from the testimony of witnesses of the character of the ones last indorsed on the information. Respectfully submitted, J. E. Cochran."

The county attorney therein states that the prosecution had no further reputable evidence than was given on the former trial, and that, as the supreme court had held that the evidence at the former trial was not sufficient to convict for that reason, he moved to dismiss said case. The record shows that the county attorney acted in perfect good faith, and in line with his duty, in making said motion. See Cooley, Const. Lim. (5th Ed.) p. 379, and note 3. The court denied the motion, and proceeded with the trial. The defendant was convicted, and judgment of imprisonment imposed. A motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

The evidence is substantially the same as that given on the former trial. However, the state produced as witnesses a Mrs. Trafton,

William Lyman, and Seth Ellsworth, who had not testified on the former trial. Witness Bruce testified that he and one Ben Williams, on their trip from Teton Basin, about June 15, 1897, from whence they drove the animal alleged to have been stolen, with several others, stopped at Trafton's or Harrington's ranch overnight, and put the cattle they were driving in a corral there for the night. Mrs. Trafton was called to show that witness Bruce and said Williams did not stop overnight at Trafton's, as testified to by Bruce. She testified that Bruce and Williams did not stop overnight at Trafton's ranch in June, 1897. On cross-examination she testified that they might have stopped there on the 14th or 15th of June. It appears that this witness refreshed her memory from a book that was considerably mutilated by having leaves torn out. William Lyman, brother of Mrs. Trafton, also testified that Bruce never stopped at Trafton's in the month of June, 1897, and put cattle in the corral, to his knowledge; but that it would have been possible for them to have stopped there all night without his knowing it, as he was away some of the time. Five witnesses testified that Mrs. Trafton's reputation for truth and integrity was bad. Counsel for defendant offered to prove by Capt. Aller and his son Amos that said Aller and son stopped at the said Trafton ranch overnight about the 15th of June, 1897, and that one Ben Williams and D. C. Bruce stayed overnight at the residence and ranch of said Trafton, and that they drove four head of cattle to that ranch, placed them in the corral that night, and the next morning turned them out of the corral, and drove them towards St. Anthony. The county attorney interposed an objection thereto on the ground that said testimony was not rebuttal or surrebuttal testimony, but evidence in chief on the part of the defense, and cumulative, which objection was sustained by the court. It was prejudicial error to reject said testimony, provided the question whether said Bruce and Williams stopped at said Trafton's, as testified to by Bruce, was a material point in the case. As it went to the truthfulness of witness Bruce as to the place from whence, and the route over which, the animal alleged to have been stolen was driven, we think it had a bearing in the case, and was proper to go to the jury. The testimony of said witness Lyman shows that Bruce and Williams might have stopped at Trafton's as sworn to by Bruce, and Lyman not have known it. The witness Bruce described Ben Williams as having light hair, while Seth Ellsworth, a witness for the prosecution, testified that his complexion was darker than medium, and that he thought his hair was nearly black.

The testimony above set forth of the witnesses Mrs. Trafton, Lyman, and Ellsworth is all of the evidence introduced by the state in addition to the evidence on the first trial of

the case, and does not materially change the evidence on which the defendant was first convicted. This court held on the former appeal that that evidence was not sufficient to sustain the verdict. Mrs. Trafton was most thoroughly impeached, and, aside from that, the defendant offered to show, by two disinterested witnesses, that Bruce and Williams did stop overnight at the Trafton ranch about June 15, 1897. However, Mrs. Trafton testified on cross-examination that they might have stopped there on the 14th or 15th of June, 1897. The color of Ben Williams' hair was an immaterial matter, and the difference in the opinions of the two witnesses who testified on that point can have no important bearing in this case.

The attorney general quotes from the testimony of the defendant, and the quotations, taken alone, would indicate that the defendant had testified, on direct examination, that Williams had purchased several head of cattle for him, and on cross-examination that he had purchased but one. But that testimony, as we read it, states that Williams only purchased one animal on his trip to the Teton Basin. He testified as follows: "That is the only animal that he bought and delivered. * * * When he came in from Teton Basin he returned the money I had given him. He paid \$17 for the critter. * * * He did not buy any more cattle at all." In other words, that was the only one that he bought on that trip.

As there is no material change in the evidence from that given on the first trial, the cause must be determined upon the same evidence that was before us on the former appeal, and, as the law of the case was announced in the decision on that appeal, it contains the law of the case on this appeal so far as it applies to the insufficiency of the evidence to sustain the verdict. In his motion to dismiss, the county attorney stated to the court that the state had no further reputable evidence than was given on the former trial, and the evidence submitted by him fully bears out that statement, and the case should have been dismissed, or, at least, the court should have instructed the jury to bring in a verdict of not guilty at the close of the evidence.

Several other errors are assigned, but it is only necessary for us to further notice one of them. Counsel for the defendant called the county attorney as an impeaching witness against Mrs. Trafton. The county attorney thereupon stated that he did not wish to testify. The court thereupon said that he need not testify if he did not want to, he being county attorney. The county attorney replied that he did not wish to, to which ruling the defendant duly excepted. On what theory the county attorney was excused from testifying is not made to appear. It certainly was not on the ground that it would incriminate him, and we know of no other reason under our law why the county attor-

ney, or any one, even the judge himself, may not be compelled to testify on behalf of one on trial for a crime. Both by the federal constitution and that of this state, the defendant has the right to process to compel the attendance of witnesses in his behalf. It was error for the court to excuse the county attorney from testifying in said case, as the defendant only desired his testimony in the impeachment of one of the witnesses for the state. As it is apparent that the state cannot produce other evidence of defendant's guilt than that given on the first trial of this case, the judgment of the district court must be reversed, and the appellant Emery H. Seymour discharged from custody; and it is so ordered.

QUARLES, C. J., concurs.

STOCKSLAGER, J. (dissenting). I cannot concur with my associates in this case. The facts are stated in the opinion by Justice SULLIVAN, concurred in by Chief Justice QUARLES; hence unnecessary here only as may become necessary to refer to them in expressing my views and giving my reasons for dissenting. As is shown by the opinion, this is the second time this case has been to this court on the question of the sufficiency of the evidence to support the verdict and judgment of the trial court; no errors of law being assigned or presented to this court. The record does not disclose that the appellant ever made an application for a change of the place of trial from Fremont county, alleging bias and prejudice of the people of that county, or the presiding judge of that district, against him. This being true, the presumption is that appellant has had two fair and impartial trials by his countrymen, residents of the county wherein he resided, and was engaged in business at St. Anthony, the county seat of said county. At each of said trials a verdict of guilty of grand larceny was returned against him, and he was sentenced to servitude in the state penitentiary by the presiding judge of said district. It is a well-settled rule, frequently announced by this court, that, where there is a conflict of evidence on the material issues involved in the trial, the verdict of the jury and the judgment of the lower court will not be disturbed on appeal to this court. This rule not only prevails in this jurisdiction, but is almost, if not quite, universal. In each of the trials of this case in the lower court, the juries that returned verdicts of guilty against the appellant had the opportunity of looking the witnesses in the face while testifying, observing their manner and conduct, and determining the truth or falsity of their evidence. The court evidently instructed them that they must give the defendant the benefit of every doubt, and only return a verdict of guilty when they were satisfied of guilt beyond all reasonable doubt. The judge who presides over that district,

and who had the same opportunities to observe the testimony upon which these convictions were had, refused to set the verdicts aside. The presumption is that he, being a sworn officer of the state, performs his duty as he sees it, and I think we should be very careful in disturbing his judgment, especially where it is shown by the record that the appellant had two opportunities to establish his innocence, and failed in both. In this court we have simply the printed record to guide us, no opportunity to see the witnesses, and observe their manner and conduct, and thereby determine their character, as well as the truth or falsity of their testimony.

Now, as to the facts as disclosed by the record in this case. On the 27th day of June, 1897, appellant was arrested upon the charge of grand larceny, and after preliminary examination, on the 19th day of February, 1900, J. E. Cochran, the county attorney of Fremont county, filed an information against him, charging him with the larceny of a cow in said county. A trial was had, conviction followed, and, on appeal to this court, the judgment of the trial court was reversed, and the case remanded for further proceedings. In December, 1900, another trial was had, conviction followed, and this appeal. Appellant testifies that he drove the cow in dispute into his pasture, thereby placing himself in a position where he must explain such possession to the satisfaction of the jury. He tells the same story that has been heard in every trial court in this state, and in fact all states where trials of this character are had, in every case where the possession of stolen animals is traced to the possession of the party accused. The purchase is always from a stranger. It must necessarily be a stranger, as he cannot be brought face to face with the accused to contradict him. Where is the necessity to look further into the evidence? His explanation was unsatisfactory to the jury and the judge who tried the case in the first trial, and the same is true of the second trial. What is the difference whether the jury believed Mrs. Trafton or not? It is evident from their verdict that they did not believe that the possession of the cow by the appellant was honestly acquired, and his explanation of such possession was unsatisfactory to them. They may have believed Mrs. Trafton told the truth, even though her reputation for truth and veracity was shown to be bad by five witnesses. The most depraved person (and we do not wish to be understood as saying she is) may tell the truth, and the jury may or may not have believed her. That was their special province, and no one can control it. It is for the express purpose of passing upon such testimony that the jury system prevails all over the civilized world, and their verdicts should carry great weight with the courts.

It cannot be said there was any malice or ill will towards the defendant by the jury,

as it recommended him to the mercy of the court. This may also be said of the court that pronounced the sentence, and before whom the case was tried. The sentence is for 3 years, and might, under the law, have been 14 years. I do not think this case should be reversed on the ground of insufficiency of the evidence to warrant the verdict and judgment. I agree with my associates that the trial court should have required the county attorney to testify when called upon by the defendant. I also agree with them that the court should have permitted the two witnesses, Captain Aller and his son, to testify in rebuttal.

(7 Idaho, 497)

MARTIN, Atty. Gen., v. STEELE, Judge.
(Supreme Court of Idaho. Feb. 15, 1901.)
FRAUDULENT SALES—INSTRUCTIONS—WRIT
OF ERROR.

It is error to instruct the jury in a criminal prosecution under sections 6519, 6540, Rev. St., that a sale made with intent to defraud creditors is not a fraudulent sale, within the purview of said statutes.

(Syllabus by the Court.)

Original proceeding by Frank Martin, attorney general, for a writ of error to Edgar C. Steele, district judge. Writ denied.

Frank Martin, Atty. Gen., and J. W. Reid, for plaintiff in error. S. B. Kingsbury and J. F. Ailshie, for defendant in error.

QUARLES, C. J. This is an application for a writ of error to review the action of the lower court in instructing the jury. There are two errors assigned, the first being: "The court erred in advising the jury to acquit the defendants, or either of them." The second being as follows: "The court erred, before so advising the jury, in instructing them as follows: 'The jury having been called in this case, and all are present. On yesterday, at the conclusion of the state's testimony, the defendants made a motion for the court to advise the jury to acquit the defendants. The motion was extensively argued yesterday afternoon, and the court has extensively examined the matter. This information has no definite name applied to it by the statute. It is a conspiracy to defraud creditors, and by this information the defendants are accused of this crime. The information charges, and it was necessary to charge, that they did combine, confederate, and agree to willfully and unlawfully sell,—not necessarily a criminal sale, but unlawful, not according to law. The section upon which this information is based is 6540, which is as follows: [Reading it.] The section under which they claim this information is filed is section 6519, in addition to section 6540, which reads as follows: [Reading it.] The state takes the position that any sale made with the intention to hinder, delay, and defraud creditors comes within this section, and that the word "fraudu-

lently" has practically no significance; that the sale is fraudulent whenever it is done to hinder, delay, and defraud creditors. The court does not think that position is correct, and I will advert to it further on. That this case will be more fully understood, and without going fully into the testimony, the testimony shows, in substance, that Mr. Hunte was the owner of a large stock of goods, and that Mr. Sweet called at his house upon other business along about the 7th of January, or the 6th, and that Mr. Hunte proposed to him to sell him his goods. He didn't go there for that purpose. Mr. Sweet told him at that time that he would consider the matter, or something of that kind, and went back to Grangeville. He then came to see him again, and Mr. Hunte, according to his testimony, states: That he told him that his creditors were worrying him to death. They were after him for money, and he didn't have money to pay them with, and offered him his goods for fifty cents on the dollar, and fifteen cents for hauling the goods, or freight charges. That when Sweet returned he told him that he would give him sixty cents on the dollar. That Hunte agreed to the sale, and the goods were taken from Nez Perce to the storehouses of the defendant in Cottonwood and Grangeville. That, as Hunte swears, probably one thousand dollars' worth of the goods were sold at that time, and he says were sold at a sacrifice. That the note was given for eight thousand dollars by Sweet, Richardson, and Wilkinson to Mr. Hunte. As the court looks at this case, it is practically a question of, where a man is heavily indebted, and another man knows he is indebted, and knows that he is not going to pay his creditors, or he tells him, at least, he is not going to pay his creditors the purchase price, can he buy those goods, even at a bargain, and would the sale be a good-faith sale, or a fraudulent sale, if he so bought them? The court would rather these burdens would not be placed upon it, but, when they are, the court has to meet them without flinching, and with the best consideration it can give them under the circumstances. If a party knows a man is indebted, it certainly does not give to the creditors the right to claim that they hold a lien against his property so that they cannot sell it, because a party knows that another is largely indebted; and, even though he may know that it is his intention to pay the money that he gets for the goods to his creditors, it ought not to prevent the sale of the goods. The creditors have no lien upon the goods. There is no such thing as a purchase-money lien, but this is to creditors generally. This is for defrauding creditors generally of their rights. Upon all the facts produced in this trial, under this statute, a mere sale of goods, knowing that the party is largely in debt,—a mere sale of goods to a party who knows that the party is in debt,—is not enough. There must be a fraudulent sale. The fraudulent sale consists of some scheme between

the defendant, Hunte, and Wilkinson, Richardson, and others, whereby these goods will be so appropriated or concealed, or something different done with them from a mere sale,—a transfer from one party to another. There must be something in the sale itself that is fraudulent. For instance, Mr. Sweet, Richardson, and Wilkinson might agree that they would hold these goods in trust for Mr. Hunte, and that they would hold them so that the creditors could not get at them, and, after the creditors had got tired,—got tired of working for their money,—they would make it all right with Mr. Hunte. This would be a fraudulent sale,—a fraudulent disposition of the property. Or if they agreed to aid him in concealing the property, or anything of that kind. But here it is stated by the state that the sale of the property—and the evidence shows that there was an absolute sale of it—was made for fifty cents or sixty cents on the dollar, and this is the proof before the court. Whether it amounted to eight thousand dollars or more, whatever it was, the contract before the court is that they were to receive sixty cents on the dollar of the invoice price, and they were sold by Hunte to Wilkinson, Richardson, and Sweet. If there was not a fraudulent sale, however much it may have been done with the intent to defraud the creditors, it doesn't matter. Every word of the statute must be given meaning to, and to sell is not necessarily fraudulent because it is done with intent to hinder, delay, and defraud creditors. There must be something in the sale itself, in the acts of the parties between themselves, that it is a fraud. There must be something that can be set aside, as between the parties, as a fraud. A fraud vitates everything. It burns and blisters wherever it goes. Every transaction touched by fraud is vitiated and made illegal. And, where the statute says a fraudulent sale, it means a fraudulent sale,—something in the sale itself; something in the acts of the parties between themselves that carries this out; a secreting of the goods, or secret plan between themselves. Other questions have been presented in this case. One is the question of the corroboration of the accomplice. The court would have to instruct the jury that the testimony of an accomplice is not sufficient, and they could not convict upon his testimony alone, although they might believe beyond a reasonable doubt every word that he said. The common law didn't use to be this way, but it is so now, under our statute. But that matter the court could have submitted to the jury, and would have done so; but the whole feature of this case, the whole underlying principles of this case, as the court believes, for a criminal action, are not correct. There is in the court's mind (and the court is nothing more than a lawyer among you) an idea that there is a misapprehension of the criminal statute,—as to what it takes, under this statute, to make parties guilty of the crime

charged. All of the facts shown in this case might show Mr. Hunte guilty of the crime defined in section 6519. It might show that he, because he sold his note, and that he said he was going to defraud his creditors, is guilty of that charge. But the sale between him and Mr. Sweet, Richardson, and Wilkinson, as is detailed here before the court and before the jury, the court does not believe that, even as against him, the facts shown in this matter would have convicted him. The sale was not fraudulent as between him and Sweet, Richardson, and Wilkinson. There was an intent to defraud creditors, but the sale itself was not a fraudulent sale, as the court believes."

The object of this proceeding is to determine whether or not the lower court correctly interpreted or construed sections 6519, 6540, Rev. St. Idaho, which are as follows:

"Sec. 6519. Every debtor who fraudulently removes his property or effects out of this territory, or fraudulently sells, conveys, assigns, or conceals his property with intent to defraud, hinder or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both."

"Sec. 6540. If two or more persons conspire: (1) To commit any crime; (2) falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime; (3) falsely to move or maintain any suit, action, or proceeding; (4) to cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses; or, (5) to commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice or the due administration of the laws; they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both."

Inasmuch as a review of the evidence introduced upon the trial in the lower court, and the proceedings therein, is not necessary to a determination of the questions presented, we deem it best to deny the writ, but to express our views as to the correctness of the instruction given by the trial court. The propriety of this course is more apparent when it is remembered that the only purpose to be subserved by granting the writ and the hearing upon the return thereto is to obtain the views of this court as to the correctness of the construction of said statutes. Under these conditions, we have concluded to express our views as to the construction of said statutes as shown by the instructions of the trial court set forth in the petition of the plaintiffs in error. The object and purpose of the two statutes in question is apparent. Their primary object is the protection of creditors against those fraudulent acts of their debtors which tend

to prevent, delay, or hinder the collection of the claims of the creditors. Under the statutes cited supra, it is a crime for the debtor to sell or dispose of his property with intent to defraud, hinder, or delay his creditors, and it is a crime for other parties to conspire with him and aid and assist him in accomplishing such result. The trial court instructed the jury, in effect, that the transaction was made with intent to defraud creditors, but that the sale was not a fraudulent sale; that a sale is not necessarily fraudulent because it is made with intent to hinder, delay, and defraud creditors. To our minds, this was not a proper instruction, nor a proper construction of the statutes in question. This was the purpose and intent of the sale alleged in the information to have been made by the defendant Hunte. If this intention was known to his co-defendants, who, knowing such intent and purpose, encouraged him in making such sale, and actually purchased the property which Hunte, the debtor, was attempting to place beyond the reach of his creditors, such sale was fraudulent, and was prohibited by section 6519, supra,—was criminal,—and his co-defendants, who purchased from him, violated subsection 4 of section 6540, supra. This sufficiently disposes of the second error alleged in the petition.

SULLIVAN and STOCKSLAGER, JJ., concur.

(25 Mont. 122)

JONES v. GIESKE et al.

(Supreme Court of Montana. March 12, 1901.)
SPECIFIC PERFORMANCE—DOWER INTEREST
OF WIFE.

Where it is sought to compel specific performance of a contract to convey, and it appears that defendant's wife did not join in said contract, the decree for specific performance will require a conveyance by said defendant reserving to his wife whatever dower she may have in the land.

Appeal from district court, Cascade county; J. B. Leslie, Judge.

Action by Alfred E. Jones against John E. Gieske and others. Judgment for plaintiff. Defendants appeal. Modified.

Sam Stephenson and J. W. Freeman, for appellants. Wm. G. Downing, for respondent.

MILBURN, J. This is an appeal from an order denying a motion for a new trial and from the judgment. The suit was brought to cancel a deed made by one Millard and wife to one Mary E. Gieske, and to compel one John B. Gieske to convey to plaintiff by deed certain real estate. It is claimed that Millard and wife made and delivered to plaintiff a deed for lot 3 in block 10 of the townsite of Belt, Cascade county, Mont., which deed was never recorded; that defendant John B. Gieske agreed in writing to convey to plaintiff lot 28 in block 11 of said town site upon the payment of a

certain sum, and that plaintiff paid all of said sum excepting \$225, and was ready and willing to pay said balance as per the terms of the agreement; that Gieske fraudulently induced plaintiff to deliver said unrecorded deed for said lot 3 to him (Gieske), who delivered it to Millard, and that Millard and wife thereupon made and delivered to defendant Mary E. Gieske a deed for lot 3, and the deed was recorded; that said John B. Gieske fraudulently induced plaintiff to cancel said contract for lot 28, and to accept in consideration of the surrender of said contract a deed for a certain lot 1 in block 1, Riverside addition, St. Paul, Minn., together with a promissory note of defendant John B. Gieske for \$250. It is charged that the property surrendered by plaintiff was valuable, and that the St. Paul lot was of little value, and the note worthless. The court below, sitting with a jury, found for plaintiff, and decreed: (1) That the \$250 note be canceled; (2) that the plaintiff reconvey to John B. Gieske said lot in St. Paul; (3) that plaintiff pay to John B. Gieske \$17.51, the balance of the \$225 due on account of lot 28, deducting the amount adjudged to plaintiff for rents and costs; (4) that defendants convey to plaintiff, by deed, said lots 3 and 28; (5) that possession of said lots 3 and 28 be restored to plaintiff upon payment of said sum of \$17.51; (6) that defendants be divested of all title to said lots 3 and 28, and that the title thereto be vested in plaintiff; (7) that plaintiff have \$150, the rents collected; and (8) for costs.

The appellant relies, in his brief, upon alleged insufficiency of the evidence, and upon certain alleged particulars in which the judgment is against the law. We have carefully examined the evidence, and find that it is not insufficient to support the material findings as made and adopted by the court. We do not find that the court erred in its rulings on the evidence. The court did not err in denying the motion for a new trial. In the light of the pleadings and the evidence the judgment must, however, be modified as follows: Whereas said judgment orders that the said defendants convey to the plaintiff, by deed, said lots 3 and 28, let it be ordered by said district court that said deed from Millard and wife to Mary E. Gieske for said lot 3 be canceled, and declared void, and that Millard at once return and deliver to plaintiff the deed for said lot 3 heretofore by him and his wife executed and delivered to plaintiff; and whereas, the parties hereto have admitted that Mary E. Gieske was the wife of defendant John B. Gieske at the time said contract for the sale of lot 28 was entered into by plaintiff and John B. Gieske, and it appears that Mary E. Gieske did not join in said contract, it is ordered, that the said judgment be further modified to the effect that John B. Gieske, without said Mary E. Gieske, be ordered to convey, by proper deed, to plaintiff, said lot 28, within five days after tender of the said balance of \$17.51, due by plaintiff; and that said decree be further modified to reserve to Mary E.

Gleske whatever right of dower she may have, if any, in said lot 28. The order of the court denying the motion for a new trial is affirmed, and the judgment of the said court is affirmed as modified. Respondent will recover his costs in this court, except as against Mary E. Gleske, to whom he will pay such costs as she has incurred upon appeal. Affirmed and modified.

BRANTLY, C. J., and PIGOTT, J., concur.

(25 Mont. 149)

CARR, RYDER & ADAMS CO. v. CLOSSER et al.

(Supreme Court of Montana. March 11, 1901.)

NEW TRIAL—NOTICE OF INTENTION—APPEAL—TRANSCRIPT—REQUISITES.

Where, on appeal from an order granting a new trial, there was inserted in the transcript a copy of the notice of intention to move for a new trial, the notice not being made part of any bill of exceptions or statement of the case on motion for a new trial, nor a constituent part of the judgment roll, as defined in Code Civ. Proc. § 1196, or in the absence of a bill of exceptions or statement on motion for a new trial, one of the papers required by sections 1176, 1738, to be furnished to the appellate court, it will be stricken from the transcript.

Appeal from district court, Deerlodge county; Wellington Napton, Judge.

Action by the Carr, Ryder & Adams Company against Floyd Closser and another. Findings in favor of plaintiff were entered, and from an order granting a new trial the plaintiff appeals. On motion to strike out from the transcript notice of intention to move for a new trial. Motion granted.

McHatton & Cotter, for appellant. Walsh & James and H. P. Napton, for respondents.

PIGOTT, J. Findings in favor of plaintiff and against the defendants having been entered in the court below, the defendants moved for a new trial, which was granted. The plaintiff has appealed from the order granting it. It now moves this court to strike from the transcript the notice of intention to move for a new trial containing it, on the ground that the notice is improperly included therein. It appears that the clerk of the court below inserted in the transcript a copy of the notice of intention to move for a new trial, without any request therefor upon the part of the plaintiff. The notice is not made part of any bill of exceptions or statement of the case on motion for a new trial; nor is it a constituent part of the judgment roll provided for and defined in section 1196 of the Code of Civil Procedure; neither is it, in the absence of a bill of exceptions or statement on motion for a new trial, one of the papers required by sections 1176 and 1738 of the Code of Civil Procedure to be furnished by copy to this court. It is, therefore, not a part of the transcript or record on appeal, and must be stricken out. It is, therefore, ordered that the copies of the notice of intention to move for a new trial, which appear twice in the

transcript, be stricken therefrom. Motion granted.

MILBURN, J., concurs.

BRANTLY, C. J., having tried the cause in the court below, takes no part in the foregoing opinion.

In re PEMBERTON et al.

(Supreme Court of Montana. March 8, 1901.)

DISBARRED ATTORNEY—REINSTATEMENT.

The mere petition of attorneys and others for the reinstatement of a disbarred attorney will not be considered, such attorney not being before the court in person or by petition asking for reinstatement, and giving his reasons therefor.

Petition of W. Y. Pemberton and others for the reinstatement of John B. Wellcome as a member of the bar of the state. Denied.

PER CURIAM. Under no practice known to this court, or to any other court, so far as this court is advised, can the mere petitions of attorneys and others for the reinstatement of a disbarred attorney be considered. Said John B. Wellcome not being before this court in person, or by his petition by him subscribed, asking for reinstatement, and giving his reasons therefor, there is nothing which this court can entertain; and therefore it is ordered that said petitions of said attorneys and others be not considered.

Mr. Justice PIGOTT is of the further opinion that the petitions or memorials are frivolous, state no reason why said Wellcome should be admitted to the bar, have no place among the papers or records of this court, and should, therefore, be stricken from the files.

(25 Mont. 135)

WETZSTEIN v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO.

(Supreme Court of Montana. March 12, 1901.)

SUPERSEDEAS—RESTRAINING ORDER—APPEAL—JURISDICTION OF SUPREME COURT—STARE DECISIS—ORDER TO SHOW CAUSE—TIME FOR HEARING—REASONABLENESS—ABUSE OF DISCRETION.

1. Code Civ. Proc. § 1722, as amended February 23, 1899, provides that an appeal may be taken from an order granting or dissolving an injunction or refusing to grant or dissolve an injunction. *Held*, that the supreme court has no jurisdiction to grant an order of supersedeas to stay a temporary restraining order pending the hearing of an order to show cause why an injunction should not be issued, as there is no appeal from a temporary restraining order.

2. The supreme court decided that an appeal would lie from a certain order, and, though the order was called a "temporary restraining order," it was in fact an injunction pendente lite, and subsequently a petition was filed in the supreme court for an order of supersedeas to stay a temporary restraining order on the ground that an appeal would lie from such an order. *Held*, that the rule of stare decisis did not apply, since the prior decision was not in fact a restraining order.

3. Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period.

Pigott, J., dissenting.

Appeal from district court, Silverbow county.

Action by Adolph Wetzstein against the Boston & Montana Consolidated Copper & Silver Mining Company. Order restraining defendant, and it appeals, and petitions for an order of supersedeas. Petition denied.

Forbis & Evans, for appellant. McHatton & Cotter and J. M. Denny, for appellee.

MILBURN, J. This cause comes now before this court upon the petition of the defendant for an order of supersedeas staying a certain restraining order issued by the district court on February 18, 1901, pending a hearing of an order to show cause, on April 2, 1901, why a temporary injunction may not issue enjoining the defendant from continuing certain work in and about the Comanche lode claim. On the 25th day of February, 1901, the defendant appealed from the order so restraining the defendant pending the hearing on the order to show cause why a temporary injunction should not issue. Respondent contends that this court has no jurisdiction to grant the petition, for the reason that there is no appeal to this court from a restraining order. We are of the opinion that respondent is right in the position he takes. Section 873 of the Code of Civil Procedure very clearly makes a distinction between an injunction and a restraining order. A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation, and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause why an injunction should not issue. 10 Enc. Pl. & Prac. 878; Railroad Co. v. Moss, 77 Ind. 139; Hicks v. Michael, 15 Cal. 107; San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216, 35 Pac. 651; Fenwick Hall Co. v. Town of Old Saybrook (C. C.) 66 Fed. 389; Strickland v. Griffin, 70 Ga. 541.

It is the plain duty of a court to set the order to show cause at a very early day, and, upon the application of the defendant, to shorten the time, to the end that, if the facts on the hearing warrant it, the restraining order may be discharged. In such a case, appeal from a restraining order is not pos-

sible or contemplated, for the reason that on the hearing, or soon thereafter, the court, in the discharge of its duty, will grant or refuse an injunction, and in either event the restraining order is dead. The law presumes that a judge will be fair and just, and will not put off the hearing of the order to show cause until a day so distant that by the force of his own despotic will a mere temporary expedient, to wit, a restraining order, granted ex parte and without bond, perhaps, will become an injunction. A judge might, over the objection of the plaintiff, set a demurrer to a complaint for hearing at a time one year ahead. This might work great injury to the plaintiff, but the remedy of the injured plaintiff could not be by appeal from the order so setting the hearing on demurrer. We are aware that in Bennett Bros. Co. v. Congdon, 20 Mont. 208, 50 Pac. 556, the court decided that a restraining order was an order from which an appeal might be taken, and that in Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co., 24 Mont. 135, 63 Pac. 830, the court considered such an appeal; but the point in the latter case, considered on appeal, was simply whether or not the complaint was properly verified. The rule of stare decisis does not here control, as it is not unusual, but proper, in matters of practice, to establish a correct and legal practice, if an error has been committed ill-advisedly in a former opinion of this court, provided that it is apparent that no substantial injury will be suffered by litigants by reason of reliance upon the precedent. The court does not in Bennett Bros. Co. v. Congdon, supra, give any authority for its holding. It does not appear in that case that it acted upon anything more urgent than a suggestion of counsel, or that there was an argument upon, or serious consideration of, the point; and, further, it appears from an examination of the case that the "temporary restraining order" was in fact an injunction pendente lite, and not a mere restraining order pending a hearing upon an order to show cause why an injunction pendente lite should not issue as in the case at bar.

This court does not deem it improper to say that in reviewing this case it notices an abuse of the power of the court below in setting the order to show cause over so long a period of time. In the exercise of its extraordinary powers in cases, such as the one at bar, involving important interests and mining operations, which may suffer from interruption and delay, the court should grant a hearing at as early a date as practicable, and it is difficult to believe that such an order could not be heard within a reasonable time less than six weeks. To set an order to show cause why a temporary injunction should not issue for hearing on so distant a day, and granting a restraining order meanwhile, in a case like the one before us, indicates a want of deliberate con-

sideration of the defendant's rights. Days being 24 hours long, certainly a court, which is ordinarily occupied in trial of causes on the regular calendar only 5 hours in actual time per day, can find a few hours in which to grant a hearing on an order to show cause why important business concerns should not be suspended pending a suit which may last for a long time. To add to the danger of so long a postponement of the hearing, we notice that the restraining order was issued without a bond. We are not to be understood as saying that a bond should or should not have been required in case the restraining order had been set in operation for a short time only, but we do say that cases are exceptional where it would not be advisable to require a bond.

Section 1722 of the Code of Civil Procedure, as amended February 28, 1899, provides for appeal from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, but does not provide for appeal from an order granting or refusing a restraining order; and holding, as we do, that there is a distinction made in section 873 of the Code of Civil Procedure between an injunction and a restraining order, we have concluded that there is no appeal from an order granting or refusing a restraining order pending the hearing of an order to show cause why an injunction should not issue. It is not necessary, in view of the opinion expressed, to consider the point of the alleged want of proper verification to the complaint in the cause, and the further point that no bond was required. The petition for an order of supersedeas is denied. Denied.

BRANTLY, C. J., concurs.

PIGOTT, J. I dissent. I am of the opinion that a restraining order is a species of injunction order, and is an order from which an appeal lies by virtue of section 1722 of the Code of Civil Procedure as amended in 1899. I concur, however, in the remarks of the majority of the court touching the duty of district courts in the matter of restraining and injunction orders.

(7 Idaho, 490)

PARKE v. BOULWARE et al.

(Supreme Court of Idaho. Feb. 12, 1901.)

PLEADINGS — MATERIAL ALLEGATIONS — SUFFICIENCY OF EVIDENCE — INTRODUCTION OF EVIDENCE.

1. Under section 4217, Rev. St., every material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true.

2. Held, that the evidence is insufficient to sustain the special verdict of the jury and findings of fact made by the court.

3. The rejection of evidence not material to the issues is not error.

4. The admission of evidence, not material to the issues made by the pleadings, against the objection of the adverse party, is error.

5. The ownership of a ditch may be separate from any water right.

6. One may adopt as a part of his ditch a depression, slough, or high-water channel, and have his right to the possession and use thereof protected, the same as if such ditch had been wholly artificially made.

(Syllabus by the Court.)

Appeal from district court, Cassia county; C. O. Stockslager, Judge.

Action by William H. Parke against John B. Boulware and others to recover damages for tearing certain dams out of irrigating ditch and for an injunction. Judgment for defendants, and plaintiff appeals. Reversed.

Hawley & Puckett, for appellant. John C. Rogers, for respondents.

SULLIVAN, J. This suit was brought to recover damages for the destruction of certain dams belonging to the plaintiff, and to perpetually restrain the defendants from entering upon the land of the plaintiff and interfering with his dams and ditches. The answer is a denial of the material allegations of the complaint, and demands a dissolution of the temporary injunction then in force, that the complaint be dismissed, and for costs of suit. No affirmative relief is prayed for by the defendants. Certain questions were submitted to a jury, and the special verdict of the jury was adopted by the court upon the questions submitted to them, and the court supplemented the same by certain other findings of fact. Judgment and decree were entered dissolving the temporary restraining order therein issued, and directing plaintiff and defendants to put certain boxes and headgates upon all points in Cow creek where they, or either of them, proposed to divert water from said creek, and enjoining the plaintiff from placing solid dams in the channel of said creek, or in any manner interfering with the flow of the waters therein belonging to either of the defendants. And plaintiff is also enjoined from diverting any of the waters to which the defendants are entitled from the channel of said Cow creek for any purpose whatever, and from conducting said water into Cassia creek. The plaintiff is also adjudged to pay the costs of this suit. This appeal is from the judgment.

The first error relied upon is that question numbered 5 submitted to and answered by the jury, and adopted by the court as one of its findings of fact, is not authorized or warranted by the evidence. Said question and finding is as follows: "Was it necessary for plaintiff to have dams in the channel called 'Cow Creek' to properly irrigate his land? Answer. No; he should have head gates." It is contended that that question should not have been submitted to the jury, for the reason that plaintiff alleged in his complaint that it was necessary to put dams in said creek in order to get water on plaintiff's land; that the answer does not deny that

allegation, and hence must be considered and taken as true, under the provisions of section 4217, Rev. St., which declares that every material allegation of the complaint not controverted by the answers must, for the purpose of the action, be taken as true. And it is also contended that the evidence shows that dams were necessary. On an examination of the evidence we find that the witness Parke testified that, in order to throw the water out of said channel onto his land, it was necessary to put dams therein. Witness Charles Parke testified as follows: "In order to get water out onto Parke's meadow, it was necessary to build dams in these dry channels to throw it out." Witness E. Homer testified, "Mr. Parke cannot use his water on his meadow without putting dams in his ditch, and the dams are necessary for the purpose of watering his meadow," and also that the water would not run on his (plaintiff's) meadow, except in very high water, without dams. Witness D. H. Homer testified to the same effect. Defendant Boulware testified that he removed the dams from the place where he (plaintiff) throws the water into his lateral ditches, and he also testified that he had removed plaintiff's dams three times, and that thereafter the dams would have to be repaired before plaintiff could get water through his ditches. H. Caldwell, witness for defendants, testified that plaintiff could not put water out in his meadow without the use of dams, and in the ordinary season of the year that dams were necessary to force water out through the laterals onto plaintiff's meadow. A. V. Caldwell, witness for the defendants, testified as follows: "I don't think Mr. Parke could get water out of Cow creek without putting dams in it." John Dennis, a witness for defendants, testified as follows: "Mr. Parke could not get water out onto his meadow without putting in these dams, and they were necessary in order to irrigate his meadow, and without these dams his ditches and water rights would be useless." The evidence is all one way on the point under consideration. There is no conflict. It is all to the effect that such dams are necessary. The special findings of the jury and court that such dams are not necessary have no evidence whatever to support it, and the allegation of the complaint that said dams are necessary is admitted by the answer. It was error to find that it was not necessary for plaintiff to have dams in the channel called "Cow Creek" to properly irrigate his land.

It is contended that the seventh finding of fact is not authorized or warranted by the evidence, and that it flatly contradicts the first finding of fact. By the first finding the jury found, and the court adopted such finding as its own, that the plaintiff did construct a ditch from Cassia creek, which is called "Parke's Ditch," some time in 1879; and by the seventh question submitted to the jury it is found that said ditch was not an artificial channel,

but that the same was a natural channel. Witness King testified that he was acquainted with what is commonly called the slough on the Parke ranch; that it was only a high-water channel previous to 1879, and since then it has been used as a ditch, and that between 1879 and 1885 it was used continuously as an irrigating ditch; that witness and a man by name of Chase in 1879 cut a channel from Cassia creek to said slough, and turned water into it. Witnesses Charles Parke, Abercrombie, E. Homer, D. H. Homer, Chase, Pierce, Rice, Caldwell, and Scott all testified, in effect, that a ditch was cut from Cassia creek to said high-water channel, and that water was run through said ditch into said channel. The evidence shows that said channel was used by the plaintiff as a part of his ditch, which ditch and old channel formed what some of the witnesses called Parke's ditch. The finding of the court that the conduit described in the complaint as plaintiff's main ditch and described in the answer as Cow creek is not an artificial ditch, but that the same is a natural water channel, is not sustained by the evidence, as the evidence without any conflict shows that said ditch was artificial in part and a natural slough or channel in part.

That part of this opinion in regard to the seventh finding of fact applies to the eighth finding of fact, as the last-mentioned finding is a repetition of the seventh finding.

The ninth finding is to the effect that defendants conducted water through said channel (plaintiff's ditch), and used it in the irrigation of their land. While defendants may have run some water through said ditch and channel, the record shows that Parke never recognized their right to do so. The defendant John Boulware testified as follows: "Parke has never recognized my right to use water through that slough, and has acted as if I had no right." He also testified that his predecessor in interest located the Chase waste water, and that he took it out at the lower dam after it had run over Parke's dam. Witness King testified to the same effect, and that defendants never had any interest in the water diverted by himself and Chase through what is designated as Parke's ditch, consisting of the artificial channel and the slough called by some of the witnesses Cow creek, save the waste water that ran off the ranch. We have searched the record in vain for any evidence in support of that finding of fact. E. Homer, who was water master in that district, testified that he turned the defendants' water through plaintiff's headgate and ditch on one or two occasions, by plaintiff's special permission; that plaintiff objected to his doing so regularly, and for that reason he did not do so. For one season, at least, the defendants diverted their water through the old Billy Gwin ditch. That finding is not supported by the evidence.

The tenth finding, to the effect that respondents have used water through said channel since the year 1887, is not supported by the evidence, and the finding of the court that the

respondents have used said channel for the purpose of conducting water to and upon their lands from and since 1881 is not supported by the evidence.

We have very carefully examined the eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth special findings of the jury, adopted by the court, and all of the additional findings made by the court upon the material issues in the case, and are of the opinion that not one of said findings is supported by the evidence. All of the findings of fact proceed upon the theory that the ditch and high-water channel adopted and used by the appellant as his ditch was a running stream, and all of the evidence shows that it was not. It was a high-water channel, which, in its natural condition, carried water only during the high-water period of Cassia creek. That plaintiff's predecessors in interest dug a ditch connecting it with said Cassia creek, put a dam in Cassia creek, and by means of said dam and ditch threw water into said channel during the time that the water in Cassia creek was low, or at its normal stage. The evidence clearly shows that dams were required in said channel to throw water into appellant's lateral ditches leading from said channel. Respondent John Boulware testified as follows: "I have removed his [appellant's] dams three times, and that was the cause of this injunction. The dams would have to be repaired before Mr. Parke could get water through his ditches." The evidence shows that appellant had a prior water right to that of respondents, and, in order to utilize it, had put dams in the high-water channel that he had used as a part of his main ditch; that respondent had torn out such dams, and admits by the evidence above quoted that the dams, after he had torn them out, must be repaired before appellant could get water through his ditches. The only purpose of this suit was to recover damages for said unlawful acts of respondents, and to restrain them from again interfering with and tearing out his dams. The appellant had the prior right, had constructed his dams and ditches so as to utilize that right, and on that state of facts the respondents have no legal right to interfere in any manner with his dams or ditches. Much of the evidence shows that, if there is such a stream as Cow creek, it runs through the corner of appellant's land, and is not the slough or channel used by appellant as a part of his ditch. Appellant's land is above and up Cassia creek from respondents' land, and the water, after flowing over appellant's meadow, would naturally flow down towards respondents' land. The evidence also shows that appellant's ditch was composed partly of said high-water channel, which had been assessed to appellant and his predecessors since 1879, and that they have paid the taxes assessed thereon. The findings are uncertain and contradictory.

It is contended that the court erred in refusing to permit respondent John Boulware on cross-examination to testify whether he

could appropriate and divert his water in other ways than through plaintiff's ditch. That was not an issue in this case, and, even if he could not divert his water except through appellant's ditch, he could not appropriate or use said ditch for that purpose without the consent of appellant, or securing that right in some lawful manner. The rejection of the testimony offered on that point was not error.

The action of the court in allowing respondents to introduce in evidence the decree in the case of *Darby v. Jones*, showing the amount of water decreed to the parties to this suit, and allowing to be introduced in evidence that part of said decree relating to the appropriation of water by one Caldwell from said Cassia creek, is assigned as error. The amount of water appropriated from said creek by either the respondents or said Caldwell was immaterial, so far as the issues of this case are concerned, and it was error for the court to allow said decree to be put in evidence on the trial of this suit. The material allegations of the complaint denied by the answer are: (1) The ownership and use of the ditch and dams described in the complaint; (2) the cutting or destruction of said dams by the respondents; (3) the damage, if any, resulting to appellant from the cutting or removal of said dams by respondent; (4) and whether appellant is entitled to the injunction prayed for. So far as the issues made by the pleadings are concerned, it matters not whether the appellant owns any water right, as the law is well settled in this state that a ditch may be owned separately from a water right, and a water right separately from a ditch. If the appellant is the owner of the ditch and dams described in the complaint, the respondents have no legal right to interfere therewith in any manner, and have no right to run water through said ditch, except as hereinbefore stated, although a part of said ditch is composed of a slough or high-water channel.

In the oral argument of this case counsel for appellant contended that it was error for the court to submit this case to a jury, and that it had become quite prevalent in some districts of this state for courts to submit purely equitable causes to a jury. On an examination of the pleadings in this case we find it one for the recovery of damages alleged to result from the illegal acts of the respondents. The application for an injunction is auxiliary to the main case. This being primarily a law case, it was not error for the court to submit the question of damages to a jury. However, there seems to be a growing tendency in the trial courts of the state to submit divorce cases and purely equitable actions to a jury, in which the special verdict of the jury is only advisory to the court. We deplore this tendency, as it is creating a feeling that courts call juries in equity cases for the purpose of pla-

cing the responsibility on the jury, instead of the court accepting the full responsibility for the decisions in such cases.

For the reasons above stated, the court erred in not granting a new trial. The judgment of the trial court must be set aside, and the cause remanded, with instructions to grant a new trial; and it is so ordered. Costs of this appeal are awarded to the appellant.

QUARLES, C. J., concurs. STOCKSLAGER, J., took no part in the hearing or decision of this case.

(7 Idaho, 502)

MAYDOLE v. PETERSON et al.

(Supreme Court of Idaho. Feb. 18, 1901.)

PROMISSORY NOTE—CONSIDERATION—EVIDENCE—EXTENSION—EFFECT ON SURETY—ESCROW.

1. Where a promissory note is executed and delivered, and suit instituted in name of original payee, and defendant in his answer pleads want of consideration, alleging that deed to property had been placed in escrow by payee, to be delivered to the maker of the note on its payment, and also alleging that the payee had withdrawn said deed from escrow before commencing his suit, he should be permitted to prove such facts.

2. Where a note is signed as surety only, and suit is instituted by the payee of the note, and the surety in his answer sets up want of consideration, and an extension of time to the principal to pay for a valuable consideration without his knowledge or consent, and that the payee agreed to release such defendant from all liability, he should be permitted to prove such defense.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; Joseph O. Rich, Judge.

Action by M. H. Maydole against Adolph Peterson and Z. B. Yearian. Judgment for plaintiff. Defendants appeal. Reversed.

Redwine & Boyd, for appellants. W. T. Reeves and J. H. Hawley, for respondent.

STOCKSLAGER, J. The facts in this case, as disclosed by the record, are as follows: The plaintiff, Maydole, commenced his action, in the district court of the Fifth judicial district for Lemhi county, on a promissory note of date October 1, 1898. The complaint was filed April 26, 1900. On the 5th of May thereafter defendants filed separate demurrers. On the 15th of May said demurrers were overruled by the court then in session in said county, and on the 18th of May the defendant Yearian filed his answer. On the 19th the defendant Peterson also answered. The defendant Peterson in his answer denies that "no part of said note has been paid," and alleges that said note has been settled in full. Further alleges that said note was executed by the defendants under a mutual agreement with plaintiff that plaintiff would execute a deed conveying to defendant Peterson an undivided one-third interest in certain real estate situated in Gibbonsville,

Idaho, and place same in escrow with the Gibbonsville Mercantile Company, to be delivered to defendant Peterson upon payment of the sum of \$800, provided same was paid to the said Gibbonsville Mercantile Company by said Peterson on or before the 1st day of October, 1899, and if not so paid that said deed was to be returned to said plaintiff for cancellation, and said note was to be returned to said defendants for cancellation; that said plaintiff placed said deed in escrow as agreed, and that the defendant Peterson failed to pay said \$800 to said company; that the payment of said note was optional with the defendants; that afterwards, to wit, on or about the 15th day of February, 1900, said plaintiff took said deed from the possession of said company, and now has same in his possession, and owns all of said property, and is in possession of the same; that this was the only consideration for the note; that defendant Peterson executed the note as principal, and defendant Yearian as surety only. Defendant Yearian, answering, denies that he executed the note on the 1st of October, 1898, but says it was executed by him on the 21st day of January, 1899, as surety merely, receiving no consideration whatever, which fact was well known by all the parties to this suit. The answer then sets up the escrow contract in much the same language as the answer of defendant Peterson. For a third defense this defendant alleges, on information and belief, that about the 15th day of February, 1900, the plaintiff and defendant Peterson entered into an agreement by the terms of which plaintiff agreed to and with said Peterson, and without the knowledge or consent of this defendant, to extend the time of payment of said note to April 1, 1900, and that defendant Peterson paid to said plaintiff a valuable consideration therefor, and that this defendant was by the terms of said agreement to be released from all obligations on said note. The record discloses the fact that on May 22d the case went to trial with a jury on the pleadings as above stated. On the same day a verdict was rendered in favor of the plaintiff, and against the defendants, for the sum of \$895, and a judgment was signed by the district judge, and filed by the clerk of that date. The plaintiff introduced his note in evidence, and rested his case. Whereupon the defendants moved for a nonsuit, and, before a ruling of the court was had, plaintiff's counsel asked permission to call the plaintiff as a witness in his own behalf, who testified that no part of the principal of the note had been paid, but that the interest was paid to the 1st day of February, 1900. No light is thrown on the transaction by the cross-examination of this witness, and plaintiff here rested his case. Defendants' counsel called defendant Peterson, who testified he was one of the defendants, and resided at Gibbonsville, and was in the mercantile business. The note

was executed October 1, 1898. "Q. When did the defendant Yearian sign the note? (To which counsel for plaintiff objected as being wholly immaterial. Objection was sustained, and ruling excepted to by defendants.) Q. When did you sign the note? (Same objection and same ruling, with exception.) Q. Explain, Mr. Peterson, what the consideration of this note was. A. I was to purchase one-third interest in butcher business at Gibbonsville at the time we executed this note. Mr. Maydole agreed." Counsel for plaintiff objected to what was agreed, but the record does not disclose a ruling by the court. Witness, continuing: "I signed the note, I believe, on the 1st day of October. The consideration was to be one-third interest in the butcher business; that's all. Q. Did you receive a deed for that? (Objected to as being immaterial. Objection sustained, followed by an exception.) Q. Was there another consideration for this note? (Counsel for plaintiff objected. Sustained. Exception.)" Witness, continuing, said there was an agreement afterwards about the deed to the property, about February 15th. "Q. Was there an agreement made in January, 1899, in regard to that? A. I don't think there was. Yes; I believe there was an agreement made at the time Mr. Yearian signed the note. Q. Mr. Yearian signed the note in January? (Objected to. Sustained. Exception.) Q. Mr. Peterson, you may state what that agreement was in January that you went into. (Counsel for plaintiff objected, alleging as his reasons that it was foreign to the contract sued on in this case and not relevant to it. Objection sustained. Exception.) Q. Was there an agreement made on or about the 21st of January, 1899, in regard to placing a deed in escrow with the Gibbonsville Mercantile Co. or other parties for the consideration of this note? (Objected to. Sustained. Exception.) Q. Was there a deed placed in escrow in January, 1899, for this property for which the note was executed? (Objected to for the reason that it occurred long after the execution of the note. Objection sustained. Exception.) Q. Was there an agreement made between you, Mr. Yearian, and Mr. Maydole as to how this note was to be paid at any time? (Objected to as being immaterial, changing and varying the terms of a written contract. Objection sustained. Exception.)" Then counsel for defendants offered to prove by this witness that this note was executed without consideration, and no consideration passed to either defendant from the plaintiff. Counsel for plaintiff objected to the offer. Sustained, and exception. "Q. Has this property for which this note was executed ever been transferred to you, or has Maydole ever offered to execute you a deed? (Objected to as being immaterial. Objection sustained, and exception.)" Then defendant Yearian was called as a witness for defendants, and, with the exception of telling where he resided,

he was not permitted to answer any questions propounded to him by counsel for defendants, all questions being objected to by counsel for plaintiff, which was sustained by the court, and excepted to at the time by defendants. Counsel for defendants offered to prove by this witness that the note at the time it was signed by him as surety, on the 21st day of January, 1899, had the following statement in writing on the envelope, and the deed in the envelope to be placed in escrow: "Gibbonsville, Jany. 21st, 1899. Gibbonsville Mercantile Co. will deliver the within deed to Adolph Peterson upon the payment of eight hundred dollars (\$800.00) lawful money of the United States of America. If the money is not paid by October 1st, 1899, the within deed is to be given to M. H. Maydole." Counsel for plaintiff objected, alleging as his reasons that it is a matter that arose afterwards, and is not signed by any one, and as being wholly immaterial. Objection sustained, and exception. Counsel for defendants further proposed to show by this witness that the deed to this property for which the note was executed was placed in escrow as per agreement, and that it was afterwards taken out of escrow, and has since that time been in the possession of the payee of the note (plaintiff here); that neither of the defendants have received any consideration whatever for the execution of the note; that the payee (plaintiff) is still in possession, and holds title to the property for which the deed was executed and the deed to the property at this time. Counsel for plaintiff objected for the reason it was immaterial. Objection sustained. Exception. Evidence closed. Counsel for plaintiff asked the court to instruct the jury to find for the plaintiff amount due on the note, and \$75 attorney's fee, which was done, and verdict accordingly. We have set out all the facts, and practically all the testimony given and offered on behalf of the defendants, and rejected by the court on objections by counsel for the plaintiff.

Defendants rely upon four errors of the trial court: (1) In refusing to allow the defendant Peterson to prove a want of consideration; (2) in refusing to allow the defendant Yearian to prove want of consideration; (3) in refusing to allow Yearian to prove that he signed the note as surety, and that an extension of time had been granted the principal without his knowledge or consent; (4) in refusing the offer of defendant Yearian to prove that he signed the note as surety, and that an agreement had been made between plaintiff and defendant Peterson whereby defendant Yearian was released from all obligations under the note.

Counsel for respondent contends that the answers of the defendants are insufficient to raise the issue of a lack of consideration, and the trial court seems to have accepted this theory, as shown by his rulings on the evidence sought to be introduced by the defend-

ants relative to this issue. We cannot agree with this contention. It occurs to us that the answer of Peterson sufficiently raises the issue to justify the court in submitting the fact to the jury for their consideration and decision. We are also of the opinion that the court should have permitted the defendant Yearian to show that he signed the note only as a surety, and that an agreement had been made between plaintiff and defendant Peterson whereby defendant Yearian was to be released from all obligations under the note. In effect, the defendants should be permitted to prove all the allegations of their answers. See *Bank v. Cecil* (Or.) 32 Pac. 393; *Bensen v. Phipps*, 87 Tex. 578, 29 S. W. 1061; *Gillett v. Taylor* (Utah) 46 Pac. 1009; *Smith v. Freyler* (Mont.) 1 Pac. 214; *Tuohy v. Woods* (Cal.) 55 Pac. 683. For the reasons above set forth this action is reversed, and the cause remanded for a new trial, with costs for appellants.

QUARLES, C. J., and SULLIVAN, J., concur.

(40 Or. 305)

NOSLER v. COOS BAY, R. & E. R. & NAV. CO.

(Supreme Court of Oregon. March 11, 1901.)
APPEAL—BILL OF EXCEPTIONS—STENOGRAPHER'S MINUTES—TRANSCRIPT—IDENTIFICATION OF TRANSCRIPT.

1. A transcript of the stenographer's minutes of the trial of an action of law is no part of the record, unless made so by the bill of exceptions.

2. A bill of exceptions reciting the making of a transcript of the proceedings in a law action by the official stenographer, and its examination and approval, and containing an order by the trial court that such transcript be made a part of the bill of exceptions, and ordering the clerk to attach a copy thereto, does not make the transcript so attached thereto a part of the bill, since such minutes cannot be made to constitute a bill of exceptions by the mere identification by the trial judge.

3. Under Hill's Ann. Laws, § 232, prohibiting a bill of exceptions from setting out more of the evidence or other matter than necessary to explain the objections, the insertion of the entire transcript of the stenographer's minutes in a bill of exceptions in a law case, without setting out any objections or exceptions and so much of the evidence necessary to explain them, does not make the transcript a part of the bill.

4. Where the question sought to be presented on appeal can only be made to appear by bill of exceptions containing evidence, the judgment will be affirmed on sustaining a motion to strike out the transcript as not properly included in the bill.

Appeal from circuit court, Coös county.

Action by J. T. Nosler, administrator of the estate of Matilda E. Nosler, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

E. B. Watson, for the motion. S. H. Hazard, opposed.

PER CURIAM. This is a motion to strike from the files what purports to be a tran-

script of the stenographer's notes of the proceedings had at the trial in the court below from the impaneling of the jury to the rendition of their verdict, which covers 326 pages of the printed abstract, and is designated as "Transcript of Trial," for the reason that it is not properly a part of the record. A transcript of the stenographer's notes of the trial of an action at law is no part of the record on an appeal to this court, unless made so by a bill of exceptions. *McQuaid v. Railroad Co.*, 19 Or. 535, 25 Pac. 26; *Reynolds v. Jackson Co.*, 33 Or. 422, 53 Pac. 1072. Now, the bill of exceptions in this case simply recites the appointment of the stenographer, the fact that he took down in shorthand all the evidence given, offered, and received on the trial, all exceptions and objections made by the attorneys for the parties during the course of the trial, and the instructions of the court, and other proceedings connected therewith; that he transcribed his notes into longhand in due form, and entitled the same "Transcript of Trial," and certified and filed it with the clerk. Then follows an order of the court "that said transcript of trial, so made by said W. U. Douglas, and so filed in said court, be, and the same hereby is, made a part of this bill of exceptions, the same as if it were copied therein; and the clerk of this court is hereby ordered and directed, in making a transcript of this action for appeal to the supreme court, to make a copy of said transcript of trial so made by W. U. Douglas, and to attach the same to this bill of exceptions as a part thereof." It then proceeds to recite that "such transcript of trial has been examined and approved as correct, except as hereinafter changed or modified." Then follows a reference by pages and questions to certain matters that occurred during the trial, and certain explanations are made in reference thereto, but the bill does not contain, or purport to contain, the statement of any objection or exception, "with so much of the evidence or other matter as is necessary to explain it," as required by section 232, Hill's Ann. Laws. In *Roberts v. Parrish*, 17 Or. 583, 22 Pac. 136, it was held that, although a bill of exceptions recited that a certain deposition was made a part thereof, it was insufficient to present for consideration any alleged errors relating to matters contained in such deposition. The court, speaking through Mr. Justice Strahan, said: "To become a part of the record, it [the deposition] must be either copied into the bill of exceptions, or attached to the same as an exhibit, and marked so that the same may be identified. * * * What is claimed to be the deposition of the plaintiff in this case is not even attached to the bill of exceptions, but is copied, and sent up with a large mass of other useless matter. We cannot, therefore, determine whether the answers to those questions were prejudicial to the appellant or not." This decision would seem to be controlling, so far as the present motion is concerned.

In the case at bar, the transcript of the trial was copied, and sent up by the clerk, but it was not embodied in or attached to the bill of exceptions at the time it was signed. Under the statute and practice in some jurisdictions, an authentication by the trial judge of the transcript of the stenographer's notes, with a direction by him that it shall be considered a part of the bill of exceptions, is sufficient to make it so. 3 Enc. Pl. & Prac. 436. But such has never been the practice in this state, nor is it authorized by the statute. The reporter's notes contain material for, but do not constitute, a bill of exceptions; nor can they be made such by any certificate of identification the trial judge might make. And, even if what purports to be a transcript of the stenographer's notes had been copied into the bill of exceptions, or attached thereto, and made a part thereof, it would still not conform to the requirements of the statute. Section 230 defines an exception, and section 231 points out the method of making the same a part of the record so as to present a question for review in this court; and we have repeatedly held that these provisions of the statute must be observed, and have refused to search through a mere transcription of the shorthand notes of the trial for the purpose of ascertaining whether it showed error or not. The court has spoken so often on this question that we need do nothing more at this time than refer to the decisions. *Jane-way v. Holston*, 19 Or. 97, 23 Pac. 850; *Eaton v. Navigation Co.*, 22 Or. 497, 30 Pac. 311; *O'Connor v. Van Hoy*, 29 Or. 505, 45 Pac. 762; *Reynolds v. Jackson Co.*, 33 Or. 422, 53 Pac. 1072; *MacMahon v. Duffy*, 36 Or. 150, 59 Pac. 184. So that we conclude the motion in this case is well taken, and, as the questions sought to be presented on the appeal can only be made to appear by a bill of exceptions, the motion will be treated as for an affirmance, and the judgment will be affirmed accordingly. *Fisher v. Kelly*, 28 Or. 249, 38 Pac. 67.

(33 Or. 533)

CITY OF PORTLAND v. GASTON.

(Supreme Court of Oregon. March 11, 1901.)

MUNICIPAL CORPORATIONS—STREETS—DAMAGES—AWARD—APPEAL.

Under Sess. Laws 1898, p. 146, §§ 112-114, providing that an owner whose property has been condemned for use as a street may appeal from the action of the council as to the amount of damages awarded to the circuit court, and that its decision shall be a final and conclusive determination of such assessment, no appeal lies from the circuit to the supreme court, since an appeal is not a matter of common right, but may be regulated and restricted by legislative action.

Appeal from circuit court, Multnomah county.

Action by the city of Portland against Mary W. Gaston. From a judgment awarding damages, defendant appeals. Motion to dismiss. Granted.

D. Solis Cohen, for the motion. Seneca Smith, opposed.

BEAN, C. J. This is a motion to dismiss an appeal from the judgment of the circuit court rendered on an appeal from the action of the common council of the city of Portland in the matter of the assessment of damages suffered by the defendant in consequence of the laying out and establishment of Main street through her premises. The charter of the city (Sess. Laws 1898, p. 146), after conferring upon the council power and authority to establish and open streets, and prescribing in detail the method of procedure, provides that the owner or owners of any lot or part thereof sought to be appropriated may, within 20 days from the adoption of the report of the viewers by the council, appeal to the circuit court of Multnomah county from such report and assessment of damages, limiting the inquiry, however, on such appeal, to the question of "the excess of damages over benefits" (sections 112, 113), and that such appeal shall be conducted, heard, and determined in the circuit court, and the judgment thereon enforced, as far as practicable, as in an action at law. It is also provided that the jury shall view the property to be appropriated, that proof of damages and benefits may be introduced by the parties to the litigation, and in making the reassessment the jury shall be governed by the same laws as in the charter provided for the action of viewers, and that their verdict "shall be a final and conclusive determination of such assessment." Section 114. Section 117 directs that, in case of an appeal to the circuit court from the assessment of damages, the council shall, immediately after judgment is rendered therein, make an appropriation for the amount of damages and costs, if any, assessed by the jury against the city, and order warrants drawn on the treasurer, payable out of the fund provided for that purpose, for the amount thereof, in favor of the owner or owners of such property, and "that unless said appropriation shall be made and said warrants so drawn and ready for delivery, and the full amount of such appropriation shall be in the city treasury subject to the payment of such warrants * * * within six months from the date of the rendition of judgment or decree on appeal, all acts and proceedings under such survey and view shall be null and void." The contention for the city is that, under these provisions of the charter, no appeal will lie to this court from the judgment of the circuit court in the matter of the assessment of damages for the opening or laying out of a street, and this view we think is supported by the authorities. An appeal in an action at law, it is true, under our system, partakes somewhat of the nature of a writ of error, which in most cases was a matter of right at common law; but with us it depends wholly upon statutes granting that right, and not upon

any principle of the common law. The right of a litigant to prosecute an appeal or writ of error is a matter pertaining to the mode of judicial procedure, and is not guaranteed by our constitution. The provision (article 7, par. 6) that this court shall have jurisdiction to revise the final decisions of the circuit courts is not self-executing, and does not mean that all decisions of such courts may be brought here for revision, in the absence of a prescribed method by which jurisdiction may be obtained. The legislature has the power to define in what cases, and under what circumstances, and in what manner, an appeal may be taken to this court. *Western American Co. v. St. Ann Co.* (Wash.) 60 Pac. 158; *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795. In the absence of a legislative enactment to the contrary, it is probable that an appeal will lie from the judgments or decrees of the circuit court, under Hill's Ann. Laws Or. § 535. But, when the legislature has prescribed rules of procedure in special proceedings, such rules must be followed, and, if they limit the right of appeal or specify the court or tribunal in which such proceedings shall terminate, they must govern. *Simon v. Common Council*, 9 Or. 437. Now, in this instance, the legislature has, by the charter of the city of Portland, provided a special proceeding for establishing and opening streets and assessing damages to the property owners therefor. It has given to a dissatisfied landowner the right to appeal to the circuit court from the assessment of damages alone, and has provided, in effect, that the judgment of such court on that question shall be final and conclusive.

The clear meaning, it seems to us, of the several provisions of the charter, is that the legislature intended that litigation over the opening of a street, so far as the question of damages to the property owner is concerned, should terminate in the circuit court. The language of the charter, confining the inquiry in such court to that question, and making the verdict of the jury a final and conclusive determination of such assessment, and the requirement that an appropriation should be made, and a warrant issued, and the full amount necessary for its payment be in the city treasury, within six months after the rendition of a judgment thereon, otherwise the proceedings shall be null and void, would be senseless if not construed to make such proceedings final. It is not perceived how any effect can be given to these provisions of the charter unless it be to take away and prevent any further appeal or review in the matter of the assessment of damages. They must have been inserted by the legislature for some purpose, and the court cannot treat them as redundant and without meaning. We can reach no satisfactory conclusion other than that they were designed and intended to confine a dissatisfied land owner to a new trial of the question of damages and benefits by the circuit court. The wisdom of such

legislation rests upon questions of public policy, and is for the legislative department to determine, and the courts must abide by its determination.

The conclusion reached is supported by numerous authorities, construing similar statutes, governing proceedings in courts of general jurisdiction. 1 Dill. Mun. Corp. (4th Ed.) § 440; *Appeal of Houghton*, 42 Cal. 35; *McAllister v. Plank-Road Co.*, 10 N. Y. 353; *Railroad Co. v. Marvin*, 11 N. Y. 276; *In re Canal & Walker Sts.*, 12 N. Y. 406; *People v. Betts*, 55 N. Y. 600; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929; *Dismukes v. Stokes*, 41 Miss. 430. It follows that the appeal must be dismissed; and it is so ordered.

(38 Or. 232)

**GERMAN SAVINGS & LOAN SOC. v.
KERN et al.**

(Supreme Court of Oregon. March 11, 1901.)

MORTGAGE — FORECLOSURE — DEFICIENCY — PERSONAL JUDGMENT — DECREE — UNDERTAKING ON APPEAL — SURETY — LIABILITY — USE AND OCCUPATION — REASONABLE VALUE.

1. Under a statute providing that, to stay proceedings on appeal from a decree in foreclosure, a bond shall be given, conditioned to pay the value of the use and occupation of the premises, not exceeding a certain sum, a surety on such bond is not liable absolutely for the amount named in the bond, but for the reasonable value of such use and occupation, not exceeding the amount named.

2. Where, on an appeal from a decree in foreclosure, a bond is given, conditioned to pay the value of the use and occupation of the premises, the court, in rendering judgment on the appeal, will not give judgment as to the amount due on the bond, when the record shows nothing as to the reasonable value of the use and occupation, but will leave the mortgagee to his remedy by suit on the bond.

3. Under Hill's Ann. Laws, § 414, providing that if, on the foreclosure of a mortgage, it shall appear that a personal obligation has been given to secure the debt, in addition to the mortgage, the court shall decree a recovery of the amount of the debt, as in an ordinary decree for the recovery of money, and section 417, requiring such decree to be enforced first by sale of the property adjudged to be sold, and then, if the proceeds are insufficient, by execution, a decree foreclosing a mortgage, and also against the mortgagor for the amount of the debt secured thereby, is one entire decree, so that a surety on an appeal bond conditioned to pay the amount of the deficiency is liable for such deficiency, though the decree of foreclosure has been executed by sale of the property prior to the giving of the bond.

Motions by plaintiff and the Fidelity & Deposit Company, as surety on defendants' undertaking on appeal, to recall mandate and amend decree. Denied.

For former opinion, see 62 Pac. 788.

Milton W. Smith, for respondent. R. G. Morrow, for surety.

BEAN, C. J. On May 6, 1898, the plaintiff obtained a decree in a suit to foreclose a mortgage against the defendants Kern for some \$57,000, besides costs and disbursements. On June 17th the mortgaged prop-

erty was sold to the plaintiff, upon execution issued on the decree, for several thousand dollars less than the amount due thereon. The sale was confirmed on July 12th, and on September 6th the defendants appealed from the decree foreclosing the mortgage, and on such appeal gave an undertaking, with the Fidelity & Deposit Company as surety, conditioned that "the appellants will pay all damages, costs, and disbursements which may be awarded against them on appeal, and, further, that, during the possession by said appellants of the said mortgaged premises so decreed to be sold, they will not commit or suffer to be committed any waste thereon, and if such decree, or any part thereof, be affirmed, will pay the value of the use and occupation of said premises, so far as affirmed, from the time of the appeal, until the delivery of the possession thereof, not exceeding the sum of \$2,000, fixed and ascertained by the said court; also that said appellants will pay any portion of such decree remaining unsatisfied after the sale of the said premises covered by the said mortgage, or which now remains, after the sale of the said premises, which has already been had, and in case the same is not set aside." The decree was in all things affirmed by this court (*Loan Society v. Kern*, 62 Pac. 788), and a decree entered here that the plaintiff recover of the defendants and their surety its costs and disbursements in this court allowed and taxed, together with the deficiency remaining unpaid after the application of the proceeds of the sale of the mortgaged premises. The plaintiff now moves to recall the mandate, and that the decree be amended so as to include the sum of \$2,000 for the use and occupation of the premises by the appellants pending the appeal; and the surety also moves that the mandate be recalled, and the decree amended by striking out the portion thereof charging it with such deficiency.

The statute touching undertakings on appeal from a decree foreclosing a lien does not provide or contemplate that the value of the use and occupation of the premises shall be fixed in advance by the trial judge. The provision is that, in order to stay the proceedings, the appellant must give an undertaking, with one or more sureties, conditioned, among other things, that if the decree, or any part thereof, be affirmed, he will pay the value of the use and occupation of the property, so far as affirmed, from the time of the appeal until the delivery of possession, not exceeding a sum therein specified, to be ascertained and fixed by the court or judge thereof. A surety on such undertaking is liable for the reasonable value of the use and occupation of the premises, not exceeding the amount specified; but it is manifestly not intended that he should be liable for the face of the undertaking, without regard to such value. As there is nothing in the record from which we can ascer-

tain the liability of the surety under this provision of the bond, even if it be conceded that it is valid under the facts of this case, and that we have jurisdiction to do so upon a proper showing, the motion must be denied, and the plaintiff left to its remedy at law upon the bond, if it desires to pursue the matter further.

The motion of the surety is based upon the contention that, since the decree adjudging the sale of the mortgaged property had been executed prior to the appeal, and nothing but the deficiency judgment remained, the execution was not stayed by the undertaking given, and therefore the provision covering the deficiency was invalid for want of consideration. The argument seems to be that a suit to foreclose a mortgage, in which a personal decree is rendered against the mortgagor for the amount of the debt secured thereby, is dual in its character (that is, there is a decree for money, and also for the sale of the mortgaged premises), and that the plaintiff has the right and may elect to enforce the decree for money by an ordinary execution, without reference to the other directions therein, or he may proceed to sell the mortgaged premises as provided in the decree, and that, if a defendant desires to stay the execution for the deficiency remaining after such sale, he must embody in his undertaking on appeal the provision required by subdivision 1 of section 538, Hill's Ann. Laws Or. Our statute provides that, in a suit to foreclose a mortgage, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor, the court shall also decree a recovery of the amount of such debt, as in case of an ordinary decree for the recovery of money. *Id.* § 414. But it is also provided that such decree must be enforced first by a sale of the property adjudged to be sold; then, if the proceeds thereof should be insufficient, the decree, as to the sum remaining unsatisfied, may be enforced by an execution, as in ordinary cases. *Id.* § 417. A decree foreclosing a mortgage, and also against the mortgagor for the amount of the debt secured thereby, is therefore one entire decree; and under the statute there is but one way provided for staying an execution thereon, and that is by an undertaking, as required by subdivisions 2 and 4 of section 538, *supra*. And, so far as the surety's liability under subdivision 4 is concerned, it is of no consequence whether the decree has been partially executed or not. In either event he becomes liable for any deficiency that may remain after the application of the proceeds of the sale of the property upon which the lien is foreclosed. The appeal, although taken after a sale of the mortgaged property, is not from a decree for money, as provided in subdivision 1 of the section, but from the whole decree, and the

only method of staying an execution for the deficiency is by giving an undertaking containing the provision required by subdivision 4. The case of *Englund v. Lewis*, 25 Cal. 337, upon which the surety principally relies, is not in point, because it was necessary, under the statutes of that state, where it was desired to stay proceedings as to the whole judgment in a suit foreclosing a mortgage, for the appellant to give a bond for costs for double the amount of the personal judgment and for waste and deficiency, all of which might be included in one instrument or several, at the option of the appellant. But we have no such statute, and hence the decision is not applicable here. The motions to recall the mandate are therefore both denied.

(9 Wyo. 368)

BOARD OF COM'RS OF SHERIDAN COUNTY v. HANNA.

(Supreme Court of Wyoming. March 12, 1901.)

APPEAL—DISMISSAL—OPPOSITION OF ATTORNEYS.

A judgment was obtained in an action against a county, and the latter employed attorneys to assist the county attorney on appeal, a certain fee to be paid them in case the judgment was reversed. Thereafter, a new county attorney having been elected, he filed a motion waiving all errors and dismissing the appeal under directions of the county commissioners. The county commissioners passed a resolution wherein they expressed a willingness to pay such attorneys for their services on appeal, and notified them of their discharge. The action was on claims against the county found in the trial court to be just. *Held* that, as the employment of the attorneys was for the purpose of assisting the prosecuting attorney, and there was no evidence that such attorney was acting fraudulently, the control of the case would not be taken from him, and given to those employed to assist him, but the appeal would be dismissed on his motion.

Error to district court, Sheridan county; Joseph L. Stotts, Judge.

Action by C. P. Hanna against the board of county commissioners of the county of Sheridan. Judgment for plaintiff. Defendant brings error. Dismissed.

J. F. Hoop, Co. Atty., and W. S. Metz, for plaintiff in error. Appelget & Mullen, for defendant in error.

POTTER, C. J. Defendant in error having recovered a judgment in this cause in the district court against the plaintiff in error the latter, by an order of the board regularly entered, directed that an appeal be taken and employed Appelget & Mullen to assist the county attorney in taking the appeal and prosecuting the same in this court. Said firm of attorneys had, under a similar employment, represented the county in the trial court, and were paid for those services. The order of the board, as entered, providing for their employment to assist in this court, fixed their fee at \$100, to be paid upon the disposition of the cause in this court, accord-

ing to a written agreement between the board and said attorneys. By the affidavits of said attorneys, filed herein, it is stated that said fee was to be paid only in case the judgment was reversed; and, if unreversed, they were to be refunded the expense of preparing briefs. When the cause was tried below, Charles Lenwood was county attorney, and as the case came here said Lenwood, as county attorney, and Appelget & Mullen, were named as attorneys of record for plaintiff in error, and as such they had filed briefs herein upon the merits of the cause. On the 9th day of January of the present year, J. F. Hoop, as county attorney, filed a motion waiving all error and dismissing the appeal. Accompanying the motion was filed a certified copy of an order of the board of commissioners, made and entered January 7th, directing the county and prosecuting attorney to dismiss this appeal. The same resolution directed said county attorney to notify Appelget & Mullen that their services were no longer required. The latter are here resisting the motion. They contest the validity of the order aforesaid, and a subsequent one, to be referred to later, on discharging them from the case, and the validity of the orders of the board directing a dismissal of the error proceedings.

The matter was brought to the court's attention verbally, but not submitted, early in January, and shortly after the filing of the motion to dismiss; and we then intimated that, so far as the matter should be found to be within the power of the court, attorneys of record would be reasonably protected from unwarranted discharge in the absence of a settlement with them. The attorneys opposing the motion of the county attorney then stated that the material objection to the action of the board was that it was had by the votes of two members only of the board, while the other member voted against it; and that one of the members voting to dispense with the services of said attorneys and to dismiss the appeal was interested adversely to the county in the judgment. The matter was set for hearing, and has been submitted upon affidavits and briefs. The defendant in error does not oppose a dismissal. Upon the facts, therefore, as disclosed by the papers before us, the question is whether the proceedings should be dismissed, notwithstanding the objection of said attorneys. Two resolutions of the board appear to have been entered on the same date,—January 7, 1901. That which we suppose to have been the first one in point of time referred to an agreement with Appelget & Mullen to assist the county attorney in appealing this case and prosecuting the same in the supreme court, and fixed their compensation at the sum of \$100, to be paid, according to the agreement previously made, when the cause should be disposed of in this court. The other resolution provided for dispensing with the services of said attorneys, and directed

a dismissal of the appeal by the county attorney. It is fair to assume that the first resolution was adopted by the board as formerly constituted, and the other by the board as composed of the newly-elected members. The first order referred, as stated above, to a previous employment under a written agreement, and that there had been an omission to record the fact in the journal of the board. The opponents of the motion to dismiss submit certain affidavits, and, among other things, it is shown that one Skinner, a member of the present board, who voted on January 7th to direct a dismissal of the appeal, stated at the time that he was one of the interested parties in the case, but believed he would have voted the same way if he were not. On February 6th it appears that another resolution was adopted by the board, said Skinner and one other member voting for its adoption, and the third member recording his vote in the negative. That resolution covers the ground of the second order of January 7th, but goes somewhat further. It is as follows: "Whereas, Appelget & Mullen have performed certain services for Sheridan county in that certain action now pending in the supreme court of Wyoming wherein the board of the county commissioners of Sheridan county, Wyoming, are plaintiff in error, and O. P. Hanna is defendant in error, which said firm has been notified that their employment has been terminated; and whereas, said firm have signified their unwillingness to be discharged until they have been paid for their services therein: The said firm of Appelget & Mullen are hereby notified that the board of county commissioners of said Sheridan county, Wyoming, are ready and willing to pay them for their services at any time the said firm may present their claim for their fees therein, and they are hereby notified that their services are no longer required in said cause, and J. F. Hoop, county attorney, is hereby directed to file in the district court of Sheridan county and in the supreme court a waiver of errors, and to dismiss the appeal of said cause. The clerk of this board is directed to notify said Appelget & Mullen of this action of the board." Following the adoption of said last-mentioned resolution, it appears that the county attorney filed in the district court a waiver of all errors in the cause. On behalf of the board, on its motion to dismiss, an affidavit of Charles W. Skinner is submitted, who, after stating his official connection with the board, swears that at the time of the passage of the resolution of February 6th he had no interest, directly or indirectly, in this cause, or in any claim or claims therein involved, and no interest in the litigation, except as a member of the board of county commissioners. He further swears that he knows of his own knowledge that the claim represented by the judgment was just and meritorious, and the county had received great value in considera-

tion thereof, and that in justice and honesty the same should be paid; and for those reasons he voted for the resolution. This affidavit stands before us uncontradicted. It should be explained that the record of the cause discloses that the suit was brought against the county upon several causes of action for goods sold and labor performed in connection with the construction of a certain road and public highway in Sheridan county. The petition alleged an assignment of each claim to the defendant in error, except one claim, due directly to him, before commencement of suit, for value; and the court found that they had each been so assigned. One of those claims in suit had been originally held by said Skinner. Whether it is competent for the attorneys of the board to question the qualification of a member to vote upon the matter in the manner attempted here we do not decide. But, assuming that it may be, we think that, as against the attorneys, who upon this motion represent merely their own interests, the order of the board directing a dismissal must be treated as valid and effectual, in view of the absolute denial under oath by Mr. Skinner of any personal interest in the subject of the controversy, and the fact that in the trial court the claims sued on were found to be just and valid claims against the county; and in consideration of the additional fact that the county attorney, a public officer, upon whom, by statute, rests the duty of appearing for the board, recognizes the order, and is willing to and does act upon it. The right of a client to discharge his attorney at any time, with or without cause, is well settled; but the client will not be permitted to discharge his attorney without cause unless he first pays or secures the attorney's fees and charges. Mechem, Ag. § 856; 3 Am. & Eng. Enc. Law (2d Ed.) 409. We think it clear that the last resolution of the board fully secures the payment of the fees of counsel; and, in our judgment, the objection is not well taken that counsel are unable to verify the claim as required by statute. They contend that, as their compensation was to depend upon a reversal of the judgment, the case must be prosecuted to final conclusion upon the merits to ascertain whether anything will be due them or not. The rule is so plain in analogy to other cases of employment that if, by act of the client, counsel are, against their consent, prevented from obtaining a decision upon the merits, as provided by the terms of their employment, the client cannot refuse to pay the agreed compensation, that we deem much discussion thereof unnecessary. 3 Am. & Eng. Enc. Law (2d Ed.) 425, 426. See Watertown Nat. Bank v. Holabird School Tp., 2 S. D. 224, 49 N. W. 98. In that case it was said, upon a similar contention, "But a complete answer to such claim is that the appellant township could not, by dismissal of the appeal against the consent and protest of their attorneys,

change such attorneys' relation to or rights under their contract;" and a dismissal was granted over the protest of some of the attorneys for the appellant. One of the appellant's attorneys had stipulated for the dismissal. In the absence of intervening rights of attorney or other person, a client has the right to control the disposition of his case, even contrary to the wish or judgment of his attorney. An attorney has no right to prevent a discontinuance merely because he deems it unwise, and detrimental to the client's interest. If the client directs a dismissal, it is the act of the party, and not of counsel. The party is the principal; and the attorney represents the principal, and his duty is to advise and assist, rather than dictate and override the wishes of, his principal. If the party insists upon dismissal, and asks the court to dismiss his action, if the adversary does not object, and he has otherwise a right to dismiss, his attorney, if he has no vested interest in the subject of the controversy, should not be permitted to prevent it. *Dolloff v. Curran*, 59 Wis. 332, 18 N. W. 266; *Stephens v. Railway Co.*, 10 Lea, 448; *Roberts v. Doty*, 31 Hun, 128; *Theilman v. Superior Court*, 95 Cal. 224, 30 Pac. 193. Now, in this case it seems that one of the attorneys of record, who appeared as, and because he was, county and prosecuting attorney, has been superseded in office by another. The order of the board names Mr. J. F. Hoop as the county attorney. It is not disputed that Mr. Hoop is in fact the regularly elected and qualified county attorney. As such the statute not only invests him with authority to appear for the board, but casts that duty upon him. We have no statutory provisions governing the method of substituting attorneys of record. Such matters, we feel safe in saying, have been conducted in our courts rather informally. Generally, of course, there arises no dispute, and formality has not seemed essential in such cases. Doubtless, there should ordinarily, in the event of a change of attorneys, be entered an order of substitution, so that conflicts may be avoided; although we think it has seldom been done. But, in the absence of statute, we are not inclined to require a formal order of substitution in case of a public officer—such, for instance, as county and prosecuting attorney or attorney general—before permitting him to appear. Under the statute Mr. Hoop is authorized, in the capacity of county attorney, to appear and have recognition; and, should he ask it, we would have been obliged to make a formal order substituting him in place of his predecessor in office. No objection is made on account of his failure to make the request, or of the previous absence of such an order. An order on our own motion will now be entered formally showing the substitution. We have, then, a case of conflict between attorneys for the same party. In such case we think that, if the interests of the other attorneys

are found by the court to be protected, the principal, rather than the assistant, attorney should control the disposition of the case. The county attorney has a statutory right to represent the board. The other counsel had been employed to assist that officer. None of the orders of the board ignored the right of the county attorney. Each resolution for the employment of Mr. Appelget or the firm of Appelget & Mullen stated specifically that it was for the purpose of assisting the county attorney. Unless it should be shown to the satisfaction of the court that the county attorney was acting fraudulently or collusively, the control of the case should not be taken from him and given to those engaged to assist him; at least when, as in this case, the board is not requesting it. Of course, as already indicated, the court would, so far as it legally had the power, see to it that the assistant counsel were protected as to fees. We are of the opinion that the motion to dismiss ought to be sustained, and the order will be entered accordingly dismissing the proceedings and remanding the cause. Dismissed.

CORN, J., and KNIGHT, J., concur.

(9 Wyo. 157)

FIRST NAT. BANK OF ROCK SPRINGS v. FOSTER.

(Supreme Court of Wyoming. March 12, 1901.)

TRIAL—INSTRUCTIONS—VERDICT—WAIVER—ESTOPPEL—UNDUE ADVANTAGE—APPEAL.

1. Where the court instructed the jury, without objection, that they might return a verdict on the concurrence of three-fourths of their number, and a verdict was returned supported by 10 only of the 12 jurymen, defendant's failure to object to such instruction was not a waiver of its right to object to the acceptance of such verdict, since the court was not misled by such failure, nor was the opposing counsel betrayed into any step prejudicial to his case; hence defendant's exception to the entering of such verdict entitled him to question its legality on appeal.

2. Defendant was not precluded from objecting to the verdict by reason of having taken an undue advantage in not objecting to the instruction, since he took no advantage not equally open to the plaintiff.

On rehearing. Reversed.

For former opinion, see 61 Pac. 466.

D. A. Reavell, for plaintiff in error. John H. Chiles, for defendant in error. Lindsey & Parks, amici curiæ.

CORN, J. In the course of the trial in this case, the court instructed the jury that they might return a verdict upon the concurrence of three-fourths of their number. The record shows no objection to this instruction by either party, and it seems that none was in fact made. But, upon the return of the jury into court with a verdict signed by 10 of their number, the defendant, by its counsel, requested that the jury be polled. From the poll it appeared that only 10 of the 12 jury-

men concurred in the finding, and defendant then objected to the receiving and entry of the verdict, for the reason that it was not a lawful verdict. The court overruled the objection, and received the verdict, and plaintiff in error excepted.

The defendant in error insists that, by its failure to object to the instruction, plaintiff in error waived its right to object at any future stage of the proceedings to the acceptance of a verdict found by less than the whole number, and a great many authorities are cited in support of the proposition. We have read a large number of the cases cited, and have given a careful examination to those specially relied upon. They establish beyond controversy, if any authority was required, that error may be waived. It may be waived by consent, either express or implied, or by such conduct of the party as will estop him from afterwards objecting. But we fail to find any case holding a party to have consented when the action complained of was objected to before it was taken, and an exception preserved, at the time, to the decision of the court overruling such objection. Indeed, it would be a contradiction in terms to say that there was consent to the action of the court when such action was objected to before it was taken, and the court informed by an immediate exception that the objection would be insisted upon. But, where there has been no consent, illustrations are not wanting where a party, by his conduct or by his silence, loses his right to interpose objections which would otherwise be available. If, for instance, in support of his case, he introduces incompetent evidence, he cannot afterwards object if his opponent pursues the same line of evidence. He has opened the door. If he has joined in the trial of the cause upon a particular theory, he cannot afterwards be heard to object that it was a false theory. He is held to the theory which he maintained or to which by his silence he assented. But all such cases depend upon the principle that the court or his opponent has been led into error which, but for his apparent assent, it is presumed would have been corrected. And nothing of the kind appears in this case. The instruction to which he failed to object, and which, it is claimed, estops him from objecting to an illegal verdict, was a mere announcement to the jury that they might reach a verdict by the concurrence of three-fourths of their number. It announces no principle of law nor any theory of the case. By his failure to object the court was not misled in its procedure, and opposing counsel was not betrayed into any step prejudicial to his own case. It is urged that counsel took an unfair advantage in offering no objection until he ascertained that the verdict was against him. But he took no advantage which was not equally open to counsel on the other side in case a verdict should have been adverse to him. He was not in bad faith with the

court; for the court was not proceeding in the matter by consent of parties, but by authority of a void statute.

Moreover, it is the ultimate ruling in any case which constitutes available error. Elliott, App. Proc. § 590. If the jury had finally reached a unanimous verdict, the erroneous instruction would have been harmless to either party, unless, perhaps, actual prejudice could be shown by its influence upon the deliberations of the jury. The time to object and to save an exception is when the irregularity occurs. *Thomp. Trials*, 700. The irregularity complained of in this case was the acceptance of a verdict agreed to by less than the whole jury. The objection was in time for the court to correct its error, and direct the jury to retire for further deliberation.

It would not be practicable to refer to all the authorities cited by counsel, and keep this opinion within reasonable limits. But it may be proper to distinguish some of them from the case under consideration, choosing those which seem to be most relied upon. In *Driving Park v. West*, 35 Ill. App. 496, the case was tried by the court without a jury, and the appellant insisted in the appellate court that it was entitled to a trial by jury, and had not waived its right. The court disposed of the matter by saying: "If appellant desired a trial by jury, and had objected to the trial by the court, it would have been error to have denied him a jury; but as he was present by his counsel, and failed to interpose any objection of that kind, he waived his right to have the case submitted to a jury." *Barnes v. Perine*, 12 N. Y. 23, decides only that a party having treated the questions as purely legal, and acquiesced in the disposal of them by the court as such, cannot, on appeal, be heard to object that facts were involved which should have been decided by the jury. In *Millett v. Hayford*, 1 Wis. 401, the case was tried in the county court by a jury of six under the act creating the court. Plaintiff in error claimed that the statute was unconstitutional, in so far as it limited the jury to six persons. The court refused to consider the constitutional question upon the ground that the record did not show that the plaintiff in error made any objections to the jury, and that, in the absence of such objection, it must be presumed that he consented to submit his case to a jury, as allowed by the statute. In *Machine Co. v. Bull*, 52 Iowa, 554, 3 N. W. 564, a reversal was asked for upon the ground that the court permitted evidence to be introduced which was not justified by the pleadings. In affirming the judgment, the supreme court said that it was sufficient to say that no such objection was made to the introduction of the evidence in the court below, and that it was not even objected in general terms that the evidence was incompetent. In the case under consideration objection was made to receiving the verdict, the very action of

the court which is complained of. In the cases cited the ground of the decision is that no objection was made. It is so evident that they and similar cases cited do not even tend to sustain the position of defendant in error that further comment upon them is unnecessary. But counsel insist that *Farrell v. Hennesy*, 21 Wis. 639, is very similar in some of its features to the case before us, and that it sustains counsel's contention. The jury brought in a verdict for the plaintiff, and they were polled upon demand of defendant's counsel. One of the jurymen answered: "It was and is my verdict, but it is contrary to my conscience. I only consent to it because all the rest have given in to the plaintiff." The verdict, however, was received and recorded without any objection by the defendant. He subsequently moved to set it aside, upon affidavits showing the above facts, and, upon his motion being overruled, appealed to the supreme court. Even in the face of the fact that the verdict was received and recorded absolutely without objection, that court say they find no little difficulty in determining what should be the effect of a verdict received under the circumstances disclosed. They finally, however, reach the conclusion that the time to raise an objection of this nature is before the verdict is received, and when an opportunity exists for the jury to reconsider their verdict, and, if the objection is not then taken, it is waived. But they add that, even though no objection was taken at the time by the defeated party, it was clearly the duty of the court, upon its own motion, to have directed the jury to retire and reconsider their verdict. It is a little difficult to see how counsel for defendant in error find in this decision any support of their position, when it points out the very method pursued by the defendant in this case as the proper one, and declares the objection waived by a failure to adopt it. But there is one other decision, in the English case of *Morrish v. Murrey*, 13 Mees. & W. 52, which defendant in error claims to be decisive in its favor. The judge was of the opinion that one of the defendant's pleas was a sufficient answer to the action, and that it was proved, and that the judgment must be for the defendant. But he left it to the jury to say what amount of damages the plaintiff had sustained, so that, in the event of the court being of the opinion that the plea was not proved, the plaintiff might enter judgment for the damages so found by the jury. This course was unauthorized by law, and could only be pursued by the consent of the parties; but, neither party offering any objection, the jury returned their verdict assessing plaintiff's damages at one farthing. The court held that the judge was in error in holding the plea sufficient, and the plaintiff insisted that she was entitled to a new trial on the ground of misdirection. But the court held that, having consented to the assessment of the damages contingently, she

was precluded from insisting upon the misdirection, and could only move to enter a verdict for the sum found by the jury. It is perfectly apparent that this case, like the others referred to, is distinguished from the one before us by the essential fact that the unauthorized act of the court was not objected to at the time it was committed. We have gone into great, and perhaps unnecessary, detail in the discussion of the question presented. But we have done so out of deference to the great earnestness and unquestioned sincerity with which counsel have maintained the correctness of their views. We understand that the request for a rehearing upon the ground that this court erred in holding the statute in question to be unconstitutional, is no longer urged, the supreme court of Colorado having since announced the same conclusion in a very able and exhaustive opinion in the case of *City of Denver v. Hyatt* (Colo. Sup.) 63 Pac. 403. A rehearing is denied.

POTTER, C. J., and KNIGHT, J., concur.

(16 Colo. A. 139)

MONTEZUMA CATTLE CO. v. DAKE.¹

(Court of Appeals of Colorado. Feb. 11, 1901.)

JUDGMENT—RES ADJUDICATA—ACTION—DEFENSE.

Where six directors of a corporation for themselves as directors, and themselves and others similarly situated as stockholders, of the plaintiff corporation, sued defendant, another director, alleging fraudulent acts and misrepresentations by him in negotiating a loan, and asked for an accounting, a decree in favor of defendant is res adjudicata in a subsequent suit by the corporation on the same cause of action,—for fraud in foreclosing the chattel mortgage securing the loan, and for an accounting.

Error to district court, Arapahoe county.

Action by the Montezuma Cattle Company against Alvin C. Dake to recover money fraudulently obtained, and for an accounting. From a judgment on the pleadings in favor of defendant, plaintiff brings error. Affirmed.

Rogers & Shafroth and George Rogers, for plaintiff in error. F. A. Williams and Cass E. Herrington, for defendant in error.

WILSON, J. The plaintiff was a corporation organized under the laws of Colorado, but carrying on its business—that of buying, selling, and raising cattle—in the territory of New Mexico. At the time of the occurrences which gave rise to this controversy, defendant was, and for a long time previous had been, a stockholder in, and one of the seven directors of, the corporation. The pleadings are of great length, comprising, as they apparently do, a history of the transactions of the corporation for a period of years; but it is not necessary to set forth a detailed statement of all the facts, in or-

¹ Rehearing denied March 11, 1901.

der that the issues herein and their determination may be understood. It appears that in February, 1893, the company became involved in financial difficulties, necessitating the borrowing of \$13,000. From this circumstance arose the troubles which culminated in this suit. The complaint alleges that the defendant undertook to procure, and did procure, for the company, a loan of said sum of money from two persons, for which it executed its two promissory notes, indorsed by the directors. The plaintiff alleges that the said several sums of money were in fact loaned by the defendant, and the notes were his property,—a fact, however, which was not then known to plaintiff. It is further alleged that upon the maturity of the notes the defendant, with the intent and purpose of securing a benefit and advantage for himself as against the plaintiff, represented to the directors that the parties to whom the notes had been executed were insisting upon payment, and urged the selling of a large number of cattle with which to make said payment; that by reason of said statements he induced the plaintiff to sell to one Kinneham and one Keeler a large number of cattle, but that in truth and in fact they were merely representatives of the defendant, he being in reality the purchaser, and furnishing the money therefor; that, by reason of certain wrongful acts of defendant and his said representatives, the plaintiff received less than it should have been paid for the cattle sold. It is further alleged that about October, 1893, the plaintiff, in pursuance of a demand by defendant, and for the purpose of meeting its matured obligations, executed and delivered to one Henry W. Green, for the use and benefit of said defendant, its promissory note for about \$11,400, and, to secure payment of the same, also executed and delivered to the said Green a chattel mortgage upon all the cattle and live stock owned by plaintiff in the territory of New Mexico, together with a deed of trust on its real estate; that at such time the indebtedness of the company was in the sum of \$10,000 only, being the balance yet due on the \$13,000 loan; that, in November following, Green assigned said note and chattel mortgage to the defendant. It is further alleged that in May, 1894, defendant made a pretended sale and transfer of said promissory note to his nephew, Lyman Dake, then living in New Mexico, but that said sale and transfer was collusive and colorable, for the sole and only purpose of enabling the said defendant to make a pretended sale under the chattel mortgage of the live stock of the company for his benefit. The complaint then alleges various acts on the part of the defendant, acting through his nephew, in the manner of foreclosure of said chattel mortgage, tending to show that the defendant had defrauded the company by selling and appropriating to his own use cattle to the value of \$50,000, in disregard

of the rights of plaintiff, and for which he had failed to account. The plaintiff demanded judgment for \$100,000; also for an accounting of all the property of plaintiff taken possession of by defendant, or in anywise disposed of by him. The answer set up three defenses: First, denial of all the allegations of fact tending to show any misrepresentations or fraudulent conduct on the part of defendant; second, the plea of *res judicata*; third, a plea of another suit pending in a district court of New Mexico. Judgment upon the pleadings was rendered in favor of defendant.

Only one question is necessary to be considered, and that is the second defense,—the plea of *res judicata*. This was based upon a suit instituted in February, 1894, also in the district court of Arapahoe county, Colo., the parties to which were William B. Palmer and five others, who sued for themselves as directors, and also for themselves and all other persons similarly situated as stockholders, of the plaintiff corporation, as plaintiffs, and both the plaintiff and defendant in this suit, and Frederick A. Williams, trustee in the deed of trust, as defendants. In the complaint in this action the plaintiffs set forth in greater detail the alleged fraudulent acts and misrepresentations of defendant with reference to the negotiation of the \$13,000 loan, which is the basis of the present suit, and the sale of cattle to make payments thereon. The prayer was: First, for the appointment of a receiver of the company's property; second, that the note executed by the corporation to Green, and by Green transferred to defendant, together with the chattel mortgage and deed of trust executed to secure its payment, should be declared fraudulent, null, and void, and delivered up to be canceled and set aside, and for a full accounting; third, that an injunction issue, restraining defendant from interfering with or taking possession of any of the company property, or attempting to foreclose the note, chattel mortgage, or deed of trust; fourth, that Williams, trustee, be enjoined from foreclosing the trust deed. The defendant corporation in such suit filed its separate answer, admitting and adopting the allegations of the complaint. Defendant Dake also filed a separate answer, denying, as in this cause, the allegations tending to show any fraud, misrepresentation, or misconduct on his part. In response to the prayer of the complaint, a receiver was appointed, and a preliminary injunction granted. Soon after, the injunction was dissolved; and in April, 1894, defendant Dake filed a supplemental answer, setting forth that since the dissolution of the injunction he had sold and assigned the note in controversy to Lyman H. Dake for a valuable consideration, and was no longer the owner thereof. To this no reply was made. Nothing further seems to have been done in this cause until 1896, when final hearing was had, and two separate decrees entered by the court,—

one on January 18th and one on February 27th of said year. The issues, so far as they affected or are connected with those involved in this suit, were found in favor of the defendant Dake.

In the case at bar the trial court based its decision in favor of the defendant upon this plea of *res judicata*, and that it was correct in so doing is, we think, quite clear. In the Palmer suit, the corporation, though nominally a defendant, was in reality a party plaintiff. The acts of defendant which were complained of, if wrongful at all, were wrongful to the entire corporate body. The plaintiff stockholders were not entitled to, and could not have obtained, any relief, except that to which the corporation was entitled. Any judgment or decree in their favor must necessarily have been for the benefit of the corporation. Besides, the corporation in this instance filed its answer, in which it specifically adopted the allegations of the complaint, thereby making itself a party plaintiff. The defendant Dake was the only party in interest as defendant in that suit, Williams having no interest except as trustee for him. The action was therefore between the same parties as the case at bar. Even if the corporation had not been, strictly speaking, the party plaintiff, it, being in privity with the parties plaintiff, would have been equally bound with them by a valid judgment in the cause. *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *Kilander v. Hoover*, 111 Ind. 10, 11 N. E. 796; *Harmon v. Auditor*, 123 Ill. 122, 13 N. E. 161. So far, then, as parties are concerned, there was in these two cases an identity of parties sufficient to bring them within the rule governing a plea of *res judicata*.

With reference to the identity of subject-matter and the identity of cause of action in the two suits there can, also, be no question. The subject-matter was the \$13,000 indebtedness, the execution of the Green note, the chattel mortgage, and the deed of trust given to secure the same, and the alleged attempt or purpose to foreclose them. Upon all these questions the court necessarily passed in the hearing and determination of the cause instituted in February, 1894, and which is pleaded in bar of this suit. Counsel seek to make a distinction, however, by contending that the issues in this case concern only the legality and bona fide nature of the actions of defendant Dake in foreclosing the note and chattel mortgage, and that these were subsequent to the matters and things alleged as the basis of the rights of plaintiffs in the first suit. Without entering into an elaborate discussion of what questions were embraced in the two suits, it is only necessary to say that the position of counsel cannot be maintained, because the matters and things upon which the plaintiff here seeks to base the issue might have been raised, and should have been raised and adjudicated, in the former suit. "A valid judgment is conclusive be-

tween the parties, not only as to such matters as were in fact determined in that proceeding, but as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered." *Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565; *Cromwell v. Sac Co.*, supra; *Harmon v. Auditor*, supra. In April, 1894, plaintiff was notified by the supplemental answer of defendant Dake in the Palmer suit, to which it was a party, that he had transferred the note; and this transfer, of course, carried with it the transfer of the mortgage and deed of trust given to secure it. It appears, also, upon plaintiff's own allegation in its complaint, that in pursuance of such transfer Lyman H. Dake, acting, however, for defendant A. C. Dake, who was alleged, notwithstanding the pretended transfer, to have still continued to be the real owner of the note and mortgage, proceeded in May, 1894, to foreclose the chattel mortgage. At that time, therefore, defendant Dake was guilty, if at all, of the fraudulent and wrongful acts prejudicial to the rights and interests of plaintiff, and then, if at all, he wrongfully sold and appropriated to his own use the cattle of plaintiff, and without accounting therefor. Final hearing was not had, and the final decree was not entered in the cause, until nearly two years thereafter, giving plaintiff ample time to have presented and secured an adjudication of these matters. That it might have done so, and that it should have done so, is too apparent to require discussion, because they were part and parcel of the same transaction. It was a carrying out and consummation of the alleged wrongful and fraudulent acts of defendant Dake, if there had been any such. The chief object of the first suit was to secure the annulling and cancellation of the chattel mortgage, and certainly there should have come within the scope of this suit any acts threatened or done under or by virtue of the mortgage so alleged to be fraudulent. The rule, supported by reason and authority, is that a judgment should settle the rights of the parties with reference to the subject-matter of the suit as existing at the time of the trial and judgment. *School Dist. v. Hart*, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741. Again, and as conclusive of the position which we have taken that the plea of *res judicata* was properly sustained, an accounting was prayed in the first suit, as well as in the one at bar, of all the property of plaintiff taken possession of or disposed of by defendant. According to plaintiff's own theory of the present action, it is based upon the wrongful taking possession of and disposal of plaintiff's property by the defendant long prior to the determination of the first suit. These were certainly proper matters for an accounting, and should then have been presented to the court; and, such not having been done, they are barred from

further consideration by the judgment in that case. *Hodges v. Bullock*, 15 R. I. 592, 10 Atl. 643; *Hites v. Irvine's Adm'r*, 13 Ohio St. 283; *In re Helfenstein's Estate*, 135 Pa. St. 293, 20 Atl. 151.

It seems to us quite clear that every question now raised was raised and adjudicated in the former suit, or could and should have been so raised and adjudicated. The judgment is therefore correct, and will be affirmed. Affirmed.

(15 Colo. A. 495)

VENNER et al. v. DENVER UNION WATER CO.¹

(Court of Appeals of Colorado. Sept. 10, 1900.)

APPEAL—PARTIES—MORTGAGES—FORECLOSURE—VALIDITY—COLLATERAL ATTACK—RIGHTS OF PURCHASER—FOREIGN CORPORATION—PROCESS—SERVICE.

1. Under Code, § 400, providing that in case of judgment against two or more persons any one of them may appeal, and may use the names of the others if necessary, the names of parties whose interests are not affected by a decree against them need not be used in an appeal taken by the real and only party in interest.

2. A foreclosure decree and all subsequent proceedings based thereon are void and subject to collateral attack when it appears from the face of the record that the court was without jurisdiction to render it.

3. A foreclosure decree is void for want of jurisdiction so far as it affects property not mentioned in the pleadings, nor embraced in the mortgage sought to be foreclosed.

4. Evidence showing that substituted service of process is not valid is properly excluded as immaterial when the invalidity is shown by the return of service.

5. Gen. St. § 260, requires every foreign corporation to designate an agent or agents in the state on whom process may be served; and *Mills' Ann. Code*, § 33, requires service to be made on such corporation by delivering a copy of the summons to its agent in the county, and, if no such agent shall be found, then by delivering a copy to a stockholder. *Held* that, in order to give the court jurisdiction over a foreign corporation when the service is had on an agent, the return of service must show service on an agent on whom service is authorized, instead of on an officer of the corporation, and where service is had on a stockholder the return must show that no agent could be found.

6. A decree in foreclosure is void when it appears from the face of the record that the only party against whom a foreclosure could be had was not within the jurisdiction of the court.

7. Records in foreclosure proceedings showing that the court had no jurisdiction of the subject-matter and the party against whom a decree could be rendered are admissible to show that the decree and the subsequent proceedings based thereon are invalid.

8. Since the grantee of purchasers at a void foreclosure sale has no title to the premises, he cannot maintain a suit to remove a cloud on title; but since he succeeds to all the rights of the purchasers, including the rights and remedies of the mortgagees, he can maintain a suit to cancel an instrument which constitutes an apparently prior incumbrance.

Appeal from district court, Arapahoe county.

Action by the Denver Union Water Company against Clarence H. Venner and others. From a judgment for plaintiff, defendant Venner appeals. Reversed.

Yeaman & Gove and Henry B. Babb, for appellant. Wolcott & Vaile and Wm. W. Field, for appellee.

THOMSON, J. On the 1st day of October, 1889, the Mountain Water Company executed 40 bonds, by each of which it promised to pay the bearer on the 1st day of July, 1909, the sum of \$1,000, with interest from date, payable on the 1st days of January and July of each year until maturity, and, to secure the payment of the bonds and interest, executed to John L. McNeil and the acting sheriff of Arapahoe county, as trustees, a mortgage of all its real estate and all its other property and rights, including its franchises. These bonds were duly issued and sold, and in the year 1890 were the property of a firm called C. H. Venner & Co. This firm was afterwards dissolved, and the bonds passed into the possession of a new firm of the same name, and upon the dissolution of the latter firm, in 1892, came into the hands of Clarence H. Venner. On the 15th day of November, 1890, the Mountain Water Company conveyed all its property, real and personal, and all its franchises and rights, to the Denver City Waterworks Company, which latter company at the same time received a conveyance of the property of the Denver Water Company, subject to a mortgage to the Farmers' Loan & Trust Company to secure the payment of 2,000 bonds executed by it for \$1,000 each. On the same day the Denver City Waterworks Company executed its mortgage to the Central Trust Company of New York, as trustee, to secure the payment of its 7,000 bonds, of \$1,000 each, of which 1,238 were afterwards sold. On the 28th day of April, 1891, the Denver City Waterworks Company sold and conveyed all of its property, including the property conveyed to it by the Mountain Water Company, to the American Waterworks Company, a corporation organized under the laws of New Jersey. On the 15th day of January, 1892, default having been made by the Denver Water Company in the payment of the interest on its bonds, and certain other corporations, whose property had been acquired by the Denver Water Company, being also in default in the payment of interest secured by mortgages executed by them, separate proceedings for foreclosure were instituted against those corporations and the Denver Water Company, which suits were afterwards consolidated into one action, numbered 16,249; and, the Denver City Waterworks Company having also made default in the payment of the interest due on its bonds, suit for foreclosure was brought against it and its grantee, the American Waterworks Company, which suit was numbered 17,476. In the consolidated action numbered 16,249 the trustees

¹ Rehearing denied March 11, 1901.

named in the several mortgages were parties plaintiff, and the Denver City Water Company, the Denver City Irrigation & Water Company, the Domestic Water Company, the Denver Water Company, the Denver City Waterworks Company, the American Waterworks Company, the Central Trust Company of New York, and certain individuals were parties defendant; and in action numbered 17,476 the Central Trust Company of New York was plaintiff, and the Denver City Waterworks Company and the American Waterworks Company were defendants. In case No. 16,249, after the consolidation of which mention has been made, an amended complaint was filed, which was the starting point of the subsequent proceedings in the case. This complaint alleged the purchase by the Denver Water Company of the property and franchises of the Denver City Water Company, the Domestic Water Company, and the Denver City Irrigation & Water Company, and the assumption by it of the bonds issued by those companies, the acquisition by the Denver City Waterworks Company of the title of the Denver Water Company in the several properties, the execution by the Denver City Waterworks Company of its mortgage to the Central Trust Company, and the transfer of all its property and rights to the American Waterworks Company. The prayer of the amended complaint was that an account be taken of the outstanding and unpaid bonds and coupons of the Denver Water Company, the Domestic Water Company, the Denver City Water Company, and the Denver City Irrigation & Water Company, and that the property described in the several mortgages executed by those companies be sold for the payment of the indebtedness. In this complaint there was no mention of or allusion to the bonds or mortgage executed by the Mountain Water Company, or the property described in its mortgage, and neither that company nor either of its trustees was a party to the suit. The defendants entered no appearance to the action, and judgment went against them by default. The decree, which was entered July 20, 1893, followed the prayer of the complaint, and concluded as follows: "That any party to this proceeding may apply to the court for further orders and directions at the foot of this decree to correct any error or to supply any omission that may be discovered, and for any proper purpose necessary to protect the rights of each and all of the parties thereto, and that on the adjournment of the present term of this court the said cause shall stand continued until the next term of this court; the court reserving full and complete jurisdiction over this cause until the sale of the property herein provided for, and the approval and consummation of such sale by this court." Afterwards, on the 29th day of March, 1894, on motion of the plaintiffs, an addition was made to the decree, providing for the sale of the property described in the mortgage executed by the Mountain Water Company. In ac-

tion numbered 17,476 the following was the return of service of summons: "State of Colorado, County of Arapahoe—ss.: Samuel N. Mitchell, being first duly sworn, deposes and says: That he is over the age of eighteen years, and that he is not a party to the within-entitled action. That he personally served the within summons upon the defendants within named, as follows: That is to say, by delivering a copy thereof to Clarence H. Venner, vice president of the American Waterworks Company, at Denver, in the county aforesaid, on November 5, 1892, and by delivering a copy thereof to William P. Robinson, president of the Denver City Waterworks Company, at Denver, as aforesaid, on this November 12, 1892. And that at the time of said service he also delivered to the said Clarence H. Venner and the said William P. Robinson, respectively, a copy of the complaint in the within-entitled action. And further affiant saith not. [Signed] Samuel N. Mitchell." There was no appearance to this suit by the defendants, or either of them, and judgment was taken against them by default. The decree provided for the sale of the property which had been transferred to the American Waterworks Company, including the property described in the mortgage executed by the Mountain Water Company. In pursuance of the two decrees, and in accordance with their terms, a sale was made of all the property which they described, and for the sale of which they provided, including the property embraced in the Mountain Water Company's mortgage. The Denver Union Water Company, a corporation, claiming to be the owner of the property so sold, instituted this proceeding to obtain a cancellation of the mortgage executed by the Mountain Water Company to John L. McNeill and the acting sheriff of Arapahoe county, trustees. Those trustees were joined with Clarence H. Venner as defendants. The complaint alleged the execution of the several mortgages we have mentioned; traced the titles to the property which they described into the American Waterworks Company; set forth the proceedings for foreclosure, the resultant decrees, and the sale; averred the conveyance of the property to the plaintiff by the grantee of the purchaser at the judicial sale; alleged that the defendant Venner possessed, and claimed to be the owner of, the bonds to secure which the Mountain Water Company's mortgage was given; and stated that the bonds had been fully paid. The answer of Venner denied the alleged title of the plaintiff, denied payment of the bonds, and averred ownership and possession of the bonds in him. The defendant McNeill answered, disclaiming any interest in the suit; and William K. Burchinell, the acting sheriff, made default. A decree was rendered in accordance with the prayer of the complaint, and the defendant Venner appealed.

In behalf of the plaintiff the point is made that, because the appeal was taken by Venner alone, it cannot be entertained. Section

400 of the Code provides that, in case of a judgment against two or more persons, any one of them may appeal, and may use the names of the others if necessary. This authorized the appeal by Venner, and his appeal stayed all proceedings on the judgment. *McCoy v. Wilson*, 8 Colo. 335, 7 Pac. 298. Venner was the real and only party in interest. The others were merely trustees, to whom it was a matter of supreme indifference what decree should be rendered. A judgment for either side could not possibly affect any interest of theirs, there was nothing which required an appeal by them, and the use of their names by Venner, was unnecessary.

The validity of the decrees is brought into question by the defendant. But it is contended for the plaintiff that the proceedings under which the sale was made are not properly subject to investigation in this suit, and that the defendant cannot legally be permitted to go behind the deed made pursuant to the decrees. But the effect of the deed is dependent upon the decrees, it has no validity except what it derives from them, and, therefore, to determine its character, they must be examined. It is unquestionably true, as plaintiff contends, that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities not going to the jurisdiction. And it is also true, where the jurisdiction of the court depends upon facts not appearing in the record, the existence of such facts will be presumed, and evidence dehors the record is incompetent, collaterally, to rebut the presumption. But it is equally true that if, upon the face of the record, the court was without jurisdiction to proceed, its judgment is a nullity, all subsequent proceedings which derive their authority from the judgment are void, and the invalidity of the judgment, as well as the proceedings following it, may be shown whenever and wherever they are asserted as the foundation of a right. In the language of the court in *Thompson v. Tolmie*, 2 Pet. 157, 7 L. Ed. 381, "If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no jurisdiction, and may be rejected when collaterally drawn in question." The objections made to these decrees go directly to their validity. It is not mere irregularities or errors of which complaint is made. The jurisdiction of the court to render the decrees is denied. This question of jurisdiction must therefore be investigated, and the investigation must be confined to the disclosures made by the record.

The defendant, for the purpose of showing the want of jurisdiction in the court, sought to introduce in evidence the amended complaint in the consolidated action numbered 16,249, and the original and amended decree in the case, and also offered the return of

service in case numbered 17,476, but the proposed evidence was rejected as immaterial. It has, however, been preserved, and is before us. The question raised with reference to case 16,249, as to the power of the court, after the lapse of the term, to amend its decree by incorporating into it an additional judgment, does not require decision. We do not undertake to say that the position of the defendant that the amendment, as made, was without support from the reservation of jurisdiction contained in the decree as originally entered, and was without authority of law, is untenable; but the conclusion we have reached makes it immaterial whether the order for the sale of the Mountain Water Company's property was contained in the decree originally, or was introduced into it afterwards. The amended complaint which the consolidation of the different suits into the one action, No. 16,249, rendered necessary, and which was the only pleading by which the subsequent proceedings could be guided, sought the foreclosure of the mortgage executed by the Denver Water Company, and, as that company had become the owner of the properties of other corporations, and had assumed their indebtedness, the charging of that indebtedness against the entire property of the Denver Water Company. None of the mortgages, either of the Denver Water Company or of the companies whose properties it had acquired, embraced the property mortgaged by the Mountain Water Company. That property was never owned by any of those companies, it was not mentioned in the complaint, and no relief was sought in relation to it. There was not a word in any of those mortgages, nor an allegation in the complaint, which would authorize an allusion to that property in the decree. In ordering it to be sold, the court went entirely outside of the case before it. The Denver City Waterworks Company and the American Waterworks Company were parties defendant. The entire property involved in the suit had been conveyed to the Denver City Company, and by it to the American Company. The former had also acquired title to the Mountain Water Company's property, and had transferred it to the latter. The Denver City Company was not a necessary party, because its title had been divested, and it was without interest; but the American Company was a necessary party, because it owned the equity of redemption, and that could not be barred in a proceeding to which it was not a party. It was made a party to extinguish its equity in the property upon which foreclosure was sought, and no other, and the judgment could operate upon it only in relation to that property. That it also owned the property of the Mountain Water Company is immaterial. The property of the latter company was not embraced in the proceeding, it had not been brought within the jurisdiction of the court, and there was no power in the court to make

any order affecting it. *Corwithe v. Griffing*, 21 Barb. 9; *Munday v. Vail*, 34 N. J. Law, 418; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 10 Atl. 385; *Dunlap v. Southerlin*, 63 Tex. 38; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569; *Hume v. Robinson*, 23 Colo. 359, 47 Pac. 271; *Jansen v. Hyde*, 8 Colo. App. 38, 44 Pac. 760; *Freem. Judgm.* § 130.

In suit numbered 17,476, service of summons was attempted to be made upon the American Waterworks Company by delivering a copy of the summons to Clarence H. Venner, who was described in the return as vice president of the company. It is provided by our statute concerning corporations that foreign corporations shall, before they are authorized or permitted to do business in this state, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the secretary of the state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state, residing at its principal place of business, upon whom process may be served. *Gen. St.* § 260. The law further provides that, in an action against a foreign corporation doing business within this state, the summons shall be served by delivering a copy to any agent of such corporation found in the county in which the action is brought, and, if no such agent shall be found in such county, then by delivering a copy of the summons to any stockholder who may be found in that county. *Mills' Ann. Code*, § 38. The American Waterworks Company was a foreign corporation doing business in this state. It was organized under the laws of New Jersey. Service of summons could therefore be made upon it only by the delivery of a copy of the writ to an agent of the corporation found in the county of the suit, or to a stockholder in that county, if such agent should not be found. In this case, as shown by the return, the service was made upon Venner, not as a stockholder, but as vice president, and the return did not show that no agent of the corporation could be found in Arapahoe county. It is only in the event that no agent is found in the county that service may be had upon a stockholder. But under no condition would service upon the vice president of a foreign corporation satisfy the requirements of the statute. Venner may or may not have been a stockholder. There is nothing in the record to indicate whether he was or not. But service upon him as vice president was not service upon him as a stockholder, so that, if the return were otherwise sufficient, it would not show valid service. But, if the service had been upon Venner as a stockholder, the court would still have had no

jurisdiction of the American Waterworks Company. There could be no service upon a stockholder, except upon a failure to find an agent in the county. The defendant offered, and was refused permission, to prove that when the attempt was made to serve the summons the company had an authorized agent in Arapahoe county,—the county in which the suit was brought,—duly appointed in compliance with the statute, upon whom process might have been served. In view of the contents of the return, the evidence offered was immaterial, and the court committed no error in excluding it. Where substituted service is authorized, it is sufficient to give the court jurisdiction only where the condition upon which it is permissible exists; and the existence of the condition is not to be inferred, but must appear by affirmative statement in the return. *Alexandria v. Fairfax*, 95 U. S. 774, 24 L. Ed. 583; *Settemler v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110; *Trullenger v. Todd*, 5 Or. 36; *Mining Co. v. Frost*, 15 Colo. 310, 25 Pac. 506. In a suit against a foreign corporation, service must be made upon it by delivering a copy of the summons to its agent found within the county where the action is brought; and it is only in case such agent is not found within the county that substituted service is valid. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. The return of service is not aided by presumption. And, to give the court jurisdiction where service is had upon a stockholder, the return must show that no agent of the corporation could be found within the county. Even on the supposition that Venner was served as a stockholder, the return sets forth no reason why a copy of the summons was given to him. For aught that it indicates, the proper agent of the company might readily have been found in the county. The return says nothing about an agent, and does not purport or pretend to show the existence of the condition upon which alone substituted service is authorized. Jurisdiction of the person of a defendant, if there is no appearance by him, depends upon the service of the summons, and the fact and manner of the service must be stated in the return. It appears from this return that there was no legal service of summons upon the American Waterworks Company. It also appears from the record that no appearance to the action was made by that company; hence it was not within the jurisdiction of the court, and the judgment was, as to it, a nullity. *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771. As it was the only defendant against whom a foreclosure could be had, the decree was void.

The record in case No. 16,249 and the return in case No. 17,476 were legitimate and proper evidence, and the court erred in refusing to receive them. They showed that, in so far as the property in question is con-

cerned,—and the title to no other is involved in this suit,—the court in case No. 16,249 had no jurisdiction of the subject-matter; that in case No. 17,476 it had no jurisdiction of the defendant; and that hence the order in each case for the sale of this property, the sale itself, and the deeds which followed the sale were nullities.

There is some controversy between the parties as to whether this is a proceeding in equity to remove a cloud upon title, or an action under the Code to quiet title. We are clearly of the opinion that it is the former, and not the latter. The action given by the Code is brought by the person in possession against another person who claims an estate in the land. Mills' Ann. Code, § 255. We do not think that a mortgage represents an estate in land, within the meaning of that section. But be this as it may, the complaint before us is a carefully prepared and elaborate bill in equity praying a decree that the alleged title of the plaintiff be relieved from the apparent but fictitious lien of a mortgage. However, for any purpose of the present discussion, the result is the same whether the proceeding is in equity or under the Code. Title in the plaintiff is essential to the maintenance by him of a suit in equity for the removal of a cloud. *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393; *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424. And, to maintain the statutory action, the plaintiff must aver and prove title in himself. *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56; *Amter v. Conlon*, 22 Colo. 150, 43 Pac. 1002; *Walker v. Pogue*, 2 Colo. App. 149, 29 Pac. 1017; *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925. The proceeding under which the plaintiff claims being void, it had no title. In so far as it was concerned, there could be no cloud, because it was without title to be affected by a cloud. It was, therefore, not in a situation to maintain this suit, unless another position which it has recently taken can be sustained. In its behalf it is urged that, if the sales in pursuance of the foreclosure proceedings failed to pass title to the purchaser, yet they operated as an equitable assignment of the mortgages, and subrogated the purchasers to all the rights of the mortgagees. The principle invoked is established beyond controversy. Payment of the debt secured, by a person sustaining certain relations to the mortgaged premises, or to the mortgage, or to the persons interested, operates in equity as an assignment of the mortgage to him. An intruder or a volunteer cannot, by payment, make himself an equitable assignee; but, where the situation of a party with respect to the property or the security is such that the payment is "an equitably necessary or proper means of protecting his interests against possible loss or injury," the transaction is regarded as an assignment. 3 Pom. Eq. Jur. §§ 1211, 1212. We do not understand from the arguments that counsel of either party dissent from this general state-

ment. The question, on opposing sides of which they have ranged themselves, is whether these purchasers sustained such relations to the subject-matter of the foreclosure proceedings, or to the mortgages, or to the parties, that in virtue of their purchase at the foreclosure sales they are entitled to subrogation. The contention for the defendant is that the sales, being nullities, had no effect whatever; that they did not operate as assignments of the mortgages; and that the purchasers were therefore mere strangers, entitled to no consideration. Let us look into this. The sales purported to be judicial sales. The grantors of the plaintiff attended them, and, as the highest and best bidders, the property was struck off to them. They paid their money and received their deeds. We are bound to presume that they made their bids in good faith, and parted with their money and received their deeds supposing that they were acquiring a good title to the property. The facts take them out of the class designated in the books as "volunteers" or "strangers." But they got no title. In so far as title was concerned, their money went for nothing. Justice requires that the transaction shall not result in loss to them, if their protection is consistent with the interests and rights of the parties for whose benefit the foreclosure was sought. If their money was received by those parties, the rights of the latter under the mortgages were extinguished; and as it was errors of their commission, by which the purchasers were prevented from acquiring title, they would be estopped to say that those purchasers should not have the benefit of the mortgages, for the purpose, if possible, of making good the loss. So far as the defendant is concerned, it is a matter of indifference to him to whom the securities may belong. If his prior mortgage is unpaid, he can assert his rights against one as well as another. If it has been paid, objection by him would go for nothing. We have no doubt of the right of a purchaser at a void foreclosure sale to the benefit of the mortgage for the purpose of making himself whole. *Robinson v. Ryan*, 25 N. Y. 320; *Stark v. Brown*, 12 Wis. 572; *Muir v. Berkshire*, 52 Ind. 149; *Curtis v. Gooding*, 99 Ind. 45; *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002. The distinction undertaken by counsel of the defendant between a case where the mortgage was executed to secure a debt payable to the mortgagee himself, and a case where the mortgage was executed to a trustee to secure a debt payable to another person, does not commend itself to our judgment. In the latter case the trustee holds the naked legal title, but the beneficiary or his assignee is the owner of the mortgage. A transfer by him of the debt secured carries the mortgage. The effect of such transfer is, therefore, the same in one case as in the other; and, so far as the question we are now discussing is concerned, there is no distinction to be made between them. As grantee of the purchasers

at the foreclosure sales, this plaintiff succeeded to all their rights; and among those, if they were entitled to be regarded as assignees of the mortgages, was the right, for the protection of their own security, to pay off a prior incumbrance, or, if it had been paid, but remained unsatisfied and apparently alive upon the records, to cause it to be canceled in a proper proceeding instituted for the purpose. But we are unable to see how such relief can be allowed in the present condition of the case. The purpose of this proceeding is to obtain a decree removing a cloud upon title to real estate. The theory of the complaint is that the final result of the various steps taken in connection with the foreclosure of the mortgages was to vest the absolute ownership of the property in the grantors of the plaintiff. It is true that the purchase of the property at the foreclosure sales, and the payment of the purchase price by the purchasers, are averred in the complaint; but they are averred in their order, simply as incidents in the history of proceedings by means of which title was alleged to be transferred. What amount was paid, or to whom it was paid, or whether any of it was received by the mortgagees, is not stated. It may be said that enough was averred to warrant an inference that the mortgagees had the benefit of the money. But a cause of action must be stated. It will not be inferred. As setting forth facts from which, in connection with the others, the plaintiff's claim of title might be deduced, those allegations were amply sufficient; but, for the purpose of investing him with the rights and remedies of the mortgagees, it must appear, in addition to other matters, that the money was received by them, or by some person legally authorized to receive it for them. But a specific examination of separate averments is unnecessary. Upon the face of the complaint, it is clearly apparent that the right to relief is grounded on title, and on nothing else; that it was only because the plaintiff regarded the mortgage of the defendant, unsatisfied on the record, as a cloud upon a title to land with which it believed itself to be invested, that it sought the cancellation of the mortgage, and it is only since the petition for a rehearing has been filed in this court that a change of position has been attempted. If the plaintiff, as substituted mortgagee, desires the priority of its own mortgages established by the cancellation of that of the defendant, the cause of action must be set forth by averments showing it entitled to that sort of relief. A proceeding to protect a security by the cancellation of an instrument which constitutes an apparently prior incumbrance, and a proceeding to remove a cloud upon title to real estate, are totally different, and allegations necessary in one would be without value in the other. The defendant is entitled to an opportunity to answer the case which the plaintiff now presents, and to a trial of the new issues. The judgment will be reversed

and remanded, with leave to the plaintiff to amend its complaint, and to the defendant to plead to the amendment. Reversed.

(16 Colo. App. 129)

PEOPLE v. CLOUGH.¹

(Court of Appeals of Colorado. Feb. 11, 1901.)

PURCHASER OF STATE LANDS—BOND—EXTENT OF LIABILITY—PERFORMANCE OF CONDITIONS—PLEADING—HARMLESS ERROR.

1. Where a bond given by a purchaser of state lands is conditioned that he will comply with all the terms of a certificate of purchase issued to him by the state, the recitals in the certificate constitute a part of the bond, and must be referred to in order to determine the liability of parties.

2. The state board of land commissioners, acting under the authority conferred by Act 1887, § 18, which authorizes them to require a purchaser of state lands to give a bond on such conditions as the board may determine, and repeals Gen. Laws 1877, p. 719, which authorized the board to require a bond conditioned for the payment of the purchase money, required a purchaser to give a bond conditioned for the payment of the purchase money in the manner provided in the certificate of purchase, and for a compliance with all the terms of the certificate, which required the purchaser to vacate the premises on his failure to make the payments as therein provided. *Held*, in an action by the state against the surety, that the bond, so far as it applied to the payment of the purchase money, was in the alternative, and could be satisfied by his vacating the premises, and hence it was necessary for plaintiff to allege nonperformance of both conditions in order to state a cause of action.

3. A requirement in certificate of purchase, issued to a purchaser of state land, that he shall vacate the premises on his failure to pay the purchase money, is complied with by a surrender of the actual possession of the premises, without a surrender to the state of the certificate.

4. Appellant cannot complain of errors in his favor.

Error to district court, Arapahoe county.

Action by the people of the state of Colorado against Adella E. Clough, executrix of the estate of John A. Clough. From a judgment for defendant, plaintiff brings error. Affirmed.

Byron L. Carr, Atty. Gen., and Tolles & Cobbe, for the People. R. W. Bonyne, Rising & Marshall, and Doud & Fowler, for defendant in error.

WILSON, J. In December, 1888, one Frank K. Atkins purchased from the state four quarter sections of state land for the price and sum of \$6 per acre, being \$960 for each quarter section. Upon payment in cash at the time of the purchase of 30 per cent. of the purchase price of each tract, and the execution of a bond required by the state board of land commissioners, he received from the board a certificate of purchase in the usual form for each quarter section. Each bond ran to the people of the state of Colorado, and was in the sum of \$1,344, being double the amount of the unpaid balance due on the

¹ Rehearing denied March 11, 1901.

purchase money. The condition was "that if the above-bounden, Frank K. Atkins, will secure the state from loss or waste, and will not cut or waste more timber than shall be necessary for the improvement of the land, or for fuel for the use of the family of the purchaser, before final payment made for said land; and, further, that he will well and faithfully pay the residue of the purchase money for said land to the people of the state of Colorado, in seven equal annual payments, on the 24th day of December in each year, payments to be made to the state board of land commissioners, with interest on each of the deferred payments at the rate of seven per cent. per annum from date; and, further, that he shall and will faithfully comply with all the terms of the certificate of purchase issued to him by the register of the state board of land commissioners, and with all the provisions of the law relating to the sale, etc., of state lands,—then this obligation to be void, otherwise to be and remain in full force and effect." Each of the bonds was signed as surety by John A. Clough, now deceased, the administrator of whose estate is the defendant herein. In April, 1889, Atkins assigned the certificates to one Stuart O. Henry, and thereafter two of the seven annual payments provided for were made and indorsed upon the certificates. No further payments were made. The Colorado Savings Bank afterwards became the owner of the certificates, through a mortgage executed to it by Henry upon his interest in the premises, and at its instance the board of land commissioners ordered the attorney general of the state to institute this suit upon the bonds given by Atkins with Clough as surety, to recover the balance due on the purchase price of the said lands, upon condition that the bank pay all costs and expenses for the institution and maintenance of the suit, and further agreeing that upon recovery by the state, if such were the case, the state would convey the premises by good and sufficient deed to Thomas B. Stuart, assignee of the bank. The findings of the court were in favor of plaintiff upon the issues joined, but judgment was rendered against the defendant for nominal damages only, namely, for the sum of one dollar in each cause of action. The plaintiff thereupon brings the cause to this court on error for review.

The contention of the defendant is that, under the proof, plaintiff in error failed to make a case, because it is claimed the bond was conditioned in the alternative for the performance of one of two things, and that plaintiff neither alleged nor proved the non-performance of both of the conditions, both of which were essential to have sustained a judgment in behalf of plaintiff. It is further contended that, in the event this proposition is not correct, the bonds were penal bonds, and, under the pleadings and proof, plaintiff was entitled to recover, if at all, nominal damages only, as it did.

It will be observed that the bond was fourfold in its conditions. The obligor bound himself—First, to secure the state from loss or waste; second, not to cut or waste more timber than should be necessary for the improvement of the land, or for fuel for the use of the family before final payment; third, to make payment of the residue of the purchase money at the times and in the manner provided in the certificate of purchase; fourth, that he would faithfully comply with all the terms of the certificate of purchase issued to him, etc. We think the law is well settled, as contended for by defendant, that the obligation expressed in the bond which the maker assumed, to comply with all the terms of the certificate of purchase for the land, makes such certificate of purchase, with its terms and conditions, a part of the bond. *Forst v. Leonard*, 112 Ala. 296, 20 South. 587; *Locke v. McVean*, 33 Mich. 473; *Mayor, etc., of City of New York v. New York Refrigerating Const. Co.*, 82 Hun, 553, 31 N. Y. Supp. 714. In *Locke v. McVean* it was said by the court that in such case the transaction must be viewed as it would be if the contract—which in this case was the certificate of purchase—had been copied into the preamble of the condition of the bond. The recitals in the certificate of purchase, therefore, constitute a part of the bond, and reference must be made to them, equally with any other recital in the bond itself, to determine the character of the obligation which the maker of the bond and his surety assumed, and their liabilities thereon. Each of these certificates, after reciting the fact of purchase by Atkins, the amount of the purchase money, the payment of the 30 per cent., and the fact that upon surrender of the certificate, and fully complying with the conditions of the bond, and with all the provisions of the statute in such case, and upon the payment of the balance due as provided, the said Atkins would be entitled to a patent for the land, also contained the following provision: "Time is an essential ingredient in the premises, and the purchaser herein agrees, in accepting the certificate, to make the payments as above specified, or, on failure so to do, to immediately vacate said premises. Thereafter remaining in possession of said property shall be unlawful, and the occupier may be summarily ejected, and the right of possession shall revert to the state of Colorado." It is upon this that the defendant bases his claim that the bond, so far as it applied to the payment of the balance of the purchase money, was in the alternative. It is his contention that the obligation with reference to the payment of the balance of the purchase money could be satisfied by the immediate vacation of the premises, and in this we think he is correct.

In addition to such construction being apparently supported by the plain language of the contract, an examination of the various statutes in reference to the sale of state lands, and the powers and duties of the state

board of land commissioners, will show such to have been the intent of the law under which the contract was executed, and which enters into and controls it. The first legislative enactment in regard to the sale and disposition of state land was in 1877. Gen. Laws 1877, p. 719. Section 5, art. 4, of this act provided that the purchaser of each tract at public sale should make the first cash payment, being 50 per cent. of the whole amount of the purchase money, and execute a penal obligation, conditioned for the payment of the residue of the purchase money to the people of the state of Colorado, in seven equal annual payments, with interest, etc. Section 9 provided that, if any one payment should remain unpaid for one year after the same became due, the state board of land commissioners might direct the attorney general to put such obligation in suit, or might again sell the land for part payment of which the obligation had been given. By these statutes, the intent was manifestly shown to make the primary, principal, and only purpose and object of the bond that for the direct payment of money; in other words, a specific promise to pay the balance of the purchase money for the land bought. Payment alone could satisfy it. This was the only kind of bond that the board of land commissioners was authorized to exact or receive, and it was not empowered to insert in it any condition other than for the payment of the purchase money. At the legislative session of 1887 the entire act of 1877, together with all acts amendatory of it, was repealed, and a new statute upon the same subject, but radically different in its important features, was enacted. Under the provisions of this new act, the sale now under consideration took place, and by it the rights of the parties to this suit must be measured and determined. In this new act there was no provision or requirement whatever, as in the old, for the taking or requirement by the board of a bond of any character to be executed by the purchaser for the making of the deferred payments. In sections 14 and 15, which prescribe the time, terms, and conditions of sale, there is no reference to, or any provision whatever for, a bond of any kind or character, to be given by, or exacted from, the purchaser. The issuance of the certificate of purchase is made dependent alone upon compliance with the conditions expressed in those two sections. Section 16, which is apparently substituted for section 9 of the original act, wholly omits the provision that the state board might, upon the failure of the purchaser to make any one of the payments provided for in his certificate, direct the attorney general to bring suit upon his obligation. Section 18 provides that "when in the judgment of the state board a bond by the purchaser of state lands is necessary, the state board shall require such purchaser to give a bond upon such conditions as the board may determine."

Here was a broad power given to the board to require bond, with such conditions as it might prescribe. It seems unreasonable to us that, as contended by plaintiff, the object of this provision was alone to empower the board to exact a bond whose primary and principal object should be to insure the making of the deferred payments of purchase money. The provisions for such a bond, as contained in the old law, had been entirely omitted. It seems more reasonable to us that the legislative intent was to empower the board to require a bond to protect the interests of the state more especially in other respects, such as from waste and a destruction of timber, if the land was timbered. The interests of the state were carefully guarded and fully protected, so far as the making of deferred payments was concerned, without a bond. The purchaser had already paid nearly one-third of the purchase money in cash before the execution to him of a certificate. The legal title to the land still remained in the state, the certificate not purporting to convey to the purchaser any title whatever, and another provision of the statute expressly empowered the board, in case of a failure to make any one payment, to resell the land, all prior payments in such case being forfeited to the state. As the law contemplated, however, the improvement of the land sold, and the sale only to those who contemplated actual settlement, it might be highly important, and would be, in fact, to require a purchaser to indemnify the state against any waste which might materially diminish the value of the land, and thereby entail a serious loss to the state in the event the sale was not finally consummated. Under this provision, too, it is obvious that the board might have made the sole condition of the bond an obligation not to commit waste, or not to cut any more timber than was necessary for the improvement of the land and for fuel for the purchaser, or for vacation of the premises upon failure to make any one payment. This last was, under the apparent theory of the law, a very important condition. A sale was contemplated only to a settler, in order, no doubt, to prevent the acquisition of the land by speculators, and it was highly important the state should have full possession in event the purchaser failed to comply with his agreements, and the state undertook to exercise its right of resale to another. The state could fully protect itself from the nonpayment of purchase money by withholding a title and a resale, but it could have no protection, otherwise than by a bond from the purchaser, from waste and the wrongful withholding of possession. Because the board saw fit to insert as one of the conditions of the bonds in question that the purchaser should make the deferred payments according to his agreement is no reason why, in our opinion, the bond should be construed as one whose principal object and purpose was to secure such payment. The

vacating of the premises was essential in order that the board might resell, as it was empowered to do in section 16, in case of nonpayment of the purchase money, and the vacating could only be required or demanded in case of such nonpayment. It seems, therefore, clear to us to have been the legislative intent that, as evidenced by the terms of the bond itself, the condition as to the payment of the purchase money might and would be satisfied by a prompt vacating of the premises. The bond was in this respect, but in no other, in the alternative.

Our conclusion as to the legal construction of this provision in the bond is manifestly in harmony with the evident policy which the legislature, by its act of 1887, intended to adopt with reference to the sale of state lands. This was not only to secure, as required by the constitution, "the maximum possible amount therefor," which was done by retaining the old requirement that the land should be sold at public auction, after due notice, and none at less than appraised value previously made, but also to insure the settlement or improvement of the land by providing that sales should be made to actual settlers only, or to persons who would improve the same. This most laudable object was evidently to prevent purchases for speculation only, as we have said, and to add to the material wealth of the state. That this was one of the chief objects sought to be attained is shown by the express language of section 14. It was in furtherance of this purpose that the power to require a bond was given to the board of land commissioners. In case a purchaser should fail to make payments, the state would not thereby alone suffer any damage, because it had already received nearly one-third of the entire purchase money in cash, and still owned the legal title to the land, with power expressly granted by statute to sell again in such contingency. If, however, a purchaser had taken possession of the land before such failure, and retained it thereafter, then the state might be injured, because of its inability to give possession to a subsequent purchaser. It might also be materially damaged if a purchaser in possession, and before he had completed final payments, should commit such waste upon the land as to destroy or impair its value. It was to protect the state against damages resulting from these causes that the bond was required. It was not unreasonable, therefore, and was in strict accordance with its policy, for the state to say to the purchaser, as we believe it does by this provision in the bond: "If you fail to make the payments of purchase money, you may surrender possession, so that the land may be again sold, and thereupon you will be relieved and released from all further liability for the remainder of the purchase price. If you do not, you will be held liable on your bond as liquidated damages for the entire unpaid balance of the purchase money." The maker of the bond

was thus bound to perform only one of the conditions expressed in the alternative, and which one was at his election. It was necessary, therefore, for the plaintiff, in order to have stated a good cause of action, to have alleged in its complaint the nonperformance of both of the conditions in the bond stated in the alternative, namely, that the purchaser had failed to make the payments, and that he retained possession of the premises. There was no breach of the condition of the bond in this respect until the purchaser failed to make the payments required, and also failed to comply with the alternative condition. *Reynolds v. Torrance*, 3 Brev. 49; *Richardson v. Beaumont*, 20 N. J. Law, 578; *People v. Tilton*, 13 Wend. 597; *Morgan v. Menzies*, 60 Cal. 341.

If this was a necessary allegation to have constituted a good cause of action, it was, of course, necessary for the plaintiff also to have proved it before it would have been entitled to a recovery. Neither was done. There was no evidence at all as to possession, but the case was tried and argued in this court upon the theory that neither the plaintiff nor his assignee had ever entered into actual possession of the land. Whether this be true or not, the failure to allege in the complaint that the premises had not been vacated, which was a condition of the bond, would have defeated any right of recovery by plaintiff.

Counsel contend that, even if it be true that the bond might have been satisfied by the surrender of possession, this could have been effected only by a surrender to the state of the certificate of purchase, which was not done. We do not think so. The words, "vacate said premises," in their ordinary signification, and especially when considered in connection with the evident policy and object of the law to which we have referred, could have meant only a surrender of actual possession,—of *possessio pedis*. This alone stood in the way of the board in making a resale of the land, to do which it was specially empowered. If neither purchaser nor his assignee ever had such possession, this became, of itself, a compliance with the condition to vacate the premises.

It must be confessed that the statute under which the sale of land under consideration was made was in some respects apparently defective, and some of its provisions difficult to understand, and possibly more difficult to execute, but we do not believe that such defects in any wise affect the question here presented for consideration. Even if they did, the court must bear in mind the elementary proposition that the liability of a surety is *strictissimi juris*, and that all reasonable doubts should be resolved in his favor.

The defendant urged as a defense, and argued at length, that the bonds were penal obligations, and that, if the plaintiff was entitled to recover at all, it could recover only

nominal damages. It is unnecessary, however, to consider this, because the views which we have expressed as to the other defense are conclusive of the case. The trial court seems to have adopted the theory of the defendant as to this second defense, and directed a judgment in favor of plaintiff for nominal damages only. This was, of course, in view of the conclusion at which we have arrived, error, but it was error in favor of the plaintiff, and it has no right to be heard in complaint. The defendant interposes no objection to the judgment, and it will therefore be affirmed. Affirmed.

(132 Cal. 13)

PEOPLE v. MOONEY. (Or. 706.)

(Supreme Court of California. Feb. 28, 1901.)

CRIMINAL LAW—FORMER ACQUITTAL—EFFECT OF VOLUNTARY DISMISSAL AFTER REMAND—ARSON—INSTRUCTIONS—MISCONDUCT OF JUDGE—PHOTOGRAPHS OF HANDWRITING.

1. Defendant was convicted of arson, and appealed, and the cause was reversed and remanded for the insufficiency of the information. On a return of the remittitur the information was dismissed, and a new prosecution instituted. *Held*, that the defendant could not plead a former conviction, based on the theory that, as the appeal was partially from a motion in arrest, on remand the judgment should have been arrested, and that the dismissal was in effect a judgment of acquittal, under Pen. Code, § 1237, providing that an arrest of judgment will operate as an acquittal, since no appeal can be taken from such a motion, and the reversal and remand leave the cause as if no trial had ever been had.

2. A statement by the judge during the progress of a trial for arson bearing on the amount of insurance on the destroyed property, but which is made to the attorneys, and in which he says that he does not wish to be understood as quoting the evidence, is not reversible error, since it is not a statement to the jury.

3. A handwriting expert examined as a witness in a criminal case may testify as to the reasons for his opinion.

4. Photographs of handwriting are admissible in a criminal case in which the identification of handwriting is in issue.

Department 1. Appeal from superior court. Merced county; E. W. Riley, Judge.

K. J. Mooney was convicted of the crime of arson, and he appeals. Affirmed.

James F. Peck and Frank H. Farrar, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of arson, and prosecutes this appeal from the judgment, order denying his motion for a new trial, and order refusing an arrest of judgment. The case has been before the court upon a previous occasion. 127 Cal. 339, 59 Pac. 761. At that time this court declared the information fatally defective, and reversed the judgment and orders appealed from, and remanded the cause for further proceedings. Upon a return of the remittitur to the trial court, the district attorney made a motion, in furtherance of justice, that the court dismiss the information. Thereupon the court dismissed the information and or-

dered the defendant be discharged from custody. Thereafter such proceedings were had that a second information was filed against the defendant, and upon that information he has been tried, convicted, and now prosecutes this appeal.

Upon pleading to the second information, defendant set up a former acquittal, and based his plea upon the proceedings taken at the first trial, including the appeal to this court, and the judgment rendered upon that appeal. Defendant's contention seems to be that his previous appeal to this court being in part an appeal from an order refusing to arrest the judgment, and such order, in conjunction with the judgment and order denying his motion for a new trial, being reversed, upon the going down of the remittitur the judgment should have been arrested, and the subsequent order of discharge made by the trial court was in effect a judgment of acquittal. While it is quite a common practice to appeal from an order refusing to arrest a judgment, and while this court seems to have entertained appeals from such orders in a few cases, yet, upon consulting section 1237 of the Penal Code, we find that no direct appeal is allowed from that character of order. It is in effect an order made before judgment, and should be assailed upon appeal as any other order of that kind is assailed. It follows, therefore, that upon the prior appeal the judgment of this court, in substance, was one reversing the judgment and order denying a motion for a new trial; and, upon that state of facts, when the remittitur was issued the case stood exactly as if no trial had been had. Certainly, upon the going down of the remittitur it would not have been proper for the trial court to have ordered the judgment arrested; for there was at that time no judgment to be rendered, and therefore nothing to be arrested. So far as the motion in arrest of judgment was concerned, it stood exactly the same as a motion for a nonsuit which had been denied. In such a case, the judgment and order denying a new trial being reversed upon appeal, the motion for a nonsuit goes for naught, for there is nothing to be nonsuited. The trial has been set aside, and another must be had de novo. *People v. Schmidt*, 64 Cal. 262, 30 Pac. 815, appears to be directly in point, and the court there said: "The legal effect of the remanding order was to remit the defendant to his original position upon his plea of not guilty to the information on file, just as though a trial had never been had; and, upon the going down of the remittitur to the superior court, that court had jurisdiction to proceed in the case before it in any way authorized by the criminal law." Defendant claims that he has undergone a statutory acquittal, by reason of section 1188 of the Penal Code, but this claim falls to the ground in view of the foregoing authority. Indeed, without invoking that authority, it is apparent that defendant cannot rely upon said section for an acquittal. An acquittal only follows by vir-

tue of that section when the judgment is arrested, and, as already indicated, the judgment in this case never has been arrested. Section 1385 of the Penal Code provides: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." Under the authority vested in the court by this section, it made an order dismissing the information and discharging the defendant. It is unnecessary to decide here whether or not that order be construed as broad enough to amount to a dismissal of the action; for it certainly was an order dismissing the information, and section 1387 declares that an order made under section 1385 does not constitute a bar to another prosecution for the same offense, if that offense be a felony. The offense here involved is a felony, and from the record, taking into consideration all the proceedings of the previous trial, including the appeal taken at that time, we find nothing showing a previous acquittal of this defendant, or establishing a bar to the present prosecution. *People v. Schmidt*, supra.

The contention is made that the court should have given two certain instructions asked by defendant, bearing upon the burning of the building or its contents with the intent to defraud the insurance company. The instructions were not as clear and explicit as they should have been. But, aside from that defect in the wording of them, the court told the jurors that, in order to find the defendant guilty, they must be satisfied from the evidence, beyond a reasonable doubt, that he set fire to the building with the intent to destroy it. This instruction covers the facts set out in the information, and also fully covers the law by which the jury were bound to act in returning their verdict.

The statement made by the judge bearing upon the amount of insurance resting upon the property, as testified to by a certain witness, was a statement made to the attorneys in the course of argument, and not a statement made to the jury. The jurors had no right to consider it. At the same time the judge also stated that he did not wish to be understood as quoting the evidence of any witness in the case. The limitations placed upon the cross-examination of the witness Croop were proper. It was also proper to allow the expert witness Ames to testify as to the reasons upon which he based his opinion given as an expert upon handwriting. *Healy v. Railroad Co.*, 101 Cal. 592, 36 Pac. 125. The admission in evidence of the photographs of handwriting, likewise, was not error. *People v. Crandall*, 125 Cal. 129, 57 Pac. 785. For the foregoing reasons, the judgment and orders are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(132 Cal. 21)

BARKER v. HURLEY et ux. (S. F. 2,332.)
(Supreme Court of California. Feb. 26, 1901.)

TRUSTS—EXPRESS TRUSTS—STATUTE OF LIMITATIONS—CHANGE IN FORM OF TRUST PROPERTY—SUFFICIENCY OF EVIDENCE.

1. A denial or repudiation of an implied or resulting trust is not necessary to cause limitations to run in favor of the trustee, but it commences at the time of the creation of the trust.

2. Where there is no express trust created in personal property, and no subsequent declaration of trust, the purchase of real estate with the personalty does not create an express resulting trust which will prevent the running of limitations until the trust is repudiated.

3. Civ. Code, § 2221, provides that an express or voluntary trust may be created by any words or acts of the trustor indicating his intention to create a trust, and the subject, purpose, and beneficiary thereof. Section 2222 provides that such a trust is created as to the trustee by acts or words indicating his acceptance of the trust, or his acknowledgment made upon sufficient consideration of its existence, and the subject, purpose, and beneficiary thereof. A few days before his death a decedent executed a will, leaving the larger portion of his property, which was in the form of money, to his sister, but giving a small legacy to his brother and father. A few days thereafter he had the money drawn from the bank, and given to him, and he then gave it to his sister, and told her to keep it all. He then told his brother-in-law to pay certain debts owed by him. The sister afterwards paid the legacy to the brother. *Held* not sufficient to constitute a trust.

4. Limitations in favor of the sister commenced to run against an action by the public administrator to enforce a trust thereon at the time when she received the money.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

Action by J. H. Barker, administrator of the estate of John Carey, deceased, against Richard Hurley and another. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendants appeal. Reversed.

McNab & Hirsch, for appellants. J. C. Ruddock and Seawell & Pemberton, for respondent.

CHIPMAN, C. Plaintiff brings the action to compel defendants to convey to plaintiff certain real estate, title to which is alleged to be held by them as trustees of the persons interested in the estate of John Carey, deceased. The court gave judgment for plaintiff that defendants pay to plaintiff the sum of \$3,509.25, falling in which that the land described in the complaint be sold, and said amount be paid from the proceeds thereof; and, if there be not sufficient, that plaintiff have judgment for any deficiency. Defendants appeal from the judgment and from an order denying their motion for a new trial.

Plaintiff is the public administrator of Mendocino county, and defendants are husband and wife. John Carey was the brother of defendant Kate Hurley, and on June 6, 1893, was residing with his sister, Mrs. Hurley, on a farm eight miles from Mendocino

City. He died June 8, 1893, leaving a last will, of which the following is a copy: "This is the last will and testament of John Carey, made June 6th, 1893. I give my father, Jas. Carey, of South King, Clonacilly, Ireland, the sum of five hundred (\$500.00) dollars; to my brother, Maurice Carey, of Fort Bragg, the sum of three hundred (\$300.00) dollars; and all the remainder of my estate to go to sister, Mrs. Kate Hurley. I request that my body be decently buried in the Catholic Cemetery in Mendocino, and a suitable monument erected over my grave. John Carey. Witness: W. A. McCormack. Clara F. Thurston." Shortly before his death, deceased had on deposit in bank at Mendocino City \$3,509.25. Having been informed by the priest that "he was in danger of death," he sent his brother-in-law, Hurley, on June 6, 1893, with an order on the bank for this money, and Hurley brought it to Carey that day. Neither of the witnesses to the will was called to testify. Hurley testified that on his return with the money he met the doctor on the road, who informed him that he (the doctor) had drawn the will. It was executed before Hurley returned with the money. What took place when Hurley brought the money to Carey was testified to by defendants. No other persons were present. Defendant Hurley testified: "He asked me did I get it. I said, 'Yes.' I asked him if he wanted it counted, and he said, 'Yes.' I counted it out, and placed it back where it was. He said, 'Now, providing I get well, or live, I might want this money back.' I wasn't done putting it in the purse. I said, 'Here, take it now.' He reached out, and took it, and he held it in his hand for probably a minute. He then said: 'Here, Kate; take it. Keep it yourself, and keep it all, and don't give them any of it. Maurice don't deserve it, and father don't need it.' Kate is my wife, John Carey's sister. He handed it to her, and said, 'Keep it all.' He sat up, and reached it to her. He was pretty low at the time. This was on the 6th, and he died on the 8th, two days after. That afternoon I stayed in the room with him. I had further conversations with him in regard to the money. He said, 'If you stay on that train, you're sure to be killed.' I was working on the logging train for the Albion Lumber Company. He said: 'Take my advice. Leave that train. You've money enough now to get along without risking your life on that train.' He said he owed Mrs. Handley some money. Also Dr. Milliken, and Solomon, the Jew, at Navarro. He wanted them paid too." Plaintiff applied for and was granted letters of administration in 1897. Mrs. Hurley testified at the hearing for letters, and her deposition was read in evidence by plaintiff. She testified that after her brother's death she wrote her father that her brother left him \$500 under the will, and that the money was in her possession, and that she would pay him all of

it; that she told her husband to pay her brother Maurice the \$300 left him by the will. She testified: "I kept the rest of it because my brother told me to keep it. He told me to keep it all. * * * I didn't send my father the \$500 because I was sick in bed. If he would have taken it, I would have sent it to him." She testified that she asked for letters because the attorney for the public administrator wanted to make some trouble for her; that he had written her that he would make her pay her father the \$500, and afterwards "stopped that, and wrote about the will." "You [addressing the attorney] wrote me that you were going to sue me for the \$500. I thought there was no need of it. My father gave me the money. Then you wrote me to probate the will. Then I probated the will. When anybody asked me to show the will, I did it." Maurice Carey testified that he was at Hurley's the day after his brother died; that Hurley told him that his brother had left him \$300 by will, and his father \$500. A few days after the funeral Hurley showed him the will, and paid him \$300, and took his receipt, in which he relinquished all claims to the estate of deceased. It was alleged in the complaint that defendants, on November 18, 1893, purchased certain land with the money which they had received from Carey, and "took up their residence upon said land as their homestead, and have ever since had exclusive possession thereof and have resided thereon"; "and that by the said purchase and occupation the said defendants became trustees of a resulting trust in favor of the successors in interest of the said John Carey * * * and others interested in said property, and now hold said property as trustees," etc. It is admitted by defendants that they purchased the land, but they allege that it was for their own benefit, with money part of which was the money received from said Carey and part other money. The foregoing is substantially all the testimony in the case.

The court, among other things, found: That at his death Carey was the owner of the money referred to, to wit, \$3,509.25; that prior to his death he gave Hurley an order for said money, "to be drawn and held for the use of John Carey and his successors in interest, and that the said defendant Richard Hurley, by said order, drew the said money, and has ever since retained and appropriated the same to his own and the use of his wife, defendant Kate Hurley; that part of said money was mingled with defendants' money, and was used to purchase said land, but the exact amount of said \$3,509.25 so used is not shown by the evidence, and said intermingling was the result of the wrongful acts and fault of defendants; that there was no gift causa mortis, or gift at all, but that "said sum of money was placed in the custody of defendants, to be restored to the said John Carey, if he

lived, and disposed of in accordance with the terms of his will if he died." The court found as conclusions of law that defendants "became trustees of a resulting trust in favor of the successors in interest of the said John Carey," and so hold the said property, and judgment was entered as above stated. The fact that Carey made a will was well known to the beneficiaries and other persons. There was no evidence and no finding that it had been fraudulently concealed, or concealed at all. There were but three beneficiaries of the will; one of them Maurice Carey, who was fully paid. There is no allegation and no evidence that the testator's father complains that he has not been paid or desires to be paid, and the only other legatee is defendant Kate Hurley. There is no allegation and no evidence that there are any creditors of the estate, and the only person claiming to have any interest in the action is the public administrator. Defendants contend that the action is barred by the statute of limitations, which was duly pleaded, and we think this contention must prevail. They also claim that the findings are not supported by the evidence either as to the trust or the gift. The rule is well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied or constructive trust, and that it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust. The statute begins to run when the wrong complained of is done, and under our Code the limitation is four years. *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88. The doctrine laid down in this case has been frequently approved. *Nougues v. Newlands*, 118 Cal. 106, 50 Pac. 386; *Broder v. Conklin*, 121 Cal. 288, 53 Pac. 699.

Respondent does not seriously dispute the rule as to implied or resulting trusts generally, but he contends that, as the court found that there was no gift *causa mortis*, or gift at all, it follows that there must have been a voluntary or express trust; that section 2215, Civ. Code classifies trusts as (1) voluntary, which are express trusts, and (2) involuntary, which are implied or constructive trusts; that a trust resulting from circumstances may be either voluntary or involuntary,—or, in other words, may be express, implied, or constructive; and that the circumstances here show a voluntary trust. The direct testimony of Hurley and his wife is uncontradicted that Carey made a gift of all his money to Mrs. Hurley, his sister; and there is nothing in the subsequent conduct of defendants necessarily inconsistent with their testimony. But, waiving the question of gift, so far as the direct testimony goes there is none whatever that when Mr. Carey handed the money to his sister he directed it to be disposed of under the will, as the court found was the fact. The will had been executed some hours before

Hurley returned from Mendocino city with the money, and the testimony was that when Mr. Carey gave the money to his sister he expressly stated that she was to have all of it, and neither her brother nor her father was to have any of it. It was after this money was handed to her, although contemporaneously with that act, that he directed Mr. Hurley, not Mrs. Hurley, to pay certain debts which are not referred to in the will; but he gave no direction whatever as to executing the will. The evidence tending to show that the money handed to Mrs. Hurley (which defendants insist was given to her) was to be disposed of under the will was circumstantial, and consisted of the facts that defendants knew there was a will; that Hurley paid Maurice Carey \$300 (the sum mentioned in the will), and took his receipt; that Mrs. Hurley wrote her father that he had been willed \$500, and she had the money, and would send it to him. We fail to discover sufficient in these circumstances to establish a voluntary or express trust or that there was any understanding of the parties that defendants were to execute the will. An express trust, or what our Civil Code denominates a "voluntary trust," subject to the provisions of section 852, relating to trusts in real property, is created, "as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust" (section 2221); "and as to the trustee, by any acts or words of his indicating with reasonable certainty (1) his acceptance of the trust, or his acknowledgment, made upon sufficient consideration of its existence; and (2) the subject, purpose, and beneficiary of the trust" (section 2222). That the trust in the present instance related in its inception to personal property does not change the rule as to its creation. The nature of the evidence to establish the trust may be different where it relates to personal property than in the case of real property, but the strictness of the rule is not relaxed in the one case more than the other, so far as relates to the creation of the trust. In both the purposes of the trust, the subject-matter, and the beneficiaries must be clearly indicated. The trust, if a trust at all, commenced with the appropriation of the money, and the trust character was not changed by the subsequent mutations of the property. As to the degree of certainty required in the creation of trusts, see *Wittfield v. Forster*, 124 Cal. 418, 57 Pac. 219, and *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 1115.

It is not quite clear from the findings upon what theory the court found a resulting trust, but we presume it was because the money which was used to purchase the land was in part the money originally belonging to John Carey, and from which the court cou-

cluded that a trust resulted under section 853, Civ. Code. See, however, *Woodside v. Hewel*, 100 Cal. 481, 42 Pac. 152. But there never was any recognition by defendants that a trust existed as to the land; on the contrary, they treated it as their own. The trust with which they were charged, if at all, arose when they appropriated the money. This money could, of course, be followed, if impressed with a trust, wherever and howsoever invested. The trust could not be evaded by converting the money into land; but a subsequent change from money to land, or to any other form of property, after Carey's death, would not change the character of the trust with which defendants were originally charged. If, by any view of the evidence, a trust may be said to have arisen at all, it was not an express trust.

We search the evidence in vain to determine who were named by the parties as beneficiaries of the trust. We find nowhere any agreement, except as it may be implied, and there is not sufficient evidence to enable the court to define, even by implication, the terms, purposes, and beneficiaries of the trust. There are no words or acts of John Carey showing the extent and character of the trust intended by him to be created, and the evidence is wanting that defendants accepted a trust indicated with any sort of certainty by John Carey. The court found that the terms of the will were the terms of the trust, but there is no evidence that John Carey ever so declared, or that defendants accepted any such trust. That Mrs. Hurley, after the death of her brother, decided to pay her brother, Maurice, the \$300 left him by the will, and expressed a willingness to pay her father the legacy left him, is consistent with her claim to all the money. Many reasons might be suggested why she thought best to respect these legacies, and yet maintain that she was not obliged to pay them; and Hurley testified that when he paid Maurice by Mrs. Hurley's direction he told Maurice that she was not obliged to pay the money. We do not find in the case evidence of a trust voluntarily assumed, which, by the understanding of the parties, was to be a continuing one, as was true in *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108, and *O'Dell v. Moss* (Cal.) 62 Pac. 555, where it was held that the statute did not commence to run until the trust had been repudiated. If defendants held the money upon any confidence or trust, it was such as by operation of law was forced upon their consciences, and was not created by agreement. The complaint was filed November 27, 1897, more than four years after defendants received the money; more than four years after they purchased the land, recorded the deed, and entered in to possession, and occupied the land as their homestead under claim of ownership; and more than four years had elapsed after occupying the land before any demand was made upon defendants. Assuming that some sort

of a trust arose, it was not such as to take it out of the operation of the statute of limitations, and the action was barred.

It becomes unnecessary to determine whether the public administrator could maintain the action, and the numerous other questions presented by the record and urged by appellants. The judgment and order should be reversed, with directions to the lower court to dismiss the action.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the lower court to dismiss the action.

(132 Cal. 18)

SCHROEDER v. IMPERIAL INS. CO., Limited. (S. F. 1,616.)

(Supreme Court of California. Feb. 26, 1901.)
INSURANCE — PROVISIONS OF POLICY — INSTRUCTION — FORECLOSURE OF MORTGAGE — KNOWLEDGE OF INSURED.

Where a fire policy provided that, unless otherwise indorsed thereon, it should become void, if, with the knowledge of the insured, foreclosure proceedings should be commenced against the property covered by the policy, the policy became void on the service of process in foreclosure, and failure to secure the insurer's consent to the increased risk, notwithstanding insured had no knowledge of the proceedings commenced until such service of process.

Department 1. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Action by Philip G. Schroeder against the Imperial Insurance Company, Limited. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Chickering, Thomas & Gregory, for appellant. Van Ness & Redman, for respondent.

HARRISON, J. Action upon a policy of fire insurance. The plaintiff's right of recovery depends upon the construction to be given to the following clause in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void, * * * if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed." The policy was issued November 6, 1893, for the term of three years. At that time the dwelling house, which was a portion of the insured property, together with the land upon which it stood, was subject to the lien of a mortgage, and on April 30, 1895, the mortgagee commenced an action for its foreclosure, and made the insured one of the defendants therein. The insured and the other defendants were duly served with process in the action, and on May 18, 1895, a judgment was rendered therein for the amount of the mortgage debt, and directing a sale of the property in satisfac-

tion thereof. Under this judgment the property was sold June 15, 1895, to the plaintiff in the action. The dwelling house was destroyed by fire November 15, 1895. The insured gave no notice of the foreclosure proceedings to the defendant, nor did the defendant have any knowledge thereof until after the property was destroyed. The superior court held that the above clause did not have the effect to avoid the policy, unless the insured had knowledge of the foreclosure proceedings before or at the time of their commencement, and that, as it does not appear herein that she had any knowledge thereof until the service upon her of the process in the action, the policy remained unaffected by the proceedings. Judgment was therefore rendered in favor of the plaintiff, and the defendant has appealed.

A contract of insurance is to be interpreted by the same rules as are other contracts, and is to be so interpreted as to give effect to the mutual intention of the parties; and this intention is to be deduced, if possible, from the language of the contract. Civ. Code, §§ 1635, 1636; Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Yoch v. Insurance Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857. The above clause in the policy is included in that portion which enumerates many grounds for avoiding it, and it is manifest that the parties intended by these several clauses to agree that the defendant should not be liable upon the policy in case the risk that it assumed should be thereafter increased, unless its consent to such increased risk should be indorsed upon the policy. The provision above quoted is directed to the fact of knowledge on the part of the insured of the commencement of foreclosure proceedings, and not to the time at which he may obtain such knowledge, and the reasonable construction to be given to the clause is that whenever he shall have knowledge of the proceedings, and shall fail to obtain the consent of the insurer thereto, the policy shall be avoided. That the risk assumed at the date of the policy would be increased by foreclosure proceedings against the insured property was a fact well recognized in matters of insurance, and it has been held that a proviso in the policy that it shall be avoided by the commencement of foreclosure proceedings has that effect, even though the insured is ignorant thereof. *Titus v. Insurance Co.*, 81 N. Y. 410; *Meadows v. Insurance Co.*, 62 Iowa, 387, 17 N. W. 600. It was doubtless for the purpose of overcoming the harshness of this rule that the standard form of policy limits this effect to those proceedings of which the insured has knowledge. This limitation is for the benefit of the insured, and that he may have an opportunity to obtain the consent of the insurer to the increased risk, and pay an additional premium therefor, if it shall be demanded. The object of the clause is to provide against an increase of the risk, but such increased risk would

not be varied by the knowledge or ignorance of the insured, and it may be assumed that the parties deemed it just that the insured should have an opportunity to procure the consent of the insurer thereto, and therefore provided that the policy should not be forfeited if the proceedings were had without his knowledge.

It would be a solecism to speak of the insured having "knowledge" of proceedings yet to take place. He might be informed of the purpose of the mortgagee to commence proceedings, and he might have a belief that they would be commenced, but this information or belief could not be termed his "knowledge" of their commencement. It is equally unreasonable to assume that the parties intended by this clause to limit the provision avoiding the policy to proceedings of which the insured has knowledge at the identical moment of their commencement. These views find support in *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31; *Woodside Brewing Co. v. Pacific Fire Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620; *Gibson Electric Co. v. Liverpool, L. & G. Ins. Co.*, 10 App. Div. 225, 41 N. Y. Supp. 875, affirmed in 159 N. Y. 418, 54 N. E. 23; *Norris v. Insurance Co.*, 55 S. C. 450, 33 S. E. 566; *Insurance Co. v. Brown*, 77 Md. 79, 25 Atl. 992.

A contrary construction was given by the supreme court of Idaho in *Bellevue Roller Co. v. London & L. Fire Ins. Co.*, 39 Pac. 196, but the reasoning of the court thereon does not commend itself to our judgment. It urges in support of its conclusion that it would not be a reasonable construction of the clause to so construe it as to require a party to give notice of a fact of which he has no information or knowledge, but, as the clause makes no provision requiring any notice to be given to the insurer, the reason thus given is inapplicable. The policy merely provides that it shall be avoided, if the consent of the insurer is not obtained. The case in Idaho was cited in one of the district courts of appeals in Texas (*Insurance Co. v. Freeman*, 33 S. W. 1091), but the decision therein does not appear to have rested upon this authority. In another district court of the same state the clause seems to have received a different construction. *Insurance Co. v. Clayton* (Tex. Civ. App.) 43 S. W. 910. The judgment is reversed, and the court is directed to render judgment in favor of the defendant upon the facts stipulated by the parties.

We concur: GAROUTTE, J.; VAN DYKE, J.

(6 Cal. Unrep. 641)

WHITE v. COSTIGAN. (S. F. 1,663.)

(Supreme Court of California. Feb. 23, 1901.)

APPEAL—MORTGAGES—REDEMPTION—JUNIOR MORTGAGEE—UNAUTHORIZED REDEMPTION—REDEMPTIONER AS ASSIGNEE—EQUITY.

1. Though a receiver's sale of land had been held to be unauthorized on appeal in another

suit, the facts affecting the validity of the sale not appearing from the record in the case at bar, and it having been expressly found in the trial court that the sale was properly made, it would be assumed, for the purposes of the case, that the sale was valid.

2. Where, on foreclosure of a mortgage, a deficiency judgment was entered in favor of a junior mortgagee, but prior to his judgment a portion of the mortgaged lands not included in his mortgage had been conveyed by receiver's deed, he was not entitled to redeem such lands, under Code Civ. Proc. § 701, giving a right of redemption to creditors having a lien.

3. Where a purchaser at mortgage sale made a quitclaim deed of the land to the owner, such deed operated as a redemption, and perfected the owner's title.

4. By Code Civ. Proc. § 703, a redemption from a mortgagee is followed by a sheriff's deed, and section 705 requires a redemptioner to serve, with his notice of redemption to the sheriff, a copy of any assignment necessary to establish his claim. *Held*, that where, after mortgage foreclosure, the purchaser on mortgage sale gave a deed of the premises to the owner, and prior thereto, and with the knowledge of the owner, one who was unauthorized to redeem attempted to do so, and paid the redemption money to the sheriff, under section 703 the redemption was virtually an assignment of the purchaser's interest, though the sheriff was not authorized to make the deed under section 705, and hence should be regarded as the assignee of the purchaser, and the owner entitled to have her title quieted only on condition of paying the redemption money to the redemptioner.

5. Where the purchaser at mortgage sale gave a deed of the premises to the owner, and prior thereto one not entitled to redeem had paid the redemption money to the sheriff, the redemptioner's right to be regarded as the assignee of the purchaser's interest, being purely one in equity, did not extend to the forfeiture of the owner's title for nonredemption, she not being affected by the transaction between the purchaser and the redemptioner, and the deed from the purchaser being, in effect, a redemption.

6. Where one who was not authorized to redeem from a mortgage sale paid the redemption money to the sheriff, such redemptioner had a right to have his equitable title perfected by a conveyance from the owner, to whom the purchaser thereafter conveyed the land.

7. Where one who was not authorized to redeem from a mortgage sale paid the redemption money to the sheriff, his right to be repaid his money, or to have a conveyance from the owner of the lands, being an equitable one merely, he should be allowed legal interest only on the amount paid by him from the date of payment.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; J. M. Mannon, Judge.

Action by Frankie White against James M. Costigan. From a decree in favor of defendant, plaintiff appeals. Reversed.

Wm. T. Baggett, J. Q. White, Geo. E. Whitaker, and Walter H. Linforth, for appellant. Seawell & Pemberton, for respondent.

SMITH, C. The suit was brought to quiet title to the lands described in the complaint. Judgment was rendered for the defendant. The appeal is from the judgment, and on the judgment roll. Both parties deraign title from one George E. White, plaintiff's divorced husband. White had mortgaged the

lands in controversy and other lands to one Fairbanks, and afterwards some of the same lands, but not the lands in controversy, to the defendant Costigan. Suit was commenced by Fairbanks, January 15, 1895, for foreclosure of his mortgages, to which Costigan was made defendant as junior mortgagee. Pending this suit the mortgages of Fairbanks were assigned to the plaintiff herein, and by her to one Linforth, who was substituted as plaintiff. Judgment for foreclosure was entered,—date not given,—and on March 6, 1897, the lands included in the Fairbanks mortgage were sold by the sheriff, and on the return of the sale, March 25, 1897, a deficiency judgment for \$3,937 was docketed in favor of Costigan. At the sale Linforth became the purchaser of the lands in controversy for the sum of \$500. Costigan redeemed from the sale, within the time allowed by law for redemption, paying the redemption money to the sheriff, and receiving his certificate, and afterwards his deed for the lands sold. The redemption money was paid to, and accepted by, Linforth. The redemption was regular in all respects except as to Costigan's right to redeem. On the day after the redemption, September 8, 1897, Linforth made a quitclaim deed of the land to the plaintiff, who paid no consideration, and took the deed with notice of the redemption and of the acceptance of the money by Linforth. The plaintiff deraigns title under the deed last referred to, and also under a receiver's deed—date not given, but recorded November 21, 1896—made in pursuance of a sale under an order of the superior court of San Francisco of date April 12, 1895, and an order of confirmation of date May 5, 1896, in a divorce suit therein pending between herself and her husband. The validity of this sale was involved in the case of *White v. White* (decided by the court in bank, Dec. 6, 1900) 62 Pac. 1062; and it was there held, on the facts appearing in that case, that the court was without jurisdiction to order the sale, and the sale and deed made in pursuance thereof consequently void. But in this case the facts affecting the validity of the order of sale do not appear, and it is expressly found that the order of sale, and the order confirming the sale, were "duly made and entered" by the court, and that thereafter a deed was executed to the plaintiff by the receiver "conveying to (her) all the right, title, and interest of the said George E. White in and to the lands * * * sold, * * * including the premises described in the complaint." Hence there is nothing in the record here to show want of jurisdiction in the court; and the maxim, "De non apparentibus, et non existentibus, eadem est ratio," must be applied. It must therefore be assumed, in this case, that the sale was valid.

The relations of the parties to the land in controversy appear, then, to be as follows: Mrs. White, after the foreclosure sale, was the legal owner of the land, and entitled to

redeem. By the quitclaim deed from Linforth, she acquired whatever interest he had at the date of the deed, which, unless he had previously parted with his interest as purchaser, perfected her title. But in the meanwhile Costigan had redeemed from Linforth, and, if he thereby acquired any rights, these could not be affected by the deed to Mrs. White. The questions involved relate, therefore, to the validity and effect of this redemption. In considering them, the legal and the equitable aspects of the case must be carefully distinguished. The former will be first considered.

1. The redemption was made by Costigan under his deficiency judgment of March 26, 1897. But before that time the title to the land in controversy had passed by the receiver's deed to Mrs. White. His judgment, therefore, was not a lien upon the land, and did not entitle him to redeem. Code Civ. Proc. § 701. The sheriff's deed was therefore wholly void. "To be entitled to redeem, [the party] must be a creditor having a lien." *Haskell v. Manlove*, 14 Cal. 57. The power of the sheriff to transfer the title of the judgment debtor or his successor, in invitum, "is altogether statutory, and his acts are nugatory, unless the provisions of the statute are pursued." *Wilcoxson v. Miller*, 49 Cal. 194. The case, therefore, in its legal aspect, was not affected by the attempted redemption. The legal title was already vested in Mrs. White, but was subject to forfeiture for failure to redeem within the period prescribed by the statute. The deed removed this liability, and in effect operated as a redemption from the sale. Thenceforth her title, i. e. her legal title, ceased to be subject to forfeiture, and thus became perfect.

2. It remains to be considered whether, by his attempted redemption, Costigan acquired any equitable rights, and, if so, what these may be. With regard to this question, Mrs. White appears in a double capacity, or rather in two capacities, namely, as the successor of the judgment debtor, and as the successor of the purchaser, Linforth. In the former capacity she was the owner of the land, subject to forfeiture for nonredemption, and, as she was not a party to the transaction between Linforth and Costigan, her title was not affected thereby. But as grantee in the deed from Linforth she took subject to any equities existing against him in favor of Costigan. The question between her and Costigan is therefore the same, with regard to such equities, as would have been the question between him and Linforth if the deed had not been made. Stated generally, the question involved is as to the effect of a redemption from an execution sale by an unqualified redemptioner accepted or acquiesced in by the purchaser. On this point it seems to be settled that the purchaser is estopped to dispute the validity of the redemption. 3 *Freem. Ex'ns*, § 317, p. 1870, and cases cited. But whether such estoppel

will operate to transfer the interest of the purchaser to the redemptioner must depend upon the statutory provisions of the particular state. Thus, in Illinois,—where the effect of redemption is simply to extinguish the purchaser's interest, and thus to subject the property to the redemptioner's lien,—it has been held that a redemption by an unqualified redemptioner cannot be treated as an assignment, though it is suggested that even there the redemptioner, in a proper proceeding in equity, might be subrogated to the rights of the purchaser. *Meyer v. Mintonye*, 106 Ill. 414; *Freem. Ex'ns*, § 321, pp. 1885, 1886. But in this state, by the provisions of our statute, the redemption is followed by a deed (Code Civ. Proc. § 703), and hence "the redemption is virtually a transfer of the certificate of sale." *Bagley v. Ward*, 37 Cal. 129, 130; *Eldridge v. Wright*, 55 Cal. 536.

In *Bagley v. Ward* the redemptioner was qualified to redeem, but it was objected that the papers required by the statute were not produced to the sheriff, which ordinarily would render the redemption void. Code Civ. Proc. § 705; *Haskell v. Manlove*, 14 Cal. 54; *Wilcoxson v. Miller*, 49 Cal. 193. It was held that, "as between the immediate parties to the redemption, the production of the papers mentioned in the statute (might) be waived," and that the sheriff's deed passed a good title. In the case at bar the redemptioner was not entitled to redeem, and hence the sheriff was not authorized to make the deed; but the principle that a redemption, under our laws, is virtually an assignment, applies. And, indeed, this is evident from the nature of the transaction; for, as the end and effect of the redemption is to transfer the title, this interest must necessarily enter into the minds of the parties, and the transaction thus contains in itself all the elements of a valid assignment except the formal writing. Civ. Code, §§ 1066, 1636, 1646, 1647. In this case, for lack of the written assignment, the sheriff had no authority to convey (Code Civ. Proc. § 705); but nevertheless the intent is apparent, and the transaction, interpreted in the light of the circumstances, and of the law and usage of the state, must be regarded in equity as an assignment of the purchaser's interest. Accordingly, in *Abadie v. Lobero*, 36 Cal. 396, 397, which was a case of redemption by an unqualified redemptioner, it was assumed (though not expressly held) that, "since (the purchaser) was satisfied and treated the redemption as valid, it was good, or, if not good as a redemption as between the parties, amounted to an assignment of the certificate of sale," and this opinion is referred to with apparent approval in *Eldridge v. Wright*, 55 Cal. 536, 537, and in the concurring opinion in effect affirmed. The defendant must therefore be regarded as occupying the position of equitable assignee of Linforth's interest, and is entitled to have

his equitable right perfected. But his right, which is purely of equity cognizance, does not extend to the forfeiture of the plaintiff's title for nonredemption; for, as to her original title, she was not affected by the transaction between Linforth and the defendant, and from the legal point of view the deed from Linforth was, in effect, a redemption. Nor, were it otherwise, could equity assist him in enforcing a forfeiture. The plaintiff is therefore entitled to have her title quieted, but only on the condition of paying to the defendant the amount paid by him for redemption. The defendant has a right to have his equitable title perfected by a conveyance from the plaintiff, if she do not redeem; and, as his right is merely equitable, he should be allowed and the plaintiff required to pay legal interest only on the amount paid by him (\$560) from the date of payment. The time for redemption should be limited to a reasonable time, not exceeding six months from the entry of the judgment herein ordered. I advise that the judgment be reversed, and the cause remanded, with directions to the court below to render judgment on the findings in accordance with this opinion.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to render judgment on the findings in accordance with this opinion.

(181 Cal. 675)

HAUGHAWOUT v. HUBBARD et al. (L. A. 799.)

(Supreme Court of California. Feb. 25, 1901.)

MUNICIPAL CORPORATIONS—SEWER IMPROVEMENTS—CONTROL BY COUNCIL—DELEGATION OF POWERS—INVALID ASSESSMENTS.

Finlayson, St. Laws, p. 9, § 3, requires the city council, before contracting for sewer improvements, to pass and publish a resolution of intention "describing the work" proposed, and provides that the city engineer shall make plans and specifications and estimates of the cost thereof, which, by Id. p. 42, § 5, become part of the contract, to be awarded when approved by the council. Id. p. 61, § 6, provides that the work must be done under the direction and to the satisfaction of the superintendent of streets. The ordinance of intention for the work required it to be done in accordance with plans and specifications on file in the city clerk's office, one of which provided that, "when the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." Held, that an assessment levied for work done under a contract based on such plans and specifications was not invalid on the ground that such specifications delegated to the street superintendent powers of the council.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Suit by W. J. Haughawout against Laura A. Hubbard and others to foreclose an assessment lien on a certain lot for sewer work. From a judgment in favor of the defendants, plaintiff appeals. Reversed.

H. J. Stevens and A. B. McCutchen, for appellant. Mulford & Pollard, for respondents.

PER CURIAM. The ordinance for the work requires it to be done "in accordance with the plans and specifications on file in the clerk's office of the city of Los Angeles, said specifications being designated 'C' and 'D.'" The ordinance of intention contains a similar provision. It is claimed by the respondent, in effect, that these specifications delegate to the street superintendent powers vested by the law in the council, and which it had no right to delegate. The specification principally discussed in the briefs, and on the supposed insufficiency of which the decision of the lower court was rested, is as follows: "When the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." The point of the objection is that the power is thus delegated to the street superintendent to determine whether the ground does or does not "afford a sufficiently solid foundation," and, in the latter case, the power to determine the depth of the excavation, and the materials to be used in bringing the bottom of the ditch "to the required level and form." The former objection was overruled by the court below. The latter was sustained on the supposed authority of Bolton v. Gilleran, 105 Cal. 244, 33 Pac. 881, and cases following it. The other objections are similar, but are of a more trivial character, and were regarded by the lower court as without merit. It is assumed in these objections that, under the provisions of the law relating to the subject, it is the function of the council, in ordering any improvement, to determine in advance all the details of the construction; or, in other words, not only to make the specifications, but to make them so complete as to leave nothing to the discretion or judgment of the street superintendent. But to this view of the law there are several decisive objections: First, the function of making the specifications is not imposed by the law on the council, but on the city engineer. The function of the council with reference to them is merely to order them to be made, and to see to it that they are accompanied by an estimate of the cost of the improvement, and are otherwise satisfactory. Next, the law does not impose, either on the council or the engineer, the impossible task of making the specifications so complete.

And, finally, it is the obvious intent of the law to devolve upon the street superintendent a certain discretion with reference to the details of the work. A brief review of the act relating to street improvements, and of the several powers and functions imposed by it on the council and other municipal officers, will establish these propositions.

1. By section 2 of the street-work act the power is conferred on the city council "to order" any of the improvements therein specified. Finlayson, St. Laws Cal. pp. 5, 9, § 3. This involves the function of determining the nature or general character of the improvement to be made; and this is also implied in the provision that "a resolution of intention" shall be made and published "describing the work," by which is meant not the work or labor to be done, but the improvement or work to be constructed. This function obviously can be performed only by the council; and if it be delegated, either in whole or in part, to the street superintendent, the assessment for the improvement will be void. Bolton v. Gilleran, supra, and cases cited. But the performance of this function does not involve the necessity of determining or describing the details of construction,—a task for which the council is altogether unfitted. This task is devolved by the law on the city engineer, whose duty it is (in the case of sewer work) to make "plans and specifications, and careful estimates of the costs and expenses thereof" (Finlayson, St. Laws, p. 9, § 3), which, when approved, become part of the contract to be awarded (Id. p. 42, § 5). The function of the council with regard to these is simply that of supervision. Ultimately it is its function to determine the cost of the work, and the amount of the tax to be assessed for it (Bolton v. Gilleran, 105 Cal. 248, 38 Pac. 881); and this implies that the specifications must be accompanied by an estimate of the cost definitely determining the amount. But, if the specifications comply with this essential condition, and are otherwise satisfactory to the council, its functions are fulfilled; nor—this condition being fulfilled—is its jurisdiction to order the work in any way affected by any defects in the work of the engineer in preparing the specifications. The provisions of the act in this regard are explicit. On the publication of a sufficient resolution of intention "describing the work," and the lapse of the 25 days,—the intervening conditions having occurred,—the council is "deemed to have acquired jurisdiction to order * * * the work"; and all that is required of it in addition is that it shall require the specifications to be made, and the cost of the work to be thus determined. It is clear, therefore, that the defects, if any, in the specifications, are not to be regarded as defaults of the council in performing its functions; and that the power devolving on the street superintendent by reason of such defects cannot be regarded as a delegation of the powers of the council.

2. Hence the objections made must be re-

garded as resting simply upon the supposed defects in the specifications, and upon the proposition, assumed to be law, that these may affect the validity of the assessment. But there is nothing in the act to lead us to suppose that this was intended, and, from the nature of the case, a contrary intention must be inferred. The purpose of specifications is, indeed, to determine and prescribe the details of construction; but this can be effected only approximately. To some extent such details must depend on unanticipated contingencies, and can be determined only by the exigencies of the actual construction. The specifications must, therefore, always fall, more or less, in certainty or completeness of detail; and hence the most accurate and detailed specifications must leave unprovided for many questions arising in the course of the work as to kind and amount of work or materials and other details of construction. The question as to the sufficiency or insufficiency of specifications is, therefore, one merely of degree; that is, not whether they are certain or uncertain, but whether they are more uncertain than is desirable. To this question no general answer can be given; and hence, in the absence of specific provisions of the law, it must be regarded as immaterial to the validity of the assessment.

3. It follows, from the essential nature of all specifications, that many questions as to details must be left to the discretion of the officer superintending the construction,—in this case the street superintendent; and that this must be the case with reference to all details that are in fact not determined by the specifications. This fact is too obvious to have been overlooked by the legislature. Accordingly, it is expressly provided by the act that the work "must in all cases be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent; * * * and all contracts made therefor must contain a provision to that effect." Finlayson, St. Laws, p. 61, § 6. There is thus conferred upon the street superintendent not merely the power to see the specifications carried out, but a power or discretion beyond the specifications. This power is, of course, limited by the contract, and by the specifications as part thereof, but extends to all questions of detail not explicitly determined by the specifications, or the contract; and with reference to such questions his own judgment is by the express terms of the law and of the contract itself made the criterion. General rules may be prescribed by the council directing the exercise of this discretion, but this rather affirms than denies its existence. The cases cited by the court are not inconsistent with this view of the law: In the case of Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, the assessment was, indeed, held to be void on account

of defect in the specifications; but the defect was that they did not contain a definite estimate of the cost of the work, but alternative estimates only, of which the one might exceed the other by about 50 per cent. The result was that there was a failure to perform either of the two essential functions imposed by the law on the council, namely, that of determining and describing the nature or general character of the work, and that of determining the amount of the burden to be imposed therefor by assessment on the property of the parties to be charged with the cost. The cases of *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940, and *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414, were decided solely on the authority of *Bolton v. Gilleran*, and must be regarded as mere applications of the principle of that decision. *Fisher v. Prince*, 3 Burrows, 1304; *Osborne v. Rowlett*, 13 Ch. Div. 785. In the former case the decision in *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132, is cited to the proposition that "a contract which gave to the superintendent of streets the power to increase or diminish the cost of the improvement after the contract had been entered into by requiring a greater or less amount of material for its completion as he should determine, * * * [would render] the assessment invalid." Whether the contract in the case under consideration was of that character or otherwise does not appear from the report, but it seems that authority was given to alter the specifications, which is not the case here. In *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414, the case was decided mainly on the grounds of insufficient publication of the resolution of intention. The specifications are referred to briefly, but are not set out, or their effect stated. It results from what has been said that on the facts found the judgment should have been for the plaintiff. The judgment is, therefore, reversed, and the cause remanded, with directions to the lower court to enter judgment on the findings for the plaintiff.

(131 Cal. 667)

In re FREUD'S ESTATE. (S. F. 2,246.)
(Supreme Court of California. Feb. 25, 1901.)
EXECUTORS AND ADMINISTRATORS—SALE OF REALTY—SATISFACTION OF MORTGAGE—STATUTES—JUDGMENT CREDITOR—NO STANDING IN COURT.

1. Code Civ. Proc. § 1577, provides that, if it shall be for the advantage of the estate, the superior court may authorize the administrator to mortgage the same; and section 1578 requires the petition asking for such power to state the debts, lien, or mortgage to be paid with the money thereby received. Section 1536 authorizes a sale of the realty for the payment of the debts, or when for the best interests of the estate; and section 1537 prescribes that the petition must contain a statement of the debts and charges of administration already accrued, and an estimate of what may accrue during the administration. *Held*, that it was not error for the court to decree a sale of the realty for the payment of liens thereon and the expenses of administration still to accrue.

2. Under Code Civ. Proc. §§ 1577, 1578, providing that the realty of an estate may be sold or mortgaged for the purpose of paying or renewing liens or mortgages already thereon, an administratrix may mortgage the realty for the purpose of paying existing liens thereon, and may use the money acquired by sale or mortgage to redeem the property of the estate from one who has obtained it at foreclosure sale.

Department 2. Appeal from superior court, city and county of San Francisco; *J. V. Coffey*, Judge.

Petition by *Tiny Freud*, as administratrix with the will annexed, in the matter of the estate of *Morris Freud*, deceased, for the sale of the realty to pay incumbrances thereon and the expense of administration still to accrue. From an order granting the sale, an order settling the annual account of the administratrix, and an order for mortgaging the realty, the *Warners Bros. Company*, as mortgagees of part of the realty, appeal. Affirmed.

Hart H. North and *Henry E. Monroe* (W. B. Treadwell, of counsel), for appellant. *W. S. Goodfellow* and *Wm. B. Bosley*, for respondent.

PER CURIAM. Appeals from an order of sale of real estate, an order settling annual account of administratrix, and an order for mortgage of real property. The several appeals will be considered in the order stated.

The deceased died seised of two lots of land, described in the petition, which he devised to his widow, *Tiny Freud* (now administratrix), "to hold the same during her lifetime in trust for [testator's] five children" named in the will, and "upon the death of [the] wife * * * to be divided among [his] said children share and share alike." The will was admitted to probate and letters testamentary issued to *Jacob Freud*, the executor therein named, March 19, 1883. An order for a family allowance to the widow of \$250 a month was made December 29, 1883. The executor's final account, showing a balance of \$2,078.62 in his favor, was settled May 25, 1888; and thereupon he was discharged, and *Mrs. Freud*, the widow of deceased, was appointed administratrix with the will annexed. The estate coming into her hands consisted of the two lots above referred to, found to be of the present value, respectively, of \$6,500 and \$18,500. The latter lot was subject to a mortgage of the testator to the *German Savings & Loan Society* for \$12,500, and, when the petition was filed, had been sold, May 31, 1898, to the bank, under a foreclosure decree, for \$11,143.48. From this sale the appellant, the *Warners Bros. Company*, had redeemed, November 30, 1898, as successor in interest of *Jacob Freud*, the former executor, and one of the devisees, under a deed of date October 1, 1897,—the redemption money being \$11,609.44; and, in a suit brought by him against the administratrix of the estate and the devisees other than *Jacob*, a decree of strict foreclosure has been

rendered, June 16, 1899, foreclosing their interests, and that of each of them, in the property sold, unless redemption should be made within 60 days from the date of the decree. The mortgage, it will be observed, had not been presented to the executor as a claim against the estate. The petition for the sale of real estate was filed June 7, 1899. Up to this time, as appears from the petition and the findings, the administratrix had received in rents the sum of \$37,582.35, all of which had been disbursed in payment of interest on the mortgage, taxes, repairs, and other expenses of administration, except \$100 per month, which had been applied by her on her family allowance. The balance due to Jacob Freud, the former administrator,—\$2,078.02,—remained unpaid. The estimated amount of the expenses and charges of administration to accrue was \$2,000. The order of sale was based by the court on the double necessity of redeeming the mortgaged premises from the appellant's lien, and of paying "debts, expenses, and charges of administration accruing and to accrue."

With regard to the former ground, the contention is that the court was not authorized to order a sale for the purpose of redeeming the mortgaged premises from the appellant's lien. Such authority, it is said, could be derived only from the amendment of 1893 to section 1536 of the Code of Civil Procedure, which authorizes a sale "for the advantage, benefit, and best interests of the estate, and those interested in it." But under the decision in *Re Packer's Estate*, 125 Cal. 396, 58 Pac. 59, this provision cannot apply to the estate of the decedent, who died in 1883; and hence, if the order is to be justified at all, it must be justified under the provisions of the original section, or, rather, of the section as amended in 1880. The contention thus far, we think, must be admitted; and it may also be admitted, for the purposes of this case, as is contended, that the money needed for redemption did not come within the description of "debts outstanding against the decedent," the payment of which is one of the objects for which a sale may be made under the provisions of the statute. But a sale is also authorized when it is necessary "to pay the debts, expenses or charges of administration"; and this refers not only to accrued debts, expenses, or charges, but to those to accrue. Code Civ. Proc. §§ 1536, 1537. Hence a sale may be ordered when necessary to meet such prospective charges or expenses, though there be "no debts or expenses of administration accrued and unpaid." *Richardson v. Butler*, 82 Cal. 179, 23 Pac. 9. It is clear, therefore, that, if among the powers of the administratrix was the power to make the redemption and to charge the expense to the estate, then the court was justified in regarding the amount necessary for the purpose as a legitimate prospective charge or expense of administration, and in ordering a sale for the purpose of redeeming.

The question then reduces itself to this: Has an executor or administrator the power to use the money in his hands for the purpose of redeeming property of the estate from liens existing on it? The question is an important one, but seems sufficiently clear. The executor or administrator is intrusted by the law with the property of others. Code Civ. Proc. §§ 1452, 1581. And the duty and corresponding power of preserving the estate results necessarily from his character as trustee. 2 Perry, Trusts, § 915. Thus, while generally he has no power to carry on the business of the decedent (*In re Rose's Estate*, 80 Cal. 166, 22 Pac. 86), yet he may do so if necessary to preserve the property (*In re Smith's Estate*, 118 Cal. 466, 50 Pac. 701). He may also spend money in litigation either to recover or protect property of the estate, or for insurance. So though, generally, he may not expend money in the erection of a new building (*In re Moore's Estate*, 72 Cal. 342, 13 Pac. 880), yet he may expend it in repairs to any extent necessary to preserve the property; and in cases that may be readily imagined the power to repair might extend even to the erection of a new building (*Abb. Law Dict. "Repair"*), as, e. g., in the case of a necessary outhouse destroyed by fire, or of land paying a large rental on which the building had been destroyed by fire, or decayed so as to be no longer available, and where the new building could be paid for in a very short time out of the rental. In fine, the governing principle is that, subject to the contingency of the expense being disallowed by the court, he may do whatever is necessary for the preservation of the property of the estate, and the specific character of the act done is altogether immaterial. Hence, necessarily, his power must extend to the preservation of property by paying off liens existing on it, when necessary for the purpose (*Woerner, Adm'n*, pp. 690, 691, § 329; *Burnett v. Lyford*, 93 Cal. 118, 119, 28 Pac. 835), as, e. g., in the case of taxes, tax sales, etc. (*People v. Olivera*, 43 Cal. 494; *Weinreich v. Hensley*, 121 Cal. 637, 54 Pac. 254), or as in case of cattle or horses impounded and held for expense of pasture (*In re Armstrong's Estate*, 125 Cal. 605, 58 Pac. 183). And that this is the intention of the law appears very plainly from the provisions of Code Civ. Proc. §§ 1577, 1578, where provision is made for the payment by the administrator of liens or mortgages on the realty of the estate. Of the cases cited to the contrary by the appellant (*In re Knight's Estate*, 12 Cal. 207; *Tompkins v. Weeks*, 26 Cal. 50, 60), the latter has no application; the decision there resting on the ground, italicized by the court, that "*the prior mortgage of Tomes [the lien paid] was not a charge against the estate, [and that] no part of it could ever have been paid out of the estate.*" The case, therefore, need not be further considered. Nor is the decision in *Re Knight's Estate* applicable here. In that case it was

said, as is doubtless true, that, while it is the duty of the administrator to preserve the estate, "this does not mean that he is, at discretion, to pay off all incumbrances resting on the property upon the notion that the property may increase in value, and thereby a speculation may be made by the estate"; and the point directly ruled was that "he cannot advance money to remove incumbrances unless his intestate was bound to pay the money." Thus, apparently, the decision is placed on two grounds, namely: (1) On the ground expressed, which is in effect that the administrator cannot pay all incumbrances at discretion for speculative purposes, or, it might have been said, for any purpose except for the preservation of the property, and where necessary for that purpose; and (2) on the ground that he cannot pay off incumbrances "unless his intestate was bound to pay the money." Nor can it be determined which of these was the governing consideration in the mind of the court. But the power of the administrator to pay off incumbrances in any case results solely from the necessity of preserving the property, and can be justified only on the ground that the lien is a charge on the estate, and therefore a peril to it; and this is equally true whether the lien was created by the intestate, or, as in the case of taxes, in some other way. The circumstance that the lien was not created by the deceased may therefore be disregarded, and the decision may be construed with reference to the case before the court, and the expressed grounds of the decision. Thus construed, it may be regarded as holding simply that the administrator was not justified, under the circumstances of the particular case, in redeeming from a lien which his intestate was not bound to pay. If, however, the decision be construed as based on the latter circumstances, it does not apply to this case, where the fact is different. Here the mortgage was made and a debt contracted by the deceased. Nor was the debt barred by failure to present it. Suit could still be maintained on it. Code Civ. Proc. § 1500. And it differed from other debts of the estate only in the extent to which it was a lien. Nor was the case materially altered by the sale and redemption. The effect of this, in the legal aspect of the case, was simply to terminate "the effect of the sale," thus restoring the property to the estate, but reviving the lien of the mortgage for the benefit of the party redeeming. Code Civ. Proc. § 703. The appellant acquired no title, but an equitable lien only, by subrogation to the lien of the mortgagee. Pom. Eq. Jur. §§ 708, 799, 1211, 1212. It is therefore still the lien of the original mortgage from which redemption is to be made. In another respect, also, is the case of *In re Knight's Estate* distinguishable from the case at bar. In that decision it was observed by the court, with reference to the case before it, that in such cases, where redemption

was necessary, resort could be had to a court of equity. But under the existing law, where in the course of any regular proceeding the relief becomes appropriate, the resort may be now had to the court in which the administration is pending. *Toland v. Earl* (Cal.) 61 Pac. 914. It follows that, in cases where the administrator is otherwise without power to redeem, authority may be given him by the court, as has been in effect done in this case, by the order of sale. His authority, therefore, can now no longer be disputed, and hence the court had authority to order the sale for the purpose of obtaining the means for redemption.

It is also objected, on the supposed authority of the decision in *Re Crosby's Estate*, 55 Cal. 574, that the right to have a sale of the real property has been lost by laches. But that was a proceeding for the purpose of paying an allowed claim, and the case was regarded as in effect a suit by a creditor against the heirs. Here the proceeding is for the payment of expenses and charges of administration accrued and to accrue, which is a different case. It is unnecessary to consider here the question of the family allowance. That was not passed on by the court, nor have we any reason to suppose that in making the order of sale it entered into its consideration.

With regard to the settlement of the administratrix's account, the question as to the balance of the family allowance claimed by the widow was expressly reserved from the decision by the court, and therefore need not be considered. The sole question is as to the item of \$100 per month credited to the widow on account of family allowance. This was equivalent to a little over six years' full allowance,—a period that covers less than the first two years of her administration; so that, if we leave out of view the delay of payment, the widow has received her full allowance for that period, and no more. Whether her allowance should have been further cut down by reason of her delay in closing the estate was a question for the lower court to determine, and we see no reason to disturb its decision.

With regard to the order for mortgage little need be said. The authority of the court to order a mortgage for the purpose of paying liens on the realty of the estate is expressly given by the provisions of the statute (Code Civ. Proc. § 1578); and the constitutionality of the act has been affirmed by this court in the case of *Murphy v. Bank* (Dec. 27, 1899) 63 Pac. 368. As to the propriety of the order there can be no doubt. The authority given to the administratrix extends only to the mortgage of the property covered by the lien, which will be lost unless redeemed. No one, therefore, so far as his interest in the estate is concerned, can be injured or aggrieved by the order. The appellant is, indeed, interested adversely to the estate as a claimant of the land, but

in this capacity he has no standing in court; and his grievance, if any, in failing to acquire the property of the estate, cannot be considered. The orders appealed from are affirmed.

(131 Cal. 501)

ADAMS et al. v. CITY OF MODESTO.

(Sac. 650).¹

(Supreme Court of California. Feb. 4, 1901.)

MUNICIPAL CORPORATIONS—NUISANCES—OPEN SEWERS—ABATEMENT—CLAIMS AGAINST CITY—TORTS—PRESENTMENT—DAMAGES—EVIDENCE.

1. Under Civ. Code, § 3479, declaring that anything injurious to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life and property, etc., is a nuisance, an open wooden trough, passing about 300 yards from plaintiff's house, and constituting part of the sewerage system of the city, through which, for a distance of about 450 yards, the city sewage passed, constituted a nuisance, entitling plaintiff to its abatement.

2. Municipal Corporation Act, § 864 (St. 1883, pp. 206 et seq.), declares that all "demands," against a city or town of the sixth class shall be presented and audited by the board of trustees, etc. *Held* that, though the term "demands" was sufficiently broad to include claims for torts as well as on contracts, yet the purpose of the act being that the claim should be audited, which could not apply to claims for torts, the act did not require presentation of a claim for damages for the maintenance of a nuisance as a condition precedent to the plaintiff's right to sue thereon.

3. In an action for the abatement of an open sewer as a nuisance, where plaintiff alleged that he was damaged by the conduct of sewage through the sewer, and by discharge of the sewage over land adjacent to plaintiff's, but the finding of the court, by which damages were allowed, referred only to the running of the sewage through the sewer, and there was no evidence to show the amount paid for doctor's and medicine bills for sickness alleged as an element of damage, and the evidence did not show that plaintiff had not been able to rent the property because of the sewer, that part of the judgment awarding damages was not supported by the evidence.

In bank. Appeal from superior court, Sacramento county; William O. Minor, Judge.

Reversed on condition.

For opinion in department, see 61 Pac. 957.

PER CURIAM. Appeal from a judgment in favor of the plaintiffs for the abatement of a nuisance and for damages, and from an order denying a new trial. The plaintiffs are owners of a tract of land in the city of Modesto, on which, until a short time before the commencement of the suit, they resided with their family. The nuisance complained of is an open wooden trough, passing about 300 yards from the plaintiffs' house, and constituting part of the sewerage system of the city, through which, for a distance of about 450 yards, the sewage matter of the city is passed. This the court found was a nuisance, interfering with the comfortable enjoyment and obstructing the free

use of the plaintiffs' property, and that the plaintiffs were damaged thereby in the sum of \$650.

That the use of the open sewer by the city in the vicinity of the plaintiffs' land constituted a nuisance, and that the plaintiffs were entitled to have it abated, is too clear to require discussion. Civ. Code, § 3479; *Peterson v. City of Santa Rosa*, 119 Cal. 392, 51 Pac. 557; *Lind v. City of San Luis Obispo*, 109 Cal. 343, 344, 42 Pac. 437; *Wood, Nuls.* § 781, note 1.

With regard to damages, it is objected that the demand was not presented to the board of trustees, as required by the provisions of section 864 of the municipal corporation act (St. 1883, pp. 206 et seq.), applying to cities of the sixth class, of which the city of Modesto is one, which provides that "all demands against such city or town shall be presented and audited by the board of trustees," etc. But we do not think this provision was intended to apply to cases of this kind. The term "demands" is, indeed, sufficiently broad to include all claims, whether arising from contract or tort; but, when used in this connection, the term does not usually include demands of the latter class. 15 Am. & Eng. Enc. Law, p. 1194. That the term is here used in the narrower sense, as referring only to demands arising from contract, and for determinate amounts, is shown by the purpose for which they are required to be presented, which is that they may be "audited,"—a term that is not applicable to demands arising from torts. Law Dictionaries of Anderson, Abbott, Black, Wharton, etc.; Cent. Dict.

We do not think, however, that the finding as to damages is sustained by the evidence. In the complaint it is alleged not only that the sewage matter of the city was conducted through the trough, but that it was habitually discharged upon and spread over the land towards the land of the plaintiffs, and the damages claimed were alleged to proceed jointly from both causes,—that is, not only from the use of the sewer, but from "running the sewage on the ground"; and the testimony of the plaintiff David Adams is to the same effect. But the finding of the court refers only to the running of the sewage through the trough, and nothing is said about the discharge of the sewage on the ground, and there is nothing in the testimony to determine how much proceeded from the latter and how much from the former cause. The testimony of the plaintiff is also otherwise indefinite. He speaks of sickness in his family caused by the nuisance, which "entailed doctor bills and medicine bills," but no amounts are given. He says, also, he "lost the use of the place for two years," and that he could have rented it for \$250 a year if it hadn't been for the sewer. But the place contained about 20 acres of land, and its use, except as a dwelling place, could not have been lost by reason of the

¹ Hearing denied March 7, 1901.

nulstance complained of; and, indeed, the witness expressly says he "lost the use of it because [he] didn't care to improve it." The plaintiffs were undoubtedly damaged, but the evidence fails to show they were damaged in the amount found or in any other ascertainable amount. A new trial must therefore be granted, unless the plaintiffs prefer to release the damages.

The order denying the defendant's motion for a new trial is therefore reversed, unless the plaintiffs, within 30 days after notice of the filing of the remittitur, file their stipulation in writing, agreeing that the judgment be modified by striking therefrom the part thereof that relates to damages. Upon the filing of such stipulation, the judgment shall be modified accordingly, and as thus modified shall stand as affirmed.

(131 Cal. 681)

MEHERIN v. SAUNDERS, Constable, et al.
(S. F. 1,073.)

(Supreme Court of California. Feb. 25, 1901.)

EXECUTION SALE—RECOVERY OF PRICE—CONDUCT OF SALE—RETURN OF OFFICER—CONCLUSIVENESS—RIGHTS OF PURCHASER—RIGHT OF JUDGMENT DEBTOR TO RECOVER EXCESS—LIMITATIONS—DEFENSE—SET-OFF—ESTOPPEL.

1. A purchaser of property at an execution sale who does not pay the entire price will not be heard to question his liability for the remainder on the ground that the sale was illegal because the entire price was not required to be paid in cash.

2. Where a constable sells property on execution under the usual statutory notice, it is a cash sale, and not a sale on credit, though the purchaser does not pay the entire price, and hence the latter cannot escape liability on the ground that the sale was illegal because on credit.

3. The return of a constable showing that the execution purchaser of property paid the full price bid does not estop the corporation's assignee in insolvency from denying such fact in an action to recover the amount of the bid from the purchaser, since the purchaser was not a party to the proceedings in which the property was sold.

4. An execution purchaser of property is not released from liability on his bid by reason of a prior execution sale of the property, since the rule of caveat emptor applies to execution sales.

5. Where an officer who sells property under an execution at a price in excess of the judgment, and fails to bring an action to recover such excess from the purchaser, and surrenders a check given in payment thereof to the purchaser, and is insolvent, and his bond exhausted, the assignee in insolvency of the debtor may bring an action against the purchaser to recover such excess, by pleading such facts and making the officer a party thereto.

6. Under Code Civ. Proc. § 691, requiring an officer selling property under execution to return any surplus to the execution debtor, the purchaser, who gives his check for such surplus to the officer, and afterwards procures the check from the officer and destroys it, is subject to suit by the debtor for the amount thereof, though the latter was never informed of the giving of the check to the officer, since the debtor may be treated as the equitable assignee of the rights of the officer.

7. Such action is not barred by limitations, when brought within four years from the date of the giving of the check.

8. A purchaser at an execution sale cannot resist payment of the excess of his bid over the judgment, in a suit brought by the assignee in insolvency of his debtor, on the ground that the latter does not show that he is able or willing to procure a constable's deed to the property, since an execution purchaser must pay when the certificate of sale is issued.

9. Where a creditor purchases property of his debtor at an execution sale for a price in excess of the amount of the judgment, before he has reduced his claim to judgment, and the debtor takes the benefit of the insolvency act before the purchaser obtains judgment, the latter cannot set off such claim against an action by the assignee in insolvency to recover the excess.

10. Where a creditor who has not reduced his claim to judgment purchases the property of his debtor at an execution sale at a price in excess of the judgment debt, and the debtor then takes the benefit of the insolvency act, the filing of his claim by the creditor without deducting the excess in his possession will estop him from setting up such claim as a set-off in an action by the assignee to recover such excess.

McFarland, Garoutte, and Harrison, JJ., dissenting.

In bank. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

On rehearing. Judgment of trial court affirmed, and judgment in department (56 Pac. 1110) reversed.

BEATTY, C. J. This is an action by the assignee of an insolvent corporation to recover from the defendants the unpaid balance of the sum bid by the defendant Ambrose for certain real property of the corporation which was sold under execution by the defendant Saunders. In the trial court Saunders made default, but Ambrose defended the action, and he now appeals from a judgment for the plaintiff, and from an order denying his motion for a new trial.

The facts involved in several of the points argued by counsel are somewhat complicated, and may be more conveniently stated in detail as the discussion proceeds, but it will be necessary at the outset to indicate the general nature of the case. The defendant Saunders, a constable, in October, 1891, sold under execution certain real property of the California Steamship Company. Defendant Ambrose was the purchaser, and the amount of his bid was \$10,000, of which he paid in cash \$855. For the balance of \$9,145 he gave Saunders his check on Donahue, Kelly & Co., and received from him a certificate of sale, which he thereafter retained. A duplicate certificate was duly recorded by Saunders. After getting his certificate of sale, Ambrose stopped payment of his check, and it was never paid, nor was any attempt ever made by Saunders to enforce payment. Within 20 days after said sale the steamship company was adjudged an insolvent, and in due course the plaintiff was appointed and qualified as assignee. Saunders having accounted for only \$855 of the sum bid at the execution sale, the plaintiff commenced an action against him and the sureties on his official bond, in which he recovered a judgment

against Saunders for the balance of \$0,145, and against his sureties for \$1,000, the full penalty of their bond. That judgment was affirmed by this court, and the opinion there delivered (110 Cal. 463, 42 Pac. 866) states the most important facts involved in the present litigation. On the trial of that action, in June, 1894, the plaintiff learned for the first time of the giving of the check by Ambrose to Saunders for the unpaid balance of his bid, of his subsequent stoppage of payment of the check, and of the redelivery of the check by Saunders to Ambrose, by whom it had been destroyed. On the affirmation of the judgment in *Meherin v. Saunders and His Sureties*, Ambrose paid the \$1,000 due from the sureties, but nothing more has ever been paid on said judgment. The execution against Saunders was returned unsatisfied, and he was then, and has since continued to be, totally insolvent. In the opinion delivered in *Meherin v. Saunders* it was intimated that Saunders had a right of action against Ambrose to recover the balance of his bid at the execution sale, as undoubtedly he had; but he never took any steps to enforce payment, and thereupon the plaintiff commenced this action on September 28, 1895, less than a month prior to the date when an action on the check would have been barred by the statute of limitations. The trial court credited the defendants with \$1,000, the amount paid by Ambrose on the judgment against the sureties of Saunders, and rendered a judgment in favor of the plaintiff for \$8,145, and interest from October 24, 1891, the date of the execution sale and of Ambrose's check. On his appeal from the judgment and order denying a new trial, the defendant Ambrose assails both the findings and the conclusions of the superior court, and also contends that the complaint fails to state a cause of action. As to the findings of fact, we think they were in every material respect fully sustained by the evidence. The finding that plaintiff was not informed that Ambrose had paid only \$855 on his bid prior to the trial of *Meherin v. Saunders* is contrary to the evidence, for it clearly appears that plaintiff received that information immediately after his appointment as assignee. The fact which first came to his knowledge during the trial of *Meherin v. Saunders* was not that Ambrose had failed to pay any more than \$855, but that he had given a check on Donahue, Kelly & Co. for the balance of his bid; that he had stopped payment of that check, and afterwards got it into his possession, and destroyed it. As to this matter alone the findings are contrary to the evidence, but the fact found and the actual facts are alike immaterial. In all other particulars there is substantial evidence to support the findings, though as to some matters there is a sharp conflict. The remaining points urged by appellant will be considered in their logical order.

1. He contends that the complaint shows that no sale of the corporation's property was made. The statute, he says, furnishes the exclusive rule for execution sales, and an essential part of the rule is that every such sale must be for cash, whereas this sale was made, at least in part, upon a credit. This, I think, is an objection to the sale which it does not lie in the mouth of the appellant to make, even if it were technically sufficient. But it is not sustained by the allegations of the complaint. They show that the sale was made as such sales are usually made, and in pursuance of the statutory notice. It was, therefore, a sale for cash; and Ambrose, by his bid, agreed to pay cash. There was no fault in the mode of conducting the sale, but merely a failure on the part of the appellant to perform his promise to pay. It is true that under the statute (Code Civ. Proc. § 695) the constable, upon the refusal of appellant to pay the full amount of his bid, might have resold the property, in which case appellant would have been liable for the costs of the resale, and for any deficiency in the price realized, but the officer was induced by the appellant to forego this course. He accepted a check in lieu of cash upon the implied, if not the express, representation of appellant that it was the equivalent of cash. He issued and recorded a regular certificate of the sale. He applied the cash actually received to the satisfaction of the judgment under which the property was sold, and of other judgments, executions upon which he had in his hands. He made his return accordingly, and thereby made himself accountable to the steamship company for the full amount of appellant's bid. *Meherin v. Saunders*, *supra*. Under these circumstances, it is too late for the appellant to say that there was no liability upon his part to pay the sum covered by his check. Besides, his liability is not a mere statutory liability, if there were any merit in that contention, but is a common-law liability arising out of an express promise to pay, based upon a good and valuable consideration.

2. The second proposition of appellant is that the California Steamship Company is concluded by the return of the constable to the effect that the property was sold for the sum of \$10,000. If this proposition were conceded, it is difficult to see what bearing it would have on the present controversy; for the plaintiff, so far from contesting that part of the return, is insisting upon it, and is seeking only to recover the unpaid balance of the price bid. But I suppose the appellant means to claim that the return is conclusive in his favor that he paid the \$10,000 in full. If so, the authorities he cites do not sustain his contention. They are to the effect that the return of an officer upon an execution is—with some important exceptions—conclusive upon the parties until vacated. But appellant was not a party to the action in which the execution issued, and is neither bound by the re-

turn nor protected by it. Whether he paid the bid or not is a question to be decided upon evidence allunde.

3. The proposition is not distinctly advanced by appellant, but he seems to claim that he incurred no liability by his bid, because without his knowledge the property in question had been previously sold to another purchaser on execution under another judgment against the steamship company. It is true, the property had been sold a few days prior to the sale to appellant, but under a judgment which was a junior lien, so that the appellant by his subsequent purchase obtained the superior title. It would have made no difference, however, if the first sale had been under a prior lien; for the rule of caveat emptor applies to execution sales, and there would still have remained a right of redemption in the steamship company after the first sale. As it was, the purchaser at the first sale got only a right to redeem from the second sale, and this fact may account in some measure for the full price bid by the appellant.

4. It is contended that there is no privity of contract between the judgment debtor and the purchaser at the execution sale, such as is essential to sustain an action by the former to recover from the latter the unpaid surplus of his bid over and above the amount required to satisfy the execution. Upon this point counsel for respondent are challenged by appellant to cite a case in which a judgment debtor has ever recovered such surplus or balance in the absence of an express agreement between the debtor and purchaser. No case exactly in point is cited in response to this challenge, but the principles which support the position of the respondent are unquestionable. The right of the officer who conducts the sale to sue for the unpaid purchase money is not disputed, but it is claimed that he, and he alone, can maintain the action. Ordinarily, no doubt, the officer is the proper party to bring the action; for it is only by collecting the full purchase price that he can fulfill the commands of the writ. He stands in the position of a trustee as to the proceeds of the sale for all parties interested,—for the execution creditors, to the extent of their interest, and for the judgment debtor as to the surplus. He also has an interest in the fund to the extent of his fees and commissions. For these reasons such an action by the sheriff was sustained by the supreme court of Alabama. *Robinson v. Garth*, 6 Ala. 204. But in that case the court said (page 209): "We do not doubt that those for whom the sheriff acts, and who are interested in the money to be recovered, may also maintain the action," etc. The principle of that decision was that the sheriff, being the trustee of an express trust, could and ought to sue for the benefit of his cestuils, but that his right to sue did not exclude a similar right in the beneficiaries. In this case the trustee has utterly failed and neglected to sue, and the

right of action was about to be barred by the statute when the beneficiary commenced this suit, making the trustee a party defendant, and alleging all the facts constituting his equitable right. He shows that the trustee is insolvent, that he has surrendered and permitted the destruction of the written instrument upon which the action could be most clearly sustained, that the liability of his sureties is exhausted, and, in short, that, without action on plaintiff's part, a large portion of the price of his insolvent's land will be irrecoverably lost. It cannot be doubted that, if Saunders had sued in his own name and recovered the amount of appellant's check, he would have held the proceeds as trustee for plaintiff, and that every cent of it would have been assigned to the plaintiff by any insolvency court having jurisdiction of Saunders' estate, to the exclusion of his general creditors. It cannot be doubted that, if Saunders had commenced the action in his own name, the interest of plaintiff would have entitled him to intervene and take control of the litigation, upon the ground that he was the real party in interest, and more especially by reason of the insolvency of Saunders. These things being so, I cannot understand why, upon showing the neglect of Saunders to sue, the plaintiff could not commence the action himself, making Saunders a party. The result is that the same parties are before the court that would have been before the court if Saunders had done his duty by commencing the action, and plaintiff had exercised his clear legal right by intervening. All the facts were fully disclosed by the pleadings, and the court was in a position to do full and complete justice in the premises. There is another sufficient answer to the technical objection of want of privity. By section 691 of the Code of Civil Procedure it is made the duty of the officer holding the execution, in the absence of other specific direction of the court, to return to the judgment debtor any excess in the proceeds of the sale over the judgment and accruing costs. In this case there was no specific direction as to the surplus, which was exactly represented by appellant's check. This check was not cash, and the judgment debtor could not have been compelled to take it. But that objection could have been waived, and, if waived, it would have been the duty of Saunders, under the statute, to transfer the check. It is, indeed, true that the plaintiff never formally demanded a transfer of the check (he never knew of its existence until it had been surrendered and destroyed), and he never waived his right to the cash; but his present action is founded upon the obligation arising out of the nonpayment of that check, and he is entitled to be treated as the equitable assignee. Equity deems that to be done which ought to be done. Saunders ought to have sued on the check, or to have assigned it to the plaintiff so that he could sue. Not having sued himself, he will be deemed to

have assigned his right of action to plaintiff. Of this view he cannot complain, and still less can the appellant complain. The necessary privity of contract in this case is worked out by operation of law.

5. It is contended that the plaintiff cannot maintain this action because he does not show that he is willing or able to procure for the appellant the constable's deed. To sustain this proposition, counsel cites *Bohall v. Diller*, 41 Cal. 533, and similar cases. Such cases have no application here. A purchaser at execution sale must pay when the certificate of sale is delivered. He gets his deed in due course upon demand of the officer. Appellant received his certificate of sale at the date of the sale, and the whole amount of his bid was then payable.

6. If we are correct in holding that plaintiff can maintain this action as equitable assignee of plaintiff's check, or as the real party in interest, because of the default of his trustee, the plea of the statute of limitations is disposed of. The action was commenced within four years from the date of the check.

7. At the date of the execution sale the California Steamship Company was indebted to the appellant in about the sum of \$27,000, upon which the appellant had commenced an action and issued attachments, which he had caused to be levied on the property which he afterwards purchased. The subsequent adjudication of the company's insolvency, made within 30 days after the commencement of that suit, dissolved the attachment, and appellant thereupon proved up his claim for the full amount in the insolvency court. This was done subsequent to his purchase at the execution sale, and after he had stopped payment of his check. In proving his claim in the insolvency proceedings he made no deduction on account of the unpaid balance of his bid at the execution sale, but asked and obtained the allowance of the whole of his original claim, undiminished, and when a dividend was declared by the assignee he claimed and received the sum apportionable to the full amount of his original demands. The dividend was only a fraction over 4 per cent. of the company's indebtedness, however, and the amount still due the appellant is largely in excess of the unpaid portion of his bid at the execution sale. Upon these facts the appellant contends that the trial court erred in refusing to set off his claim upon the insolvent company against the present claim of plaintiff. To this assignment of error the respondent makes three answers: First, that Ambrose never had a right to set off his claim against the steamship company; second, that, if such right ever existed, he waived it at the time he should have exercised it; and, third, that he is estopped to claim a right of set-off by his claim and acceptance of the dividend in the insolvency proceeding on the whole amount of the original indebtedness of the steamship company. I think the position

of the respondent must be sustained on every point.

This case presents a question very different from that which arises in the ordinary case of cross demands or mutual credits. The real question is not whether cross demands may be compensated by setting off one against the other, but is, rather, a question whether a creditor of an insolvent can by his unlawful act defeat the clear and undoubted policy of the insolvency laws, and give himself a preference over other creditors; whether, in other words, he can, against the will of the insolvent debtor, and in violation of his legal rights, secure a preference which could not be secured by their voluntary and concurrent action. Under the provisions of section 55 of the insolvency act, it is perfectly clear that if a debtor in contemplation of insolvency should make over to one of his creditors a valuable asset in consideration of the release of his demand,—the creditor having reason to know the debtor's condition,—the transaction would be set aside as a fraud upon the other creditors. And, if this is so,—if the insolvent cannot give a preference, when he desires to do so, by a voluntary transfer of his property,—it certainly must be allowed that the creditor cannot secure the same preference by unlawfully taking or withholding the property and offering to credit its value. This, however, is precisely what Ambrose is seeking to do in this action. The steamship company did not make a voluntary sale of its property on credit to Ambrose, or to any one. The property was seized upon by an officer of the law who was empowered to sell enough of it to satisfy his execution, or to sell the whole of it for cash, and after satisfying the execution to return the surplus to the owner. If this course—the course enjoined by the law—had been pursued, the constable would not have taken Ambrose's check for \$9,145 in lieu of cash, but would have taken the cash itself and paid it over to the company, by whom it would have been turned over to its assignee as a part of the fund for the satisfaction of the claims of its general creditors, including Ambrose. By imposing upon the constable, and violating the right of the steamship company to receive the cash, Ambrose seeks to put himself in the attitude of a debtor of the corporation, with a right to extinguish his indebtedness by a set-off, dollar for dollar, where other creditors must be content with a modest dividend. To sustain him in this position is to allow him to take advantage of his own wrong, and to hold that the policy and plain directions of the law can be defeated by a violation of the law. The doctrine of set-off is pre-eminently an equitable doctrine, and is none the less so by reason of its embodiment in our statutes. Upon a claim of set-off, equity will work out the result that would have followed if that had been done which ought to have been done. If Ambrose had paid the full amount of his bid, as he ought to have done, the plaintiff, as assignee

of the insolvent corporation, would have had \$9,145 to divide evenly between him and the other creditors. The result of this judgment is to bring about exactly that condition, while to allow the claim of set-off which he asserts would be to give him the whole \$9,145, and leave the other creditors no part of it.

But, even if it were conceded that a right of set-off could exist under such circumstances, it is certain that the time to exercise it was when Ambrose proved his claim in the insolvency proceedings. If the cross demands were of such a nature that one compensated the other, he had no valid claim for more than the balance. But he claimed and was allowed the whole of his original demands, undiminished; and this allowance of his claim, was, like a similar allowance in probate proceedings, the equivalent of a judgment,—a judgment to be paid in due course of administration. To make this claim and secure its allowance was, therefore, a solemn admission on his part that he had no right to set off the unpaid balance of his bid at the execution sale, but that he must discharge that liability in full, and content himself with the dividend apportionable to the full amount of his original demands. I think it clear that he was well advised in making this admission, and pursuing the course that he did. But, whether well or ill advised in this matter, he certainly went too far to recede when he claimed and accepted a dividend on the whole amount of his original demands. If the right of set-off existed, and the two claims compensated each other, he was entitled to a dividend on a balance of only about \$20,000, but he claimed and accepted a dividend on over \$29,000. That is to say, about one-third of what he received was money to which he had no right, and it was money of which the other creditors were wrongfully deprived. For the purpose of drawing a dividend in the insolvency proceeding he acts upon the theory that there is no set-off, and that the cross demands are uncompensated. Having in this way appropriated to himself money that on his present theory belonged to other creditors, can he be allowed now to shift his ground, and upon a totally inconsistent theory withhold the fund out of which the other creditors would receive a dividend? It is to my mind clear that he cannot. He is estopped.

These views are, I think, amply sustained by authority, and even by the letter of our statutes. A counterclaim capable of being set off in an action must be in itself an existing cause of action. Was appellant's claim against the steamship company an existing cause of action when he sought to avail himself of it as a counterclaim? Section 49 of the insolvency act furnishes the answer to this question: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the debtor, but shall be deem-

ed to have waived all right of action and suit," etc. The case of *Brown v. Bank*, 6 Bush, 198, is on all fours with this case. I quote the following from the opinion of the court of appeals: "And to the set-off so pleaded the plaintiff filed a reply, setting forth that before he brought this action the defendant had, in the proper proceedings which were pending in bankruptcy, presented and proved and verified for adjudication and allowance against the estate of each of said bankrupts the whole amount of each of said debts, without giving or allowing any credit on either of them for the two hundred dollars and four cents in controversy, and that said debts, having been proved in bankruptcy, were beyond the defendant's control. * * *

In our opinion, proving the entire debts in the proceedings in bankruptcy, without offering to abate the claims by the amount of said deposit, was a waiver of the right to do so, and an election to proceed on said claims alone in the proceedings in bankruptcy, and that the subsequent assertion of part of the same debts by plea of set-off in this action was equivalent to the prosecution of an original suit upon the claims against the prohibition of the bankrupt law." *Russell v. Owen*, 61 Mo. 186, is a case of the same complexion, and this is from the opinion of the court: "The chief question for determination in this case is whether a creditor who, in making proof of his claim before the register in bankruptcy, omits to show that the bankrupt has an unsatisfied claim against him, can, when sued by the assignee for the amount of such unsatisfied and omitted claim, plead as a set-off the amount allowed by the register as a balance due to him. The question must receive a reply in the negative. * * * When a party defendant pleads a set-off, he, in effect, brings an action for the amount of that set-off, but by presenting and proving his claim before the register the creditor is to be deemed as waiving all right of action on suit against the bankrupt. It would be clearly contrary, therefore, to the evident intent of the above-recited section, to allow a creditor to do that indirectly which the law precludes him from doing directly,—to accomplish by way of set-off that which he would be debarred from asserting in a direct action. The same view of this point is taken elsewhere. *Brown v. Bank*, 6 Bush, 198." And see notes to section 21, *James, Bankr. L.*; *Bump, Bankr.* (9th Ed.) 684; *Id.* (11th Ed.) 491.

The superior court did not err in denying the right of set-off. Judgment and order affirmed.

We concur: VAN DYKE, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent, and think that the judgment should be reversed. Apart from the very close questions of law which arise in the case, by which, of course, it must be

determined, it is proper to remark that it would be a great hardship to compel appellant to pay the large amount of money and interest claimed to be due respondent on the bid at the constable's sale. Appellant had advanced to the California Steamship Company large sums of money, at one time amounting to \$80,000. At the time of the constable's sale the company owed appellant about \$28,000. He paid \$855 on his bid; he also paid \$1,000 on the judgment recovered against the constable and his sureties; he also paid several hundred dollars on a former sale of the same property; and he not only loses all of this, with the exception of a very small percentage coming from the effects of the insolvent corporation, but must now pay in addition the amount of the present judgment, which is for \$11,130.47 and interest. I think that it can be gleaned from the evidence that the bid of \$10,000 was understood by the judgment debtor, by the constable, and by the appellant to be fictitious, except as to the amount necessary to pay off the judgment lien, \$855, which sum appellant paid to the constable, and that the \$10,000 was bid with the consent of all parties merely to enhance the apparent value of the property; appellant supposing that it would be deducted from the large amount of indebtedness from the company to himself. It is alleged in the complaint that the constable never demanded payment of the check given him by appellant for \$9,145. The judgment debtor, before it went into insolvency, never made any objection to the nonpayment of the balance of the bid. Payment of the check was immediately stopped by notice of appellant, no demand was ever made on the bank on which it was drawn for its payment, and the check was destroyed. No proceedings were taken under section 695, Code Civ. Proc., to have the property resold. This action was not commenced until nearly four years after the date of the bid. There is no finding as to the actual value of the property, and no evidence going very directly to that point, but there is evidence tending to show that it had no value approaching the amount of the bid. Under these circumstances, the appellant should not be compelled to pay this large sum of money unless strict law inexorably demands it, and I do not think that there is such a demand.

As to the law governing the case, without considering the many other points made by appellant, I will merely say:

1. That in my opinion there was no privity of contract between the respondent and the appellant as to the alleged cause of action, and therefore respondent cannot maintain this action. There are many authorities supporting this view, but it will be sufficient to notice the cases of *Galpin v. Lamb*, 29 Ohio St. 529, and *Adams v. Adams*, 4 Watts. 160, and the cases referred to in the opinions in those cases. In *Galpin v. Lamb* the syllabus, which is a correct statement of the point de-

cided, is as follows: "A judgment creditor cannot maintain an action against a purchaser of real estate at sheriff's sale to recover damages for the breach of a contract of sale." Of course, a judgment debtor is in the same position touching this point as a judgment creditor. In the opinion the court say: "The contract of purchase is made with the officer, as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase, and he alone can maintain an action against the purchaser to recover the purchase money. The parties to the judgment or decree have different interests and stand in different relations to the property; some holding the relation of debtor, and others that of creditor. But, however numerous the parties or diverse their interests, the officer represents them all, and none of the parties stand in such relation to the contract of the purchaser as to enable them to maintain an action on it." In *Adams v. Adams* the syllabus is as follows: "For a breach of contract between a sheriff and his vendee of land no action will lie in the name of any one but the sheriff." In the opinion the court say: "The sheriff, in making the contract of sale with James Adams, was not acting as the agent of the plaintiff, nor yet of any one else. He is considered the principal himself in such cases, and the legal as well as real party making the contract of sale. Although it be true that he acts in the character of a trustee, yet it must be borne in mind that it is as an officer of the law that he does so, and that it is from the law he derives all his power and authority; and, in sales of property made by him as sheriff under this authority, he alone has the right to receive the money arising therefrom, and is responsible for the legal appropriation of it, unless it is brought by him into court for that purpose. It would inevitably produce great confusion and clashing of suits to permit other persons besides the sheriff in their own names to maintain suit against a sheriff's vendee for breaches of their contracts made with him. It would also be inconsistent with every principle of analogy in the law." I have seen no cases where the point was directly involved which are in conflict with the above authorities.

2. Under any view, the action, in my opinion, is barred by the statute of limitations. The alleged action is based upon the bid made by appellant at the sale, and not upon a written instrument, and it cannot be brought within any category of actions not barred in at least three years.

GAROUTTE, J. (dissenting). I concur generally in the views of Mr. Justice McFARLAND, but would add an additional suggestion. Though the concession is opposed to all the authorities, let it be assumed that the constable took this check as agent or trustee of the plaintiff,—an act clearly beyond the

scope of his authority. Upon this concession, the plaintiff then had either one of two courses open to him: He could ratify the constable's act and take the check, or he could repudiate it and hold him liable for the money he should have received at the sale. Here plaintiff elected to follow the latter course, and recovered judgment against the constable for the full amount of the unpaid purchase price. Having done so, he lost all rights he may have had to the check, and forever afterwards it became the property of the constable. Plaintiff had no right to sue the constable for the unpaid purchase price, and also claim title to the check. These two remedies were absolutely inconsistent with each other, and the adoption of one was a bar to the prosecution of the other. If the plaintiff had taken an assignment of the check from the constable in the first instance, he could not thereafter have sued the constable for the unpaid purchase price; and, having first sued the constable for that purchase price, he never thereafter was entitled to an assignment of the check. Conceding that when the first action was brought he did not know that the check was in existence, still that fact is immaterial, for he did know that the purchase price had not been paid. The foregoing views we believe to be supported by the language of the principal opinion, wherein it is said: "This check was not cash, and the judgment debtor could not have been compelled to take it. But that objection could have been waived, and, if waived, it would have been the duty of Saunders, under the statute, to transfer the check. * * * Equity deems that to be done which ought to be done. Saunders ought to have sued on the check, or to have assigned it to the plaintiff so that he could sue. Not having sued himself, he will be deemed to have assigned his right of action to plaintiff. Of this view he cannot complain, and still less can the appellant complain. The necessary privity of contract in this case is worked out by operation of law." Conceding the foregoing quotation to contain a sound exposition of the law, then the plaintiff, after having brought his action against the constable for the full amount of the purchase price and recovered judgment, would never be declared by the law to be the equitable assignee of the check. It was thereafter the property of the constable, and the plaintiff had no right or title in it. This action cannot be maintained for a moment unless upon the theory that it is an action upon the check. The statutes of limitation absolutely forbid it. The check being the property of the constable, the action must fail.

HARRISON, J. (dissenting). The complaint herein is based solely upon the obligation of the appellant to pay the amount of his bid, and upon the right of the plaintiff, as the assignee of the judgment creditor, to recover that amount from him. After setting forth

the facts showing the capacity in which the plaintiff brings the action, and the circumstances attending the bid, and its nonpayment, it is alleged that the plaintiff is the owner of and entitled to recover the whole amount "due to the defendant Saunders, as such constable, from the defendant Ambrose on said bid"; and the court finds, as the fact upon which it rendered judgment against the appellant, that the plaintiff is entitled to have and recover the amount "so due and payable to the defendant Saunders, as such constable, from the defendant Ambrose, on said bid, and now due to this plaintiff, as such assignee in insolvency." The plaintiff's entire cause of action rests, therefore, upon the appellant's refusal to pay the amount of his bid. The complaint is framed upon the theory that the amount bid was due from the appellant to the officer, and that by reason of the officer's neglect and default the plaintiff is entitled to maintain a direct action against the appellant for its recovery. I think it is very clearly shown in the opinion of Mr. Justice McFARLAND that there is no privity between the officer and the judgment creditor, by which the latter is authorized to maintain an action against the purchaser for the amount of his bid; but, if it be conceded that such privity does exist, the creditor can have no greater right of action than could the officer. The plaintiff has no other cause of action against the appellant than such as existed in favor of his assignor, the steamship company; and that company's right of action, if any existed, accrued October 24, 1891, at the time when the appellant purchased the property at the constable's sale. If the plaintiff's right to maintain the action is to be sustained upon the ground that he is the real party in interest, his right of action can be no greater than that of him who conducted the transaction under which he derived his interest, and by virtue of which he claims to be the interested party. If the appellant would not have been liable to Saunders under the facts alleged and found herein, the plaintiff can have no right of recovery against him. It is very evident that Saunders could not have maintained any action against the appellant for the recovery of the amount of his bid unless it was commenced within two years after the date of the bid; and it is equally clear, upon the facts alleged and shown herein, that at the time the present action was commenced Saunders could not have maintained any action against the appellant upon the check. Not only is it alleged in the complaint that he made no demand for the payment of the check, and that he declined to collect it, but it is also shown that when he received it he inclosed it in an envelope and deposited it in the bank "for safe-keeping," and afterwards, and before the commencement of this action, withdrew it and surrendered it to the appellant. He had the same right to surrender the check to the appellant as he would have had to refuse to receive it

at the time of the bid. Having thus voluntarily parted with it, he could not thereafter maintain any action upon it, and his only right of action against the appellant would have been for the recovery of the amount of his bid.

The only reason assigned in the opinion of the Chief Justice for sustaining the action, as against the plea of the statute of limitations, is that the plaintiff is the equitable assignee of the check. No adjudicated case is cited in support of this proposition, nor are any rules applicable to the principles governing equitable assignments invoked in its support. The action herein is not upon the check, and the allegations in the complaint, as well as the evidence offered at the trial, and the findings of the court in reference thereto, do not assert any right in the plaintiff by virtue of the check, but are clearly evidentiary statements of the transaction, inserted merely for the purpose of showing that the appellant had not paid the full amount of his bid. Not only does the complaint fail to set forth any right of action upon the check, but, as if with the intention not to do so, avoids any claim to the check by reason of its having been received by the officer. After alleging that he accepted it "in lieu of the balance of the purchase price" bid by the appellant, the complaint sets forth that the officer deposited it in the bank of Lompoc, "where, as this plaintiff is informed and believes, the said check has ever since been, and is now, deposited and remains." Although it was shown at the trial that the check had been withdrawn from the bank and surrendered to the appellant before the commencement of the present action, the above allegation shows that, although the plaintiff then believed that it still remained in the custody of the bank, he made no effort to get possession of it or to make it the basis of his action, but relies upon the liability of the appellant for the amount of the purchase money, and thus destroys his right to be regarded as the equitable assignee of the check. An officer making a sale has no right to accept anything but money from the bidder, or to give credit to the purchaser. If he does so, however, he acts in his individual capacity, and not as an officer, and is liable in his individual capacity equally as if he had in fact received the money. The judgment creditor may affirm the act of the officer in accepting the check or other obligation of the purchaser, instead of money, and thus be estopped from questioning the sufficiency or correctness of the officer's act, but unless he does so accept it he does not acquire any right or title thereto. To say that because he might have accepted the check it may be assumed that he did accept it, upon the ground that equity deems that to be done which ought to be done,—especially when he makes no claim that he was willing to accept it,—is to apply this rule in a manner

for which I think no authority can be found. The act of the plaintiff in bringing the former action against the officer, in which he charged him with having received the money upon the bid and obtained judgment therefor, is conclusive against any claim that the plaintiff waived the officer's obligation to receive money upon the bid, and that he was willing to accept the check in its stead. His election of remedies at that time precludes him from maintaining the present action, as is shown in the opinion of Mr. Justice GAROUTTE.

If the remedy provided in section 695, Code Civ. Proc., in case the purchaser refuses to pay the amount bid by him, is not exclusive, the officer's right of action is limited to a suit for the recovery of the amount of the bid. Such an action is a pure common-law action, resting upon the common-law liability of the purchaser upon his bid, and presents no room for invoking the principles of equity, and the rights of the creditor derived by virtue of his privity with the officer can be no greater than those of the officer; but whether the obligation of the appellant is by virtue of the statute, or rests upon his common-law liability, is immaterial. His obligation is not "founded" upon an instrument of writing, and any action to enforce such obligation must be commenced within two years after his liability accrued. *Chipman v. Morrill*, 20 Cal. 130; *McCarthy v. Water Co.*, 111 Cal. 328, 43 Pac. 956; *Thomas v. Beach Co.*, 115 Cal. 136, 46 Pac. 899. As the present action was not commenced until more than two years after the right of action accrued, the defendant's plea of the statute of limitations should have been sustained.

(24 Wash. 163)

BAY VIEW BREWING CO. v. GRUBB.

(Supreme Court of Washington. March 2, 1901.)

BILLS AND NOTES—PLEADING—INDORSEMENTS—DEMAND AND NOTICE—WAIVER—ALLEGATION OF CONCLUSIONS—GENERAL DENIAL—MATERIAL ALLEGATIONS.

1. Where the complaint in a suit against an indorser alleged that the indorser waived demand and notice, such allegation was not in conflict with the Code, forbidding the pleading of conclusions instead of alleging facts, since such waiver was a fact embodying a conclusion.

2. Where, in a suit on an indorsement of a note, plaintiff did not allege notice of dishonor, but pleaded waiver of demand and notice instead, the defendant, answering by a general denial, had a right to testify whether or not the words waiving demand and notice were on the note when he indorsed it, since such waiver was a material allegation of the complaint.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by Bay View Brewing Company against Peter Grubb. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Trumbull & Trumbull, for appellant.

DUNBAR, J. This is an action upon two promissory notes, each of said notes being made a separate cause of action. No error is alleged in relation to the first cause of action. In the second cause of action is alleged execution of the note to the appellant by John Nelson and Mary Nelson, whereby they promised to pay the sum of \$474, with interest, etc. Then follows an allegation of transfer of the note by indorsement to respondent, and an allegation "that at the time of the said indorsement by the defendant he waived demand and notice." To this cause of action the appellant demurred, which demurrer was overruled, and the action of the court in overruling the demurrer is alleged as error.

It is the contention of the appellant that the allegation that the defendant waived demand and notice is not an allegation of fact, but simply a conclusion of law; that where no notice has been given, and the plaintiff relied upon facts excusing such notice or showing a waiver thereof, such facts must be specifically alleged by the plaintiff; and several cases are cited to sustain the contention. But we do not think the cases cited are in point. They rather go to the extent that the facts proved must correspond with the averments. There is but one way known to the law by which demand and notice can be waived, and the defendant cannot but be apprised of what he is called upon to defend by the allegation in this complaint. It is true that the law does not countenance the pleading of conclusions instead of alleging facts under the provisions of the Code, but when the fact embodies a conclusion, as it seems to us it does in this case, the provisions of the Code are not violated. It has always been held sufficient to allege, in a suit for the collection of money due on a note, that demand had been made and refused, without setting forth the words which were used in making the demand or in the refusal to pay, and yet it might be said that in that instance both the allegations of the demand and refusal were the pleading of conclusions. We think the complaint was sufficient in that respect, and that the demurrer was properly overruled.

After the plaintiff had rested, and appellant was introduced as a witness in his own behalf, he testified that the words, "demand and notice waived," were not in his handwriting. He was then asked by his counsel the following question: "At the time you indorsed this note (Plaintiff's Exhibit B), were the words waiving demand and notice there?" This question was objected to by the plaintiff on the ground that the same was immaterial and irrelevant, and that the defendant under his general answer could not make any such proof, but that, if the defendant intended to rely upon such defense, it should have been specially pleaded. The objection was sustained by the court, and defendant excepted, and the action of the court

in sustaining this objection is alleged as error. We think the court erred in not permitting the defendant to testify in this regard. The waiver of notice and demand was one of the necessary averments to give a right of action against the defendant upon this note. "Where no notice has been given, and the plaintiff relies on facts excusing such notice or showing a waiver thereof, such facts must be specifically alleged by the plaintiff. This is in accordance with the rule that all the facts which constitute the cause of action must be stated by the plaintiff, and every fact on which an action depends is deemed constitutive." 14 Enc. Pl. & Prac. 1069. If this be true, then, before the plaintiff can recover he must prove the averments of the complaint of waiver of notice, and, under all authority, testimony which tends to dispute the constitutive averments of a complaint may be introduced under the general denial. The material allegations of the complaint, when denied either generally or specifically, determine in each case what evidence and what defenses may be given and established by the defendant. It is said by Mr. Pomeroy in his Code Remedies (section 670, 3d Ed.): "As the denial puts in issue all the material allegations of fact made by the plaintiff, whether originally necessary or not, he is at liberty to introduce all and any legal evidence which tends to sustain those allegations. On the other hand, under the same issue, the defendant is entitled to offer any evidence which tends to contradict that of the plaintiff, and to deny, disprove, and overthrow his material averments of fact. This is the fundamental and most comprehensive doctrine of pleading embraced in the new procedure, and it, of course, determines the nature of the defenses which may be set up under a general denial." The conclusion reached, that the court erred in sustaining objections to this testimony, necessitates the reversal of the cause, and renders unnecessary a determination on the other points raised, as they will probably not arise in the retrial of the cause. Reversed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

(24 Wash. 139)

GOORE v. GOORE.

(Supreme Court of Washington. Feb. 23, 1901.)
DIVORCE—NONRESIDENT DEFENDANT—AFFIDAVIT—PUBLICATION—SUFFICIENCY—DESCRIPTION OF DEFENDANT'S PROPERTY—NECESSITY—CAUSE OF ACTION—AVERMENT.

1.2 Ballinger's Ann. Codes & St. § 4877, provides that when a defendant cannot be found within the state, and an affidavit of plaintiff's attorney is filed, stating that defendant is a nonresident and that the action is for divorce, service may be made by publication. Held, that where an affidavit for publication alleged that the defendant's residence was unknown and that the action was for divorce, it was not necessary to mention defendant's property in order to authorize publication of sum-

mons, and to give the court jurisdiction to make a decree concerning such property.

2. An affidavit for publication because of defendant's nonresidence alleged that defendant's residence was unknown, and that the action was brought for "the dissolution of the bonds of matrimony existing between plaintiff and defendant under subdivisions 4 and 5 of the last clause of subdivision 6 of section 5716 of 2nd vol. of Ballinger's Code." *Held*, that the contention that the court had no jurisdiction, because the affidavit merely alleged that the bonds of matrimony existed under such sections, without alleging that the action was for a divorce under the sections mentioned, cannot be sustained.

3. Where a publication of summons for defendant in divorce stated that one of the objects was to obtain the equitable distribution to plaintiff of the property of plaintiff and defendant, the court had jurisdiction to dispose of the property described in the complaint, no matter whether it was the separate property of defendant or community property.

Appeal from superior court, Walla Walla county; Thomas H. Brents, Judge.

Action for divorce by Magdalene F. Goore against Esten Goore. Decree in favor of complainant. Motion by defendant to set aside parts of the decree for want of jurisdiction. Motion denied, and defendant appeals. Affirmed.

B. L. & J. L. Sharpstein, for appellant.
Wellington Clark, for respondent.

MOUNT, J. This action was brought as a divorce case, and the decree entered after proof, by default, upon service by publication. After decree, defendant appeared specially and moved to set aside parts of the decree for want of jurisdiction. This appeal raises the question as to the sufficiency of the publication proceedings to give the court jurisdiction to enter the decree, and particularly that part of it which disposes of the real property described therein. The affidavit for publication, omitting the formal parts, is as follows: "Wellington Clark, being sworn, on oath deposes and says that he is the attorney for the plaintiff in the above-entitled action, and as such attorney therein makes this affidavit for and on behalf of the plaintiff in said action; that he believes that the defendant in said action is not a resident of the state of Washington, and cannot be found therein, but that his place of residence is unknown to said plaintiff and this affiant, and that said action was brought by plaintiff against said defendant for the purpose of securing the dissolution of the bonds of matrimony existing between said plaintiff and defendant under subdivisions 4 and 5 of the last clause of subdivision 6 of section 5716 of the 2nd vol. of Ballinger's Code and Statutes of said state, and that good grounds for said action of divorce exist in favor of said plaintiff and against said defendant." Upon the filing of this affidavit, and return of the sheriff of Walla Walla county to the effect that defendant could not be found, summons was published (omitting the formal parts), as follows: "The State of Washington to the

Said Defendant, Esten Goore: You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the 21st day of December, A. D. 1899, and defend the above-entitled action in the above-entitled court, answer the complaint of the plaintiff therein, and serve a copy of your answer upon the undersigned attorney for plaintiff at his office below stated; and, in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which has been filed with the clerk of said court. The object of said action is to obtain a judgment and decree of said court in favor of said plaintiff against you, forever dissolving the bonds of matrimony existing between said plaintiff and you, and forever divorcing said plaintiff from you, upon the ground of abandonment of the plaintiff by you for one year previous to the 15th day of December, A. D. 1899, of the cruel treatment of plaintiff by you, and for your neglect and refusal to make suitable provision for your family, for the awarding of the custody of Catherine A. Goore and Charles A. Goore, minor children of plaintiff and yourself, to plaintiff during their minority, and of the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself. Wellington Clark, Attorney for Plaintiff. P. O. address, Walla Walla, Walla Walla county, Washington. Date of last publication, February 1, 1900." The lands involved herein were filed on by defendant, under the homestead law of the United States, March 18, 1892. He lived on the land continuously until October 9, 1897. The parties were married on October 23, 1896, and had two children. The decree of divorce was entered March 24, 1900, awarding all the property and both children to plaintiff. The motion to vacate the decree was filed and overruled June 21, 1900. Defendant was not a resident of the state after October, 1898. It is argued here that the court had no jurisdiction to make the decree herein, for the reasons (1) that the affidavit for publication would not authorize a publication of summons where the decree sought affected any property of defendant; (2) because property was not mentioned therein, and because the affidavit specifies that the bonds of matrimony exist under certain sections of the statute, and not that the action is for divorce under those sections; and (3) for the reason that the summons, as published, would notify the defendant only that the property of the plaintiff and himself was to be affected, and not his separate property.

Section 4877, 2 Ballinger's Ann. Codes & St., is as follows: "When the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought that the defendant cannot be found in the county, is prima facie evidence) and upon the filing of an affidavit of the plaintiff, his agent or attorney, with

the clerk of the court, stating that he believes that the defendant is not a resident of the state * * * and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases: * * * (4) When the action is for divorce in the cases prescribed by law. * * * It will be readily observed that there is no requirement that the affidavit showing nonresidence when the action is for divorce shall mention the property, and such statement was not necessary in order to authorize publication of summons. The disposition of the property and the children is a mere incident to the divorce, and follows from the action itself, which is admitted in the argument. *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931; *Carney v. Simpson*, 15 Wash. 227, 46 Pac. 233; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Webster v. Webster*, 2 Wash. St. 417, 26 Pac. 864. It is no more necessary to mention the property in the affidavit than it is to mention the children. It is enough to state that the defendant cannot be found within the state, and that the action is for divorce in one of the cases prescribed by law, naming the case. Several authorities are cited by appellant to the effect that the affidavit is not sufficient to authorize service by publication of summons, so as to give the court jurisdiction to make any decree, because the conclusions are stated in the affidavit, and not the probative facts. These authorities are all under statutes requiring an order of the court for publication, and it is there held, as in *Forbes v. Hyde*, 31 Cal. 342, that "the ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. * * * The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered." Under the statute of Washington supra, no such order is required. The summons is not even issued by the clerk, and no judicial determination is required before publication. When the ultimate fact is stated substantially in the language of the statute, publication may be made. This court held in *De Corvet v. Dolan*, 7 Wash. 365, 35 Pac. 72, 1072, at page 367, 7 Wash., and at page 73, 35 Pac., as follows: "But the statement that the defendants reside out of the territory is the statement of a fact, and is all that need be said upon the subject. The statute does not make it necessary to show where the defendants resided. This is immaterial, so that they were nonresidents. * * * The statute clearly makes the fact that the defendant resides out of the territory ground for obtaining service by publication, and upon an affidavit made to that effect the summons is issued by the clerk as a matter of course; it not being necessary to obtain any order from

the court or judge for that purpose, as is the case in most of the states before service by publication is authorized. Statutes authorizing service upon nonresidents by publication are constitutional, and the jurisdiction is dependent upon a compliance with the statute providing for the publication. *Brown*, Jur. § 51. We are of the opinion that in this instance the affidavit was sufficient to warrant the service had." In *Ervin v. Milne*, 43 Pac. 706,—a Montana case,—the court, in distinguishing the cases previously passed upon under the statute which required an order of the court for publication, from the statute then under consideration, say: "We are satisfied that the act of the clerk under the law of 1887, in causing the summons to be published, being a ministerial act, it is necessary only to present the application by affidavit to him as a ministerial officer, and that a judicial question should not be submitted, and that the clerk should not be required to determine from the probative facts whether the ultimate facts exist, and that, as a consequence, the probative facts need not be set forth in the affidavit presented to the clerk, but that the ultimate facts are sufficient, and that the affidavit submitted to the clerk is sufficient, if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons." In *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043, the court say at page 397, 15 Colo., and at page 1045, 24 Pac.: "The complaint was on file, and the affidavit of nonresidence followed. The assertion of a cause of action therein, coupled with the subsequent action of the court in obtaining jurisdiction by publication, should, in our judgment, be sufficient for our saying that to use the language of the statute in the affidavit, so worded as ours is, is a complete and full compliance therewith. * * * To say in this case that more is required by the statute than is sufficient to inform the clerk that the defendant is a non-resident, that the plaintiff has a cause of action, and that the defendant is a necessary party to the action, is, in our judgment, extending the operation of the Code beyond its legitimate purpose, and works out a conclusion utterly at variance with its spirit and letter. In this case the complaint is filed, the summons is issued, the affidavit of non-residence and that a cause of action exists, and that the defendant is a necessary party follows. This seems to be a full satisfaction of the directory provisions of the statute. We are inclined to think that the Code of Kansas and Nebraska is more analogous to that of Colorado than California, and that the view above expressed is supported by the cases of *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857, and *Fulton v. Levy*, 21 Neb. 478, 32 N. W. 307." In *Fulton v. Levy*, supra, the court say: "It will be seen that this view of the question conforms to the requirements of section 78. It states the nature of the cause of

action, not in apt words, perhaps, but sufficient so that the case appears to be one in which service by publication was authorized, and that service of summons could not be made in this state on the defendant or defendants to be served by publication." The rule stated in *Atkins v. Atkins*, 9 Neb. 200, 2 N. W. 468, that, if there is a total want of evidence upon a vital point in an affidavit, the court acquires no jurisdiction by publication of the summons, but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are simply voidable, is the true rule. The proceeding to obtain service by publication should be liberally construed, in order that justice may be done. In *Atkins v. Atkins*, supra, there was a total failure to state a material fact in the affidavit,—the nature of the cause of action. Hence the affidavit was held insufficient. Where, however, the statement is merely defective, but the essential facts are stated in the affidavit, although somewhat indefinitely, the affidavit will not be void. We hold, therefore, that the affidavit in this case was sufficient, and the judgment of the court below must be affirmed. See, also, *Gillespie v. Thomas*, 23 Kan. 138; *Easton v. Childs* (Minn.) 69 N. W. 903. It will be seen that there is a clear distinction between the statutes requiring a judicial determination, and those where the publication is a mere ministerial act. While it would have been better practice to have named the "cause prescribed by law," such as abandonment for one year, cruel treatment, etc., yet there is not a total want of statement of the cause in the affidavit; and we are not disposed to disturb the decree because the practice might have been more perfect.

It is argued that the affidavit is not sufficient, because it states that "the bonds of matrimony exist" under certain sections of the Code. It is true that the wording of the affidavit is susceptible of such a construction, but no one would place such a construction upon it unless particular attention were called to it. The meaning of the affidavit is plain,—that the action is brought for divorce under the subdivisions named,—and is sufficient to uphold the publication of summons so as to give the court jurisdiction.

It is also urged that the summons published would only notify defendant that the community property of plaintiff and defendant would be affected, and not his separate property. This also is placing a narrow and technical construction upon the language used in the summons. The language of the summons is, "the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself." This language certainly would notify defendant that plaintiff was asking for a distribution of property. It was not necessary for the particular property to be described in the summons. *Philbrick v. Andrews*, supra; *Webster v. Webster*, supra. The court had jurisdiction to dispose of the

property described in the complaint, whether it was the separate or community property, or otherwise. Finding no error in the record, the cause will be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON, and ANDERS, JJ., concur.

(24 Wash. 104)

DUNSMUIR v. PORT ANGELES GAS, WATER, ELECTRIC LIGHT & POWER CO. et al.

(Supreme Court of Washington. Feb. 26, 1901.)
CHATTEL MORTGAGES—PRIORITY—RECORDING—TAXES—LIENS—WATER MAINS—FRANCHISE—PERSONAL PROPERTY.

1. Where there has been a substantial compliance with rule 8 of this court (40 Pac. x.), providing that briefs shall contain a statement of the case, with references to the pages of the transcript for verification, and in cases tried by the court appellants shall print in their brief the findings of fact, a motion to strike out appellant's brief for failure to literally comply with the rule should be denied.

2. A water company having a franchise for 25 years to lay pipes through and under the streets of a city and supply the inhabitants with water, having purchased pipes and mains for its plant, and laid a portion thereof, but, owning no buildings or land, executed a mortgage to plaintiff reciting that it mortgaged "the following described personal property, to wit, all its water mains, franchises," etc. The instrument was executed in proper form to be recorded as a chattel mortgage, but was not recorded in the book kept for that purpose, but in the book of real-estate mortgages. The company afterwards sold all its property and franchises to another corporation, which gave a deed of trust to the defendant trustee to secure its bonds, the trustee having no actual notice of plaintiff's mortgage. *Held*, that the mains, pipes, and franchise were personal property, and, the mortgage not having been recorded in a book kept exclusively for the purpose of recording chattel mortgages, as required by 1 Hill's Code, § 1649 (Ballinger's Ann. Codes & St. § 4559), plaintiff's lien thereunder was subordinate to the trustee's lien under his trust deed under 1 Hill's Code, § 1648 (Ballinger's Ann. Codes & St. § 4558), providing that a mortgage not so recorded shall be void as to subsequent purchasers and incumbrancers of the property in good faith.

3. Where a mortgagee of personal property pays taxes levied thereon to protect the property and preserve his lien, he does not thereby acquire a lien on the property for such taxes under Laws 1891, p. 322, § 109, providing that any person having a lien on any real property on which taxes have not been paid may pay the taxes, and the same shall constitute an additional lien, since such provision relates only to liens on real estate.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by James Dunsmuir against the Port Angeles Gas, Water, Electric Light & Power Company and others to foreclose a mortgage. From a judgment for plaintiff, defendant A. P. Burwell appeals. Modified.

Ira Bronson and R. C. Wilson, for appellant. W. L. Marquardt and Geo. C. Hatch, for respondent.

ANDERS, J. The respondent moves to strike appellant's brief in this case for the

alleged reasons: (1) That appellant has failed to print in his brief the findings of fact and conclusions of law made by the lower court; and (2) that appellant has also failed to refer in his brief to the record by page, as required by the rules of this court. Rule 8 of this court (40 Pac. x.) provides that briefs shall contain a clear statement of the case, so far as deemed material by the party, with reference to the pages of the transcript for verification; and that in equity causes and actions at law tried by the court without a jury the party or parties appealing shall print in their brief the findings of fact, with the exceptions thereto, on which any question is sought to be raised by them on the appeal. Although these provisions have not been literally complied with by appellant, they have been substantially observed, and the motion to strike is therefore denied.

This action was instituted by the respondent to foreclose a mortgage on a system of waterworks in Port Angeles, alleged to have been executed to respondent by the Port Angeles Gas, Water, Electric Light & Power Company, Limited, to secure the payment of a promissory note made by said company for \$20,000, dated February 21, 1891, and payable one year thereafter; and also to foreclose a mortgage on certain real estate situated in Port Angeles, executed by defendants C. E. Mallette and wife, as further security for the payment of said promissory note. The complaint alleges the due incorporation, under the laws of this state, of the Port Angeles Gas, Water, Electric Light & Power Company, Limited; that on the 21st day of February, 1891, said corporation was the owner of, and engaged in operating at Port Angeles, Wash., a system of waterworks, for the purpose of supplying the inhabitants of Port Angeles, a municipal corporation of the fourth class, with water, and which said system of waterworks consisted of a reservoir or dam on a stream of water flowing through said town, commonly known as "Frazier's Creek," with pipes or mains leading therefrom through, over, and under the streets, alleys, and other public places of said town to the dwellings of the inhabitants thereof, through which pipes and mains said water flowed by gravity,—together with the right to said flowing water in said stream by appropriation, and a franchise from said town permitting it to so lay its pipes and mains and operate said system of waterworks therein, with certain tools and fixtures, altogether constituting its system of waterworks or plant; the making and delivery of the said note and the executing of the said mortgage, copies of which note and mortgage are set out in full therein; that said mortgage was duly recorded in the office of the auditor of Clallam county, Wash., on March 7, 1891, and indexed direct and reverse; that the plaintiff paid taxes levied on said water plant, aggregating the

sum of \$2,931.40, for the protection of his mortgage lien; that no part of said note, except \$5,000 of the interest thereon, has been paid, and that no part of said taxes has been paid, that the Angeles Water Company is a corporation duly organized under the laws of this state; and that said Angeles Water Company and the defendant A. P. Burwell, as trustee, claim some interest in the property covered by plaintiff's mortgage; and that said claim, if any they have, is subordinate to the lien of plaintiff's mortgage. Judgment is demanded in the complaint against the Port Angeles Gas, Water, Electric Light & Power Company, Limited, for the amount due on said note, and for said taxes, interest, attorney's fees, and costs; that the said mortgage be adjudged to be a first lien on all of said mortgaged property, and that the same be sold, and the proceeds thereof be applied in payment of the amount due plaintiff. The mortgagor, the Port Angeles Gas, Water, Electric Light & Power Company, Limited, was served with summons, and defaulted, and the Angeles Water Company seems to have made no defense. The defendant Burwell, in his answer, denied the allegations of the complaint, except that the two defendant companies were corporations, and alleged affirmatively certain facts showing the invalidity of the plaintiff's note and mortgage, and averred, in effect, that in June, 1892, the Angeles Water Company became the owner of the waterworks, rights, and privileges of the Port Angeles Gas, Water, Electric Light & Power Company, Limited, mentioned in plaintiff's complaint, by purchase from one C. E. Mallette, who purchased the same from the last-mentioned company; that the said Angeles Water Company issued 40 bonds of \$1,000 each, and, to secure the payment thereof, executed and delivered to a trustee a certain deed of trust or mortgage of the property described in plaintiff's complaint, and other property in said deed of trust or mortgage described; that the said trust deed or mortgage was executed as a chattel mortgage, and was recorded in the office of the auditor of Clallam county, both in the records of real-estate mortgages and in the records of chattel mortgages; that said bonds were delivered as collateral security for the payment of certain notes made by said Mallette, and sold for the benefit of the said Angeles Water Company, and that the proceeds thereof were received by said company; that none of said notes had been paid, and that no part of said bonds had been paid, except the interest thereon up to June 1, 1894; that the Angeles Water Company surrendered possession of the property mentioned in plaintiff's complaint and in the said trust deed or mortgage to the trustee; that the said Angeles Water Company duly appropriated the water of said Frazier's creek after it purchased said property; that none of the purchasers of said bonds or of said notes,

or any agents or attorneys of any of said purchasers, had, at the time of such purchase, any knowledge or notice of plaintiff's mortgage, and that the trustee named in said deed of trust or mortgage had no knowledge or notice of the mortgage of plaintiff at the time he received said trust deed or mortgage. And the defendant Burwell demanded judgment against the Angeles Water Company for the amount due on said bonds, and for the foreclosure of said trust deed, etc. The new matter pleaded in the answer was denied by the reply. The plaintiff obtained judgment against his mortgagor in accordance with the prayer of the complaint, and a decree foreclosing the mortgage as a paramount lien on the property described in the complaint, together with the usual order of sale. Judgment was also rendered in favor of defendant Burwell, as trustee, and against the defendant Angeles Water Company, establishing and foreclosing the trust deed. From the judgment and decree in favor of the plaintiff the defendant Burwell has appealed.

It appears from the record that the Port Angeles Gas, Water, Electric Light & Power Company, Limited (hereinafter designated as the "first company") was incorporated under the laws of the state of Washington in the year 1890. In November, 1890, the town of Port Angeles granted to C. E. Mallette, his associates, successors, and assigns, by ordinance, the right for 25 years to construct, operate, and maintain waterworks in said town, and to supply the town and its inhabitants with water, with the right to lay, relay, connect, disconnect, and repair its mains and pipes along, through, under, and over the streets, alleys, wharves, and other public places in said town; and it was provided in the ordinance that the town should have the right to purchase the plant after five years at a price to be fixed by appraisers. Prior to February 21, 1891, the date of the respondent's note and mortgage, said franchise was transferred by said Mallette to the first company, the respondent's mortgagor. On said February 21, 1891, the first company had commenced the construction of its waterworks, the same being the only water plant ever constructed at Port Angeles. On that date the mains and pipes had been purchased for the plant, and were in the possession of the company, but only a portion of the mains had been laid; and the dam subsequently constructed on Frazier's creek for the purpose of storing the water of said stream and of diverting it into the company's mains had not then been erected, although the company had made preparation for its construction. This dam was constructed some distance south of the corporate limits of the town, upon a section of school land owned by the state, and no other dam has ever been constructed or used for the purpose of supplying water for the plant by either of said companies. No permission or

authority was ever obtained, in writing or otherwise, from the state, for the construction or maintaining of said dam, or for laying or maintaining the pipe line of said waterworks through said school lands. The pipe line, when constructed, extended northerly from the dam and said school land over the premises of private parties. No deed of right of way was ever obtained by the first company from any of the persons whose lands were crossed by the pipe line. No proceedings were ever had to condemn the water in said stream, or the right of way for the pipe line, and no compensation was ever paid for the same, and no contract was ever made therefor; and it does not appear that the first company ever owned any land in any way connected with its water plant. On the 1st day of June, 1891, the principal mains of the plant were permanently connected together, and buried in the ground, and connected with various buildings in Port Angeles, and on that day water was turned into the mains and pipes, and thereafter flowed therein by force of gravity. On March 31, 1892, the first company, for a valuable consideration, sold and conveyed to C. E. Mallette the property described in the respondent's mortgages, and on the same day said Mallette sold and conveyed the same to the Angeles Water Company, which company executed and delivered the trust deed or mortgage to secure the payment of its bonds, as stated in the answer and so-called "cross complaint" of appellant. Neither the bonds nor the notes which they were given to secure were paid, and prior to the commencement of this action the Angeles Water Company delivered to appellant, Burwell, as successor of the original trustee, full possession and control of the water plant and other property of said company, and said trustee held such possession and control at the time of the trial of this action. A lot of mains, pipes, etc., which were purchased by the first company for the plant were never used in said plant, but are now stored at Port Angeles, and seem to be claimed by both the respondent and the appellant as covered by their respective mortgages.

Although the record in this case is quite voluminous, and many errors are assigned by appellant in his brief, the real points argued and relied on by appellant as grounds for a reversal of the judgment are not numerous. The material errors alleged are: (1) That plaintiff (respondent) failed to prove that he loaned or advanced any money to the first company; (2) that the note and mortgage set out in the complaint are defective, and insufficient to give constructive notice to appellant, Burwell, or to any one; (3) that said mortgage was not recorded in a volume kept exclusively for the recording of mortgages of personal property, and was not indexed as required by law; and (4) that said note and mortgage were not authorized by said company through its board of trustees,—or at all.

It is conceded by the respondent that the trustee named in the mortgage or trust deed executed by the Angeles Water Company had no actual notice or knowledge of respondent's mortgage, and it therefore follows that, if the said trustee was not charged with constructive notice thereof, the trust deed, having been given for a valuable consideration, must be deemed a valid and prior lien upon the property described therein. Our statute provides that a mortgage of personal property is void as against creditors of the mortgagors or subsequent purchasers and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and is acknowledged and recorded in the same manner as is required by law in conveyance of real property. 1 Hill's Code, § 1648; Ballinger's Ann. Codes & St. § 4558. And it is further provided that such mortgages must be recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively for that purpose. 1 Hill's Code, § 1649; Ballinger's Ann. Codes & St. § 4559. The respondent's mortgage, it is conceded, was recorded in the records of real-estate mortgages only; and if, as appellant contends, it is a mortgage of personal property, the record imparted no notice to appellant, and it will not be necessary to determine any question other than that presented by the third assignment of error. It is a rule almost without exception that a mortgage or other instrument which is entitled to registration must, in order to be effective as notice to third persons, be recorded in the book prescribed by law. *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737; *Hinchman v. Railway Co.*, 14 Wash. 349, 44 Pac. 867; Webb, Record Titles, § 252. The mortgage which the respondent is seeking to foreclose is set forth in the complaint as a part thereof. It recites that the said mortgagor mortgages to the mortgagee the following described personal property, to wit: "All its water pipes, mains, fixtures, plant, and any and all its property now placed and to be placed in its water system, together with all rights, privileges, securities, and franchises" of the mortgagor. The complaint then alleges that the said mortgage was acknowledged, and was accompanied by the affidavit of the mortgagor that it was made in good faith, and without any design to hinder, delay, or defraud creditors, and that it was recorded, etc. From the language of the mortgage and the allegations of the complaint it would seem that the respondent, at the time of the commencement of this action, considered the instrument in question a mortgage of personal property in all respects in accordance with all the statutory requirements. But it is now insisted by the learned counsel for the respondent that this is a real-estate, and not a chattel, mortgage, and that

it was properly executed and recorded as such. No part of the mains and pipes covered by respondent's mortgage was connected with Frazier's creek, or used for the purpose of conveying water, at the time the mortgage was made; and, as the greater portion thereof was neither laid in the ground nor connected together at that time, it can hardly be doubted that at least the unconnected portion, if not the whole, was in fact personal property, and properly so considered by the parties to the mortgage. Being personal property at the time they were mortgaged, by what means or upon what principle have these water pipes and mains been transmuted into real estate? We do not understand that the learned counsel for the respondent claims that they really became fixtures by reason of their having been laid under ground or through the streets of the city; for, if it be true that they thereby became fixtures, the ownership thereof was thus transferred to the proprietor of the land to which they were affixed, which the respondent does not concede. It is true that this property was so imbedded in the soil that, under ordinary circumstances, it might have been deemed a fixture; but such annexation did not necessarily change its character, or relieve the respondent from the duty of properly recording his mortgage. "A mortgage of articles that are afterwards so annexed or affixed to real estate as to ordinarily constitute fixtures must be recorded as a chattel mortgage, and the fact that under this construction the examination of title to realty will necessarily involve an examination of the chattel mortgage record does not change the rule." Webb, Record Titles, § 252, and see cases cited. The real contention on the part of the respondent seems to be that the waterworks, as constructed and operated, must be deemed real estate by reason of its fixed locality; or, in other words, because it is immovable, and hence, according to the law as announced by Blackstone, real estate. It is not claimed, as we have already intimated, that the pipes and mains, separately considered, are fixtures, and therefore real property, but it is insisted that the "plant" as a whole is real estate, for the reason, as stated in the brief of counsel, that "the principal thing in a waterworks is the water, and it is as immovable and fixed as the land." This statement as to the character of property in water cannot be accepted as strictly accurate. While it is true that water in a running stream is deemed in law a part of the land over which it flows, it is also true that, after it has been diverted from its original channel, and conveyed elsewhere in pipes for distribution or sale, it loses its original character, and becomes personal property. *People v. Blake*, 19 Cal. 579; *Mining Co. v. Hoyt*, 57 Cal. 44. Counsel for the respondent has cited cases holding that telegraph lines and telephone lines and electric light poles and wires are real estate, under stat-

utes relating to taxation or to mechanics' liens; and also a case from California holding that a mining right on public land is real estate (*Merritt v. Judd*, 14 Cal. 63); and still another case from the same state in which it was held that a flume with running water was realty (*Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621). In *Keating Implement & Machine Co. v. Marshall Electric Light & Power Co.* (Tex. Sup.) 12 S. W. 489, cited by respondent, the court held that the electric light poles, wires, etc., were real estate, and subject to mechanics' liens, because it was impracticable to separate them from "the lot and improvements thereon" owned by the company. And to the same effect is *Hughes v. Power Co.* (N. J. Ch.) 32 Atl. 69, also cited by respondent. Neither of these cases is applicable to the facts in the case at bar, it being conceded, or at least not denied, that the first company owned no lots or buildings to which its pipes and mains were appurtenant. In *Merritt v. Judd*, supra, the court held that a claim to public mineral land—a quartz lead—was practically a freehold estate, though it recognized the fact that in so deciding it departed from the technical rules of law. The decision was, in effect, based on the doctrine of stare decisis. The court observing in the course of the opinion that, "from an early period of our state jurisprudence we have regarded these claims to public lands as titles." After stating the reason why the courts of the state had given mining claims the recognition of legal estates of freehold, the court in that case said: "If to decide thus be a departure from some technical rules of law, it is but following other rules which hold that a system of decisions long established and long acted upon shall not be departed from, when important rights have vested under it, merely because the reasons upon which it rests might not, in the judgment of subsequent judges, be considered sound." In *Union Water Co. v. Murphy's Flat Fluming Co.*, supra, the court held that the sluice and flume in that case, which was used for mining purposes, was in the nature of real estate, and the mortgage upon it included all improvements then upon the line of the work, and also all those afterwards put thereon; but it does not appear that there was any question made by the parties to the action as to the character of the property, or that there was any agreement or understanding as to its character between the parties to the mortgage there under consideration, such as appears in the case at bar. And, moreover, it appears that in California miners' flumes and ditches are declared by statute to be real estate. *Deering's Civ. Code*, § 657 et seq. In *Western Union Tel. Co. v. State*, 40 Am. Rep. 99, cited by respondent, it was held that the telegraph line was taxable, under the statute of Tennessee, as real estate. In disposing of the question the court said: "We treat the telegraph line as partaking of the nature of real-

ty in analogy to the now settled doctrine that railroad and rolling stock are so treated." The case, however, which seems to be principally relied upon by respondent as supporting the judgment of the court below is that of *Appeal of North Beach & Mission R. R. Co.*, 32 Cal. 500. In that case the board of supervisors of the city and county of San Francisco were authorized by an act of the legislature to widen Kearney street in said city, and proceedings for that purpose were instituted by the board. By the provisions of the statute the board were authorized to assess the expenses of the work upon the owners and occupants of houses and lands and railroad corporations and companies that might be benefited thereby. The sum of \$20,000 was assessed against the street-railway company as its just proportion of the expenses of the work, and the assessment was confirmed by the county court. From the order of confirmation the company appealed. The order of confirmation was sustained in the supreme court by a majority opinion (Sanderson and Rhodes, JJ., dissenting) on the ground that the estate of the railroad company in the street was real property, and benefited by the improvement. The court in that case seems to have concluded that the railroad company was, by the legislature, vested with an easement in fee in the street,—a freehold interest,—and that that, in connection with its line of track, was real estate. Some weight was also given, in the opinion of the court, to the fact that the interest of the railroad company was local,—fixed to the particular street,—and could not be enjoyed beyond or independent of that fixed locality. But the principles announced by the learned court in that case—conceding them to be correct—are not strictly applicable to the present one. In this case the first company did not have an easement in fee in the street or in any other land at the time it made its mortgage to the respondent. Its license to use the street, or its easement therein, was limited to a definite time, and was, therefore, less than a freehold. It was a chattel real, and subject to the rules relating to personal property. 1 Schouler, Pers. Prop. (3d Ed.) § 20. If it had been the owner of lands and buildings with which its pipes and mains were connected, such pipes and mains would have been deemed a part of the realty in the nature of appurtenances or fixtures, in accordance with the rule laid down in *Appeal of Des Moines Water Co.*, 48 Iowa, 324, and *Monroe Water Co. v. Township of Frenchtown*, 98 Mich. 431, 57 N. W. 268. See, also, *Commonwealth v. Lowell Gaslight Co.*, 12 Allen, 75; *City of Fall River v. County Commissioners of Bristol*, 125 Mass. 567; *Keating Implement & Machine Co. v. Marshall Electric Light & Power Co.*, supra; and *Hughes v. Power Co.*, supra. In *Memphis Gaslight Co. v. State*, 6 Cold. 310, it was held that pipes laid through the streets of the city by permission of the corporate authorities did

not become a part of the realty, but were personal property, and the property of the company. Upon the facts presented by the record we are of the opinion that the property described in respondent's mortgage was and is personal property, and it therefore follows that the learned trial court erred in adjudging that the lien of said mortgage is prior and paramount to that of appellant's trust deed or mortgage.

It is stipulated by the parties hereto that the property involved in this controversy was assessed for the years 1892, 1893, and 1894, pursuant to law, as personal property; that the taxes assessed thereon became delinquent; that the said property was advertised for sale by the county treasurer; and that the respondent, for the purpose of protecting his claim and lien, paid the full amount of the taxes levied upon the property. It seems that respondent also paid the taxes on the water plant for subsequent years, and the sums so paid were adjudged a lien upon the property assessed by virtue of section 109, p. 322, Laws 1891, which provides that any person who has a lien, by mortgage or otherwise, upon any real property on which the taxes have not been paid, may pay such taxes, and that the same shall constitute an additional lien. As this provision relates to liens upon real property only, the payment of the taxes by respondent created no lien in his favor; and, although it would seem that those who were benefited thereby are morally bound to repay the same to the respondent, no judgment can be rendered therefor in this proceeding. Having concluded that the lower court erred in declaring respondent's mortgage to be a first lien on the property described therein other than the suburban lots therein mentioned and described, that part of the judgment and decree is reversed, and the cause remanded, with directions to enter a judgment and decree establishing and declaring appellant's trust deed or mortgage to be a prior and superior lien to that of respondent's mortgage.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

(24 Wash. 102)

CANADIAN & AMERICAN MORTGAGE & TRUST CO., Limited, v. BLAKE et al.

(Supreme Court of Washington. Feb. 25, 1901.)

MORTGAGE FORECLOSURE—REDEMPTION—CONSTITUTIONAL LAW.

Laws 1899, c. 53, § 15, providing that, where any homestead occupied for that purpose is sold, the judgment debtor shall have right of redemption without accounting for value of occupation, is unconstitutional, when applied to contracts executed before its passage.

Appeal from superior court, Lewis county; H. S. Elliott, Judge.

Action by the Canadian & American Mortgage & Trust Company, Limited, against

Benjamin W. Blake and Nancy A. Blake. Judgment for plaintiff, and defendants appeal. Affirmed.

M. A. Langhorne and W. W. Langhorne, for appellants. J. E. Willis, for respondent.

DUNBAR, J. This was an action by respondent against appellants to foreclose a mortgage. The mortgage was executed February 3, 1893, and suit to foreclose the same was commenced on the 2d day of May, 1899. The court decreed that the purchaser was entitled to immediate possession of the land to be sold, after sale. From this portion of the decree this appeal is taken.

The trial court held that section 15, c. 53, Laws 1899, which provides that, in case of any homestead occupied for that purpose at the time of sale, the judgment debtor shall have the right of redemption without accounting for issues or value of occupation, was unconstitutional when applied to contracts executed prior to its passage. It is claimed that the decision by this court of the case of *Wilson v. Wold*, 21 Wash. 393, 58 Pac. 223, is decisive of the question involved in this appeal. That case does not seem to us to reach the question under discussion here. There was no lien existing. It was simply a contract for money to be paid, and it was held that the law which provided that judgment debtors should be entitled to possession, and to the rents, issues, and profits, of real property which was sold on execution, did not deprive a party who had sued upon an open account of any right or the enforcement of any remedy which the prior law had given him. But in this case the contract is with special reference to the property upon which the lien is established by the contract. We think the principles underlying this case have been decided by this court in the case of *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, and more directly in *Swinburne v. Mills*, 17 Wash. 611, 50 Pac. 489, where the authorities, which distinguished between a simple remedy, which it is within the legislative power to change, and a remedy which is a part of the obligation of the contract,—a change of which cannot be made without impairing and lessening the value of the contract,—were collated and discussed at length. A rediscussion of these principles would not be beneficial. But we will refer again to one of the cases cited in *Swinburne v. Mills*, supra (*Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93), where the supreme court of the United States, after an exhaustive review of the questions involved, decided that a state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its pas-

sage. As to existing contracts, the law of 1899 was unconstitutional and void. The judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

(24 Wash. 78)

DIMMICK v. COLLINS.

(Supreme Court of Washington, Feb. 20, 1901.)
STATUTE OF FRAUDS—ACTION ON CONTRACT—EVIDENCE.

1. An agreement by which the interest of a tenant in a growing crop of wheat was transferred to defendant, in consideration of his promise to pay a debt of the tenant to plaintiff, was not void, under the statute of frauds, though not in writing.

2. The evidence showed a tenant surrendered his lease of certain land to defendant in consideration of two-thirds of the growing crops, that the tenant had a contract with plaintiff to raise the crop for one-half of the tenant's two-thirds, and that the defendant agreed to pay the plaintiff the amount due him for his services. *Held* to make a prima facie case for plaintiff.

3. Where plaintiff claimed that, in consideration of assignment of growing crop, defendant promised to pay a debt owing by the assignor of the crop to plaintiff, and the evidence was conflicting as to such agreement, evidence of the value of the crop was admissible, to be considered in determining whether the alleged contract was probable.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by L. B. Dimmick against H. W. Collins. Judgment for plaintiff. Defendant appeals. Reversed.

Crow & Williams, for appellant. A. J. Laughon and Del Cary Smith, for respondent.

MOUNT, J. The respondent, plaintiff below, brought this action against appellant upon two causes of action. The first is, in substance, that one W. H. Darknell was indebted to plaintiff in the sum of \$223.25; that about August 31, 1899, defendant and said Darknell made and entered into an agreement by the terms of which said Darknell assigned, transferred, and sold to defendant all his right, title, and interest in and to a certain crop of wheat then growing on premises described, in Spokane county, and as consideration therefor the defendant promised and agreed to pay the said indebtedness. The second cause is substantially as follows: That in August, 1899, defendant employed plaintiff to harvest said grain above described, and agreed to pay therefor the sum of \$1.50 per acre; that under said agreement plaintiff harvested 55 acres of grain; a demand, and refusal to pay. Defendant answered the said first cause of action, and denied the allegations thereof, and for further answer alleged that if the contract alleged was ever made the same was wholly without consideration, and was never evidenced by any written memorandum. Answering the second cause of action, defendant, after denying the allegations, alleged a con-

tract to cut 30 acres of said grain, at \$1.50 per acre, and a tender of the amount due. The cause came on for trial before a jury, and a verdict was given by the jury for the amount prayed for in the complaint. At the close of plaintiff's case, the defendant challenged the sufficiency of the evidence, and moved the court to direct a verdict for the defendant upon the first cause of action. This motion was by the court denied, and appellant assigns this ruling of the court as error. Under the rulings of this court in *Don Yook v. Mill Co.*, 16 Wash. 459, 47 Pac. 964, and in *Gilmore v. Factory*, 20 Wash. 703, 56 Pac. 934, the complaint stated a cause of action, and the contract was not within the statute of frauds.

The other question to be considered upon this motion is whether there was any evidence to support the complaint. Witness Darknell testified substantially as follows: "I had a lease on the N. E. quarter of section 1, township 21 north, range 45 E., W. M., which property was owned by defendant. I surrendered the lease which I held on said land to Mr. Collins. By my lease with Mr. Collins I was to receive two-thirds of the grain raised on the farm, and I had a contract with the plaintiff, Mr. Dimmick, that he should perform work in raising the said crop, and should receive one-half of my two-thirds of the crop. He did work under this arrangement, and had performed services of the value of \$223.25. This work consisted in plowing the ground and seeding the same. Mr. Collins agreed to pay the plaintiff the amount of \$223, which was due from me, and also to pay the note," etc. This evidence was corroborated by the plaintiff and one other witness. It was certainly competent under the pleadings, and makes a prima facie case. The court committed no error in denying the motion.

Appellant, at the trial, both by cross-examination of the witnesses of the defendant and by his own evidence, offered to prove the character, condition, and value of the crop at the time the contract is alleged to have been made. Objections to questions having this object in view were sustained by the court. While the defendant was on the stand as a witness in his own behalf, and after he had denied the making of the contract in which he was alleged to have assumed the said indebtedness of \$223.25, and after he had denied that he had agreed to pay any part of the same except from the proceeds of the crop, his counsel asked him the following question: "State what the condition of the crop was," which the court, on objection, refused to allow; whereupon his counsel made the following offer: "If the court please, the defendant now offers to prove that this crop was of very little value; that it was doubtful whether it would any more than pay the costs of harvesting and threshing; which facts were known to plaintiff and defendant and Darknell on September 8, 1900, the time of the agreement testified to;" which the court re-

jected. This evidence was relevant under the pleadings, and should have been permitted. It was not admissible as upon quantum meruit, but was admissible for the jury to consider, with the other circumstances proved, in determining as a question of fact whether the alleged contract had been made. Where there is a dispute between the parties whether or not such a contract has been made, the circumstances surrounding the transaction are permissible to show whether the contract was probable. The law assumes that men make fair bargains; that is, that when they contract they make their agreements equal. *Bedell v. Foss*, 50 Vt. 94. If A. has a horse of no value, and delivers him to B., and then says B. agreed to pay \$100 for him, B., when he denies the contract or the purchase price, may show that the horse was valueless, and that he knew at the time that he was valueless, for the purpose of showing that he would in all probability not make such a contract; and this evidence, depending upon the difference between the real value and the price, might have the weight of positive evidence. The truth is to be determined, and the jury are entitled to know the surroundings of the parties and weigh such probabilities. It is not likely that a person would agree to pay \$200 for what was worth nothing or less than nothing. The courts will not relieve against a bad bargain, and evidence of this character is not permitted for any such purpose, but only for the purpose of discovering where the truth is. Common experience of men is valuable for this purpose. The case of *Wheeler v. F. A. Buck & Co.*, 63 Pac. 566, recently decided by this court, fully discusses and cites many of the authorities, and is in point upon this question, and decisive of it. Errors 3 and 4, alleged, are not here considered, because these, if held error, would result only in a modification of the judgment. The cause will be reversed, and remanded for a new trial.

REAVIS, C. J., and ANDERS, DUNBAR, and FULLERTON, JJ., concur.

(24 Wash. 71)

STATE v. DE PAOLI.

(Supreme Court of Washington. Feb. 19, 1901.)

MISDEMEANOR—INFORMATION—MOTION TO QUASH—REVIEW—PRELIMINARY EXAMINATION—RECORD—SUFFICIENCY—SELLING LIQUOR TO MINORS.

1. Where defendant moved to quash the information because it was admitted in open court that no preliminary examination was had, but the record did not show such admission, or that the grand jury was not in session when the information was filed, an order refusing to quash the information will not be reversed.

2. Under a statute imposing a fine on any one who shall sell liquor to minors, an information that defendant willfully, unlawfully, and knowingly sold intoxicating liquor to one S., the said S. then and there being a minor, was not objectionable, as failing to aver that defendant had knowledge that S. was a minor.

Appeal from superior court, King county; E. D. Benson, Judge.

William De Paoli was convicted of selling liquor to a minor, and he appeals. Affirmed.

Fred H. Peterson, for appellant.

DUNBAR, J. The appellant was charged with the offense of selling liquor to a minor, was convicted, and from the judgment of conviction this appeal is taken. There are two assignments: First, that the court erred in denying the motion to quash the information because no preliminary examination had been had, nor any reason alleged or shown why the same was omitted; second, that the court erred in refusing to grant appellant's motion in arrest of judgment on the ground that the information did not state facts sufficient to constitute a crime or offense. It is alleged by the appellant that the information should have been quashed because no preliminary examination had been held, and it is stated in appellant's brief that it was admitted in open court that such was the fact, and that there was no reason why a preliminary examination should not have been had. It is a sufficient answer to this objection that the record does not disclose the admission of the fact, or whether or not a grand jury was in session. The rule which this court has applied to informations for felony in this respect should apply to informations for misdemeanors.

The second contention is that the information did not state facts sufficient to constitute a crime or offense. The information, as far as material, was in the following language: "William De Paoli is hereby accused * * * of the crime of selling intoxicating liquor to a minor, committed as follows, to wit: He, the said William De Paoli, in the county of King, state of Washington, on the 20th day of May, 1900, did willfully, unlawfully, and knowingly sell and give to one Thomas Sweeney intoxicating liquor, commonly called 'whisky,' without the written consent or permission of either of the parents of the said Thomas Sweeney; the said Thomas Sweeney then and there being a minor of the age of seventeen years." It is insisted that the word "knowingly" applies simply to the words "sell and give," and that appellant is not charged with knowledge of the fact that Thomas Sweeney was a minor, but is charged only with knowledge of the fact that he sold intoxicating liquors to Thomas Sweeney. We think this contention is hypercritical. There are some cases that seem to sustain this view, but a much broader and more sensible construction, in our opinion, is placed upon statutes of this kind by the United States supreme court in *Rosen v. U. S.*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 806. There, under a statute which prevented the depositing in the post office of the city of New York of obscene literature, Rosen was indicted under the fol-

lowing phraseology: "Did unlawfully, willfully, and knowingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the post-office establishment of the United States, a certain obscene, lewd, and lascivious paper," etc.; and the defendant there, as here, moved in arrest of judgment upon the ground that the indictment did not charge that Rosen knew at the time that the contents of the letter were obscene, etc., but that the word "knowingly" applied only to the fact of depositing the letter in the post office. Justice Harlan, in delivering the opinion of the court, in response to this contention made the following sensible observation: "Of course, he did not understand the government as claiming that the mere depositing in the post office of an obscene, lewd, and lascivious paper was an offense under the statute, if the person so depositing it had neither knowledge nor notice at the time of its character or contents. He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited. In their ordinary acceptation, the words 'unlawfully, willfully, and knowingly,' when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing, and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it." This case was followed and approved by the same court in *Price v. U. S.*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727, and is in harmony with modern decision and the spirit of the Code. It would be idle to say that, under the language used in this information, the defendant did not know that he was charged with selling liquor to a minor, knowing him to be a minor. "Knowingly" cannot possibly refer to the sale; for, of course, any conscious and sane man who sells liquor knows that he sells it. Again, this information is as strong as the statute, and is in the language of the statute, the statute being, "Every person who shall knowingly sell or give to a minor intoxicating or spirituous liquor," etc.; and it is not to be presumed that the legislature intended to provide a punishment for a person who should knowingly sell liquor to a minor, not being cognizant of the fact that such person was a minor. But, placing the same construction upon the statute that appellant seeks to place upon the information, the appellant is guilty in any event; for he is charged with knowingly selling liquor to a minor, and that charge meets the requirements of the statute. But such construction is an unreason-

able one when applied to either the statute or the information. The information is sufficient, and the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

(24 Wash. 62)

SEAL v. CAMERON et al.

(Supreme Court of Washington. Feb. 19, 1901.)

DEMURRER—MOTION TO STRIKE—HARMLESS ERROR—PLEADING.

1. Where a motion to strike out an amended complaint as not stating a cause of action was treated by the trial court as a demurrer, and the issue raised by it was tried in the way it would have been if it was a demurrer, and no prejudice is shown, error cannot be predicated thereon, though a demurrer would have been the proper method of testing the complaint.

2. In an action to enjoin defendants from interfering with plaintiff, manager of a private corporation, in the exercise of his office, the fact that the articles of incorporation were not pleaded in *hæc verba* was no ground for demurrer.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by C. F. Seal against G. W. Cameron and others. Judgment for defendants, and plaintiff appeals. Reversed.

Albert W. Buddress and Geo. C. Hatch, for appellant. Trumbull & Trumbull, for respondents.

FULLERTON, J. The appellant brought this action to enjoin the defendants from interfering with his exercise of the office of trustee and manager of the Groveland Improvement Company, a private corporation. The respondents demurred to the original complaint, which demurrer, after a hearing, was sustained by the trial court, and leave was granted the appellant to file an amended complaint. After the filing of the amended complaint the respondents moved "for an order striking" it, on the grounds—First, that it was not an amendment of the original complaint, but the statement of a new cause of action; and, second, because the amended complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the motion on the first ground stated, and sustained it as to the latter. The appellant thereupon elected to stand upon his complaint and refused to plead further, whereupon the court entered a judgment dismissing the action.

The first ground for reversal urged is that the trial court erred in permitting the sufficiency of the complaint to be tested by motion, instead of requiring it to be done by a demurrer. Whatever force this contention might have in a case where the motion to strike was based upon the statutory grounds for striking a complaint, we think it can have but little weight in determining the question presented here. The so-called motion was in substance a demurrer. It was

so treated by the trial court; and the issue raised by it was tried in the same way it would have been, and the appellant was granted all the rights and privileges he would have been entitled to, had the pleading been called a "demurrer," instead of a "motion," as it was called. Courts determine the nature of a pleading by an examination of its substance, and a consideration of its object and purpose, rather than from the name the parties may choose to call it; and unless it be shown that the adverse party has been denied the right to try the actual issue presented, or has otherwise lost some substantial right, because of the misnomer, error cannot be predicated thereon.

It is next contended that the court erred in holding that the complaint did not state facts sufficient to constitute a cause of action. This contention must be sustained. We are not advised of the ground upon which the trial court based its ruling, but the only ground urged upon us here for sustaining the ruling is that the articles of incorporation and by-laws of the corporation attempted to be pleaded were not set out in *hæc verba*. This was unnecessary. In pleading instruments of this character the pleader is at liberty to adopt the rules which pertain in pleading other instruments which furnish the foundation of the action. He may set them out in *hæc verba*, or he may state them in substance and according to their legal effect, without reciting their exact language. It is not denied that the complaint in this case contains the substance of the articles of incorporation and the by-laws of the corporation, so far as the same are material to the cause of action stated. As this was all that was necessary, the complaint should have been sustained. The judgment of the lower court is reversed, and the cause is remanded, with instructions to reinstate the case and require the defendants to answer.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

(24 Wash. 47)

RAUGHT et al. v. LEWIS et al.

HYATT et al. v. LEWIS.

(Supreme Court of Washington. Feb. 15, 1901.)

JUDGMENT—LIEN—CONSTITUTIONAL LAW.

Act March 6, 1897, providing that after six years a judgment shall cease to be a lien, is unconstitutional, so far as it relates to judgments rendered prior to its passage.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Petition by Abram H. Hyatt and another to revive judgment in the case of Sarah A. Raught and C. R. Fowler against F. B. Lewis and others. Demurrer of W. A. Lewis to the petition sustained, and petitioners appeal. Reversed.

Karnes, Holmes & Krauthoff and Cyrus Happy, for appellants. Lewis & Lewis, for respondent.

ANDERS, J. A petition was filed by appellants herein in the superior court of Spokane county in September, 1897, to revive a judgment in the case of Sarah A. Raught and C. R. Fowler et al. against F. B. Lewis and W. A. Lewis et al., which judgment was rendered in said court in November, 1891. A demurrer to the petition was filed by respondent herein on all of the statutory grounds. The demurrer was sustained by the lower court, and this appeal is from the judgment rendered below, dismissing the petition and allowing costs to respondent.

The only serious question presented by the record, and the one that is considered decisive, is as to the validity of the act of March 6, 1897, relating to the duration of judgments, and repealing sections 462, 463, 2 Hill's Code; it being contended by respondent that said act affected judgments rendered prior to its passage. No extended discussion of this question is now necessary; this court having decided on December 6, 1900, after a careful consideration of the subject, in the case of *Palmer v. Laberee* (not yet officially reported) 63 Pac. 216, that the said act of March 6, 1897, was unconstitutional and void as to such judgments. In view of this decision, the demurrer cannot be sustained on this ground.

The only other question insisted upon by respondent is as to the sufficiency of the assignment attempted to be set up in the petition. While the allegation of the assignment in the petition is not as clear and distinct as it should be, we are of the opinion that the defects in the allegation were not such as could be reached by demurrer.

It is not necessary to consider the remaining grounds of demurrer, as they possess no merit. The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

REAVIS, C. J., and DUNBAR and FULLERTON, JJ., concur.

(24 Wash. 49)

STATE v. DENGEL.

(Supreme Court of Washington. Feb. 15, 1901.)

ROBBERY—INFORMATION—ALLEGATION OF OWNERSHIP—LARCENY—INSTRUCTIONS.

1. Under 2 Ballinger's Ann. Codes & St. § 7103, declaring that every person who shall forcibly and feloniously take from the person of another any article of value by violence or putting in fear shall be deemed guilty of robbery, an information failing to set out the ownership of the property taken is insufficient to sustain a conviction.

2. Where the defendant in a prosecution for robbery admitted taking \$20, but denied the use of force and violence and putting in fear, and asked the court whether he would instruct on the subject of larceny, it was error for the court to omit to instruct that the defendant

might be convicted of larceny, since larceny is a lesser offense included in robbery, and conviction thereof may be had on an information for the latter.

Appeal from superior court, Yakima county; John B. Davidson, Judge.

Fred P. Dengel was convicted of robbery, and he appeals. Reversed.

Graves & Englehart, for appellant. John J. Rudkin, for the State.

REAVIS, C. J. Defendant, together with one Cox and one Smith, were jointly informed against for robbery. The information charged the defendants jointly with robbery, committed as follows: "That the said Fred P. Dengel, John Cox, and Annie Smith, on the 10th day of May, 1900, A. D., in the county of Yakima, state of Washington, then and there being, did then and there forcibly and feloniously take from the person of one Norman Stevens the sum of fifty-two dollars, lawful money of the United States, and of the value of fifty-two dollars, by violence and putting in fear him, the said Norman Stevens; contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Washington." Defendant was tried separately, and declined the services of counsel until after a verdict of guilty was returned by the jury. The evidence for the state was that Stevens, while drunk and carousing in a house of ill repute, became ill, and went out into the yard in the rear of the house; and after dark, and while alone, a man whom he recognized as the defendant Dengel came up, and presented a pistol at him, and took \$52 in money from his person. No one else saw the alleged robbery. The defendant testified that he was at the house the night of the alleged robbery; that he saw Stevens sitting out in the rear of the house, in the dark, on a chair, and that Stevens was at the time drunk and unconscious; that defendant put his hand in Stevens' pocket, and took out a \$20 gold piece; that defendant had no pistol, and used no force in taking the money; and that Stevens made no resistance or outcry. After the verdict of guilty was returned, defendant, by counsel, moved for a new trial on the ground of errors of law occurring at the trial, and insufficiency of the evidence to justify the verdict, and that the facts stated in the information do not constitute a crime, in that the information does not allege the ownership of the money alleged to have been stolen.

1. It will be observed that no fact stated in the information negatives the ownership of the money taken from the person of Stevens in the defendant. The ownership is not alleged in another than defendant. Blackstone defines robbery as follows: "Robbery is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting in fear." This is the common-law definition of rob-

bery. The statute (section 7103, 2 Ballinger's Ann. Codes & St.) reads: "Every person who shall forcibly and feloniously take from the person of another, or from his immediate presence, any article of value, by violence or putting in fear, shall be deemed guilty of robbery. * * *" 2 Blsh. Cr. Law (8th Ed.) par. 1159, observes: "The indictment for robbery charges a larceny, together with the aggravating manner which makes it, in the particular instance, robbery. For example, the property is described the same as in larceny, the ownership is in the same way set out, and so of the rest." This definition is cited with approval in *State v. Johnson*, 19 Wash. 410, 53 Pac. 667. The same author, in his work on Criminal Procedure (section 1006), declares that the ownership must be alleged and proved in robbery as in larceny; and the same rule has been announced under the California statute, which is substantially like the statute of this state. *People v. Vice*, 21 Cal. 345; *Same v. Jones*, 53 Cal. 58; *Same v. Ammerman*, 118 Cal. 23, 50 Pac. 15. And in Texas: *Smedly v. State*, 30 Tex. 214; *Barnes v. State*, 9 Tex. App. 129. In Missouri: *State v. Lawler*, 130 Mo. 366, 32 S. W. 979. In Nevada: *State v. Nelson*, 11 Nev. 334. See, also, 3 Greenl. Ev. (15th Ed.) § 224. The rule is stated in 18 Enc. Pl. & Prac. p. 1223: "As a general rule, it is necessary to charge the ownership of the property alleged to have been taken; but in some jurisdictions an erroneous allegation in this particular is held to be immaterial, as it is not, strictly speaking, of the gist of the offense." Two cases have been brought to our attention holding that the allegation of ownership in another in the indictment for robbery may be dispensed with. In *State v. Dilley* (Or.) 13 Pac. 648, it was so ruled. There the court observed: "The indictment at common law would be defective. It would have been necessary, under that system, to have averred specially to whom the money belonged. The fact that it might have belonged to the robber, and not to the person robbed, had to be negated. * * * But our statute has dispensed with the necessity of so useless a requirement. It has provided, in express terms, what shall be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon. Section 71, Cr. Code." Likewise in *Clemons v. State*, 92 Tenn. 282, 21 S. W. 525, it was determined that the omission of the allegation of ownership in another was not a fatal defect, on the ground, as stated by the court, that "the essential ingredients of the offense are the felonious and forcible taking from the person of another of goods of value by violence; and the indictment, containing all the words of the statute, was sufficient." We are not impressed sufficiently with the soundness of the reasons stated in these two cases to commend an omission of the statement of the essential elements of the crime. It is surely essential to prove that the property

taken was in another than the defendant. Literally, the defendant may have committed every act charged in the information, and yet not be guilty of robbery or larceny. It is true, the legislature may state a form for the indictment, and attach a definition to words used therein, which can then become the equivalent of the ordinary requirement of the indictment for robbery. But our attention has not been called to any such provision in our statutes.

2. It seems clear that under an information for robbery a conviction may be had for the lesser offense included therein of larceny. It is stated in 18 Enc. Pl. & Prac. p. 1233: "It is very generally held that a conviction of larceny may be had upon an indictment for robbery;" and the authorities cited support the text. It will be observed that in the case of *State v. Johnson*, supra, the provisions of our Code relative to description of the money the subject of larceny and embezzlement were applied to robbery. The evidence of the defendant tended to show a larceny,—that is, he denied the use of force and violence and putting in fear, but admitted the taking of \$20; and we think, under the circumstances, too, that his question to the court at the trial whether the court would instruct on the subject of larceny, and his exceptions to the instruction of the court, though informally made, were sufficient to require the court to instruct upon the crime of larceny as included within the charge of robbery, if the charge of robbery was correctly stated. The judgment is reversed.

FULLERTON and ANDERS, JJ., concur.

(24 Wash. 16)

SETHER v. CLARK et al.

(Supreme Court of Washington. Feb. 7, 1901.)

ACTIONS — CONSOLIDATION — INJUNCTION — PLEADING — DEMURRER — APPEAL — DISMISSAL — WANT OF ACTUAL CONTROVERSY — ANTICIPATION OF ERROR.

1. Where a subcontractor filed a bill to foreclose a mechanic's lien, and the owners filed a cross complaint, and asked an injunction restraining the contractor from prosecuting an action at law for breach of the contract, and requiring him to plead to the owner's cross complaint in the equity suit, and a demurrer to such cross complaint was sustained and the complaint dismissed, but prior to the hearing of the demurrer the court consolidated the action at law with the foreclosure suit, an appeal from the order dismissing the cross complaint will be dismissed, since, the causes having been consolidated, the controversy was ended, and the consideration of the appeal would serve no useful purpose.

2. Where, prior to an order sustaining a demurrer to a complaint, the relief sought was granted by a consolidation of causes, the supreme court, on appeal from the order sustaining the demurrer, and before the trial of the consolidated cause, will not rule as to the method of trying the consolidated cause, in anticipation of error by the trial court.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Suit by Ed. Sether against F. L. Clark and others to foreclose a mechanic's lien, in which Robert Russell and others filed a cross complaint for the same relief, and defendants Clark and others filed a cross complaint praying an injunction restraining the prosecution of an action at law by Fred Phair against defendants Clark and others, to which cross complaint Phair demurred. An order consolidating the action at law with the suit to foreclose was entered before decision of the demurrer, which was subsequently sustained, and defendants appeal. Motion to dismiss appeal. Granted.

Graves & Graves, for appellants. F. T. Post, for respondents.

MOUNT, J. The plaintiff, Sether, sued in equity to foreclose a mechanic's lien for a sum claimed to be due him for materials and labor furnished for and performed upon a certain building erected by defendants Clark and Sweeny. His claim is based upon an employment by defendant Russell, who was employed by defendant Phair, the original contractor for the erection of the building upon which the lien was sought to be foreclosed. Russell thereafter filed a cross complaint in the case, praying the foreclosure of a mechanic's lien for a sum claimed to be due him under his employment. The appellants Clark and Sweeny thereafter answered the original and cross complaint, alleging affirmative defenses to each of the complaints of Sether and Russell. Prior to the commencement of the Sether suit the respondent Phair had commenced an action at law against the appellants Clark and Sweeny alone, to recover damages for an alleged breach of the original contract for the erection of the building above referred to. Thereupon, after the suits above named had been filed, and on June 13, 1900, appellants filed a cross complaint in the case of Sether against Clark et al., praying for an injunction to prevent the respondent Phair from prosecuting his action at law, and requiring him to plead to the cross complaint of appellants and of Russell, and to plaintiff's complaint, to the end that final judgment may be entered, which shall adjudge and settle the rights of all the parties in one decree. Respondent Phair demurred to the complaint of appellants, and the demurrer was on October 4, 1900, sustained, the complaint dismissed, and an appeal taken from that order. Prior to the hearing upon said demurrer, and on September 24, 1900, the court had made an order consolidating the said cause of Phair against Clark et al. with said cause of Sether against Clark et al. Motion is now made by respondent in this court to dismiss this appeal, for the reason that the action, before the appeal herein was taken, was consolidated by order of the superior court with the action pending in said court entitled "Phair v. Clark et al.," being the action the prosecution of

which the appellants herein are by their cross complaint seeking to enjoin, the issues of which they seek by said cross complaint to have tried out in this case.

It clearly appears from the record herein that the two cases have heretofore been consolidated, and will now be tried as one case. If we were now to consider this case upon its merits, and reverse the order of the lower court sustaining the demurrer, the cause would be in no other position than it now is, and much confusion might be occasioned thereby. The controversy as to whether there may be more than one judgment or decree is now at an end; for under the consolidation there will be but one determination of all the matters in issue, and those issues will be determined by a decree which will establish the rights of all parties to the consolidated cases. The consideration of the appeal upon the merits would now serve no useful purpose. This case falls squarely within the rule announced by this court in *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *State v. Wickersham*, Id. 161, 47 Pac. 421; *State v. Prosser*, Id. 608, 48 Pac. 262; and *State v. Meacham*, 17 Wash. 429, 50 Pac. 52.

The appellants, in their reply brief, urge this court to establish a rule which shall guide the lower court in the method of trying the consolidated cause. We cannot assume that the trial court may not follow the law applicable to the trial of the cause, and therefore shall not assume to lay down any rule which the court shall follow with reference thereto. When error is committed, this court will review it, but it will not anticipate error. The real controversy between the parties to this appeal having ceased, the appeal should be dismissed.

REAVIS, C. J., and DUNBAR, FULLERTON, and ANDERS, JJ., concur.

(24 Wash. 8)

FREUNDT v. HAHN et al.

(Supreme Court of Washington. Jan. 17, 1901.)

BILLS AND NOTES—ACTION—LIMITATION—
STATE WHERE MADE.

2 Ballinger's Ann. Codes & St. § 4818, provides that when a cause of action has arisen in another state between nonresidents of Washington, and by the laws of the state where the action arose it cannot be maintained because of lapse of time, no action can be maintained thereon in Washington. Defendants made notes to plaintiff in another state, of which both were residents, but before their maturity plaintiff removed therefrom. *Held*, that plaintiff's right of action thereon was not barred by the limitations of the state where the notes were made, since the cause of action did not arise until maturity of the notes, at which time plaintiff was a resident of Washington.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by Franz Freundt against Charles Hahn and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Fred H. Peterson, for appellants. Adolph Munter, for respondent.

REAVIS, C. J. Action brought in March, 1899, against appellants, who were then and at all times mentioned residents of California. Jurisdiction was obtained by attachment in this state to recover upon two promissory notes executed by Charles Hahn and one R. Wittke. There are two causes of action alleged in the complaint, which are identical except as to the amounts of the notes and the allegations of payment thereon. The first note was for \$1,200, made in Los Angeles, Cal., February 7, 1888, and the last payment thereon made January 19, 1895. The second note was for \$1,000, made at the same time and place, and the last payment was made at the same date as upon the other note. The substantial defense to the action was that no action could be maintained upon either of the notes because the statute of limitations of California barred the action after four years from the maturity of the notes, and by reason of section 4818, 2 Ballinger's Ann. Codes & St., the statute of limitations of California pleaded here was applicable, and the bar of the California statute was a complete defense. Section 4818, Id., is as follows: "When the cause of action has arisen in another state, territory, or country between non-residents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state." The determination of the question depends upon the meaning of the words "arisen" and "arose" in the section quoted. Counsel for appellants maintains that the words "arisen" and "arose" are used in the sense of "originated," and therefore that, as the notes were executed and payable in California, the cause of action "arose" at the time the notes were executed; that those words are not used in the sense of "accrued," which specially means when the right to sue exists. The word "arise," it is true, has not been used with uniform signification in different statutes. Thus, in the case cited by counsel—*Emerson v. The Shawano City*, 10 Wis. 433—the court remarked, "A cause of action may be said to arise when the contract out of which it grows is entered into or made." Also *Steele v. Board*, 70 N. C. 139, where a statute provided that actions must be tried in the county where the cause, or some part thereof, arose, it was held that the expression "where the cause of action arose" meant where a debt was contracted, and not the place of the failure to pay the debt. But it does not appear that an action could not have been maintained in the county where the cause, or some part thereof, arose. It is elementary doctrine that under the common-law rule the statute of limitations of the forum in which the action is brought governs. Section 4818, Id., is a modification of the com-

mon-law rule, and authorizes the plea of the statute of limitations upon causes of action arising in another state between nonresidents of this state. In Illinois a statute of limitations reads as follows: "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state." *Osgood v. Artt* (D. C.) 10 Fed. 366. The supreme court of Illinois, construing this statute, said: "'When a cause of action has arisen' * * * should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin." *Hyman v. McVeigh*, 10 Leg. News, 157. See, also, *Berry v. Krone*, 46 Ill. App. 82. It was admitted at the trial that at the times the notes were executed plaintiff and defendants were residents of the state of California; that within one month after the execution and delivery of the notes the plaintiff left the state of California, and came to this state, where he has continuously resided ever since; and that defendants during the whole time were, and now are, residents of the state of California. It is apparent that during the time plaintiff was a resident of the state of California no cause of action subject to cognizance in the courts existed against the defendants. If the notes had been paid at maturity, no legal cause of action would have existed. It could neither have originated nor arisen until the breach of the contract to pay the money. Before the maturity of the notes, the plaintiff, the payee, was a resident of this state. He was then a resident of this state when the jurisdiction existed in the courts to adjudicate between the parties, and at the time he had a right to sue the defendants. We think, as used in section 4813, *Id.*, the cause of action arose between a resident of this state and a resident of California, and that the California statute of limitations is inapplicable. The judgment is affirmed.

DUNBAR, FULLERTON, and ANDERS, JJ., concur.

(24 Wash. 83)

FRENCH et al. v. FIRST AVE. RY. CO.
(Supreme Court of Washington. Feb. 21, 1901.)
MASTER AND SERVANT—ASSUMPTION OF RISK

An experienced engineer who had been employed in defendant's power house for two days, ascended a platform between the winder wheels to oil the machinery, which work was a part of his duty, and while he was oiling he fell into the wheels and was killed. The platform on which he had to walk in order to reach the oil cups was in a bad condition, and there was no guard rail to prevent him from falling

if he lost his balance. The lights were also insufficient, and he took a candle with him to light him on his way. He knew the conditions, and there was no danger that was not apparent to him. *Held*, that he assumed the risk, and defendant's motion to take the case from the jury should have been granted.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by Maggie French and others against the First Avenue Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Struve, Allen, Hughes & McMicken, for appellant. Brady & Gay, for respondents.

DUNBAR, J. This action was brought by the widow and children of Walter H. French, deceased, who was killed while in the employment of the appellant, the First Avenue Railway Company. The complaint alleges the employment by the defendant as an engineer in its power house; that the said French was required to work in an unsafe place; that the defendant had negligently and carelessly allowed the platform around the winder wheels in its power house to remain unfinished, open, and exposed, and without any protection, and without light or signal to indicate danger; that it had failed to provide rails or guards of any kind around the wheels; that it failed to provide proper light where the said French was required to work, and had failed to provide said French with any lamp for use in the prosecution of his work. It is alleged that all of these defects, omissions, and neglects, which were the principal defects, omissions, and neglects pleaded, were known to the defendant, and unknown to the said French; that, while engaged in the performance of his duties as engineer, and unaware of danger, and without any fault or neglect on his part, and on account of the negligence of the defendant, the said French slipped, fell, and was thrown into the winder wheel in the said engine room, and received the injuries from which he died. Upon the trial of the cause the jury rendered a verdict in favor of the plaintiffs for \$10,000. Judgment was entered, and appeal taken to this court. At the close of plaintiffs' testimony the appellant challenged the sufficiency of the proof, and moved the court that the cause be taken from the jury, and for judgment for the defense, which motion was overruled.

We have carefully examined the testimony of the plaintiffs in this case, and from such examination, without considering the testimony of the defense, we are of the opinion that the motion should have prevailed. The law in relation to the liability of employers and the duty of the employé has been so often announced at length by this court that it would serve no good purpose to go into an extended investigation of that subject now. It was held in the case of *Hoffman v. Foundry Co.*, 18 Wash. 287, 51 Pac. 383, that

the duty of the master to furnish the servant reasonably safe tools, machinery, and appliances with which to work, and the duty of the servant to exercise due care to avoid injury, are reciprocal obligations, and the duty of each is measured by the standard of ordinary care. And this is the universal rule. In consonance with this rule, we also held, in *Olson v. Lumber Co.*, 9 Wash. 500, 37 Pac. 679, that a person employed to work about dangerous machinery assumes the risk of all apparent danger, and cannot recover for injuries received, although his employer has not instructed him as to his duties around the machinery and the danger of his employment. The doctrine that the servant assumes the risk of apparent danger is as well established as the doctrine that it is the duty of the master to furnish the servant with a safe place to work in and with safe appliances and machinery. It certainly is the duty of the engineer to observe, examine, and understand the machinery which he is operating. It is placed under his especial custody and control, and he must necessarily know more about it than the master. He is employed on the presumption that he does have this particular and certain knowledge.

But it is contended by the respondents that the engineer in this case was newly employed, and had not had sufficient time to acquaint himself with the defects in the machinery. The testimony shows—at least, the testimony of the plaintiffs—that it was about five feet and a half from the platform to the place where the bearings had to be oiled; that there was a ladder upon which the engineer ascended to a platform between the winder wheels, and that the place or space which he had to traverse in order to reach the oil cups to oil the machinery was somewhat defective; that there were no guards or rails to keep a person from falling if he lost his balance; that it was not walled up entirely to the wheels; that in one place the cement had fallen off from a space about four inches wide by twelve inches long; and that the light was not sufficiently powerful to illuminate the path or way which the engineer had to travel. The testimony of Mr. French, before he died,—and he said very little on the subject,—was that he was oiling the bearings, fell into the winder wheel, and was thrown out onto the floor. It seems that when he went up to oil the machinery he took a candle with him to light him on his way. The testimony shows that he had been notified, on Sunday before commencing work, by the superintendent, that the machinery was not in as good condition as in some other shops in which French had worked, but the superintendent stated that they hoped soon to have those matters corrected, and that they would have them in a week or so. It appears, also, that French on that Sunday afternoon, after talking with the superintendent, went over to take a view of the power house and the machinery; that he came back

while the superintendent was there, and the superintendent said to him, "Well, I guess you didn't find things so nice up there,"—comparing the power house and machinery with other places about which French had been telling him. It also appears that he went up again about midnight to see them close down. In addition to this, he had charge of the power house for two days before he was hurt, the accident having occurred about 8 o'clock in the evening. The testimony of plaintiffs' witnesses was to the effect that it was the duty of the engineer to oil these bearings, and that they had to be oiled very frequently. So that it appears, without any contradiction, that the engineer was familiar with the alleged defects in this machinery. There were no hidden defects in the machinery. There was no danger there that was not apparent to an observing man. If there was not sufficient light, the engineer knew it. If the platform on which he had to walk was in a bad condition, he knew that, for he must have traversed it before the time at which the accident occurred. So, that, conceding the truthfulness of the testimony, and all of the testimony of plaintiffs, it appears that the danger, if there was any, was apparent: that the engineer was cognizant of the defects which existed, and consequently, under the well-established rule that the servant assumes the risk of apparent danger,—a rule which is augmented in this case by the fact that the machinery in question was under the personal supervision of the person injured,—no recovery can be had. The judgment is reversed, and the cause remanded, with instructions to the lower court to dismiss the cause.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

(24 Wash. 12)

STATE v. MENDENHALL

(Supreme Court of Washington. Feb. 2, 1901.)
FALSE PRETENSES—DEFENSES—PARTNERSHIP
—EVIDENCE—VARIANCE—AGENCY.

1. Defendant, the agent of a fruit company, contracted with prosecutor that the latter should purchase apples to be shipped to the company, accompanied by a draft, and that the apples should be substantially paid for on arrival, placed in cold storage, and the profits derived from their subsequent sale should be divided between the company and prosecutor. Prosecutor, relying on defendant's statement that he had deposited \$5,000 in a bank to prosecutor's credit, to pay for the apples, purchased a quantity, and shipped the same, but before their arrival, on ascertaining that no money had been deposited, prosecutor stopped the apples in transit. *Held* that, though a certain amount of the profits was to have been divided between prosecutor and the fruit company, the facts did not establish a partnership between prosecutor and the company so as to exempt defendant from prosecution for obtaining property by false pretenses.

2. Where an indictment charged defendant with obtaining goods under false pretenses, the fact that the proof showed that defendant nev-

er obtained the goods, but that they were obtained, if at all, by a fruit company for which defendant acted as agent, did not constitute a fatal variance, it being proved that the representations and false pretenses were made by defendant, since a plea of agency is not available to one knowingly committing a crime.

Appeal from superior court, Yakima county; John B. Davidson, Judge.

Edward B. Mendenhall was convicted of obtaining goods under false pretenses, and he appeals. Affirmed.

Henry J. Snively, for appellant. J. J. Rudkin and Frank H. Rudkin, for respondent.

DUNBAR, J. The defendant, a representative of the Copper State Fruit Company, a corporation doing business in Butte, Mont., came to North Yakima for the purpose of buying fruit. The Copper State Fruit Company was a commission house engaged in the buying and selling of fruit. In North Yakima the defendant met the prosecuting witness, Perry, who was at the time engaged in purchasing and selling fruit in Yakima county. It was agreed between them that Perry should purchase apples to be shipped to Butte, Mont., and there placed in cold storage, and sold, and the net profits, after deducting storage charges, etc., divided between Perry and the Copper State Fruit Company. A draft was to accompany the shipping receipts, and the apples were to be substantially paid for on arrival at Butte, and before delivery. Before this agreement was made the prosecuting witness had contracted for and purchased a portion of the apples which were afterwards shipped. Before the shipments were made the defendant represented to Perry that he had deposited to his credit in the Yakima National Bank of North Yakima the sum of \$5,000, which Perry could draw against for the purchase price of the apples about to be shipped. It was then stated by Perry to the defendant, in an interrogatory manner, that it would not be necessary for him to draw against the apples when shipped according to the original agreement, and the defendant replied that it would not. According to the testimony of Perry, relying upon the representations that the money had been deposited as stated, and believing the representations to be true, he delivered to defendant the apples in question, which were shipped over the Northern Pacific by the defendant, consigned by the Copper State Fruit Company to the Copper State Fruit Company at Butte. On his return to North Yakima, these representations having been made in the country about 20 miles from town, and after the shipment of the apples, Perry discovered that no money had been placed to his credit in the bank, and immediately stopped the apples in transit, and subsequently had them restored to him. Thereupon he filed an information, the char-

ging part being as follows: "He, the said Edward B. Mendenhall, on the 24th day of October, 1899, A. D., in the county of Yakima, state of Washington, then and there being, did then and there unlawfully, feloniously, and designedly obtain from one J. M. Perry four car loads of apples, of the value of two thousand six hundred and fifty dollars, lawful money of the United States, of the goods and chattels of him, the said J. M. Perry, by then and there unlawfully, feloniously, designedly, and falsely representing and pretending to him, the said J. M. Perry, that he, the said Edward B. Mendenhall, had theretofore deposited and placed in the Yakima National Bank of North Yakima, Washington, the sum and amount of five thousand dollars, lawful money of the United States, to the credit and in the name of him, the said J. M. Perry, in payment for the purchase price of said four car loads of apples, which said representation and pretense so made the said Edward B. Mendenhall then and there well knew to be false and untrue, with intent then and there to defraud him, the said J. M. Perry, contrary to the statutes in such cases made and provided." The cause came on for trial, and, after the introduction of testimony and instructions of the court, the jury returned a verdict of guilty as charged in the information. Judgment was entered and appeal taken.

Upon the conclusion of the testimony, motion was made by the defendant's attorney to dismiss the case, and the refusal of the court to grant this motion is alleged as the first error. The contention under this assignment of error is that Perry, the prosecuting witness, and the Copper State Fruit Company were partners under the arrangement entered into, and that, therefore, Mendenhall's possession or that of the Copper State Fruit Company was Perry's possession, and thus no goods were ever obtained. Many cases are cited to sustain the doctrine that one partner cannot commit larceny of the goods of the partnership; but, as we read the testimony in this case, these authorities are not pertinent, for there was no existing partnership proven. It is true that a certain amount of profits was to be divided between the prosecuting witness and the Copper State Fruit Company after certain conditions were complied with by the company, but the company had not yet bought into the partnership. The contract with the prosecuting witness was purely executory. He bought the fruit and paid for it with his own money and in his own name. He was certainly entitled to possession of it, and was the owner of it, and his possession or ownership could not have been interfered with or in any way disturbed by the Copper State Fruit Company at the time the delivery of the fruit was made to the defendant, because the payments agreed upon had not yet been made, and it was upon the

theory that the money for the payment of the fruit was deposited in the bank to his credit, and because of his belief in the representation to this effect made by the defendant, that he parted with the possession of the property and delivered it to defendant. The defendant, therefore, obtained the fruit by fraudulent and false representations, and thereby brought himself under the ban of the law.

The second assignment of error is that the court erred in not granting plaintiff's motion to dismiss because there was a fatal variance between the information and proof. It is insisted that the information charges Edward B. Mendenhall with obtaining the goods mentioned under false pretenses, while the proof shows that Edward B. Mendenhall never obtained the goods, but that, if any person obtained the goods, that person was the Copper State Fruit Company, of which company Mendenhall was the agent. It is evident from the testimony that if anybody made false and fraudulent pretenses, and obtained the fruit by reason of such misrepresentations, it was the defendant, Mendenhall. The plea of agency is not available to one who knowingly commits a crime. We think there is no merit in this assignment. The questions of fact having been submitted to the jury under proper instructions, the judgment is affirmed.

REAVIS, O. J., and FULLERTON and ANDERS, JJ., concur. MOUNT, J., did not sit in this case.

(24 Wash. 66)

BANCROFT-WHITNEY CO. v. GOWAN
et al.

(Supreme Court of Washington. Feb. 19, 1901.)

**REPLEVIN — BOND — SURETY — JUDGMENT
AGAINST—CHATTEL MORTGAGE—AC-
TION—BY MORTGAGEE.**

1. Where, in an action of claim and delivery, a judgment was rendered in favor of defendant, it was error to enter judgment against the surety on the claim bond.

2. Where plaintiff sold books to defendant under a contract providing that the title and property therein remained in plaintiff until the books were paid for, and if the notes given in payment were not paid when due plaintiff could take possession of the books, and retain them, or sell them without taking possession, plaintiff could maintain replevin to recover possession of the books on defendant's default in payment.

Appeal from superior court, King county; O. Jacobs, Judge.

Replevin by the Bancroft-Whitney Company against Richard Gowan. From a judgment in favor of defendant, and against S. B. Folger, surety on the replevin bond, the surety and plaintiff appeal. Reversed.

Mitchell Gilliam, for appellants. Richard Gowan, for respondent.

DUNBAR, J. This action was brought by the plaintiff for the purpose of recovering

from the defendant (respondent) possession of a lot of law books described in the complaint. At the time of the commencement of the action, an affidavit and bond in claim and delivery were lodged with the sheriff, and the property taken from the respondent and delivered to the plaintiff. The action was founded upon a written instrument executed and delivered by the respondent to the plaintiff, of which the essential part is as follows: "State of Washington, County of Kittitas. Know all men by these presents that I have purchased from Bancroft-Whitney Co., of San Francisco, Cal., the following named books [describing the books], for which I am to pay the Bancroft-Whitney Co. the sum of three hundred ninety-eight dollars, as evidenced by four notes, viz. [setting forth the notes], and the title and property in said books is to remain in the said Bancroft-Whitney Co. until said books are paid for. In case I do not pay for the same at maturity, the said Bancroft-Whitney Co. may take possession of said books, and retain the same, or may sell them without taking possession of them, and retain whatever was due thereon, and turn over the balance to me; provided, that the said Bancroft-Whitney Co. may perform any power herein conferred on them by agent or attorney. [Signed] Richard Gowan." The complaint made the usual allegations based upon the contract, and the respondent answered, making a general denial, with the exception of two or three counts in the complaint, but did not allege in said answer that the instrument was intended or agreed to be a chattel mortgage. Afterwards respondent obtained leave to file an amended answer, which contained an affirmative defense to the effect that, at the time of the execution of the instrument, it was mutually understood and intended that it should serve as a chattel mortgage on the property therein described. This affirmative allegation of the answer was denied by reply.

At the commencement of the trial, the plaintiff tendered to the respondent the notes mentioned in the instrument under consideration. At the time of the execution of the instrument the books in controversy were at Ellensburg, in Kittitas county, but before the commencement of the action they were brought by the respondent to Seattle, in King county, without permission of appellant to remove them. Upon the trial of the cause, verdict was rendered in favor of the respondent, and judgment was subsequently entered, not only against the plaintiff, but against S. B. Folger, surety on the claim bond, and the entering of such judgment against Folger is one of the errors assigned in this case. For this error the judgment will have to be reversed. *Eldson v. Woolery*, 10 Wash. 225, 38 Pac. 1025. This error is, however, admitted by respondent, and he asks that the judgment be modified to the extent that Folger be acquitted from the judgment, but that it remain in force against the plaintiff. But,

as we view the law on the other propositions involved, the modification asked for would be of no avail.

The question of whether the contract was a chattel mortgage, under the affirmative allegations of the answer, was submitted to the jury under the following instructions: "(1) The object of a chattel mortgage is to give security either for an antecedent indebtedness or an indebtedness accruing at the time of the execution of the instrument. A mortgage gives to the mortgagee no title to mortgaged property. It only creates a lien, which can only be enforced by a suit in a court of competent jurisdiction, or by notice and sale, in the manner prescribed by statute. (2) If you find from the evidence that the instrument in evidence was given as security for a debt previously existing, then its effect would be that of a chattel mortgage, and your verdict should be for the defendant. (3) A mortgage gives to the mortgagee no title to the property. The rule used to be different. The mortgagee having no title to the property, an action of this kind cannot be sustained if the instrument was intended to be a mortgage." These instructions are assigned as error. It was the view of the court, and it is contended by the respondent, that, under the rule announced by this court in *Silsby v. Aldridge*, 1 Wash. St. 117, 23 Pac. 836, *Kerron v. Manufacturing Co.*, 1 Wash. St. 241, 24 Pac. 445, and *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062, conceding the instrument to be a chattel mortgage, the mortgagee had no title to the property, and action of replevin would not lie to obtain possession of the same; that in this state the chattel mortgage is only a lien, and title can be acquired only by foreclosure and sale, under the statutory procedure by notice and sale. In the cases cited by respondent and relied upon by him the question here was not involved. We held in *Silsby v. Aldridge*, supra, that the chattel mortgage, which was the ordinary chattel mortgage, did not convey to the holders any title to the property in question; that, under the Code, the possession of the property could be obtained only in the manner pointed out. But there was no question there as to whether the instrument was a mortgage or whether it had actually conferred title and power to take possession. In *Kerron v. Manufacturing Co.*, supra, the instrument which was under construction was in its form the ordinary chattel mortgage, and the cause was reversed on the doctrine announced in *Silsby v. Aldridge*, supra. In *McClellan v. Gaston*, supra, it was held that a provision in a chattel mortgage, authorizing the mortgagee, in case of default or insecurity of the debt, to take possession of the mortgaged property, using all necessary force to do so, did not warrant the mortgagee or the sheriff in taking possession thereof over the objection of the mortgagor, but that, in the absence of the mortgagor's consent, the contract could be enforced only

by due process of law. This was upon the express ground that the mortgagee had no right to commit a breach of the peace to obtain his contract rights. But, whatever may be the conclusion reached by the courts in relation to the right of the mortgagee to bring an action for possession where there is no provision in the instrument empowering the mortgagee to take possession on default of payment, in this case express authority is granted by the provisions of the instrument itself. Neither did the plaintiff, as in the case of *McClellan v. Gaston*, supra, undertake to enforce its remedy outside of the law, but it has brought itself within the terms of the contract, and the contract is not susceptible of construction. Its terms are too definite, direct, and plain to be varied by oral testimony. It provides that the Bancroft-Whitney Company may take possession of said books, and retain the same, or may sell them without taking possession of them. With this right plainly and unequivocally guarantied to the company by the contract, it was warranted in bringing the action in the form in which it did bring it, for the purpose of obtaining possession of the property. With this view of this proposition, it becomes unnecessary to review the other errors alleged. The judgment is reversed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

(24 Wash. 34)

STATE v. POWER.

(Supreme Court of Washington. Feb. 13, 1901.)

CRIMINAL LAW—MANSLAUGHTER—ABORTION—STATUTES—INFORMATION—EVIDENCE—DYING STATEMENT—CHARGE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

1. Ballinger's Ann. Codes & St. § 7068, prohibits any person from using any instrument on the person of any pregnant woman whom he supposes to be pregnant, thereby to procure the miscarriage of such woman, unless necessary to preserve her life. Section 7042 provides that every person who shall unlawfully kill any human being involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter. *Held*, that an information for manslaughter by producing a miscarriage is not demurrable because the act intended to produce the miscarriage is in itself an offense punishable as such, since section 7068 provides punishment only for performing specific acts, without reference to the effect which may be produced, and is not intended to exempt the operator from the punishment due when death follows as a consequence of those acts.

2. Where, on a trial for manslaughter by acts intended to produce a miscarriage, the deceased, on leaving her home for the place where the acts are alleged to have been performed, made statements as to her intentions in going, such statements are admissible as verbal acts characterizing her intentions, but not as evidence that the defendant produced the abortion.

3. On a trial for manslaughter as the result of an abortion, a statement as to the cause of her sickness made by deceased two days before her death was received in evidence. When making the statement she was very weak and in great agony, and said that she knew that

she could not last long unless something was done for her, that she did not think that she would ever be taken out of the room until she was packed out, that she could feel that her strength was leaving her rapidly, and that she had given up all hopes. She did not rally after the statement, but gradually grew worse until she died. There was nothing inadmissible in the statement itself. *Held*, that the statement was properly received as a dying declaration.

4. After conviction of manslaughter by acts intended to produce an abortion, defendant moved for a new trial on the ground of newly-discovered evidence, based on the affidavit of a nurse whom he had employed to attend the deceased that deceased had made statements which tended to exonerate him. Defendant was at liberty on bail until the trial, and knew the whereabouts of the nurse, but did not question her till after the trial. *Held*, that the motion was properly denied, since defendant had not exercised reasonable diligence to procure the evidence at the trial.

5. On a trial for manslaughter by acts intended to produce a miscarriage, the court charged: "When a physician undertakes to attend a sick person, the law imposes on him the duty of directing the sanitary conditions surrounding the patient, of prescribing the proper medicines and the times and manner of taking, and whatever other appliances and operations necessary to the restoration of health. As to the question whether or not the deceased was improperly treated in these respects, you are to find from all the evidence in the case; and, if you have a reasonable doubt from the evidence as to whether or not the deceased was improperly treated in these respects, then you must find the defendant not guilty." *Held*, that the charge was not objectionable as telling the jury that they could convict for any neglect or improper treatment of the deceased, since the court did not undertake to define the degree of care or skill required of a physician.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Charles W. Power was convicted of manslaughter, and he appeals. Affirmed.

S. G. Allen and Sullivan, Nuzum & Nuzum, for appellant. James Z. Moore, Miles Poin-dexter, and Horace Kimball, for the State.

FULLERTON, J. The appellant was convicted of the crime of manslaughter. The charging part of the information on which he was tried is as follows: "That the said defendant, Charles W. Power, in the county of Spokane, state of Washington, on or about the fifth (5th) day of December, eighteen hundred and ninety-eight (1898), did unlawfully, willfully, and feloniously employ an instrument, a more particular description whereof is to this informant unknown, in and upon the person of one Cora Reinhart, the said Cora Reinhart then and there being a pregnant woman, whom he, the said Charles W. Power, did then and there suppose to be pregnant, with the intent and on purpose thereby to procure a miscarriage of the said Cora Reinhart, the same being then and there not necessary to preserve the life of the said Cora Reinhart, and did then and there as aforesaid, by the means aforesaid, produce a miscarriage upon the person of the said Cora Reinhart, the said defendant, Charles W. Power, then and there being a

physician and surgeon practicing his profession as such in the county and state aforesaid; the said Cora Reinhart being then and there, from and including the said fifth (5th) day of December, 1898, to the seventeenth (17th) day of December, 1898, continuously under the sole care and custody of the said Charles W. Power, and in the relation of patient to the said Charles W. Power; and the said Charles W. Power during the entire period aforesaid occupied the relation of physician and surgeon to the said Cora Reinhart. And he, the said Charles W. Power, did then and there, during the period aforesaid, as such physician and surgeon, willfully, feloniously, and unlawfully neglect the said Cora Reinhart, and did then and there willfully, feloniously, and negligently cause the person of the said Cora Reinhart to become, and did allow the same to remain, externally filthy and covered with vile and poisonous substances, and internally poisoned and inflamed and filled with poisonous and filthy matter and discharges, and did then and there, unlawfully, willfully, and feloniously neglect, fail, and refuse to cleanse the person of the said Cora Reinhart, or to remove therefrom the poisonous discharges aforesaid, and during the entire period aforesaid did unlawfully, willfully, feloniously, and negligently place, keep, and allow to remain the person of the said Cora Reinhart in an offensive and unclean bed, and in offensive and unclean clothes, and in a filthy room, filled with vile, unhealthy, and poisonous atmosphere, and said room, clothes, and bed and the person of the said Cora Reinhart then and there being filthy, vile, and poisonous as aforesaid, by through and on account of the aforesaid neglect of the said Charles W. Power, and the aforesaid miscarriage unlawfully and feloniously produced upon the person of the said Cora Reinhart by the said Charles W. Power as aforesaid, and by the acts and things aforesaid, the said Charles W. Power did then and there unlawfully and feloniously inflict upon the person of the said Cora Reinhart certain mortal injuries, the same being the acts and things aforesaid, by and on account of which said mortal injuries, the same being the unlawful acts of the said Charles W. Power, the said Cora Reinhart, in the county and state aforesaid, on or about the seventeenth (17th) day of December, 1898, died. Wherefore this informant herewith informs and charges that the said Charles W. Power, in the county and state aforesaid, on or about the said seventeenth (17th) day of December, eighteen hundred and ninety-eight (1898), did unlawfully and feloniously slay and kill the said Cora Reinhart, then and there a human being, involuntarily, but in the commission of the unlawful acts of the said defendant aforesaid, thereby committing the crime of manslaughter, contrary to the statute in such case made and provided." The information was founded upon section 7042 of the statute

(Ballinger's), which provides: "Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter." Another section of the statute (section 7068, Id.) makes it an offense for any person to administer to any pregnant woman whom he supposes to be pregnant, any medicine, drug, or substance whatever, or to use or employ any instrument or other means on her person, "thereby to procure the miscarriage of such woman," unless the same is necessary to preserve her life.

It is first contended that the trial court erred in refusing to sustain a demurrer to the information. The appellant calls our attention to the sections of the statute above cited, and argues therefrom that inasmuch as the latter makes it a substantive offense, punishable as such, for any person to administer drugs to or use instruments upon a pregnant woman for the purpose of procuring her miscarriage, such acts must be punished in the way the statute points out, under an indictment or information charging one or more of these specific acts alone, and cannot, therefore, be the unlawful acts which were intended to be included within the statute defining the crime of involuntary manslaughter. We cannot think this contention sound. The statute, it will be noticed, prescribes a punishment for doing these specific acts, without regard to the effect such acts may have had upon the person operated upon. The crime is completed when the prohibited acts are committed, and their effect is not made a material inquiry. Had the statute gone further, and made a death resulting from them a substantive offense, to be punished in the manner therein prescribed, it might be contended with some force that a person committing the acts causing the death would have to be informed against under the statute, and punished as the statute directs. But as the legislature has made the acts punishable as acts, without reference to their consequences, we cannot think it was intended to exempt a person causing the death of another by these means from being informed against and punished under the general statutes relating to unlawful homicides.

It is next contended that the court erred in admitting certain testimony. It appeared that the deceased resided near Rathdrum, in the state of Idaho, and that immediately preceding the time of her meeting with the defendant she left her home and went to Spokane, where the defendant resided; that while preparing for her journey she had a conversation with her sister relative to the purpose of her going. The sister was examined as a witness on behalf of the state, in the course of which she was asked the following question: "I will ask you if your sister, Cora Reinhart, made any statement to you, at the time she was in the act of

going and preparing to go to Spokane from Rathdrum, where she was going, and her purpose in going." This was objected to by the appellant as incompetent, irrelevant, and immaterial. The court overruled the objection, and the witness answered: "She said she was in trouble, and was going to Spokane to be treated by Dr. Power." It is urged here that this testimony was hearsay, not part of the *res gestæ*, and highly prejudicial to the defendant. The learned trial judge did not admit the testimony generally, nor as part of the *res gestæ* of the main transaction. When ruling upon the objection he distinctly and clearly stated in the presence of the jury that it was competent only to explain the purpose of the deceased in leaving home, and as characterizing her act of going, and that he admitted it as explanatory of the nature, character, and object of that act. As thus limited, we think the evidence was properly admitted. It was certainly competent for the state to prove that the defendant left her home to go to Spokane, and that she there sought the defendant and placed herself under his treatment. The preparation she made for going, her condition of health at that time, and her conduct and demeanor, were likewise matters properly admissible in evidence, as a part of the history of the case, and necessary to its general understanding. On the same principle, her declarations made at the time she was preparing for the journey could be shown. They were in the nature of verbal acts, explanatory of what she was doing and of her object and purpose, and are part of the *res gestæ* of this particular part of the entire transaction. The authorities generally hold declarations of this character admissible. In Greenl. Ev. § 108, it is said: "Where a person * * * leaves his home, * * * his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts." In the case of *State v. Dickinson*, 41 Wis. 299, the defendant was tried for the crime of having murdered Jenny Everson in the commission of an abortion. One Mary Erickson was called as a witness, and, over the objection of the defendant, was permitted to testify to certain conversations had with the deceased immediately preceding the time the deceased left the place where they were stopping, as to where she was going, and for what purpose. In these conversations the deceased stated to the witness that she (the deceased) was in a family way, that she had been to see the defendant about it, that she was going to the defendant to get medicine and syringe, and that she had engaged with the defendant to return to his place on a subsequent day for the purpose of having instruments used to get rid of the child. The trial court instructed the jury that they might consider these declarations as evidence tend-

ing to prove the fact that the deceased had at that time the intention of having an abortion produced upon her, but that it was not evidence that the defendant had actually produced the abortion, or had engaged to do it. It was held that to admit the evidence with this restriction was not error, the court saying: "The first inquiry is whether the declarations of deceased to Mary Erickson were admissible for the purpose of showing her intention, and as their scope and effect were restricted by the court. We are of the opinion that they were. They constituted a part of the *res gestæ*, were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character. 1 Greenl. Ev. § 108. It was certainly competent to prove that the deceased went to the house of the defendant at the time it was charged in the information the abortion was produced. Upon the authorities, her intent or purpose in going there might be shown by her declarations then made or previously made, because such declarations became a part of the *res gestæ*. For it is evident the declarations were connected with the act of her going to the defendant, were expressive of the character, motive, or object of her conduct, and they are to be regarded 'as verbal acts indicating a present purpose or intention, and therefore are admitted in proof like any other material facts.'" In *State v. Howard*, 32 Vt. 380, the defendant was indicted for attempting to procure the miscarriage of one Olive Ashe, in consequence of which she died. On the trial it was shown that the deceased, in company with her sister, left home and started for a neighboring town, near where the respondent resided. "The government asked the witness what was the purpose of their thus leaving home, as understood between them at the time of leaving." The trial court overruled the objection of the defendant to the question, after which the witness answered: "I had some talk of going on a visit before I knew she was going. I and she supposed her to be pregnant, and she left Sutton to get an abortion procured, as was understood between us at the time we left." It was held that the evidence was properly admitted, the court saying: "The declarations of Olive Ashe as to the purpose of the journey in going to the respondent's were properly admitted as part of the *res gestæ*. The mere act of going was equivocal. It might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act." See, also, *State v. Winner*, 17 Kan. 298; *Solander v. People*, 2 Colo. 48; *Cluverius v. Com.*, 81 Va. 787; *Thomas v. State*, 67 Ga. 460; *State v. Peffers*, 80 Iowa, 580, 46 N. W. 662; *U. S. v. Nardello*, 4 Mackey, 503; *Harris v. State*, 96 Ala. 24, 11 South. 255; *Tilley v. Com.* 89 Va. 136, 15 S. E. 526

The state, over the objection of the de-

fendant, was allowed to introduce statements made by the deceased some two days previous to her death, as dying declarations. Prior to the admission of these declarations the witness was searchingly and minutely examined as to the condition of the deceased at the time, and the circumstances under which they were made, not only by the counsel for the state and the defendant, but by the trial judge himself. The examination covers many pages of the record, and only a brief outline of it can be given here. Describing the condition of the deceased, the witness stated that she was very weak and in great agony; that she had no strength, and had to be lifted from one side of the bed to the other; that her "hands felt terribly, * * * a clammy feeling"; and that she never rallied after the conversation, but gradually grew worse until her death. Testifying as to the circumstances, the witness stated that she (the witness) had been for some time trying to get from the deceased the cause of her illness; that the deceased had previously refused to tell her, not only anything concerning the cause of her illness, but even her name; and that just preceding the conversation in which the declarations were made the deceased called her to her bedside, took hold of her hands, and made the statements. The witness further testified: That in the course of this conversation the deceased said that she knew that she could not last long unless there was something done for her; that she did not think she would ever be taken out of the room where she was lying until she was packed out; that she could feel her strength leaving her rapidly. That when the witness tried to encourage her, telling her that she must live in hopes, the deceased answered that she had lived in hopes long enough; that "she had given up all hopes." On being examined by the defendant's counsel the witness further stated that the deceased did not say that she "believed she was going to die," or that "she could not live any longer," or use words to express her belief of her approaching death, other than those above quoted. It was not contended that there was anything in the declarations themselves which would render them inadmissible. The objection is that it was not shown that they were made while the declarant was in extremis, or while she was under the consciousness of impending death. The first part of the objection is directed against the time elapsing between the making of the declarations and the declarant's death. But, while this was an element proper and necessary to be considered in determining the admissibility of the declarations, it was not of itself sufficient to require their exclusion. The rule requiring it to be shown that the declarations were made while the declarant was in extremis does not require that it be shown that they were made while the declarant was literally breathing her last. The

rule is satisfied when it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made, and that the illness from which she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate. See the cases collected in 10 Am. & Eng. Enc. Law (2d Ed.) p. 369, note 4. As to the second part of the objection, it is true that it was not shown that the declarant said, in so many words, that she believed she was going to die, or that she could not live longer, but this was not necessary. The question to be determined here is, was the trial court justified in believing, from the nature of the evidence, that the declarant believed she was about to die, and was without hope or expectation of recovery? This conclusion must be drawn from the entire statement and the conditions surrounding the declarant, and not from any specific words she may have used. Without again recurring to the record, we think the statements and circumstances shown justified the trial court in the conclusion that the declarant in this case believed she was about to die, and that from her all hope of recovery had departed. It was not error, therefore, for the court to admit the declaration in evidence.

It is next objected that the court erred in refusing to grant the appellant's motion for a new trial. This motion was based on the ground of newly-discovered evidence. This consists of the statement, shown by the affidavit of a nurse, to the effect that the deceased, immediately preceding her death, had made declarations to the nurse tending to exonerate the appellant. It appears from the record that the nurse was employed to wait upon the deceased by the defendant himself; and, while he states in his affidavit that he had no knowledge at the time of the trial that she would testify that the deceased had made these declarations, it would be too much to say that he could not, by reasonable diligence, have discovered that fact. He was at all times prior to his conviction at liberty, on bail, and had every opportunity to prepare for his defense. He knew the whereabouts of the nurse, yet it appears that she was never questioned as to her knowledge concerning the matters that would be subject to inquiry at the trial. This was not the exercise of that reasonable diligence which the Code requires as a prerequisite to the granting of a new trial on this ground.

Finally, it is urged that the court erred in giving the jury the following instruction: "When a physician undertakes to attend a sick person, the law imposes upon him the duty of directing the sanitary conditions surrounding the patient, of prescribing the proper medicines and the times and manner of taking, and whatever other appliances and operations necessary to the restoration of health. As to the question whether or not

the deceased was improperly treated in these respects, you are to find from all the evidence in the case; and, if you have a reasonable doubt from the evidence as to whether or not the deceased was improperly treated in these respects, then you must find the defendant not guilty." It is objected that this is not a correct statement of the law, in that it virtually tells the jury that any neglect or improper treatment of the deceased, if they found it to exist, would be sufficient to convict the defendant, while the law is that a physician is not criminally liable unless he is guilty of gross want of skill or attention. But it will be noticed that the court did not, in this instruction, undertake to define the degree of care and skill required of a physician. This was done in the preceding instruction, and, while it is true that the word "gross" was not used, yet the jury were told that they could not find the defendant guilty unless they found that his neglect was willful and felonious. The charge, as a whole, was a clear and concise statement of the law applicable to the case, and could not have misled the jury. The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

(24 Wash. 53)

STATE ex rel. SPOKANE & B. C. TELEPHONE & TELEGRAPH CO. v. CITY OF SPOKANE et al.

(Supreme Court of Washington. Feb. 18, 1901.)

MUNICIPAL CORPORATIONS—TELEPHONE LINES—USE OF STREET—CONSTITUTIONAL PROVISION—OPERATION—LEGISLATIVE REGULATION—NECESSITY—AUTHORITY OF CITY COUNCIL—REFUSAL TO CONSENT—EXCLUSIVE PRIVILEGES.

1. Const. art. 1, § 12, provides that no law shall be passed, granting privileges or immunities to any other than a municipal corporation, which on the same terms shall not equally belong to all corporations. Ballinger's Ann. Codes & St. § 739, par. 7, vests in cities of the first class the power to authorize or prohibit the use of electricity on their streets, and to prescribe the conditions on which electricity may be used. The streets of a city of the first class were in use by a telephone company, but the franchise did not provide for their exclusive use. The city council refused a second telephone company the privilege of using its streets for erection of wires, and it applied for mandamus to compel such consent, and contended that the city's refusal was equivalent to granting the first company an exclusive privilege, in violation of the constitution. *Held*, that the question of the city's power to grant exclusive privileges was not involved, as the city had not attempted to grant such a privilege, and had the right, under the statute, to refuse the use of its streets to relator.

2. Const. art. 12, § 19, providing that any corporation shall have the right to construct telephone lines within the state, and that all such companies are common carriers and shall have the right of eminent domain, and that the legislature shall provide reasonable regulations to give effect to the section, is not self-operative, and hence, in the absence of legislative regulation, does not confer on telephone companies the right to use the streets of a city.

3. Ballinger's Ann. Codes & St. § 4369, authorizes the construction of all necessary telephone lines for public service along and on any public street or highway, but provides that, where the right of way is within the corporate limits of a city, the consent of the city council shall be obtained before the line can be erected. *Held*, that a city has power to refuse to allow a telephone company to use its streets, and that its authority is not limited to a reasonable regulation of the method of using streets for such purposes; the power to refuse being correlative to the power to consent.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Mandamus by the state, on relation of the Spokane & British Columbia Telephone & Telegraph Company, against the city of Spokane and others, to compel the respondents to consent to the use of the streets of the city of Spokane by relator for the erection of telephone lines. From a judgment quashing the writ and dismissing the case, relator appeals. *Affirmed*.

Stoll & Macdonald, Henley, Kellam & Lindley, and W. S. Dawson, for appellant. Fred M. Dudley, for respondents.

REAVIS, C. J. The appellant (plaintiff) is a corporation created under the laws of the state for the purpose of constructing and operating a telephone line and system within this state between the Canadian boundary on the north and the city of Spokane on the south. It made application to the city of Spokane for the city's consent to erect its telephone poles and construct its wires through the streets of the city. In its application it offered to submit to such reasonable rules and regulations as might be imposed by the city. Upon consideration of the application by the city council, such consent was refused. Appellant thereafter instituted proceedings in the nature of mandamus to compel the city to give its consent to the construction and operation of appellant's telephone system, and that the city be required to prescribe reasonable rules and regulations therefor. The affidavit upon which the application was based states that appellant was willing to abide by and conform to any reasonable rules and regulations imposed by the city; that it had built and was operating and maintaining a system of telephones between the town of Northport and the city of Spokane, a branch line from the town of Meyers Falls to the town of Republic, and another line from Bossburg to the boundary line between the United States and Canada, connecting with towns in the province of British Columbia; that it was under contractual relations with another company owning and operating telephones in the province of British Columbia by which it was required to deliver the messages of the foreign company within this state, and especially within the city of Spokane; that in 1896 it had entered into a contract with the Inland Telephone & Telegraph Exchange, in the city of Spokane, owning and operating lines of telephone in

Idaho, Oregon, California, and elsewhere in this state; that under the terms of such contract the wires of appellant were connected with the central office of the Inland Telephone & Telegraph Company in the city of Spokane, and, as occasion required, were connected with the system of the Inland Telephone Company and the telephones of its numerous subscribers in the city of Spokane; that, by reason of such contract, appellant had procured a large and lucrative business, which produced an income of many thousand dollars per month, and was rapidly increasing; that in June, 1899, the Inland Telephone Company terminated its contract with appellant and severed its lines from its office, rendering impossible any communication from appellant's lines to those of the Inland Company, and making communication impossible between the customers and patrons of appellant and persons having telephones in offices or residences in the city of Spokane; and that, to enable appellant to properly transact its business and give proper service to the public as a common carrier, it became necessary for appellant to establish an exchange at the city of Spokane. An alternative writ of mandamus was issued from the superior court. The respondent city appeared and demurred to the writ, and moved that the same be quashed. The demurrer was sustained.

Pertinent to the issues involved in the controversy are the following provisions of the constitution of Washington: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Article 1, § 12. "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." Article 12, § 19. Paragraph 7, § 739, Ballinger's Ann. Codes & St., vests cities of the first class, of which respondent is one, with

power "to lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof." Section 4369, Id., provides: "Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right-of-way of any railroad corporation, and may erect poles, pliers, or abutments for supporting the insulators, wires and any other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: provided, that when the right-of-way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, any county, city or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law: provided further, that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

1. The issue involved is succinctly stated by counsel for appellant: "Has the city council the power to refuse the use of its streets to a corporation competent and qualified to erect a telephone exchange within the city?" Counsel have first addressed themselves to constitutional rights, and maintain that section 12, art. 1, of the constitution, supra, inhibits municipalities from granting exclusive franchises, and that, as such franchise has been granted to one telephone company by the city, the refusal to grant another to appellant in fact constitutes the first grant an exclusive one; and well-considered authority is cited to sustain the principle that neither the city nor the legislature may grant exclusive privileges. Among them are *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 18; *Attorney General v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262. The argument against the power to grant an exclusive privilege is sound, and is fully sustained in the rule announced by this court in *North Springs Water Co. v. City of Tacoma*, 21 Wash. 517, 58 Pac. 773. But the question of the power to grant an exclusive privilege cannot arise here. If the city had attempted to grant such privileges to a telephone company, so as to disable itself from consent-

ing to the construction of another telephone system through its streets, such attempt would be void and beyond its power. The city cannot by ordinance or contract disable itself to consent to the erection of telephone lines upon its streets. The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be divested without the sanction of the legislature. The legislature, within constitutional limitations, has sovereign control of the streets and highways of the state and the cities. The primary purpose for which highways and streets are established and maintained is for the convenience of public travel. The use of such highways and streets for water mains, gas pipes, telephone and telegraph lines is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of such ways. *Cincinnati Inclined-Plane Ry. Co. v. City & Suburban Tel. Ass'n (Ohio)* 27 N. E. 890; *Hudson River Tel. Co. v. Water-villet Turnpike & R. Co. (N. Y.)* 32 N. E. 148; *Halsey v. Railway Co. (N. J. Ch.)* 20 Atl. 859. It would seem that, within the fundamental limitations mentioned, the legislative control of ways and streets for the secondary use is absolute, and that the legislative discretion in this regard is not subject to judicial intervention. That the legislature may delegate to municipalities such powers and act through their instrumentality is unquestioned. 2 Dill. Mun. Corp. (3d Ed.) §§ 705, 724; *Pacific R. Co. v. City of Leavenworth*, 18 Fed. Cas. 953 (No. 10,649). The city streets are limited in dimension. It is apparent that the secondary uses of the streets are physically restricted. When such limit is approached or reached must be determined by some competent authority. The inconvenience, too, of the obstruction of the streets for any secondary uses, and also the breaking up of the solid surface, which is frequently of stone and other expensive material, all suggest the propriety of the control of such uses in the discretion of the municipality. It is further urged that section 19, art. 12, of the constitution declares the right of any corporation or individual to construct and maintain lines of telegraph and telephone within the state, and that such lines are declared to be common carriers, and the right of eminent domain was extended to them. It may be observed that, in the absence of such constitutional provision, telegraph and telephone companies could derive such rights from the legislature, and it may also be seen that the same section imposes the duty on the legislature to provide by general law reasonable regulations to give effect to the section. The important feature of the section seems to be the duty imposed on the right of way of railroad corporations. The section of the constitution, however, is not self-operative, but requires the action

of the legislature to give it effect. There is no prescription of rights referable to the roads, highways, and streets of the state. The obvious construction of this provision is that all such rights were left to the discretion of the legislature. The only right absolutely declared is to maintain lines of telegraph and telephone within the state.

2. It may be observed, then, that section 4369, Ballinger's Ann. Codes & St., is pursuant to the constitutional declaration upon the subject of telegraphs and telephones. The statute authorizes the construction and maintenance of all necessary lines of telegraph and telephone for public service along and upon any public road, street, or highway. But when the right of way has not been acquired by grant or donation from the United States or the state, or any county, city, or town, the right must be secured by the exercise of eminent domain; and it is further declared "that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon." The contention of counsel for appellant that the statute limits the authority of the city council to reasonable and proper regulations, and to prescribing the method in which telegraph and telephone companies shall construct and operate their lines, cannot be conceded. As has been seen, by another statute, the authority to regulate and of complete control of such lines has been given. The power to refuse is correlative with the power to consent, and such power is plainly authorized by the statute. The first clause of the section grants the easement along any public road, street, or highway, and across the right of way of any railroad corporation, in such manner as not to incommode the public use of the railway or highway. This provision reserves the necessary power of police regulation everywhere in the state, and it has been seen that the same power to regulate and control the use of the street was in apt terms conferred upon cities of the first class. The authorities cited by appellant in *Inhabitants of Summit Tp. v. New York & N. J. Tel. Co.* (N. J. Ch.) 41 Atl. 146, and *Atlantic City Waterworks v. Consumers' Water Co.* (N. J. Ch.) 15 Atl. 583, construe different grants of power and upon different states of fact from those appearing in the case at bar and under our statute. In addition to the reasons suggested heretofore for imposing the powers and duties upon municipalities to control the streets, it is pertinent to refer to the long usage in this country for vesting such authority in municipalities. Such usage is historical, and is expressed in many statutes in the different states and in the mother country. The people of a municipality, who incur and pay the expenses for the construction and maintenance of their streets, and who largely use them, are usually most cap-

able of exercising discretion in the secondary and subordinate purposes for which their streets shall be used. A recent case from the circuit court of appeals of the Fourth circuit (*Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 103 Fed. 31), in which the statute of the state of Virginia upon the particular controversy involved is substantially the same as our statute, is very much in point here. Under the Virginia statute the power of the city council to withhold consent or attach any conditions thereto was fully sustained. The judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

(24 Wash. 1)

FIDELITY NAT. BANK OF SPOKANE v.
HENLEY et al.

(Supreme Court of Washington. Jan. 14, 1901.)

MONEY RECEIVED — ACTION — CONTRACT — ASSIGNMENTS — BREACH — COMPLETION BY SURETIES — PAYMENT TO SURETIES — RECOVERY BY ASSIGNEE.

A contractor agreed to erect government buildings, authorizing the government to retain 20 per cent. of the payments to become due until the completion and acceptance of the work. With the consent of the officer in charge of the work, he assigned the money due or to become due under the contract to plaintiff, who advanced money used in the construction of the buildings, and afterwards failed to comply with the contract, the 20 per cent. unpaid thereon being in possession of the United States. Defendants, who were sureties on the bond to secure performance of the contract, completed the work, after notice of the assignment of the money to plaintiff, and received the same from the United States. *Held*, in an action to recover such money, that it was error to overrule plaintiff's demurrer to defendants' answer, setting up as a defense that as sureties they took the contract off the principal's hands, and the United States promised to pay them the 20 per cent. held back, since plaintiff was entitled to recover the money.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by the Fidelity National Bank of Spokane against D. W. Henley and another to recover money which had been assigned to plaintiff, but paid to defendants. From a judgment against plaintiff for costs, on its refusal to plead further after the overruling of its demurrer to defendants' answer, plaintiff appeals. Reversed.

Happy & Hindman, for appellant. Henley, Kellam & Lindsley and A. G. Avery, for respondents.

DUNBAR, J. On July 1, 1897, the United States entered into a contract with one N. B. Rundle to construct buildings at the army post near Spokane, and in said contract it was provided, among other things, that payments upon the same were to be made from time to time as the work progressed, and that from all payments 20 per cent. was to be retained until the completion of the work and the acceptance of the same by the govern-

ment. At the time of making this contract, Rundle, as principal, and respondents herein, as sureties, subsequently to the execution of the contract, executed a bond for the faithful performance of the contract by Rundle. In consideration of the advancement of money by the appellant to enable Rundle to comply with such contract, Rundle executed and delivered to appellant a written assignment of the money due or to become due from the United States for the construction of the said buildings, and authorized and empowered it to collect, receive, and receipt for said moneys. The assistant quartermaster of the United States in charge of the construction of said work was at once notified of this assignment, and consented thereto. Relying upon this assignment, appellant advanced to Rundle something over \$47,000, only about \$24,000 of which has been paid. The money advanced went to pay for material and labor which were used in the construction of the building. On the 13th day of August, 1898, there was in the hands of the United States \$6,186.40, which had been earned by Rundle, and which was held back by the government under the terms of the contract. At said date, Rundle failing to comply with the conditions of said contract, the respondents, as sureties, took up the work where Rundle left off, and completed the same, having, before they commenced work, been notified by the appellant of the assignment to it of the 20 per cent. held back by the government. They thereafter, however, received the same from the United States, and refused to pay it over to the appellant upon demand. Action was brought against the respondents by this appellant, on February 23, 1899, for said sum of money, and the matters and things before enumerated constituted the important part of the complaint. Respondents answered, and as a separate defense alleged the fact to be that they were sureties on the bond of Rundle, and that, when he made his default, they, as sureties, took the contract off his hands, and completed the same, and that the United States promised to pay to them the 20 per cent. held back. To this further answer a demurrer was interposed, on the ground that the same did not state facts sufficient to constitute a cause of defense to plaintiff's action, which demurrer was overruled and exceptions taken. Appellant refusing to plead further, judgment for costs was entered against it, from which judgment this appeal is taken.

This case involves the determination of the question whether or not, at the time of making this assignment, Rundle had such an interest in the fund to be so held back by the government that he could assign the same to the appellant, and vest the appellant with the title to said fund, and whether an action would lie against the respondents by the appellant for the recovery of such money. We think these questions must be answered in the affirmative. There are some cases,

the most of which are early ones, holding that where two claimants for the same service apply for payment to the party bound to pay, and one of them is recognized as having a just claim, and is paid to the exclusion of the other, who was in fact the one entitled, the party thus excluded derives no title, against the party receiving payment, to the money paid, and that there is no such privity between the parties as will enable the party entitled to the money to maintain an action for the same against the party receiving it. This doctrine was announced in *Patrick v. Metcalf*, 37 N. Y. 332, and was for a time followed by the courts of New York and some few other states, though in that case we think there was a futile effort made to distinguish the case of *Bradley v. Root*, 5 Paige, 632. There the holder of the mail contract from the post-office department assigned it to the complainant, who took upon himself the duty of carrying the mail according to the contract, during its continuance, and was to receive therefor all the moneys which should become payable under the contract, according to the terms thereof. No notice of this assignment was given to the postmaster general. Afterwards the assignor, who was insolvent, gave the defendant an order upon the postmaster general for the moneys which might become payable on the contract, to indemnify him against a responsibility which he had incurred as indorser for the assignor. The defendant took the order, having notice of the assignment. After the moneys had been earned by the complainant under the contract, the defendant presented his order to the postmaster general, and received thereon \$430. It was held by the chancellor that he was equitably bound to pay it over to the complainant. The later New York cases, however, have been inclined to abandon the doctrine of *Patrick v. Metcalf*, supra, and go back to the rule announced in *Bradley v. Root*, supra. In *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. 606, the court, in commenting upon this question, said: "Assuming that the plaintiff is right in his construction of the facts, the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in

a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances. The right on the one side and the correlative duty on the other create the necessary privity, and justify the implication of a promise by the defendant to do that which justice and equity require." See, also, *Hathaway v. Town of Cincinnati*, 62 N. Y. 434, and *In re Le Blanc*, 14 Hun, 8. In *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89, it was held that, in an action for money had and received, there need be proved no privity of contract other than such as arises out of the fact that the defendant has received the plaintiff's money under circumstances which make it against conscience that he should retain it. In *Allen v. Stenger*, 74 Ill. 119, it was said: "Assumpsit always lies to recover money due on simple contract; and this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies only for money which, *ex sequo et bono*, the defendant ought to refund. When, therefore, according to this rule, one person obtains the money of another, which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery; and it is not necessary that there should be an express promise, as the law implies a promise. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money, in justice, belong to the plaintiff, and has the defendant received the money, and should he, in justice and right, return it to plaintiff? These facts create a privity, and the law implies the promise to pay." This doctrine is sustained by *Wilson v. Turner* (Ill. Sup.) 45 N. E. 820; *Belden v. Perkins*, 78 Ill. 449; *Bank v. Robinson* (Kan. Sup.) 53 Pac. 762; and a multitude of other cases.

Outside of other authority, however, the question has been decided by this court in *Soderberg v. King Co.*, 15 Wash. 194, 45 Pac. 785, 33 L. R. A. 670, where it was held that assumpsit would lie against the county for the recovery of sums charged by the sheriff as commissions upon foreclosure sales, and by him mistakenly paid into the treasury, when such sums constitute a surplus in his hands to which the judgment debtor is entitled. In that case we cited *Pimental v. City of San Francisco*, 21 Cal. 352; *Bank of the Metropolis v. First Nat. Bank of Jersey City* (C. C.) 19 Fed. 301; *Bayne v. U. S.*, 93 U. S. 642, 23 L. Ed. 997; *State v. Village of St. Johnsbury*, 59 Vt. 332, 10 Atl. 531; *Attorney General v. Perry*, 2 Comyn, 481; *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588; *U. S. v. State Bank*, 96 U. S. 30, 24 L. Ed. 647; *Cris-*

63 P.—71

well v. Whitney, 13 Ind. App. 67, 41 N. E. 78; *Board v. Robinson* (N. M.) 34 Pac. 295; *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42; *Knapp v. Hobbs*, 50 N. H. 476. We think there can be no question but that the assignment in this case is supported by almost universal authority. See *Manufacturing Co. v. Marsh*, 91 Pa. St. 96; *Hawley v. Bristol*, 39 Conn. 26.

Again, it must not be forgotten that the respondents were sureties of Rundle, the defaulting contractor. It will not be claimed that Rundle would have had a defense to this action if he had succeeded in obtaining the money from the United States after having made an assignment of the funds to the bank. We think the sureties stand in no better position than the principal. It was doubtless upon the strength of the bond furnished that the bank advanced the money to Rundle for the purpose of carrying out his contract, and when the sureties took up the work that Rundle had abandoned, and carried it forward to completion, they simply placed themselves in the position which Rundle had occupied, aided in this endeavor by the money which Rundle had obtained from the bank, and which had been expended in performing the contract. We think the court erred in overruling the demurrer to the respondents' defense, and the judgment will therefore be reversed, and the cause remanded, with instruction to sustain said demurrer.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.

(24 Wash. 19)

JOHNSTON v. McCART et ux.

(Supreme Court of Washington. Feb. 7, 1901.)
REPLEVIN—EVIDENCE—BURDEN OF PROOF—
WRITTEN CONTRACTS—CONTEMPORANEOUS ORAL AGREEMENT.

1. Where a question of fact was properly submitted to the jury, the appellate court will not set aside the finding, there being evidence to support it.

2. In replevin for a piano for failure to make payment thereon, the defendants' plea of payment did not throw the burden of proof on the defendants, as the plaintiff must establish his ownership of the property, and hence it was not error for the court to instruct that the burden of proof was on the plaintiff.

3. Plaintiff sold defendants a piano on a written contract that, in case defendants did not make the required payments, the plaintiff might retake the same wherever found. Contemporaneous with the sale, an oral agreement was entered into whereby payment might be made, not in money, as provided in the contract, but in commissions for the sale of other instruments. *Held*, in replevin for the piano, that evidence of the contemporaneous oral agreement was properly received, as the same did not contradict or vary the written contract, except as to the manner of payment, which could be shown by parol.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Replevin by D. S. Johnston against Thomas McCart and another. From a judgment

in favor of the defendants, the plaintiff appeals. Affirmed.

Mendenhall & Strong, Jerry E. Bronough, and Pritchard & Harvey, for appellant. Graves & Graves, for respondents.

MOUNT, J. This action was brought to recover possession of a piano and for damages for its unlawful detention. The complaint alleges, in substance, that the appellant had agreed to sell and had delivered to respondents the piano in question, under a written contract in the nature of a conditional sale, which contract provided that, in case the respondents failed to make any of the payments at the time agreed upon, or should remove or attempt to remove or sell said instrument, then the appellant might retake the same wherever found; and, further, that respondents had failed to make the payments agreed upon, and had, without the consent of the appellant, removed said instrument from Wallace, Idaho, where the contract was made, to Spokane, Wash.; that appellant, before bringing the action, demanded possession of the respondents, which demand was refused. The respondents, after admitting the contract and removal and payments alleged, denied generally the other allegations of the complaint, and alleged affirmatively that, by a contemporaneous oral contract, payments were to be made, not in money, as provided in the contract, but in commissions for the sale of other instruments, and that by the terms of this oral contract all payments to be made upon the written contract had been made; and also alleged, by way of counterclaim, that, subsequent to the written contract, respondents had, at the request of appellant, rendered services to the appellant, the reasonable value of which more than offset the purchase price of the piano sued for. When the action was brought, appellant took possession of said piano under the statute, and had the same at the time of the trial. On the trial the jury found for the respondents. From the judgment, rendered upon the verdict, plaintiff appeals.

Numerous errors are assigned in appellant's brief, which for convenience here are grouped under three classes: (1) That the verdict is not supported by, and is contrary to, the evidence; (2) that the court erred in permitting appellant's counsel, upon cross-examination of witnesses, to ask certain questions; (3) that the court erred in its instructions to the jury.

Upon the first class of errors we find ample evidence in the record to support the verdict of the jury. It is a settled rule that this court will not disturb verdicts where the question of fact is properly submitted to the jury, even although this court may believe the facts to be otherwise than as found by the jury. *Swadling v. Barneson*, 21 Wash. 699, 59 Pac. 506.

Second. While some of the questions asked upon cross-examination by respondents' counsel were undoubtedly open to criticism, we are of the opinion that the court below did not abuse its discretion in this regard, and that no reversible error was committed.

Third. The principal contention in this case arises upon the instruction of the court to the jury, wherein the court instructed the jury as follows: "The real issue is, was there any money due on the piano at the time it was taken? You are judges of the credibility of the witnesses. If you find that any witness has willfully testified falsely in regard to any material fact, you are at liberty to disregard his testimony entirely, except when corroborated. The burden of proof is on the plaintiff to show at the time it was taken that anything was due on the piano, and should show that fact by a preponderance of the testimony. Preponderance of the testimony is the convincing proof. If the evidence is clearly balanced on all the facts as to the payments claimed by defendants, you should find for the defendants." It is urged by appellant that this instruction is erroneous, because the action is founded upon a failure to pay money which the respondents have promised and agreed to pay, and when the respondents claimed to have made payment this is new matter, and must be set up as an affirmative defense; that is to say, the burden of proof is on the respondents to show such payment. This rule urged by appellant for application here is certainly correct in actions upon promissory notes, and where the action is founded upon a failure to pay money and the like, but is not applicable in an action for replevin or claim and delivery, as in the case at bar. In cases of this character, it devolves upon the plaintiff to prove ownership, which in this case depended upon the fact whether the defendants had failed to pay for the piano or not. Under a general denial, the defendants would have been permitted to have shown that they had fully paid for the instrument in question, and the plea of payment here neither abridged nor enlarged their right of proof in that regard, nor placed the plaintiff in any different position from that in which a general denial would have placed him. The onus is upon the plaintiff to prove title in himself, and this was the real issue in the case. The plea of payment was, in effect, a plea of property in the defendants. Under such a plea, the burden is upon the plaintiff to show his title. *Cobbey*, Repl. §§ 1003, 1005, 1006, 1036, 1040.

It is also urged that the contemporaneous oral agreement above referred to is one upon which no evidence could have been received, because it contradicted the terms of the written contract. This oral agreement was not a contradiction of the terms of the written contract, and did not vary that contract except in the manner of payment, and this

can be shown. It is also competent to show that the parties, either at the same time or subsequently, upon a new consideration, agreed how the payments provided for in the original contract might be made, either in money or money's worth, and this is not such a variance as is contemplated by the general rule here announced. 1 Greenl. Ev. 303; Weeks v. Medler, 20 Kan. 57.

The other instructions complained of substantially state the law as applied to this case. We find no reversible error, and the judgment will therefore be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON, and ANDERS, JJ., concur.

(24 Wash. 135)

CHEHALIS BOOM CO. v. CHEHALIS COUNTY et al.

(Supreme Court of Washington. Feb. 28, 1901.)

TAXATION—CORPORATION—FRANCHISE—ASSESSMENT.

1. Where a boom company is organized under a statute giving it a right to establish and maintain a boom on a navigable stream, and to collect tolls for logs and lumber, the right, being valuable and conferred by public authority, is a franchise, and subject to taxation as such.

2. The license fee of \$10 imposed annually on corporations doing business in the state is not in lieu of other franchise taxation.

3. Where a taxpayer made no application to the board of equalization for the reduction of the valuation placed on his personal property, he cannot be heard to complain afterwards that an arbitrary valuation was placed thereon.

Appeal from superior court, Chehalis county; Charles W. Hodgdon, Judge.

Suit by the Chehalis Boom Company, a corporation, against Chehalis county and another. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Sidney Moor Heath, for appellant. W. H. Abel, for respondents.

REAVIS, C. J. Suit to enjoin the collection of a tax upon the franchise of a boom company. The appellant is a domestic corporation, organized in 1888 under the provisions of the statute relating to boom companies, found in section 1593 and following sections, 1 Hill's Code. The principal office and place of business of the appellant is in Chehalis county. In the year 1898 an officer of the company returned a detail list to the county assessor on certain real estate and personal property, consisting of fixtures, etc. Upon the detail list the assessor fixed the value of the real property, and thereupon entered the value of the personal property, and added the franchise of the company, fixing the value of the personal property, including the franchise, at \$20,000. The errors deemed material for consideration here, as presented by the appellant, are two: (1) That there was no franchise to tax, or, if the company has a franchise, that it is not such a one as is subject to taxation; and (2) that

the assessment was arbitrarily, fraudulently, and maliciously made.

The first contention, that the franchise of a boom company is not subject to taxation, may be considered. The objects of the corporation, as stated in its articles, are to build, maintain, and operate booms on the Chehalis and other rivers, and obtain franchises for the same; to assort, drive, store, and deliver to owners or mills such logs as shall come into such booms; to own or condemn land for the purposes mentioned; to dig canals, build railroads, own and operate steamers, and transact any and all business pertaining to the booming and handling of logs. The statute under which the incorporation was made prescribes the privileges and liabilities of boom companies. They are authorized, generally, to improve floatable streams, and meandered rivers and sloughs, and navigable waters are declared to be public highways, and such corporations are declared to be public corporations. The improvement of the streams and sloughs and waters is deemed a public use. Such companies are authorized to charge tolls for all logs boomed by them, and they are given the right of eminent domain. It appears from the record that appellant has for many years had established a boom in the Chehalis river, and been engaged, pursuant to the purposes of its incorporation, in carrying on its business. The right of appellant to establish and maintain its boom upon the stream which is declared a public highway, and to collect tolls for logs and timber, is a privilege and franchise. An examination of the provisions of the statute under which it is incorporated clearly indicates that such rights are conferred by public authority. The contention of counsel for appellant is that the privileges received by appellant under the statute are open and common to every person or corporation, and not exclusively in appellant, and therefore not the subject of taxation, and the constitutional provision against the granting of exclusive privileges is invoked. But this question was determined adversely to this argument in *Power Co. v. Judson*, 21 Wash. 49, 56 Pac. 829, which was followed in *Edison Electric Illuminating Co. v. Spokane County* (Wash.) 60 Pac. 132. In neither of these cases was the right possessed by the company an exclusive one, in the sense that another company or person might not, under the same authority, engage in the same business, or enjoy the same privileges. The real question is, are such privileges valuable, and do they exist by warrant of public authority? The right to occupy such streams, and to charge tolls for booming logs and timber, seems to follow, without any uncertainty, the recognized designation of a franchise. *Sellers v. Lumber Co.*, 39 Wis. 527; 4 Am. & Eng. Enc. Law, art. "Boom Companies," p. 707. It was observed in *Ridpath v. Spokane County* (Wash.) 63 Pac. 261: "There can be no question but that the prop-

erty of a domestic corporation of every nature in this state, such as this, is assessable to the corporation. This includes both tangible and intangible property. The tangible property may be valued in connection with its use with the intangible."

But counsel for appellant urges that the license of \$10 imposed by the legislature annually upon corporations doing business in the state is in lieu of other franchise taxation. It may be said with regard to this license fee, whatever it may be, that it goes no further than an excise upon the right of the corporation to be; that it is entirely distinct from the right to do. The privileges enjoyed by appellant in the operation of its boom seem to fall directly within the rule announced in *Power Co. v. Judson*, supra, and the other cases mentioned determined by this court.

The assessment seems to have been upon the value of the use of the franchise in connection with the tangible property of appellant. It appears that appellant made no application to the board of equalization for the reduction of the valuation placed upon its personal property. It would seem that, under the ruling of this court in *Olympia Waterworks v. Thurston County*, 14 Wash. 268, 44 Pac. 267, *Same v. Gelbach*, 16 Wash. 482, 48 Pac. 251, and *Edison Electric Illuminating Co. v. Spokane County*, supra, specially applied to franchises, appellant cannot now well complain of the arbitrary valuation placed upon its personal property by the assessor. However, an examination of the testimony at the trial does not incline us to disturb the finding of the superior court upon this issue. Judgment affirmed.

DUNBAR, FULLERTON, and ANDERS, JJ., concur.

(24 Wash. 75)

STATE v. JOHNSON.

(Supreme Court of Washington. Feb. 20, 1901.)

CRIMINAL LAW—ORDER GRANTING NEW TRIAL—RIGHT OF STATE TO APPEAL.

2 Ballinger's Ann. Codes & St. § 6500, subsec. 6, gives the state the right to appeal from an order granting a new trial in civil cases, and subsection 7 declares that an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment, on the ground that the facts stated do not constitute a crime, or in some other material error in law not affecting the acquittal of a prisoner on the merits. *Held*, that the state cannot appeal from an order granting the defendant a new trial in a criminal action.

Appeal from superior court, Spokane county; E. D. Benson, Judge.

Alfred Johnson was convicted of perjury. The state appealed from an order granting

defendant a new trial, and defendant filed a motion to dismiss the appeal. Motion granted.

James Z. Moore, Miles Poindexter, and Horace Kimball, for appellant. Robertson & Miller, for respondent.

DUNBAR, J. The respondent was indicted for perjury, was tried and convicted, but, upon the motion of his attorneys, the court granted him a new trial. From such order of the court the state appeals, and the respondent interposes a motion to dismiss on the ground that the order was not appealable. We think this motion must be sustained. At the common law an appeal would not lie from the ruling of a lower court in a criminal case on behalf of the state. It follows, then, that, if any right to appeal exists, it must be by constitution or by statute. While the constitution provides that the supreme court shall have appellate jurisdiction in all actions and proceedings, it does not undertake to confer the right of appeal in a particular case, but leaves such provisions to the discretion of the legislature, and the statute defines the determinations from which an appeal may be had. Section 6500, 2 Ballinger's Ann. Codes & St., recites the orders or judgments from which appeals may lie. The first six subsections of the act have reference specially to civil actions, and the fact that an appeal is provided for in civil actions from an order granting a new trial, and is not provided in subsection 7, which deals with appeals in criminal cases, would seem to exclude the idea that the statute was intended to grant the right of appeal from an order granting a new trial in a criminal action under the rule announced by the maxim that the expression of one excludes the other. If there is any provision for an appeal at all, it must be found in the last part of subsection 7, which provides that an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or in some other material error in law not affecting the acquittal of a prisoner on the merits. Plainly, this appeal does not fall within the first two propositions, nor do we think it is comprehended in the last. The granting of a new trial is not exclusively an error of law; for, at the most, it is a ruling of the court upon law and facts. The statute, then, not having provided, by express words or fair deduction, for an appeal from this order, the motion to dismiss will be sustained.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

(26 Nov. 85)

STATE ex rel. COHN v. MACK, Judge. (No. 1,583.)

(Supreme Court of Nevada. March 13, 1901.)

MANDAMUS—NECESSITY OF COURT RECORD.

Where the record on appeal does not show that the transcribed testimony was read or referred to on the hearing of a motion for a new trial, mandamus will not be granted, on conflicting testimony, to compel the trial court to certify that it was so read or referred to, under Comp. Laws, § 3292, requiring the court to certify to the papers presented on the hearing of such motions.

Original mandamus by the state, on the relation of E. Cohn, against C. E. Mack, district judge of the First judicial district in and for the county of Douglas. Writ denied.

Trenmor Coffin, D. W. Virgin, and Samuel Platt, for relator. W. D. Jones and Alfred Chartz, for respondent.

MASSEY, C. J. The relator brings this action to compel the respondent, the district judge, to certify, under the provisions of section 197 of the civil practice act (Comp. Laws, § 3292), that the testimony taken and written out by the reporter in the case of Yori against Cohn was read or referred to on the hearing of the motion for a new trial in the last-named action. The determination of the relator's right to the peremptory writ rests upon one issue, as we view it, made by that part of the respondent's answer, in which he denies that the paper sought to be certified was read or referred to on the argument of the motion for a new trial. The minutes containing the record of the proceedings of the court do not show that this testimony, as taken and written out by the shorthand reporter, was used on the hearing of said motion. It may well be doubted whether secondary evidence of the regular and authorized proceedings of the district court may be offered except upon the showing of the loss or destruction of the record. It is a general rule, not requiring citation of authorities, that the action of the court in matters authorized or directed must be proven by its records. In the absence of such proof, and without a showing as to the loss or destruction of the record containing the evidence of the fact sought to be established, we are asked to grant the peremptory writ to compel the respondent to act, upon conflicting testimony of witnesses based upon their memories of a transaction in court which should and could have been shown by the records of the court made at the proper time. This court has held that the writ should be awarded only in a case when the party applying shows a clear right to have the respondent do the thing which he is sought to be compelled to do. State v. La Grave, 22 Nev. 417, 41

Pac. 115. Such showing not having been made, the peremptory writ will be denied.

BELKNAP and FITZGERALD, JJ., concur.

MEMORANDUM DECISIONS.

CITY OF OAKLAND v. CENTRAL PAC. R. CO. (S. F. 1,885.)¹ (Supreme Court of California. Dec. 29, 1900.) Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge. Action by the city of Oakland against the Central Pacific Railroad Company. From an order denying a new trial, and from a judgment in favor of defendant, plaintiff appeals. Affirmed. W. A. Dow, for appellant. H. S. Brown, for respondent.

PER CURIAM. This case involves the same questions as in City of Oakland v. Southern Pac. Co. (No. 1,864; this day decided) 63 Pac. 371. Upon the authority of that case, for the reasons therein given, the judgment and order are affirmed.

CROSBY v. AHART. SAME v. KIER. (Sac. 593, 598.) (Supreme Court of California. Feb. 25, 1901.) In bank. Appeal from superior court, Placer county; J. E. Prewett, Judge. Separate actions by F. O. Crosby against Peter Ahart and against C. T. Kier. From a judgment in favor of defendants, plaintiff appeals. Affirmed. A. M. Seymour, A. L. Hart, and Pullen & Wallace, for appellant. W. H. Carlin and L. L. Chamberlain, for respondents.

PER CURIAM. The foregoing cases were submitted under stipulation that the judgment in them should follow the determination and judgment in the case of Crosby v. Clark (this day decided) 63 Pac. 1022. For the reasons given in Crosby v. Clark (Sac. No. 587), the judgments and orders appealed from in the above-entitled cases are hereby affirmed.

FAY v. REED. SAME v. RICH et al. FAY et al. v. REED. (S. F. 1,509-1,511.) (Supreme Court of California. Feb. 25, 1901.) Department 2. Appeals from superior court, Santa Clara county; M. H. Hyland, Judge. Actions by Charles W. Fay against E. P. Reed and against Jacob Rich and others, and by Charles W. Fay and another against E. P. Reed, to foreclose assessments for street improvement. From judgments for plaintiffs, defendants appeal. Reversed. Jackson Hatch, for appellants. C. T. Bird, for respondents.

TEMPLE, J. These are companion cases to Fay v. Reed (No. 1,264) 128 Cal. 357, 60 Pac. 927. The resolutions of intention are precisely like the resolution in that case; in fact, it is the same resolution. A petition for a rehearing was filed in that case, and was denied; and we are convinced the conclusion there reached was necessitated by previous rulings of this court. As the judgment here under consideration has the same infirmity found fatal there, and the assessment is made invalid thereby, it would serve no useful purpose to consider other points urged. For the reasons stated in the opinion in the case referred to, the judgments and orders are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

¹ Rehearing denied January 29, 1901.

GREENE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (GINN et al., Interveners; S. F. 2-382.) (Supreme Court of California. Jan. 16, 1901.) In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge. Action by J. C. Greene against the board of education of the city and county of San Francisco and others; Ginn & Co. and the H. S. Crocker Company intervening. From a judgment in favor of plaintiff, defendants appeal. Reversed. Sheffield S. Sanborn (Wm. B. Bosley, of counsel), for appellants. John H. Dickinson, for respondent J. C. Greene. H. H. Hindry, for respondent H. S. Crocker Co. Franklin K. Lane, for respondent board of education.

PER CURIAM. This case involves the same questions as in *Greene v. Board* (S. F. No. 2-381) 63 Pac. 161. Upon the authority of that case, and for the reasons therein given, the judgment and order herein appealed from are reversed.

In re KRUGER'S ESTATE. (S. F. 758.) (Supreme Court of California. Dec. 11, 1900.) Department 2. Appeal from superior court, Nevada county; F. T. Nilon, Judge. On the settlement of the account of the executors of the estate of W. H. Kruger, deceased, the compensation of the attorney for the estate was fixed, and from the order fixing the amount Ida Gardner and another appeal. Reversed. Fred T. Searls and Geo. T. Wright, for appellants. P. F. Simmonds, for respondent.

PER CURIAM. For the reasons stated in *Re Kruger's Estate* (Sac. 757; this day decided) 63 Pac. 31, the decree appealed from is reversed.

PATTON v. CARPENTER. (L. A. 741.) (Supreme Court of California. Dec. 19, 1900.) Department 1. Appeal from superior court, San Diego county; J. W. Hughes, Judge. Action by J. A. Patton against H. N. Carpenter. From a judgment for plaintiff, defendant appeals. Affirmed. Collier & Collier and D. L. Murdock, for appellant. J. Z. Tucker, for respondent.

PER CURIAM. Action of claim and delivery brought in the justice's court. Defendant by his answer showing that the title to real estate was involved in the litigation, the cause was certified to the superior court. The judgment went for plaintiff, and this appeal is taken. The subject-matter of the litigation consists of a house, and plaintiff's title to the house depends upon his title to the land upon which it rested. During plaintiff's absence defendant removed the house from this particular tract of land. Upon the trial the defendant offered no testimony, and, as far as the evidence shows, was a mere trespasser in removing the building. The court found the plaintiff to be the owner of the property in litigation, and we are entirely satisfied with that finding. It is not necessary to recite the evidence in detail. It appears that the building was located upon land which the plaintiff claimed, upon which he was being taxed, and which he had improved in various ways by fencing, clearing, etc. In addition to this evidence the defendant concedes plaintiff's right of recovery if the evidence justifies the conclusion "that pueblo lot No. 1,196, according to the Poole map, is identical with the same lot according to the Pascoe map." After an examination of the record we deem the evidence substantially discloses that fact. For the foregoing reasons, the judgment and order are affirmed.

WARREN et al. v. FERGUSON. (S. F. 2-404.) (Supreme Court of California. Jan. 10, 1901.) Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge. Action on a street assessment by one Warren and others against one Ferguson. From a judgment in favor of the plaintiffs, the defendant appeals. Reversed. Stafford & Stafford, for appellant. J. C. Bates, for respondents.

PER CURIAM. Action upon a street assessment. The question involved upon this appeal—the sufficiency of the engineer's certificate—was presented in *Obermeyer v. Patterson* (Cal.) 62 Pac. 926, and it was there held that the court erred in admitting the certificate in evidence. Under the authority in that case the court erred herein in admitting the engineer's certificate in evidence, and in rendering judgment in favor of the plaintiffs. See, also, *Warren v. Ferguson*, 108 Cal. 535, 41 Pac. 417. The judgment and order are reversed.

COVERDALE v. WESTCHESTER FIRE INS. CO. (Supreme Court of Kansas. Feb. 9, 1901.) Error from court of appeals, Southern department, Central division. Action by W. T. Coverdale against the Westchester Fire Insurance Company. Judgment for plaintiff was reversed by the court of appeals (58 Pac. 1029), and plaintiff brings error. Affirmed. C. E. Elliott and H. L. Woods, for plaintiff in error. E. F. Ware, Jas. Lawrence, and Glead, Ware & Glead, for defendant in error.

PER CURIAM. An examination of the entire record in this case leads us to the conclusion reached by the court of appeals. We would not be justified in extending our inquiry further than was done by that court, nor do we think that further discussion of the points involved is necessary. For the reasons given by the court of appeals, its judgment, reversing that of the district court, will be affirmed.

HARDEN v. METZ. (Supreme Court of Kansas. Feb. 9, 1901.) Error from court of appeals, Southern department, Eastern division. Action by J. E. Harden against Frank Metz. Judgment for defendant was affirmed by the court of appeals (58 Pac. 281), and plaintiff brings error. Affirmed. Ergebright & Banks and F. J. Fritch, for plaintiff in error. A. B. Clark and Geo. W. Clark, for defendant in error.

PER CURIAM. This case involves questions relative to the dedication of land for streets and alleys in a town, the acceptance of the dedication by the public, and an estoppel by deed. All of these questions arise upon the evidence, but the record fails to show that it contains all of such evidence. In fact, the jury trying the case made a finding relative to the matter of estoppel entirely inconsistent with the idea that the record does contain all the evidence, and for that especial reason, apart from the general and oft-repeated rule, we cannot examine the claims of error without something equivalent to an affirmative statement that all the evidence has been preserved. The case is affirmed.

STATE v. JORDAN. (Supreme Court of Kansas. Feb. 9, 1901.) Appeal from district court, Shawnee county; Z. T. Hazen, Judge. Pie Jordan was convicted of larceny, and brings error. Affirmed. S. S. Urmy, for appellant. A. A. Godard, Atty. Gen., and A. P. Jetmore, Co. Atty., for the State.

PER CURIAM. Pie Jordan was convicted of stealing a fancy velvet quilt of the alleged value of \$50. He complains that there was no sufficient evidence to prove the value of the

quilt to be over \$20. Two witnesses, who were acquainted with the value of the material used in making the quilt and of the work done upon it, testified that it was worth from \$40 to \$50. It is true they did not know the market value of the quilt; but some articles, like this one, have no market value, and hence no such test can be applied. The testimony as to value was sufficient. For the same reason, the objections to the testimony of the witnesses are without merit. The judgment will be affirmed.

DEAN et al. v. FIRST NAT. BANK OF HAYS CITY. (Court of Appeals of Kansas, Northern Department, W. D. July 13, 1900.) Error from district court, Ellis county; Lee Monroe, Judge. Action by Catherine M. Dean and John A. Dean against the First National Bank of Hays City. Judgment for defendant. Plaintiffs bring error. Reversed. A. D. Gilkeson, for plaintiffs in error. David Rathbone and A. J. Bryant, for defendant in error.

PER CURIAM. The contention of the plaintiffs in error, who were the plaintiffs in the trial court, is clearly stated in the briefs of plaintiffs in error as follows: "The plaintiffs made certain notes in favor of the defendant. It, being a national bank, charged and reserved in each and every one of them a greater rate of interest than is allowed by the laws of the state of Kansas. For this reason each and every note lost or forfeited its interest-bearing quality, and was only valid against the plaintiffs for the amount loaned to or obtained by them. These different notes at last all became merged in one note, which was largely in excess of the amount actually and legally due. They made payments from time to time upon the principal of money, and at a certain time there was certain personal property taken and applied upon the indebtedness. By reason of these matters, the indebtedness is more than paid, and the defendant is indebted to the plaintiff for the excess, being a sum certain; and for this amount we ask for judgment." Upon the trial, after the plaintiff had rested, the court sustained a motion to strike out certain evidence, and also a demurrer to the evidence, and thereupon rendered judgment for the defendant. It is first contended by the defendant in error that the record does not purport to contain all the evidence. With this we cannot agree. We think a fair reading of the record will disclose that all the evidence is therein. While we do not think that the amended petition in this case is a model, yet we do think it was sufficient to serve as a basis for a recovery. Some parts of the motion of the defendant to amend it should have been sustained; but, in the absence of this, there was sufficient in the pleadings and the evidence to go to the jury. The judgment of the trial court is reversed, and a new trial directed.

DOUGLASS v. BRANDON et al. (Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.) Error from district court, Leavenworth county; Louis A. Myers, Judge. Action by John C. Douglass against George Brandon and others. Judgment for defendants, and plaintiff brings error. Dismissed. John C. Douglass, for plaintiff in error. J. H. Gilpatrick and John Atwood, for defendants in error.

PER CURIAM. This action was brought by John C. Douglass, on the 6th day of August, 1887, in the district court of Leavenworth county, against George Brandon, John Brandon, Louisa Williams, Fred Lange, Henry Lange, and David Atchison, in ejectment, for the recovery of real estate in the city of Leavenworth and for rents and profits. A summons was issued and served on all of the defendants. David Atchison, by his attorney, J. H. Gilpatrick, answered. John Brandon and George Bran-

don, by their attorney, Lucien Baker, answered. The defendants Louisa Williams, Fred Lange, and Henry Lange made default. The plaintiff replied to the various answers. A trial was had and judgment entered, and upon motion a new trial granted. Another trial was had on December 10, 11, and 12, 1894. The plaintiff appeared in person and by Wheat, his attorney; George Brandon and John Brandon, by Lucien Baker, their attorney; and David Atchison appeared in person and by J. H. Gilpatrick, his attorney. The jury returned a verdict for the defendants, together with special findings of fact. The plaintiff filed a motion for a new trial, which was argued on October 19, 1895, and taken under advisement. The motion for a new trial was on the 2d day of October, 1897, overruled, and the plaintiff allowed 90 days to make and serve a case-made, which time was extended until March 20, 1898. The case-made was served on the defendant Atchison on the 18th day of March, and on William C. Hook and John H. Atwood, attorneys, on March 21, 1898. However, it does not appear that the last-named attorneys at any time entered an appearance for any of the defendants. The plaintiff gave notice that the case-made would be presented for settlement on Saturday, the 1st day of October, 1898, at the court house in the city of Leavenworth. This notice was served upon George and John Brandon by the delivery of a copy to Baker, Hook & Atwood, and upon David Atchison in person. The case-made was settled and signed by the trial judge on October 1, 1898. The petition in error, together with case-made, was filed in this court on October 3d; the 2d being Sunday. The summons in error was issued October 4th, and served on the 10th day of October, 1898. George Brandon, defendant, died on 2d day of June, 1898, and there has been no proceeding to revive the action against his heirs or legal representatives. The action was, on July 11, 1900, dismissed by plaintiff in error as to Brandon, deceased, and his heirs and legal representatives. The judgment rendered in this cause was in favor of all the defendants, and against the plaintiff, for costs. The defendants in the trial court are all necessary parties to this proceeding in error. The case-made was not served upon Louisa Williams, Fred Lange, or Henry Lange. The attempted service of the case-made upon John Brandon and George Brandon was made upon William C. Hook and John H. Atwood, attorneys; but there is nothing in the record to show that these parties were attorneys for the defendants, or either of them. Besides, the service was made on the 21st day of March, 1898, and not within the time allowed therefor. The plaintiff in error dismissed his action as to George Brandon, deceased, and his heirs and legal representatives. The defendants are all necessary parties to a review of the alleged errors in the proceedings of the trial court. The petition in error must be, therefore, dismissed.

FALETTI v. MARSHALL. (Court of Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.) Error from district court, Osage county; William Thomson, Judge. Action by Samuel Marshall against Mathew Faletti. Judgment for plaintiff. Defendant brings error. Affirmed. A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error. C. S. Martin and J. H. Stavelly, for defendant in error.

PER CURIAM. The questions presented in this case are substantially the same as those considered by us in the case of Brentnall v. Marshall (just decided by this court) 63 Pac. 93. One or two questions are discussed in the brief of counsel in this case that were not considered in the former case; but, after a careful examination of the record, we are satisfied that the district court committed no error which will

require a reversal of the case, and the judgment of the court below will therefore be affirmed.

FIRST NAT. BANK OF KANSAS CITY, MO., v. SCHRENKLER. (Court of Appeals of Kansas, Northern Department, W. D. Sept. 25, 1900.) Error from district court, Ellis county; Lee Monroe, Judge. Action by the First National Bank of Kansas City, Mo., against William Schrenkler. Judgment for defendant, and plaintiff brings error. Affirmed. David Rathbone, for plaintiff in error. Wm. B. Sutton, for defendant in error.

PER CURIAM. This was an action brought by the First National Bank of Kansas City, Mo., against William Schrenkler, for the recovery of the amount alleged to be due upon a certain check negotiated by the defendant. It appears that the defendant drew a check upon the First National Bank of Russell, Kan., for the sum of \$1,500, and delivered the same to the Traders' Grain Company at Kansas City. Thereafter the grain company delivered the same to plaintiff in error. The defendant filed an answer, and afterwards, by permission of the court, filed an amended answer, to which the plaintiff replied. A trial was had and judgment rendered for defendant. The plaintiff, as plaintiff in error, presents the case to this court for review. There are numerous assignments of error, but we deem it unnecessary to examine them. The petition is fatally defective. It does not state a cause of action in favor of the plaintiff and against the defendant. It necessarily follows that the trial court properly rendered judgment for defendant, and against the plaintiff, for costs. The judgment must be affirmed.

HALE v. MCCONNELL et al. (Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.) Error from district court, Jackson county; Marshall Gephart, Judge. Action by William D. Hale, receiver of the American Savings & Loan Association against Thomas O. McConnell and Nellie P. McConnell. From the judgment, plaintiff brings error. Affirmed. John H. Orain, for plaintiff in error. Hayden & Hayden, for defendants in error.

PER CURIAM. It is said by the plaintiff in error in his brief that "the determination of this case depends entirely upon whether or not the defendant in error is entitled to be credited upon his mortgage indebtedness with such sums as he has paid as dues upon his stock in the building association." It was held by the majority of this court in *Association v. Kidder*, 58 Pac. 798, that under the facts of that case all the payments must be applied to the payment of the mortgage indebtedness, with interest. That case was different from this. It is also contended that the sufficiency of the petition in this case was decided in the case of *Hale v. Hoagland*, 61 Pac. 314. Neither of the cases cited is decisive of this case. The courts of this state should not permit a nonresident company, or, in fact, any company, to first collect the amount of the loan from the borrower, and trust to the courts of another state to refund to him the amount due him upon his stock, as the latter would often result in the forfeiture of the property offered as security, when, in fact, little or nothing was owed thereon by the owner. In the case at bar there was no statement of facts from which the necessary conclusions could be made to justify a foreclosure, and for that reason the demurrer to the petition was properly sustained. The judgment of the court below is affirmed.

HOKE v. ZENT et al. (Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.) Error from district court, Reno

county. Action by William H. Zent and another against James S. Hoke. From a judgment of the district court in favor of plaintiffs on appeal from a justice, and from an order denying a new trial, defendant appeals. Affirmed.

PER CURIAM. It is conceded by counsel for defendant in error that the statement of facts set forth in the brief of the plaintiff in error is a correct statement of the issues made by the pleadings. The statement is as follows: "The defendants in error commenced an action before a justice of the peace in Reno county, Kan., against plaintiff in error, for \$279, claiming that on the 26th day of April, 1898, plaintiff in error placed in the pasture of defendants in error 205 head of cattle, under an agreement with the defendants in error that he would pay them at the rate of 25 cents per head per month, provided that said cattle remained during the entire pasturing season, but 30 cents per head per month if he took them out before the end of the pasturing season; that said cattle were kept in the pasture of defendants in error until the 2d day of September, 1898, and then taken out; that the pasturing season was not then closed; and that the plaintiff in error was indebted to them for said pasture for said cattle at the rate of 30 cents per month. To this action the plaintiff in error filed his answer, in which he admitted placing the 205 head of cattle in the pasture of defendants in error, and that he kept them in there the length of time claimed by defendants in error, but claiming that the contract was that he was only to pay the defendants in error 25 cents per head per month, and that defendants in error were not to pasture to exceed 400 cattle on 2,400 acres of pasture, which amount of good pasture defendants in error represented they had, and claiming that said defendants in error misrepresented the amount of their pasture land; that in fact they had only 1,900 of pasture land, and that they had pastured upon this land over 600 head of cattle; that the 1,900 acres of land was wholly insufficient for so large a number of cattle, and that by reason of that fact the cattle of plaintiff in error were not properly cared for and pastured; that said pasture land had been so closely fed and eaten that the plaintiff in error was compelled to remove his cattle therefrom, which he did as soon as he learned the condition of said pasture; and that by reason of the facts aforesaid, and of the failure of the defendants in error to furnish plaintiff with pasture as agreed, his cattle were damaged in the sum of \$1,200,—and praying the court to offset so much of said amount as was necessary to offset the claim of defendant in error for the price of said pasture. On the trial of the case before the justice of the peace, judgment was rendered in favor of defendants in error. Plaintiff in error appealed to the district court, where the case was again tried, and again resulted in a judgment for defendants in error in the sum of \$224.45, and for the further sum of \$188.75 costs. A motion for a new trial was properly filed by the plaintiff in error and overruled by the district court, and this proceeding is brought for the purpose of reversing the judgment of the lower court." It is contended that the district court erred in giving and in refusing to give certain instructions. The court instructed the jury as follows: "(1) The plaintiffs in their bill of particulars claim that on the 26th day of April, 1898, the defendant placed in pasture with plaintiff 205 head of steers; and they agreed with defendant to pasture said steers during the entire season of 1898 at 25 cents per head per month during the time said steers were in plaintiffs' pasture, and further agreed that, if at any time said defendant was dissatisfied with the pasture, he should remove said steers from the pasture, and, if the season of 1898 was not then closed, he should pay 30 cents per head per month during the time said steers were in plaintiffs'

pasture. The plaintiffs claim that under this agreement 205 head of steers were placed in their pasture the 22d day of April, 1898, and that they are entitled to recover for the pasture of these 205 head of cattle at the rate of 30 cents per head per month for the time between the 26th day of April and the 2d day of September, 1898. They also claim that 3 other head of cattle were put in the pasture for 3 months, and claim for the pasture of these steers at 30 cents per head per month for the 3 months. The defendant, in his bill of particulars and cross petition, denies each of the allegations alleged in plaintiffs' bill of particulars, except as he afterwards admits. He admits that he had 205 head of cattle in plaintiffs' pasture from the 26th day of April, 1898, to the 2d day of September, 1898, and also that he had 3 other head of cattle from May 15 to July 1, 1898. The defendant alleges, in substance, that these cattle were furnished for pasturage under a verbal agreement with the plaintiffs, in substance, that the plaintiffs should furnish the defendant good and sufficient pasture and water during the season of 1898 for the said stock, and that he wholly relied upon plaintiffs to furnish proper pasture for the cattle, and did not know the condition of the pasture for some time prior to the 2d day of September, 1898. He also alleges that it was further agreed between the defendant and plaintiffs that the plaintiffs should furnish 2,400 acres of good pasturage, and would not place on said pasture more than 450 head of cattle, for the season of 1898. He also alleges that, notwithstanding the terms of the contract, the plaintiffs failed to furnish but 1,900 acres, and placed therein, contrary to said agreement, more than 600 head, and there was not sufficient amount of grass in said pasture for such an amount of cattle; and the plaintiffs failed and neglected to furnish sufficient pasture for the cattle of the defendant, and while they were in plaintiffs' pasture the defendant relied upon the representations of plaintiffs, and left the said cattle in the possession of plaintiffs until the 2d day of September, 1898, without knowing the condition of said pasture; and by reason of the failure of the plaintiffs to furnish pasture and grass for said cattle, as plaintiffs agreed to do, the defendant was compelled to remove his cattle to another pasture, and was damaged thereby in the sum of \$1,200. He alleges these damages consisted in the loss of growth of the cattle during the last three months that they were in plaintiffs' pasture, amounting to 10,000 pounds, of the value of 4 cents per pound, and also that there was a loss of growth of the cattle, by reason of the plaintiffs' failure to furnish grass and water agreed upon, on account of having to remove the cattle to another pasture, in the further amount of 5,000 pounds of growth, of the value of 4 cents per pound; and these damages he reserves from this amount, all except the amount of \$300, which he seeks to offset in this case, and asks that his damages, not exceeding the amount of \$300, be set off against any amount you may find to be due to the plaintiffs for the pasturing of the cattle; and, if such damages exceed the amount due to plaintiffs for pasturing the cattle, he asks judgment against the plaintiffs for the excess. (2) The burden of proof in this case is upon the plaintiffs to prove by a preponderance of the evidence the alleged contract for the payment of 30 cents per head, instead of for 25 cents per head, if the cattle should be removed before the end of the season by the defendant. There is no dispute between the parties as to the number of head of cattle and as to the time they were pastured by the plaintiffs. (3) The burden of proof in this case is upon the defendant. J. S. Hoke, to prove by a preponderance of the evidence that the plaintiffs made the contract with him as he alleged, and also that the plaintiffs understood at the time they made

the contract that the defendant contemplated that his cattle should make the gain that cattle of a like kind usually make under like circumstances, and that the plaintiffs were undertaking, and agreed, with the said Hoke, to make the said cattle gain as many pounds as cattle of a like kind could be made to gain under the most favorable circumstances. (4) A person who receives cattle for hire, to be fed and pastured, is a bailee for hire, and the relation between the parties is what is known in law as a 'bailment'; the party furnishing the cattle being the bailor, and the person feeding or grazing cattle being the bailee. (5) As between the bailor and bailee for hire, the bailee is only bound to use ordinary care; and ordinary care is such care as is ordinarily taken and exercised by bailees engaged in a like business under like circumstances. Before the defendant, Hoke, could recover for any want of care on the part of plaintiffs, under ordinary care, he must show by a preponderance of the evidence that the plaintiffs contracted and agreed with him to take more than ordinary care of the cattle. The want of ordinary care is ordinary negligence, and the plaintiffs in this case are not bound for slight negligence, unless the evidence shows in behalf of defendant, by a preponderance thereof, that they contracted and agreed that they would exercise more than ordinary care. (6) A bailor cannot recover damages for any negligence or want of care on the part of the bailee which is not expressly contracted for in the contract, if he is himself guilty of any want of ordinary care which contributed to the injury; and if you find from the evidence that the defendant, Hoke, was at the plaintiffs' pasture the latter part of July, and at the time when he now claims that the said pasture was insufficient, or at any time when, by examining the pasture, it could have been determined by him that the pasture was insufficient to pasture the cattle then in the pasture, and failed to make an examination of the pasture, and further find that a reasonably prudent man, under the same circumstances, would have made an examination of the grass in the pasture at that time, in that event, such failure on the part of the defendant would be negligence, and, if such negligence contributed to his injury, he cannot recover, or offset any such damages in this case. (7) The plaintiffs in this case are not bound for any mistake of judgment. If they took, in the spring of the year, when grass was starting, what cattle in their honest judgment could be reasonably well pastured in the pasture for the season, and such number as a reasonably prudent man would have taken under like circumstances, they cannot afterwards be held liable for any damages resulting from their mistake in judgment, if they exercised and used ordinary care, prudence, and judgment, unless you find, from the evidence in favor of the defendant, by a preponderance thereof, that the plaintiffs agreed to furnish more acres of pasture per head than they did subsequently furnish. (8) To constitute a contract or agreement, both parties must agree upon its terms. It must be mutual. Both parties must understand the subject-matter of the contract, and contemplate fully and fairly all the matters which could reasonably be expected to arise from a breach thereof; and before the defendant in this case can recover against the plaintiff any damages, on account of anticipated profits, by reason of a breach of the contract to furnish him a certain amount of grass and water, he must show by a preponderance of the evidence that the plaintiffs agreed to furnish the amount of acres and water claimed, and that they fairly understood at the time what would be the result in damages to the defendant in case of a breach of the contract; and the defendant is bound to prove, also, by a preponderance of the evidence, that the plaintiffs did knowingly breach the contract, and al-

so that he was damaged in a sum and amount which can be determined with reasonable certainty, and that such damage was the result of the breach of such contract. (9) If you find from the evidence that plaintiffs agreed with defendant to furnish defendant plenty of grass and water for pasturing defendant's cattle, then you will consider whether or not plaintiffs have failed to furnish plenty of grass and water for defendant's cattle. If you further find from the evidence that defendant's cattle failed to increase in weight by reason of the failure of plaintiffs to furnish grass according to their contract, then you will determine from the evidence how much defendant has been damaged by reason of the failure of his cattle to increase in weight as they would have done if grass had been furnished them according to the contract, and deduct said damages so found, if any, from the amount that you may find due plaintiffs for pasturing said cattle. (10) The defendant claims that plaintiffs agreed to furnish him plenty of grass for the cattle which he furnished in plaintiffs' pasture, and that plaintiffs failed to furnish plenty of grass as contracted; and it is for the jury to determine whether or not such a contract was made, and whether or not plaintiffs failed to comply with such contract. (11) If the jury find from the evidence that plaintiffs failed to furnish grass for defendant's cattle in the season of 1898 as they agreed to do, and if you further find that by reason of plaintiffs' failure to furnish grass according to the contract the defendant had to remove his cattle from plaintiffs' pasture in order to furnish them with sufficient grass, then you will find what damage, if any, was caused to defendant by reason of loss of growth of defendant's cattle caused by the removal of said cattle before the pasture season was ended, and deduct the damages so found from any amount which may be owing to plaintiffs by defendant for the pasturing of said cattle. (12) If you find from the evidence that defendant agreed with plaintiffs that, if he removed his cattle before the end of the pasture season, he should pay 30 cents per head for the time actually pastured, and find that defendant removed his cattle before the end of the season for the reason that the pasture furnished by plaintiffs was insufficient for his cattle, you cannot find the additional 5 cents per head per month against the defendant, unless you should further find from the evidence, by a preponderance thereof, that the defendant contracted and agreed with plaintiffs that he should pay 30 cents per head for the cattle during the time they were in the pasture, if he should remove them before the end of the season for any reason, including the reason that the pasture furnished by the plaintiffs was insufficient for their support. In the absence of any special agreement, the defendant would have a right to remove his cattle at any time that the plaintiffs failed or refused to furnish sufficient grass and water according to the terms of the contract between the parties. (13) The jury are the sole and exclusive judges of all the facts in the case, and of the credibility of the witnesses. You have the right, in determining the weight and value of the evidence, to take into consideration the feelings, motives, passions, and prejudices of the witnesses; their interest in the result of the suit, where any is shown; their manner on the stand while giving their testimony; their memory and knowledge of the things about which they testify; and every fact and circumstance occurring at the trial, and in evidence, which tends to contradict or corroborate any witness, —and then give the several parts of the evidence such weight as they may seem to merit." The special instructions submitted by counsel for plaintiff in error are as follows: "(1) If you find from the evidence that defendant removed his cattle at the end of the pasture season by reason of plaintiffs' pasture being insufficient,

then plaintiffs could not recover 30 cents per month per head, even if the contract was made as claimed by plaintiffs. (2) If the defendant went to Colorado in the latter part of July, and if the pasture was apparently sufficient for his cattle when he examined same shortly prior to his going to Colorado, then I instruct you that the defendant had the right to rely on plaintiffs to furnish pasture as agreed, and defendant is not guilty of negligence by reason of not examining said pasture from about July 24 to about September 1, 1898." From our examination of the evidence, we are satisfied that the law, as given in the instructions, is applicable to the facts, and that no error was committed that would justify a reversal of the case. The judgment of the district court is affirmed.

KANSAS & C. P. RY. CO. v. LAWRENCE et al. (Court of Appeals of Kansas, Southern Department, E. D. Dec. 17, 1900.) Error from district court, Franklin county; A. W. Benson, Judge. Injunction proceedings by the Kansas & Colorado Pacific Railway Company against J. J. and Martha Lawrence. On the death of J. J. Lawrence, Martha Lawrence and W. F. Lawrence were substituted as his personal representatives. Judgment for defendants. Plaintiff brings error. Affirmed. Waggener, Horton & Orr, for plaintiff in error. H. P. Welsh, for defendants in error.

PER CURIAM. This is a proceeding in error, brought by plaintiff in error to reverse a judgment of the district court of Franklin county refusing an injunction against the enforcement of a judgment theretofore rendered by said court in an action in which plaintiff in error and the Council Grove, Osage City & Ottawa Railway Company were defendants and J. J. Lawrence and Martha Lawrence were plaintiffs. In its petition, filed in the injunction proceedings, plaintiff in error alleged that the judgment, the enforcement of which it sought to enjoin, was void because, in the case in which such judgment was recovered, it (plaintiff in error) was not served with summons and made no appearance in said action. Defendants in the injunction proceedings admitted that no summons was served, but averred that plaintiff entered its appearance. The case was tried to the court. The only question at issue was, did the plaintiff enter its appearance in the action in which the judgment, the enforcement of which it sought to enjoin, was rendered? Upon this question, the court found in favor of defendants. Taking the evidence as a whole, we think that it supports this finding. The judgment of the district court will be affirmed.

LEHMAN-HIGGINSON GROCER CO. v. STAUB et al. (Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.) Error from district court, Sumner county; J. A. Burnette, Judge. Action by the Lehman-Higginson Grocer Company against John Staub, Sr., and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed. W. W. Schwin and James Lawrence, for plaintiff in error. Haughey & McBride and C. E. Elliott, for defendants in error.

PER CURIAM. This case was submitted on the same brief as case No. 714, Bank v. Staub (just decided) 63 Pac. 1133, and the conclusions there reached are adopted in this case. The judgment of the district court is affirmed.

LITTLEFIELD v. LITTLEFIELD. (Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.) Error from district court, Shawnee county; Z. T. Hazen, Judge. Ac-

tion by Clara E. Littlefield against James E. Littlefield. Judgment for defendant, and plaintiff brings error. Reversed. Waters & Waters, for plaintiff in error. W. E. Fagan, for defendant in error.

PER CURIAM. There is nothing in this case to review. There is no case-made or certified transcript of the record attached to the petition in error, as is required by law. The pretended transcript of the record is certified to by the clerk as "a full, true, and correct copy of petition, demurrer, and journal entry in the above-entitled cause, as the same appears on file in my office." Under numerous decisions of our supreme court, this has been held not to be a compliance with the law. The petition in error will be dismissed.

NELSON et al. v. BARR. (Court of Appeals of Kansas, Southern Department, W. D. Nov. 12, 1901.) Error from district court, McPherson county. Action by Sarah E. Barr against Mary C. Nelson and others. Judgment for plaintiff. Defendants bring error. Affirmed.

PER CURIAM. This action was commenced by Sarah E. Barr, defendant in error, in the district court of McPherson county, against Mary C. Hultgren, now Mary C. Nelson, plaintiff in error, to recover upon a promissory note given for \$1,000 and interest and upon a certain real-estate mortgage executed to secure the note sued upon. The note was made payable to the Globe Investment Company, at its office in Boston, Mass., and was by the investment company indorsed to the plaintiff below, defendant in error, Sarah E. Barr. The defendants below in their answer allege that the plaintiff's note had been duly paid and satisfied before the commencement of this action, a part of which payment it is alleged was made in money, and a part by the giving of a new note and mortgage for \$800. The trial court instructed the jury that there was no evidence in the case to warrant the court in submitting to them the question as to whether or not any payment had been made upon the plaintiff's note by the giving of the \$800 note and mortgage. In this ruling we concur. The only question submitted to the jury was the amount due on the note. The jury returned a verdict for \$1,012, after deducting the \$200 cash payment. For this amount judgment was rendered. The defendants below bring the case here. The court instructed the jury: "(5) There is some evidence in this case, with relation to a certain draft sent from Marquette, in the sum of \$225, as a payment upon the plaintiff's note, sued upon, and interest then due, and the jury are instructed that if said sum of money was received at the place where the said sum was payable, at the office of the Globe Investment Company, at Boston, Mass., then the defendant Mary C. Hultgren, now Nelson, is entitled to a credit upon the note in suit for the amount of such payment as was made upon the note as of the date when it was so received at said office in Boston. There is also some evidence in this case tending to prove that the plaintiff received interest upon her note in suit for 18 months after it became due, and that this was so received from the Globe Investment Company, at Boston. If she did so receive such interest, then the defendant Mary C. Hultgren, now Nelson, is entitled to receive credits upon the note in suit of the amounts so received by the plaintiff, and at the times it was so received. (6) If the defendant Mary C. Hultgren, now Nelson, is entitled to receive any credits upon the note now in suit, it is by reason of the payments made in the first preceding instruction. These are the only payments which are to be taken into consideration by the

jury. If these payments were so made, or if either of them were so made, then you should credit the note in suit with the amount of such payments and at the times they were made." We will not attempt to give a review of the evidence. From a careful consideration of the record, we conclude that the agency of the Globe Investment Company was a limited one, and that the rulings and instructions of the court are in harmony with the well-established principles of law in this state. The judgment of the district court will be affirmed.

NOLAN v. FOLEY. (Court of Appeals of Kansas, Southern Department, W. D. Nov. 19, 1900.) Error from district court, Hamilton county. Action between T. B. Nolan and Dennis Foley. From a judgment for the latter, the former appeals. Affirmed.

PER CURIAM. We have made a careful examination of the questions raised in this case, and have concluded that a fair trial was had, and no prejudicial error was committed by the trial court. No good purpose can be served by writing an extended opinion in the case. The judgment of the district court is affirmed.

PENDLETON v. MENTE et al. (Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.) Error from district court, Douglas county; Samuel A. Riggs, Judge. Action by W. M. Pendleton against E. W. Mente and E. V. Benjamin. Judgment for defendants, and plaintiff brings error. Reversed. Bishop & Mitchell and Brownell & Poehler, for plaintiff in error. Alford & Clingman, for defendants in error.

PER CURIAM. The plaintiff in error began this action against the defendant in error to recover damages for an alleged breach of contract for the sale and delivery of a car load of bags. The action was begun before a justice of the peace, where the plaintiff had judgment. Defendants appealed to the district court. Upon a trial, defendants objected to the introduction of any evidence in support of the plaintiff's claim, for the reason the bill of particulars did not state a cause of action. This objection was sustained by the court, and judgment went against the plaintiff for costs. The briefs of both parties are devoted almost entirely to the discussion of a proper measure of damages in such cases. No defect of the bill of particulars is pointed out. The bill of particulars alleged the co-partnership between the defendants in error, a contract for the purchase of a specific character of bags at an agreed price and the number of bags constituting a car load, a failure to deliver according to the agreement, and the market value at the place of delivery and at the time the delivery should have been made, with a prayer for damages accordingly. It also contains allegations respecting a resale by the plaintiffs in contemplation of the delivery, and the price at which such resale was made, but does not aver knowledge on the part of the defendants of such contemplated resale by the plaintiff. On the part of the defendants in error it is argued that the measure of damages is the difference between the contract price and the market price at the time and place of delivery. It is true that this is the usual measure of damage in such cases, and, while it may be true that the allegations of the bill of particulars were not sufficient to charge the defendants with damage upon the account of the resale, under the allegations it is sufficient to charge the defendants with damages according to the ordinary rule stated. We are of the opinion, therefore, that the court erred in sustaining the objection to the introduction

of evidence. The judgment of the district court is reversed, and the cause remanded, with directions to award a new trial.

SELLERS et al. v. GAY et al. (Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.) Appeal from district court, Miami county; John T. Burris, Judge. Action between A. K. Sellers and others and Henry Gay and Willard P. Holmes. From a judgment, Sellers and others bring error. Affirmed. B. F. Simpson and N. W. Wells, for plaintiffs in error. Cook & Gossett, for defendants in error.

PER CURIAM. From our examination of the record and the authorities cited, we are satisfied that no error sufficient to justify a reversal of this case has been committed. The judgment of the district court is affirmed.

SNYDER et al. v. NICHOLS et al. (Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.) Error from district court, Sedgwick county; D. M. Dale, Judge. Action by C. W. Snyder and others against Emily M. Nichols and others. From a judgment in favor of certain defendants, plaintiff and defendant Gertie Snyder bring error. Motion to dismiss overruled. Amidon & Conly, for plaintiffs in error. Hardy Sayre, Kos Harris, and J. H. Stewart, for defendants in error.

PER CURIAM. The ground of the motion to dismiss is that Gertie A. Snyder, wife of C. W. Snyder, is improperly joined as a plaintiff in error; the claim being that, although Mrs. Snyder was made a party defendant on motion of the original defendant in the action brought by C. W. Snyder and others against Emily M. Nichols and others, and although she filed an answer therein, and although judgment was rendered against her and her husband for costs, and a judgment in favor of Nichols, quieting title as against Snyder and wife to the land in controversy, yet that Mrs. Snyder did not file a motion for a new trial or participate in making and settling a case-made. We find this claim to be unfounded. The journal entry of the final judgment in the action recites that the "plaintiff filed motion for a new trial, * * * and the same was argued by the attorneys for C. W. Snyder and Gertie Snyder, * * * and the court overruled the same, to which the said plaintiff and the said Gertie Snyder duly at the time excepted, and asked the court for time in which to make and serve a case-made for the supreme court in the state of Kansas." Snyder and his wife were represented throughout the trial by Amidon & Conly, who made and served a case-made, and the certificate of the judge states that the case-made was presented to him for settlement by Amidon & Conly as attorneys for Charles W. Snyder and Gertie Snyder. The action involves the homestead of the Snyders, and it is possible that Mrs. Snyder was not a necessary party in the action. The motion to dismiss will be overruled.

STARRETT v. SHAFFER, Sheriff, et al. (Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.) Error from district court, Ness county. Action by P. P. Starrett against W. H. Shaffer, sheriff, and J. A. Wierman. Judgment for defendants. Plaintiff brings error. Affirmed.

PER CURIAM. This action was commenced in the district court of Ness county, Kan., to enjoin defendants in error from selling certain property, claimed by plaintiff in error, under an execution. The material error complained of is "that the evidence did not warrant the

court in rendering judgment in favor of defendants." From an examination of the record, we are satisfied that the finding of the court is fully sustained by competent testimony. The judgment of the district court is affirmed.

STATE v. EDWARDS. (Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.) Appeal from district court, Finney county. Charles Edwards was convicted of violating the prohibitory law, and brings error. Affirmed.

PER CURIAM. In this case the appellant was charged with violating the prohibitory law. The principal errors assigned and the authorities cited are the same as in *State v. Hinkle*, infra, and *Same v. Scarlett* (just decided) infra. We have examined the record, the errors assigned, and the authorities cited, and find no error so prejudicial to the appellant that it would justify a reversal. The judgment of the district court is affirmed.

STATE v. HINKLE. (Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.) Appeal from district court, Finney county. George T. Hinkle was convicted of illegal sale of liquor, and brings error. Affirmed.

PER CURIAM. The appellant was charged with the illegal sale of liquor, and the keeping and maintaining of a common nuisance. He was tried in the district court of Finney county, and convicted. He brought the case here on appeal. Many errors are assigned and well argued in the brief of counsel for appellant. From a careful examination of the authorities, we find no error prejudicial to the substantial rights of the appellant. The judgment of the district court will be affirmed.

STATE v. SCARLETT. (Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.) Appeal from district court, Finney county. John Scarlett was convicted of violating the prohibitory law, and brings error. Affirmed.

PER CURIAM. In this case the appellant was charged in the district court of Finney county with the violation of the prohibitory law. The errors discussed in the brief of counsel for appellant and the authorities cited are similar to those in the case of *State v. Hinkle* (just decided) *ubi supra*. We have examined the record in this case, and find no error sufficient to justify a reversal. The judgment of the district court is affirmed.

STATE BANK OF BURDEN v. HOYLAND et al. (Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.) Error from district court, Cowley county; C. L. Swarts, Judge pro tem. Action by the State Bank of Burden against L. E. Hoyland and others. From a judgment for defendants, plaintiff brings error. Affirmed. M. G. Troup & S. J. Day, for plaintiff in error. Madden & Buckman, for defendants in error.

PER CURIAM. This was an action commenced by the plaintiff in error against defendants in error to recover upon a certain promissory note for the sum of \$1,200. The defendants admitted the execution of the note, but alleged that they were entitled to certain credits. This action assumed the nature of an accounting. From our consideration of the record and the argument of counsel, we are satisfied that the evidence is sufficient to uphold the verdict and judgment, and the instructions given fully state the law. The judgment of the district court is affirmed.

THOMAS v. BARBER. (Court of Appeals of Kansas, Northern Department, E. D. Jan. 1, 1901.) Error from district court, Atchison county; W. T. Bland, Judge. Action by Joseph Barber against George C. Thomas. Judgment for plaintiff. Defendant brings error. Reversed. Jackson & Jackson, for plaintiff in error. Waggener, Horton & Orr, for defendant in error.

PER CURIAM. This action was originally instituted in the Atchison city court upon a bill of particulars filed by the defendant in error herein against the plaintiff in error to recover the sum of \$248, which sum was claimed upon a certain contract, a copy of which is as follows: "Horton, Kansas, November 3, 1898. Sold to George W. Cole twelve hundred, more or less, bushels number three corn, at twenty-five and one-half cents per bushel, to be delivered at his elevator in Horton, Kansas, within ten days from date. [Signed] George G. Thomas." Said bill of particulars further stated that on the same day said Cole assigned and transferred said contract to said plaintiff therein in the following words, to wit: "November 3rd, 1898. Transfer. This within contract of corn to J. Barber at twenty-six cents per bushel, said Barber to pay Thomas full amount of twenty-six cents per bushel and accept grade. [Signed] George W. Cole. Joseph Barber,"—and forthwith the said defendant, George C. Thomas, recognized said assignment and transfer, and agreed to deliver said corn to said plaintiff, at the farm of said plaintiff, whenever demanded, and in consideration thereof the said plaintiff paid to said defendant \$200 on account thereof; that demand was made for the delivery of said corn about February 1, 1899, which has never been complied with; that said corn at the time of demand was worth 30 cents per bushel,—and claiming judgment for said sum of \$248. An appeal was taken to the district court, where a trial was had to a jury, and at the conclusion thereof the plaintiff withdrew the \$48 item of damages, and under the instruction of the court a verdict was returned for the plaintiff in the sum of \$207.50, and judgment was rendered accordingly. To reverse this the case is brought here. Upon the trial some evidence was introduced tending to show modifications of the original contract. It was also shown on behalf of the defendant that before the corn was delivered to the plaintiff the defendant was garnished in an action against the plaintiff, and that in said garnishment proceedings the defendant answered that he had in his possession \$200 worth of corn belonging to said Joseph Barber, being 769³/₁₆ bushels, at the price of 26 cents per bushel. Afterwards an execution was issued on a judgment therein rendered, and levied on said corn in the crib, with other corn undivided, and same sold as the property of said Joseph Barber. We do not think that the court could say as a matter of law just what the contract was as it existed between the parties at the time of the alleged forfeiture. There was sufficient evidence to go to the jury upon that question, and from the evidence thereon different minds could legally draw more than one conclusion. The judgment is reversed, and a new trial directed.

WALLACE et al. v. KUFFLER. (Court of Appeals of Kansas, Southern Department, E. D. Jan. 14, 1901.) Appeal from district court, Labette County; A. H. Skidmore, Judge. Action between David and John Wallace and Henry Kuffler. From the judgment the Wallaces bring error. Affirmed. George Campbell, for plaintiffs in error. W. D. Atkinson, for defendant in error.

PER CURIAM. From our examination of the record and the argument of counsel, we

are satisfied that the judgment of the district court should be affirmed. No authorities are cited bearing upon the errors assigned. The judgment of the district court is affirmed.

WELLINGTON NAT. BANK v. STAUB et al. (Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.) Error from district court, Sumner county; J. A. Burnette, Judge. Action by the Wellington National Bank against John Staub, Sr., and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed. W. W. Schwin and James Lawrence, for plaintiff in error. Haughey & McBride and C. E. Elliott, for defendants in error.

PER CURIAM. This proceeding in error is brought to reverse the ruling and judgment of the district court of Sumner county in dissolving certain attachments procured by the plaintiff in error, as plaintiff below, against the defendants in error, as defendants below. For some years prior to the 16th day of March, 1896, S. E. Staub, called Lizzie Staub, was the proprietor of a grocery store in the city of Wellington under the name of Staub & Co. Her father, John Staub, acted as manager of the business. The controlling facts are that on the 16th day of March, 1896, Staub & Co. (being S. E. Staub) owed a note to the Wellington National Bank for \$412. On this note Catherine Staub was security. Staub & Co. also owed a note to F. K. Robbins & Co. for \$575.96. This note was secured by the name of M. L. Briggie, and also by the indorsement and delivery of a certificate of deposit for \$600 owned by Catherine Staub. Staub & Co. were also indebted to other parties. On the 16th day of March, 1896, Lizzie Staub, signing as Staub & Co. and S. E. Staub, executed a mortgage to M. L. Briggie upon the stock of groceries, store fixtures, and book accounts to secure him as surety on the note for \$575.96 to Robbins & Co. It is contended that the giving of this mortgage to Briggie was fraudulent; that the effect was to place the goods beyond the reach of the bank, and to hinder and delay it in the collection of its debts; and that this was sufficient to justify the attachment. The attachment was obtained upon an affidavit charging a fraudulent disposition of property. The motion to dissolve was verified, and traversed the grounds alleged in the attachment affidavit. On the hearing, oral testimony was introduced and the attachment dissolved by the court. We have examined the evidence and the authorities cited, and conclude that the judgment of the district court should be affirmed.

WICHITA WHOLESALE GROCER CO. v. STAUB et al. (Court of Appeals of Kansas, Southern Department, C. D. Jan. 12, 1901.) Error from district court, Sumner county; J. A. Burnette, Judge. Action by the Wichita Wholesale Grocer Company against John Staub, Sr., and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed. James Lawrence and W. W. Schwin, for plaintiff in error. Haughey & McBride and C. E. Elliott, for defendants in error.

PER CURIAM. This case was submitted on the same brief as the case of Bank v. Staub (just decided) *ubi supra*, and the conclusions there reached are adopted in this case. The judgment of the district court is affirmed.

WILCOX v. EADIE. (Court of Appeals of Kansas, Southern Department, W. D. Jan. 12, 1901.) Error from district court, Greeley county. Action by A. C. Wilcox against Robert Eadie. Judgment for defendant, and plaintiff brings error. Affirmed.

PER CURIAM. This action was commenced in the district court of Greeley county, "on December 31, 1897, to recover \$350 and interest claimed to be due on a promissory note executed January 1, 1898, due five years after date. The only question before the trial court was that of the statute of limitations. The note sued on provides that on failure to make any interest payment the note might become due, at the option of the owner and holder. The defendant claims that this option was exercised, and the statute of limitations began to run, in January, 1891, more than five years before the commencement of this action. The defendant was notified of this option by a written notice, received by Thomas Eadie, the owner of the land on which the mortgage was given to secure the said note. The plaintiff denies that this option was exercised, but admits that if it was the action was barred, and plaintiff cannot recover." The plaintiff in error in his brief says: "To avoid any misunderstanding, the plaintiff will admit that, if the owner and holder of the note sued on notified Robert Eadie that an interest coupon had been due and unpaid more than ten days, and therefore he declared the whole of said principal note due, then the statute of limitations would begin to run, and, if that was more than five years prior to December 31, 1897, the plaintiff ought not to recover." This is the only question. The whole controversy is reduced to a question of fact. It is contended that the trial court erred in the admission of testimony. There is some incompetent testimony in the record, but in our opinion the errors complained of are not sufficient to require a reversal of the case. The judgment of the district court is affirmed.

BOUNDS v. BOUNDS et al. (Supreme Court of Washington. Dec. 18, 1900.) Appeal from superior court, Garfield county; M. M. Godman, Judge. Action by Amanda E. Bounds against David O. Bounds and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed. Tweedy & Jewett, for appellant. S. G. Cosgrove and Gose & Kuykendall, for respondents.

WHITE, J. This action is brought by the appellant to obtain a decree of divorce against the respondent David O. Bounds and for a decree declaring certain property, the title of which is now in the name of Jane Bounds, the other respondent, to be the property of the appellant and the respondent David O. Bounds. The respondent David O. Bounds answered, and denied the alleged acts of cruelty and the fraud alleged as to the conveyance of the property to Jane Bounds. The respondent Jane Bounds denied the fraud alleged as to the conveyance to her of the property. The court below found against the appellant on all the issues, and adjudged the title of the property to be rightfully in Jane Bounds. The court below, in addition to the findings of fact and conclusions of law, filed a written opinion, carefully weighing, analyzing, and comparing the testimony, which is very voluminous. We have carefully read the testimony, and fully concur, not only in the findings of fact and conclusions of law, but in the force and effect given to the testimony by the trial court. It will do the litigants in this action no good to review in this opinion the testimony at length, and the public would not be benefited thereby. It is the policy of the law to discourage divorces, and, unless the evidence clearly warrants a different conclusion from that arrived at by the trial court, in a case where the court fails to find the allegations of the complaint sustained by the evidence, we will not disturb the findings of the court. The appellant and the respondent David O. Bounds had lived together over 12 years. They are the parents of three

children as the result of that union, who yet need their joint care and support. We do not regard the differences between the appellant and her husband as irreconcilable. We are very much impressed, as was the court below, after reading the testimony in this case, that the father of the appellant and the mother of the respondent David O. Bounds have sown the seeds of discord between the husband and wife. With this malign influence removed, we see no reason why the father and mother of the helpless children involved in this litigation may not again resume the marriage relations. The judgment of the court below is affirmed.

DUNBAR, C. J., and ANDERS, REAVIS, and FULLERTON, JJ., concur.

EATON v. SPOKANE COUNTY. (Supreme Court of Washington. Dec. 26, 1900.) Appeal from superior court, Spokane county; William E. Richardson, Judge. Action by H. H. Eaton against the county of Spokane. From a judgment in favor of plaintiff, defendant appeals. Affirmed. James Z. Moore, Miles Poindexter, and Horace Kimball, for appellant. John H. Roche, for respondent.

DUNBAR, C. J. This was an action by the plaintiff (respondent) against the county of Spokane to recover certain commissions on sheriff's sales in foreclosure suits which were alleged to have been turned over to the county treasurer; it having been held by this court in *Soderberg v. King Co.*, 15 Wash. 194, 45 Pac. 785, 33 L. R. A. 670, that a sheriff was not entitled to a commission upon a sale of mortgaged premises under a decree of foreclosure where the property was bid in by the plaintiff for the amount of the mortgage debt, and that where the sheriff, upon making a foreclosure sale, had been paid by the bidder, who was the plaintiff in the action, a certain sum as commission, such sum constituted a surplus in the hands of the sheriff, which it was his duty to pay over to the judgment debtor. At the close of the plaintiff's evidence, defendant moved for judgment of nonsuit against the plaintiff, upon the ground that no proof had been offered that the sheriff had paid over any of the surplus funds aforesaid to the treasurer of Spokane county. The motion was denied, and the court found that such commissions had been paid to the treasurer aforesaid. There is only one assignment of error, viz. that the evidence does not justify this finding of fact by the court. The evidence is very brief, but from an examination of it we are of the opinion that there was sufficient proof on this question to justify the finding of the court. The judgment is therefore affirmed.

REAVIS, FULLERTON, and ANDERS, JJ., concur.

HOPKINS et al. v. HALE. (Supreme Court of Washington. Dec. 27, 1900.) Appeal from superior court, King county; William Hickman Moore, Judge. Action by Charles P. Hopkins and others, executors, etc., against William D. Hale, receiver. From a judgment for plaintiffs, defendant appeals. Affirmed. Clise & King, for appellant. Fred H. Peterson, for respondents.

PER CURIAM. On the authority of the case of *Hale v. Stenger*, 61 Pac. 156, the judgment of the trial court is affirmed.

UNITED STATES SAVINGS & LOAN CO. v. OWENS et ux. (Supreme Court of Washington. Dec. 27, 1900.) Appeal from superior court, Chehalis county; Charles W. Hodgdon, Judge. Action by the United States Savings & Loan Company against Harrison Owens and Narcissa Owens. From a judgment in favor

of defendants, plaintiff appeals. Affirmed. Shank & Smith, for appellant. Greene & Griffiths and J. A. Hutcheson, for respondents.

PER CURIAM. This was an action to foreclose a mortgage given by the respondents to the appellant to secure a loan made upon the terms and conditions common to building and loan associations. The trial court held that all

payments made by the borrower to the company, whether as dues, premiums, fines, interest, or otherwise, applied directly upon the loan, discharging it pro tanto, and the correctness of this holding is the question here. In *Hale v. Stenger*, 61 Pac. 156, we decided that such payments should be so applied, and for the reasons given in that case the judgment will stand affirmed.

END OF CASES IN VOL. 68.

